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A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

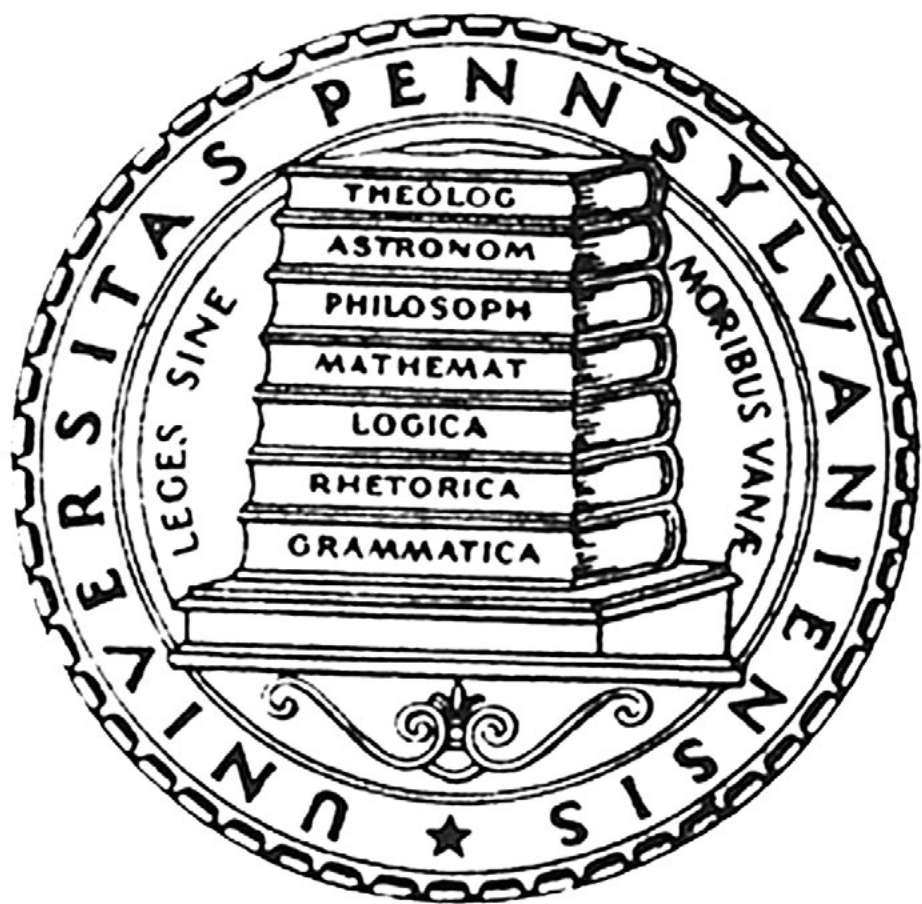
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Letter from the Editor

Dear Reader,

I am honored to present the Penn Undergraduate Law Journal's sixth issue, the spring edition of our third volume. The exemplary articles that follow are a testament not only to the intellectual merit and academic success of these authors, but also to the long-standing support the Journal has received from its academic advisors, its sponsors, and the University of Pennsylvania. We are deeply grateful for this support.

Our first piece was written by Sarah E. Light, Assistant Professor of Legal Studies and Business Ethics at Penn's Wharton School of Business, and is entitled "Regulating Toxic Chemicals Through Precautionary Federalism." Professor Light argues that the United States' allocation of authority to regulate toxic chemicals should be governed by the principle of precautionary federalism, which dictates that a state's efforts to regulate toxic chemicals more strictly than the federal government should not be preempted by federal law. In particular, Professor Light discusses this principle in the context of the Toxic Substances Control Act (TSCA) of 1976 and its recent 2016 amendments.

Our second article investigates racial diversity in public schools. In her paper "A Dream Deferred," Victoria Akah of Columbia University discusses *Parents Involved in Community Schools v Seattle School District* (2007), a landmark case in which the Supreme Court found a Seattle school district's use of "racial tiebreakers" in assigning students to schools to be unconstitutional. Akah contends that this decision – relying heavily on corrective justice frameworks – undermined the court's decision in *Brown v Board* (1954), which advocated for more distributive, race-conscious frameworks to promote equality. Akah argues that the Supreme Court ought to return the approach extolled by *Brown*, which more effectively countered racial oppression and inequality.

Our third piece, written by Hayley Hahn of The College of William and Mary, is entitled "Would RFRA require exemptions in cases of this ilk?": Public Accommodations Protections for LGBT Individuals Considered in Light of Hobby Lobby." Hahn focuses on the Supreme Court case *Burwell v Hobby Lobby Stores, Inc.* (2014) and related cases, acts, and controversies, including the Religious Freedom Restoration Act, civil rights laws surrounding public accommodation, and historical and contemporary court rulings that implicate religious exemption. Hahn concludes that businesses open to the public cannot discriminate against a customer's sexual

orientation, even if such discrimination stems from religious belief.

In our fourth article, “Gender Neutrality in Irish Rape Law,” author Evie Clarke of Trinity College Dublin focuses on Ireland’s efforts to move to a gender-neutral approach to rape. Clarke begins with a discussion of historical trends in Irish law definitions of rape, then critiques these definitions. Clarke acknowledges that, while efforts to shift away from gender-specific legal definitions reflect some progress, further reform is needed, which may include a newly formulated model for defining the offense of rape.

Our fifth and final piece, written by Evelyn Atwater of Northwestern University, is entitled “Nuclear Courtrooms and Administrative Law: Understanding the Fail-to-Prevail Trend in Anti-Nuclear Litigation.” Atwater notes that nuclear licensing lawsuits are less successful than in decades past; since 1989, no public-interest plaintiff has won in federal appellate court against the Nuclear Regulatory Commission. Atwater argues that both limited judicial review and considerable administrative deference have contributed to this trend, but she also acknowledges that litigation remains a critical tool for challenging nuclear regulatory decisions.

Though diverse, all of these authors critique perceived shortcomings of law and its implementation, and nearly all conclude with recommendations on how these challenges can be corrected, improved, or understood. For the authors, these published works reflect hard work and dedication to scholarly discourse. For the Journal and its members, this issue marks a three-year anniversary of showcasing this discourse, and it confirms PULJ’s ongoing commitment to supporting bright thinkers around the world. On behalf of the Penn Undergraduate Law Journal, I wish you a good read.

Sincerely,

A handwritten signature in black ink, reading "Taryn MacKinney". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Taryn MacKinney
Editor-in-Chief

FOREWORD

REGULATING TOXIC CHEMICALS THROUGH PRECAUTIONARY FEDERALISM

Sarah E. Light[†]

This issue of the Penn Undergraduate Law Journal highlights student scholarship on such diverse topics as nuclear licensing, legal protections for the LGBT community, Irish rape law, and public school integration. I am delighted to be invited to contribute this brief Introduction, which examines a critical issue in my field of expertise – environmental law. Here, I focus on the importance of the allocation of authority between the federal and state governments to regulate toxic chemicals.

Practically since its passage, the Toxic Substances Control Act (TSCA) of 1976¹ was criticized for its inadequacies. Scholars and policy-makers argued that TSCA did not successfully address the problem it was designed to solve – controlling the use of toxic chemicals in the United States to protect human health and the environment.² One of the primary critiques was that TSCA was insufficiently “precautionary” because it placed the burden of proof on the Environmental Protection Agency (EPA) to demonstrate that a chemical was *unsafe* to limit its manufacture, distribution, or use, rather than on industry to demonstrate that a chemical was *safe* before it could enter the stream of commerce.³ These advocates of precau-

[†] Sarah E. Light is an Assistant Professor of Legal Studies and Business Ethics at the Wharton School at the University of Pennsylvania.

¹ Toxic Substances Control Act of 1976, Pub L No 94-469, 90 Stat 2003, codified as amended at 15 USC §§ 2601-2692.

² H. Rep No 1341, 94th Cong, 2d Sess 1 (1976) (discussing purpose of TSCA). To date, the EPA has only regulated nine chemicals, out of approximately 85,000 on its TSCA Inventory. *See infra*, note 48 and accompanying text.

³ See, e.g., John Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 Ecology L Q 721, 722, 734-839 (2008) (discussing critiques of TSCA, and arguing that a reformed approach to regulating toxic chemicals should be more precautionary, with a greater emphasis on public information disclosure); Noah M. Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 Vand L Rev 1817, 1826 (2009) (noting limited availability of toxicity data in the United States under TSCA, and critiquing TSCA’s burden of proof); Wendy E. Wagner, *The Precautionary Principle and Chemical Regulation in the U.S.*, 6 Hum

tion largely focused on the question of *whether* to regulate any particular toxic chemical and *what form* such regulations should take.

Over the last year, the House and Senate took up the task of fixing some of TSCA's most significant flaws. Those efforts culminated in the Frank R. Lautenberg Chemical Safety for the 21st Century Act (H.R. 2576), signed into law on June 22, 2016 by the President.⁴ These amendments are generally a positive step in a precautionary direction when it comes to these two basic questions of *whether* EPA should regulate any particular toxic chemical, and *what form* such regulation should take. For example, H.R. 2576 mandates an affirmative finding by EPA of safety before new chemicals can enter the marketplace;⁵ it eliminates the prior requirement that the EPA show potential risks to require safety testing of chemicals;⁶ it requires consideration of effects on vulnerable populations such as infants and pregnant women,⁷ it sets mandatory deadlines for EPA to evaluate the risks of existing and new chemicals,⁸ and it removes the requirement that EPA's chosen regulatory approach or limit be the "least burdensome."⁹

One controversial issue in these debates was whether an amended TSCA should preempt states from regulating toxic chemicals more stringently than the federal government.¹⁰ Here, I argue that a precautionary approach should guide not only the *whether* and *what form* questions, but also the question of *who gets to decide* whether to regulate toxic chemicals and what form such regulations should take – the federal government, the states, or some combination of the two. This question implicates the theo-

& Ecological Risk Assessment 459 (2000) (contending that TSCA exemplifies an "unprecautionary principle").

4 Frank R. Lautenberg Chemical Safety for the 21st Century Act, HR 2576, Pub L 114-182, 114th Cong., 2d Sess (June 22, 2016) [hereinafter HR 2576], <https://www.epa.gov/sites/production/files/2016-06/documents/bills-114hr2576eah.pdf>.

5 HR 2576 §§ 5(a), 5(g).

6 HR 2576 § 4(a).

7 HR 2576 §§ 3(12), 5(e)(1)(A), 5(f)(1), 6(a), 6(b)(4)(A).

8 HR 2576 § 6(b)-(c).

9 HR 2576 § 6(a).

10 For discussions of the controversies regarding TSCA reform and the proposed allocation of authority between the states and the federal government, see Sam Pearson, *State Regulators Criticize 'Deeply Troubling' TSCA Deal* (E&E News, May 20, 2016) (citing statement of the environmental regulators for the various states); Sam Pearson, *House Tees Up Vote for Final TSCA Bill, Releases Text* (E&E News, May 20, 2016) (citing concerns regarding preemption of state authority to regulate toxic chemicals under the proposed amendments); Sam Pearson, *Rules Committee to Set Vote on Final TSCA Bill* (E&E News, May 23, 2016); Sam Pearson, *Rand Paul Holding Up Final Passage of TSCA Reform – Inhofe* (E&E News, May 26, 2016) (discussing uncertain timing of final votes on bill relating to concerns over state authority).

ry and practice of federalism.¹¹ Advocates of a “dual federalism” approach would argue that all authority should be vested in one optimal regulator.¹² Uniform federal rules would, for example, best address problems that extend across state boundaries like air pollution, and could prevent states from “racing to the bottom” to attract industry with lax environmental rules. In contrast, decentralizing authority within the states would encourage policy experimentation.¹³ In contrast, advocates of “dynamic federalism” contend that regulatory overlap – situations in which *both* the federal and state governments play a role – promotes policy variation according to local preferences, democratic participation, and can limit the risk of interest group capture.¹⁴ At the same time, dynamic overlap has drawbacks, including the potential for innovative industries to face competing or conflicting rules, or the potential for under-regulation.¹⁵

In this Introduction, I argue that the allocation of authority to regulate toxic chemicals in the United States should be governed by the principle of *precautionary federalism*.¹⁶ The principle of precautionary federalism has three primary features: first, a default presumption against preemption and in favor of multiple regulatory voices under conditions of uncertainty; second, a recognition of risk-risk tradeoffs that requires weighing the default presumption against the benefits of more uniform legal rules; and third, a time-limited nature, such that a different allocation of regulatory authority may become appropriate as more information about the risks of an activity (or a chemical) becomes available.¹⁷ In this context, the principle of precautionary federalism dictates that state efforts to regulate toxic chemicals more stringently than the federal government should not be preempted by federal law. If more information becomes known about the risks of certain chemicals, then a more uniform allocation of authority may become appropriate over time. This principle should generally guide Congress as it designs legal rules, and courts and agencies interpreting those rules. Thus,

11 Federalism theory and practice are concerned with the allocation of authority between the federal government and the states. For an in-depth discussion of federalism theory and a foundational discussion of the principle of precautionary federalism, see Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 Emory J L (forthcoming 2016), available at SSRN: <http://ssrn.com/abstract=2760985>.

12 Id (manuscript at 16-22).

13 Id (noting other rationales favoring uniform federal or decentralized state rules).

14 Id (manuscript at 22-25) (discussing rationales for and against a dynamic approach).

15 See Light, 66 Emory J L (cited in note 6) (manuscript at 22-25).

16 Id (manuscript at 25-27).

17 Id.

while the recent amendments to TSCA in H.R. 2576 have many positive features, Congress should have been more precautionary in its allocation of the balance of power between the federal government and the states. And the EPA, which is tasked with interpreting the scope of preemption in the first instance, as well as the courts reviewing such interpretations, should read the new law's preemption provisions narrowly.

This Introduction will first discuss the precautionary principle and its application to the regulation of toxic chemicals. It will then explain the basic structure of the TSCA of 1976 and discuss some of the primary critiques of the former statute, including that Act's failure to be sufficiently "precautionary" in its allocation of the burden of proof to regulate particular chemicals. It will then briefly discuss the recent amendments to TSCA in H.R. 2576, focusing specifically upon alterations in the balance of power between the federal government and the states. I conclude that the principle of precautionary federalism should limit federal preemption of more stringent state rules. While Congress has passed these amendments, the new law, in particular certain waiver provisions, remain open to interpretation by both courts and agencies.

I. THE PRECAUTIONARY PRINCIPLE

The precautionary principle attempts to answer the questions of whether and how to regulate under conditions of uncertainty when there is a significant risk of harm to health, safety, or the environment.¹⁸ The oft-cited 1998 Wingspread Statement on the Precautionary Principle declares:

When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.¹⁹

In colloquial terms, the principle advises that it is better to be "safe" than "sorry" under such conditions.²⁰ In one sense, the precautionary principle

18 See, for example, DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 9 (YALE 2010); CASS R. SUNSTEIN, *IRREVERSIBLE AND CATASTROPHIC*, 91 CORNELL L REV 841 (2006); DAVID A. DANA, *A BEHAVIORAL ECONOMIC DEFENSE OF THE PRECAUTIONARY PRINCIPLE*, 97 NW U L REV 1315, 1316, 1320 (2003).

19 Global Development Research Center, *Wingspread Statement on the Precautionary Principle*, available at <http://www.gdrc.org/u-gov/precaution-3.html>; Robert V. Percival, *Who's Afraid of the Precautionary Principle*, 23 Pace Envir L Rev 21 (2005-2006) (arguing that many critiques of the precautionary principle are "attacking a straw man"). For a discussion of major critiques and defenses of the precautionary principle, see Light, 66 Emory J L (cited in note 12) (manuscript at 13-15).

20 Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U PA L Rev 1003, 1019 (2003);

is a burden-shifting principle – rather than waiting for scientific certainty that regulation is unwarranted, it permits regulators to take action in the absence of certainty.²¹ Cass Sunstein has likened the principle to the purchase of an “option” to prevent harm in the future.²² Toxic chemical regulation is precisely the sort of context in which a precautionary approach makes sense; chemicals pose the potential for significant risk to health, safety, or the environment. However, with chemicals, there is often a great deal of uncertainty as to whether any particular chemical will actually be harmful or beneficial.²³ One of the challenges under the precautionary principle is that there may be uncertainty about the risks of substitute chemicals as well.²⁴ Thus, a precautionary approach must take both of these risks into account.

To speak of “the” precautionary principle is a bit of a misnomer, as it is more accurate to describe a spectrum along which degrees of precaution exist.²⁵ At one end of the spectrum is the strongest form of the principle, which would call for a ban on an activity or entry of a new chemical into the marketplace until a conclusive determination that it is safe.²⁶ A more moderate form would simply say that a regulator may still take action to limit or otherwise regulate an activity of concern, even in the absence of scientific certainty as to the magnitude of harm.²⁷

compare Andrew Liebler, Note, *Better Safe than Sorry: A Precautionary Toxic Substances Control Act Reform Proposal*, 46 Wash U J L & Pub Pol 333 (2014).

21 Dana, NW U L Rev at 1315 (cited in note 14).

22 Sunstein, 91 Cornell L Rev at 841 (cited in note 19).

23 Noah M. Sachs, *Rescuing the Strong Precautionary Principle from its Critics*, 2011 U ILL L Rev 1285 (2011) (arguing that Congress should replace TSCA with a more precautionary statute); Applegate, 35 Ecology L Q at 722 (cited in note 4) (arguing that regulation of chemicals in the United States should be more precautionary). Wagner notes that the TSCA of 1976 was more precautionary for new chemicals than existing ones, and suggests that this could create unfair barriers to entry for safer substitute chemicals. Wagner, 6 Hum & Ecological Risk Assessment at 459 (cited in note 4).

24 Sunstein, 151 U PA L Rev at 1019 (cited in note 21).

25 Light, 66 Emory J L (cited in note 12) (manuscript at 12-13) (discussing different versions of the precautionary principle). Wagner notes that “some argue that attempting to pin down the precautionary principle with legal specificity may do violence to the principle by limiting its applicability and flexibility in addressing a broad range of environmental problems.” Wagner, 6 Hum & Ecological Risk Assessment at 461 (cited in note 4).

26 Light, 66 Emory J L (cited in note 6) (manuscript at 12-13); Sachs, 2011 U ILL L Rev at 1295 (cited in note 24) (discussing the “strong” precautionary principle as one that shifts the burden of proof on safety to industry).

27 Light, 66 Emory J L (cited in note 6) (manuscript at 12).

II. THE TSCA OF 1976

The TSCA of 1976 authorized the EPA to regulate both existing and new industrial chemicals in the United States, and to obtain information about their hazards and risks. Section 2 of the 1976 Act set forth the policy of the United States to (1) develop adequate data about the effects of chemicals on health and the environment; (2) regulate those chemicals that “present an unreasonable risk of injury to health or the environment;” and required the EPA to (3) exercise its regulatory authority in a way that continues to promote innovation.²⁸

To effectuate these policy goals, the Section 4 authorized the EPA to require manufacturers to test their chemical substances if insufficient data regarding the substance’s effects were otherwise available.²⁹ However, if the EPA wanted to require such testing, it first had to demonstrate that the manufacture, distribution, processing, use, or disposal “may present an unreasonable risk of injury to health or the environment;” or that the chemical may “enter the environment in substantial quantities;” or that there may be “significant or substantial human exposure.”³⁰

Under Section 5, companies were required to file a pre-manufacturing notice with the EPA before manufacturing a new chemical.³¹ This notice had to show that the chemical would “not present an unreasonable risk of injury to health or the environment.”³² If firms were required to test chemicals under Section 4, then such testing data had to be included in the pre-manufacturing notice; however, in reality, very little toxicity information accompanied these notices under the prior regime.³³

Section 6 required the EPA to protect against risks from both new and existing chemicals when the EPA could demonstrate “a reasonable basis to conclude” that a chemical “presents or will present an unreasonable

28 15 USC § 2601.

29 15 USC § 2603.

30 15 USC § 2603(a).

31 15 USC § 2604(a).

32 15 USC § 2604(b)(2)(B).

33 15 USC § 2604(b)(1)(A); Sachs, 62 VAND L REV AT 1828 (CITED IN NOTE 4) (“WITH THIS ‘DISCLOSE IF YOU HAVE IT’ MODEL, A RATIONAL FIRM IS INCENTIVIZED NOT TO UNDERTAKE TOXICITY RESEARCH ON THE PRODUCTS IT IS BRINGING TO MARKET”); GEN. ACCOUNTING OFFICE, TOXIC SUBSTANCE CONTROL ACT: LEGISLATIVE CHANGES COULD MAKE THE ACT MORE EFFECTIVE, GAO/RCED-94-103, AT 2, 12 (1994) [HEREINAFTER GAO, LEGISLATIVE CHANGES] (NOTING THAT ONLY 15 PERCENT OF SUCH NOTICES CONTAINED HEALTH AND SAFETY INFORMATION).

risk of injury to health or the environment.”³⁴ Section 6 offered a list of potential actions that the EPA could take, including banning or restricting the chemical’s production, distribution, or use, or simply requiring informational labeling; however, the EPA was required to use “the least burdensome requirements.”³⁵

Section 8 of the Act required chemical manufacturers to submit data to the EPA regarding adverse health and environmental effects; however, the Act did not require manufacturers to undertake studies to reveal such information.³⁶ Section 8(b) required the EPA to compile and publish an inventory of chemicals manufactured and processed in the United States, called the “TSCA Inventory.”³⁷ In 1979, the EPA’s initial Inventory listed approximately 62,000 chemicals that were in commerce by that time, and thus considered “existing” chemicals.³⁸ The EPA’s TSCA Inventory currently lists approximately 85,000 existing chemicals.³⁹

With respect to the allocation of authority to address toxic chemicals between the federal government and the states, the 1976 Act expressly preempted state and local law under certain circumstances. Under Section 18 of the Act, except as specifically provided, nothing in the Act preempted existing state regulations of chemicals.⁴⁰ If, however, the EPA Administrator promulgated a rule requiring the testing of a chemical substance under Section 4, then “no State or political subdivision” was permitted, “*after the effective date of such rule, [to] establish or continue in effect a requirement for the testing of such substance or mixture for purposes similar to those for which testing is required under such rule.*”⁴¹ And if the EPA Administrator promulgated a rule under Section 5 or 6 of the Act “designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may . . .

34 15 USC § 2605(a).

35 15 USC § 2605(a).

36 Bradley C. Karkkainen, *Information As Environmental Regulation: Tri and Performance Benchmarking, Precursor to A New Paradigm?*, 89 Geo L J 257, 370 & n.22 (2001) (“Although the [TSCA] § 8(e), 15 USC § 2607(e) (2000), requires manufacturers and distributors of chemical substances to report any information that supports the conclusion that a substance presents a substantial risk of injury to health or the environment, they are not routinely required to conduct such studies in the first place.”).

37 15 USC § 2607(b).

38 GAO, Legislative Changes at 11 (cited in note 29).

39 Envir Prot Agency, *About the TSCA Chemical Substance Inventory* (EPA, Nov 16, 2015), available at <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act>.

40 15 USC § 2617(a)(1).

41 15 USC § 2617(a)(2)(A) (emphasis added).

establish or continue in effect any requirement” regarding the same substance unless that requirement was (i) identical to the federal requirement, or (ii) adopted under a different federal law such as the Clean Air Act, or (iii) prohibited “the *use* of the substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).”⁴²

The 1976 Act permitted states and their political subdivisions to apply to the EPA Administrator for exemption from the preemption requirements under certain circumstances if the state rule provided “a significantly higher degree of protection from such risk” than the protection under TSCA, and did not “through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.”⁴³ Thus, while the 1976 Act precluded states from regulating manufacture of chemicals, it authorized them to limit use within the state, and embodied no limits on state action until the EPA promulgated a final rule under the Act.⁴⁴

With these provisions in mind, in 1986, California adopted Proposition 65, which regulates toxic chemicals in the state.⁴⁵ More than a dozen other states have since adopted chemical safety laws of some kind.⁴⁶ And because the EPA only imposed limitations on nine chemicals under the 1976 Act,⁴⁷ states have largely been able to regulate in this area according to their own policy preferences.

III. CRITIQUES OF TSCA OF 1976 UNDER THE PRECAUTIONARY PRINCIPLE

Many scholars and policymakers have criticized the TSCA of 1976. A central criticism has been that its substantive provisions were insufficient-

42 15 USC § 2617(a)(2)(B) (emphasis added).

43 15 USC § 2617(b).

44 William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L Rev 1547, 1563-64 (2007) (referring to the TSCA’s provisions and similar rules as express federal preemption of “design and engineering” requirements).

45 Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), Cal. Health & Safety Code §§ 25249.5-.13 (1986); summary available at <http://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>.

46 For an updated list of state laws and proposed bills governing toxic chemicals, see www.saferstates.com/bill-tracker.

47 US Gov’t Accountability Office, GAO-05-458, *Chemical Regulation: Options Exist to Improve EPA’s Ability to Assess Health Risks and Manage its Chemical Review Program*, Appendix V at 58 (2005) [hereinafter, GAO, Options Exist] (identifying these nine chemicals); U.S. Gov’t Accountability Office, GAO-09-428T, *Chemical Regulation: Options for Enhancing the Effectiveness of the Toxic Substances Control Act* (2009) [hereinafter GAO, Enhancing TSCA].

ly precautionary. More specifically, critics argued that the TSCA improperly placed the burden of proof on the EPA to demonstrate that a chemical was unsafe in order to remove that chemical from the stream of commerce, rather than on industry to demonstrate that a chemical is safe before such a chemical could enter the market.⁴⁸

In 1994, a Report of the U.S. General Accounting Office (GAO) concluded that because the 1976 TSCA's "legal standards are so high . . . they have usually discouraged EPA" from using its authority to limit the manufacture, distribution, and use of toxic chemicals.⁴⁹ To date, EPA has only issued regulations regarding nine chemicals – four "new" and five "existing" chemicals.⁵⁰ Because the EPA's decisions are subject to review under the Administrative Procedure Act, litigation has ensued challenging even these limited actions under the 1976 Act.⁵¹

The most famous – or infamous – case under the 1976 TSCA is *Corrosion-Proof Fittings v. EPA*,⁵² in which the Fifth Circuit held that EPA had "failed to muster substantial evidence" to support a regulation that prohibited the manufacture, importation, processing, and distribution of asbestos in "almost all products."⁵³ The EPA had studied the risks to human health of exposure to asbestos for ten years.⁵⁴ During that ten-year period, the EPA reviewed more than one hundred studies on asbestos, and compiled an enormous administrative record.⁵⁵ Nonetheless, the Fifth Circuit held that the EPA had failed to "give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately," and remanded the matter to the agency.⁵⁶ More specifically, the court was concerned that the EPA had failed to consider regulatory options other than a total ban on asbestos-containing products, such as product labeling or workplace restrictions, despite the fact

48 See, for example, Applegate, 35 Ecology L Q at 722 (cited in note 4) (arguing that a reformed TSCA should be more precautionary, with a greater emphasis on public information disclosure); Sachs, 62 Vand L Rev at 1819 (cited in note 4) (criticizing TSCA on this basis, and arguing that the European Union's approach to regulating toxic chemicals is more precautionary); Wagner, 6 Hum & Ecological Risk Assessment 459 (cited in note 4) (contending that TSCA exemplifies an "unprecautionary principle").

49 GAO Legislative Changes at 2-3 (cited in note 29).

50 See note 48.

51 15 USC § 2618.

52 947 F.2d 1201 (5th Cir 1991).

53 *Id.* at 1207.

54 *Id.*

55 *Id.*

56 *Corrosion-Proof Fittings*, 947 F.2d at 1215.

that the agency had concluded that asbestos is carcinogenic at all levels of exposure.⁵⁷ After *Corrosion-Proof Fittings*, the EPA never comprehensively revisited its ban of asbestos-containing products under the TSCA.⁵⁸ This legal battle demonstrated the anti-precautionary nature of the 1976 Act's placement of the burden of proof upon the EPA, as well as other burdens discouraging regulation such as the "least burdensome" requirement. Scholars have thus argued that the United States should be more precautionary in its approach to toxic substances.

In contrast, in the European Union, the 2006 law on Regulation, Evaluation, and Authorization of Chemicals (REACH) has for ten years taken a more precautionary approach to toxic chemicals.⁵⁹ REACH requires manufacturers to conduct safety testing, does not distinguish between "new" and "existing" chemicals, and requires manufacturers to produce data regarding the hazards of chemicals if they wish to manufacture or import chemicals into the European Union.⁶⁰ REACH is thus arguably more "precautionary" than the TSCA of 1976 by shifting the burden of proof to manufacturers to disclose information on hazards and risks in order to access this large market.⁶¹

IV. PRECAUTIONARY FEDERALISM

While the legal scholarship critical of the 1976 Act applies the precautionary principle to the questions of *what form* regulation of toxic chemicals should take, I argue that precaution should also guide the allocation of authority between the federal and state governments to regulate toxic chemicals. I have called this the principle of *precautionary federalism*, and have argued in other contexts that this principle should guide us in answering the question of who gets to decide whether and how to regulate under

57 Id at 1207, 1216. The court further noted the EPA's failure to consider the availability of substitute products and the risks associated with such substitutes. Id at 1221.

58 Instead, a more piecemeal approach followed, including some regulation of asbestos in schools and in the workplace. See Envir Prot Agency, *Asbestos Laws and Regulations*, <https://www.epa.gov/asbestos/asbestos-laws-and-regulations#epalaws>.

59 Commission Regulation 1907/2006, 2006 OJ (L396) 1 (EC); Sachs, 62 VAND L REV AT 1819 (CITED IN NOTE 4) ("REACH IS THE FIRST MAJOR CHEMICAL REGULATORY REGIME IN THE WORLD TO SHIFT THE BURDEN OF PROOF ON CHEMICAL SAFETY FROM GOVERNMENT TO MANUFACTURERS, AND IT REQUIRES SAFETY TESTING FOR THOUSANDS OF CHEMICALS ON WHICH THERE IS LIMITED OR NON-EXISTENT TOXICITY DATA IN THE UNITED STATES.").

60 Id.

61 Id.

conditions of uncertainty regarding significant health, safety, or environmental risks.⁶² Thus, while the debates over federalism and preemption in the context of amending TSCA may appear to be orthogonal to the debates over the precautionary principle, in fact, they are intimately related.

The principle of precautionary federalism addresses the question of who gets to decide whether and how to regulate under conditions of uncertainty about significant health, safety, or environmental risks.⁶³ The principle has three primary features. First, precautionary federalism contains a default presumption against preemption and in favor of overlapping regulatory authority (i.e., that states can exceed federal standards) under conditions of uncertainty about potentially significant health, safety, or environmental risks. Second, precautionary federalism recognizes that uncertainty is one factor that must be weighed against other factors in determining how to allocate regulatory authority. Other factors may weigh in favor of more uniform federal rules, including the need to promote innovation by providing certainty to industry about legal obligations and avoiding conflicting regulatory frameworks. A precautionary approach to federalism recognizes that there are tradeoffs across risks (for example, the risk of an existing chemical versus the risk of a substitute chemical). Finally, precautionary federalism is time-limited in nature. While there is initially a presumption in favor of regulatory overlap, a different allocation of regulatory authority may become appropriate as more information about the risks (and the tradeoffs) of toxic chemicals becomes available.⁶⁴

A precautionary approach to federalism makes sense in the context of toxic chemical regulation for the same reasons that a precautionary approach to the burden of proof makes sense. Toxic chemicals – even in small quantities – introduce risks to human health and the environment.⁶⁵ Allowing states to exceed federal standards can facilitate policy variation, learning, and the production of additional information by chemical manufacturers, particularly when there is uncertainty about risks both of existing and new substitute chemicals.⁶⁶ At the level of “whether to regulate,” a precautionary approach to the burden of proof may be information-forcing by

62 Light, 66 Emory J L (cited in note 12) (manuscript at 25-29).

63 Id (manuscript at 28).

64 Id (manuscript at 25-27).

65 See sources cited in note 4 (discussing risks and uncertainties in exposure to toxic chemicals); John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 Colum L Rev 261, 264-65 (1991) (same).

66 Light, 66 Emory J L (cited in note 12) (manuscript at 25-27).

requiring industry to produce information on chemical safety.⁶⁷ Similarly, regarding the federalism question – allocating authority to decide whether to regulate – a precautionary federalism approach can force industry to produce information on chemical safety in order to demonstrate that uniform federal rules are sufficient to guard against risks. Information is the *sine qua non* of toxic chemical regulation, and thus, creating incentives to gather and produce information in this context are crucial.⁶⁸ In addition, while some testing can be accomplished quickly, other risk-related testing may take time, in the form of longitudinal studies. For certain types of chemicals, or interactions among chemicals, it may be the case that only over time do true risks become apparent. This timing affects the length of the period of uncertainty during which the need for a precautionary approach is most acute.

While H.R. 2576's amendments alter the EPA's substantive authority to regulate both new and existing chemicals in ways that are more precautionary than the 1976 Act,⁶⁹ the same cannot be said of all of the amended preemption provisions.⁷⁰ True, the amendments do grandfather in certain existing state laws and regulatory actions taken before enactment of H.R. 2576.⁷¹ However, of greatest concern is the provision in H.R. 2576, Section 13(b)(1), that temporarily "pauses" state regulatory action when the EPA has merely "defined the scope of a risk evaluation" for an existing, high-priority chemical – but before the EPA has definitely concluded in a final rule whether further regulatory action is warranted or unwarranted.⁷² This "pause" preemption limits state action earlier in the process of federal action than the 1976 Act – at the period during which uncertainty regarding risks is highest. The 1976 Act's preemption provisions became applicable only when the EPA actually prescribed a final rule under Section 5 or 6.⁷³ Under H.R. 2576, while states may apply for waivers of this pause preemption,

67 Wagner, 6 Hum & Ecological Risk Assessment at 462 (cited in note 4) (discussing information-forcing nature of the precautionary principle).

68 Compare Wagner, 6 Hum & Ecological Risk Assessment at 462 (cited in note 4).

69 See sources cited in notes 6-10 and accompanying text.

70 For a summary of the substantive provisions of the amended Act, see Envir Prot Agency, Highlights of Key Provisions in the Frank R. Lautenberg Chemical Safety for the 21st Century Act, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/highlights-key-provisions-frank-r-lautenberg-chemical>; for a summary of key changes between TSCA and HR 2576, see EDF, Comparing the 1976 TSCA to HR 2576, http://blogs.edf.org/health/files/2016/06/Side-by-side-oldTSCA-newTSCA-FINAL.pdf?_ga=1.233599966.1514485682.1459798302.

71 HR 2576 § 13 (cited in note 11).

72 *Id.* at § 13(b).

73 15 USC 2617.

and the amended statute limits the EPA's discretion to deny such requests in this context,⁷⁴ the statutory criteria that the EPA must consider are open to some degree of interpretation by the Agency. For example, before granting such a waiver, the Administrator must find that the state rule would not unduly burden interstate commerce, which may be a contentious issue.⁷⁵ The Agency's determinations on waiver requests are subject to judicial review.⁷⁶ Thus, while it is possible that the EPA will grant such waivers from pause preemption, the statute clearly contemplates the possibility that it will not. And there is no reason to set up road blocks to state action – even ones that could potentially be surmounted – before the EPA has determined through final agency action whether regulation is required. It is arguably during this period of risk evaluation by the EPA that uncertainty is at its height, and the need for precaution is most acute. States should not be discouraged from regulating during this period. The procedure pursuant to which states may apply for waivers only muddies the waters and creates more potential litigation, which may discourage state action during this time.

The amendments in H.R. 2576 proved controversial among state environmental regulators, many of whom spoke publicly in favor of preserving state authority to regulate toxic chemicals.⁷⁷ Though these concerns were not expressed in terms of precautionary federalism, I want to suggest that this discomfort with preemption of state and local governance is consistent with that principle. Of course, it is certainly true that all legislation entails compromise, and it may have been the case that the preemption provisions were traded for more stringent substantive rules. A better approach, however, would have been to permit state experimentation and more stringent regulation as a matter of course – and to reject preemption – at the very least during the risk evaluation period, when uncertainty about risk is at its height. When uncertainty regarding risks is lower, over time, it may later become appropriate to revisit the allocation of authority.

We are entering a new era in the regulation of toxic chemicals in the United States. It remains to be seen precisely what impact these 2016

74 HR 2576 § 13(f)(2). The EPA evaluates these waiver requests differently for the pause preemption provisions as compared to other preemption provisions, see § 13(f)(1), and the Administrator must grant the state's application for a waiver from pause preemption if the application meets certain mandatory criteria.

75 HR 2576 § 13(f)(2).

76 *Id.* at § 13(f)(6).

77 See sources cited in note 11. I note that HR 2576 does not preempt remedies under state tort law. See *id.* at § 13(g).

amendments to the TSCA will have. One thing is certain, however: any approach to preemption should take precaution into account.

ARTICLE

A DREAM DEFERRED

Victoria “Chigozie” Akah[†]

While the *Parents Involved*¹ decision has wrought little real-world impact on the desegregation of public schools, it entrenches in judicial record a growing disregard for integration as a legitimate end and continues an erroneous distinction between so-called *de jure* segregation (enforced by the law) and *de facto* segregation (enforced by individual preferences rather than by policy). In this way, *Parents Involved* dramatically rolled back the Court’s commitment to the promise and meaning of *Brown v Board of Education*² by alternately relying on colorblind and corrective justice frameworks. However, these have proven ineffectual towards combatting racial segregation in the nation’s schools and are grounded in little to no constitutional imperative. When determining the constitutionality of public school integration plans that incorporate race-conscious factors, the Court must move away from relying on individualist, corrective justice solutions that demand evidence of *de jure* segregation. Instead, the Court should return to its approach in *Brown*, which extolled a more distributive, race-conscious sense of justice that better addressed the ways in which racial oppression harms communities, recognized that *de jure* and *de facto* segregation are one and the same, and truly grappled with responding to the racial oppression preceding the Civil War Amendments and *Brown*.

With a 5-4 decision, and a plurality putting forth competing dicta, the *Parents Involved* decision represents one of the Court’s most divided desegregation decisions. Hines points out the irony characterizing the common conclusion reached by the plurality, noting that, “While *Brown* sought to *achieve integration* by prohibiting discrimination on the basis of race, *Parents Involved* essentially *forbade integration* by what a plurality of the Court interpreted to be discrimination on the basis of race.”³ At issue was the use of race in Seattle and Louisville school boards’ integration plans. Ultimately, four justices opposed essentially all consideration of race in school assignments, four justices upheld integration plans that consider a student’s race, and Justice Kennedy permitted the consideration of an area’s racial make-up but not the race of individual students.⁴

The districts’ plans were as follows: in Seattle, the school district used

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1 *Parents Involved in Community Schools v Seattle School District No 1 et al*, 551 US 701 (2007).

2 *Brown v Board of Education*, 347 US 483 (1954).

3 Meaghan Hines, *Fulfilling the Promise of Brown? What Parents Involved Means for Louisville and the Future of Race in Public Education*, 83 Notre Dame L Rev 2173, 2174 (2008) (emphasis added).

4 William J. Glenn, *School Segregation in Jefferson County and Seattle: The Impact of the Parents Involved Ruling and District Actions*, 63 Cleve St L Rev 297, 299 (2015).

“tiebreakers” to decide who would be assigned to the more popular, oversubscribed schools. The first tiebreaker privileged students who already had a sibling enrolled at the desired school. The second tiebreaker depended upon “the racial composition of the particular school and the race of the individual student.”⁵ The district had an “integration positive,” which was the desired “white/nonwhite racial balance.” When oversubscribed schools did not fall within 10 percentage points of the integration positive, the district used the second race tiebreaker in order to achieve racial balance. The third tiebreaker used was the “geographic proximity of the school to the student’s residence.”⁶ In Louisville, the Jefferson County School District continued its integration plan under court-ordered desegregation after the school district was officially declared unitary in 2000. This plan required “all non-magnet [elementary] schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.”⁷ Parents of kindergartners and first-graders could designate a first-choice and second-choice school for their child within their geographic cluster, but “a student whose race would contribute to the school’s racial imbalance [would] not be assigned there.”⁸ Parents of students who were denied assignment to certain schools based on race filed suit claiming that Seattle and Jefferson County’s plans violated their rights under the Equal Protection Clause.

In his leading opinion, Chief Justice Roberts states that the primary legal question the Court had to answer was “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”⁹ He then applied a standard of strict scrutiny whereby Seattle and Jefferson County had to show that their “use of individual [race] in the assignment plans... is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”¹⁰ To the latter point of achieving a compelling government interest, Roberts notes that only two such interests have been recognized by the court: “remedying the effects of past intentional discrimination” and “diversity in higher education.”¹¹ Both school districts also outlined other interests at the heart of their integration plans. Seattle argued that its use of racial tiebreakers mitigates the effect of “racially concentrated housing patterns” that can “prevent nonwhite students from having access to the most desirable schools.”¹² Jefferson County, in a similar vein, expressed a general commitment to educating students “in a racially integrated

5 *Parents Involved in Community Schools v Seattle School District No 1 et al*, No 05-908, slip op at 3 (June 28, 2007).

6 *Id* at 3.

7 *Id* at 7.

8 *Id* at 8.

9 *Parents Involved in Community Schools*, No 05-908, slip op at 2.

10 *Id* at 12.

11 *Id* at 12–13.

12 *Id* at 17.

environment.”¹³

Chief Justice Roberts relies on *Grutter v Bollinger*¹⁴ and *Gratz v Bollinger*¹⁵ in determining the constitutionality of the districts’ plans. He states that the use of race in the University of Michigan Law School admissions was constitutional because *Grutter* dealt with the holistic individual, such that race was a “part of a broader assessment of diversity, and not simply an effort to achieve racial balance.”¹⁶ However, the Districts’ plans mirror the University of Michigan undergraduate school’s plan that was struck down in *Gratz*, in that the plan used race in a way that was “decisive by itself.”¹⁷ Further, while narrow tailoring requires robust consideration of other race-neutral approaches, Roberts states that Seattle cast alternative assignment plans aside “with little or no consideration.”¹⁸ In short, Roberts takes issue with the Districts’ practice of racial balancing, believing that it betrays *Brown* by categorizing and treating students differently on the basis of race. From this analysis he concludes that “the way to stop discrimination on the basis of race is to stop discrimination on the basis of race.”¹⁹

Justice Kennedy takes a different approach than that of Chief Justice Roberts and Justice Thomas, noting in his concurrence that while “the enduring hope is that race should not matter; the reality is that too often it does.”²⁰ On these grounds, Justice Kennedy criticizes the plurality’s solution of stopping racism by no longer talking about race as too simplistic. Justice Kennedy does not rule out school districts considering racial diversity, but says that districts should try other methods in achieving this goal such as “s t r a t e g i c site selection of new schools; drawing attendance zones with general recognition of demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race.”²¹

Before critiquing the specifics of the *Parents Involved* decision, it is important to take a cursory look at the history of slavery and public education that produced the conditions necessitating the remedial responses provided by the Civil War Amendments and the *Brown* cases.²² The United States has a history such that racism can be considered “a culture, a way of life.”²³ ‘Slave’ as a legal status started in 1662 with

13 *Parents Involved in Community Schools*, No 05-908, slip op at 17.

14 *Grutter v Bollinger*, 539 US 329 (2003).

15 *Gratz v Bollinger*, 539 US 244 (2003).

16 *Parents Involved in Community Schools*, No 05-908, slip op at 14.

17 *Id* at 15.

18 *Id* at 27.

19 *Id* at 40–41.

20 *Parents Involved in Community Schools*, No 05-908, slip op at 7 (Kennedy concurring).

21 *Id* at 8 (Kennedy concurring).

22 For the sake of space, this brief overview, as well as much of this paper, will focus primarily on the plight of African-American/Black people. It should be noted that other minorities, including Asian Americans, Latinos, and Native Americans have also been denied access to equal educational opportunities in ways both similar and dissimilar to African-Americans.

23 James S. Liebman, *Desegregating Politics: “All-out” School Desegregation Explained*, 90 *Colum L Rev* 1463, 1586 (1990).

legislatures throughout the colonies crafting laws affirming Africans as an inferior, sub-human category.²⁴ This eventually led to the legalization of “enslaved Africans as chattel.”²⁵ Subsequently, before *Brown* and the Civil War Amendments, “slavery in the United States functioned like an educational institution” for much of this nation’s African-American population.²⁶ As an act of resistance, slaves risked their lives and created their own educational organizations, with the primary goal of achieving literacy. Denied the right to an education, slaves who were found capable of or attempting to read and write were “whipped, sold or maimed.”²⁷ Southern states did not have a monopoly on suppressing access to education. For example, Connecticut opposed the construction of a college in New Haven for African-American males, specifically balking at the idea that an institution of *higher* education be available to black people.²⁸ The 1856 *Dred Scott* decision, one of the Court’s darkest moments, declared that black people “had no rights which the white man was bound to respect,”²⁹ thereby “codify[ing] into law, at the highest level of the American legal process, the precept of black inferiority.”³⁰

Once President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863, which (technically) freed slaves in the South, many states responded by passing “concrete legislation to create a separate and unequal educational system for black people.”³¹ While the system of separate and unequal schools for whites and freed slaves was originally intended to preserve a racial hierarchy with white people on top, it “would also end up guaranteeing that whites and blacks would experience a relatively inequitable level of prosperity into the foreseeable future.”³² Thus, emancipation may have the Freedmen’s Bureau in 1865 to assist former black slaves and refugees in the South by removed the physical shackles of black slaves, but it “did not lift the badge of inferiority.”³³ After the Civil War ended, the former Confederacy entered a period called Reconstruction. Congress created providing “food, housing, medical aid, and legal assistance” during this period.³⁴ It was particularly instrumental

24 Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J Gender Race & Just 633, 647 (2011).

25 *Id.*

26 Donald Warren, *Slavery as an American Educational Institution: Historiographical Inquiries*, 40 J of Thought 41, 42 (2005).

27 Vince Rogers, *The Specter of Slavery: The Misallocation of Education to Black Americans and Its Contribution to Declining American Economic Viability*, 10 Harv J of African American Pub Pol 53, 54 (2013).

28 *Id.*

29 *Scott v Sandford*, 60 US 393, 407 (1856).

30 A. Leon Higginbotham Jr., *The Ten Precepts of American Slavery Jurisprudence*, 17 Cardozo L Rev 1695, 1704 (1996).

31 Vince Rogers, 10 Harv J of African American Pub Pol at 53 (cited in note 27).

32 *Id.*

33 Aiyetoro, 14 J Gender Race & Just at 648 (cited in note 24).

34 *Freedmen’s Bureau* (History.com, Dec 11, 2015), archived at <https://perma.cc/AR9S-TLGW>.

in building thousands of schools for black people.³⁵ The Reconstruction process was bolstered by the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, guaranteed equal citizenship, and established equal suffrage for former slaves, respectively.

After the 1877 Compromise removed federal troops from the South, southern legislators responded to Reconstruction with a period of Deconstruction prompted by the passage of

Black Codes, which “prevented [blacks] from owning property, farm lands, or city lots,” forced black people into sharecropping (which involved tilling land for egregiously little pay), and preserved “the trappings of slavery as nearly as possible.”³⁶ Disenfranchisement removed black people from office and resulted in state legislatures passing laws that treated whites and blacks unequally and underfunded black schools. As a result, black students went to schools with “wretched and inadequate,” “undertrained, underpaid teachers” and short term lengths.³⁷ Jim Crow laws followed Deconstruction, continuing the disenfranchisement of blacks and mandating the separation of whites and blacks “in virtually every sphere of life.”³⁸ Jim Crow-esque separation occurred in the North as well, with black people barred from certain neighborhoods, jobs, schools, etc. The Supreme Court upheld these laws in *Plessy v Ferguson*.³⁹ Enshrining the principle of ‘separate but equal,’ the Court made a distinction between treatment and protection of law, saying that the Fourteenth Amendment only guaranteed equal “consideration and protection of the law,” not equal treatment.⁴⁰ The Court tacitly allowed this racial discrimination until *Brown v Board*, which attempted to respond to this history of combined racial separation *and* oppression, declaring that “separate educational facilities are inherently unequal.”⁴¹

The above historical overview shows the true nature of education and racial oppression in this country. Throughout history, an amalgamation of laws, spiteful individuals, communities, institutions, and actions have worked together to target African-Americans as a group, denying this group equal access to life, liberty, and property well after the Fourteenth Amendment made it expressly unconstitutional to do so. The issue was not the mere categorization by race, but the notions of superiority and inferiority that accompanied it. Former slaves were not denied equal citizenship because they were black; they were systematically denied equal citizenship because they were black and therefore seen as inferior.

Different approaches have tried to remedy the way this history has continued

35 Id.

36 Rogers, 10 Harv J African American Pub Pol at 57 (cited in note 27).

37 Heather A. Williams, *Self-taught: African American Education in Slavery and Freedom* 200 (U of North Carolina 2005).

38 Aiyetoro, 14 J Gender Race & Just at 650 (cited in note 24).

39 *Plessy v Ferguson*, 163 US 537 (1896).

40 Id at 544.

41 *Brown v Board of Education*, 347 US at 495.

to materially disadvantage African-Americans in the present. Among these approaches, two are of primary concern to this paper: corrective justice and distributive justice. Distributive justice holds that members of a political community must receive resources in a way that ensures “equality for the people involved will be the same as for things involved.”⁴² Distributive justice is best suited to combatting education discrimination cases because “the experience of discrimination, and the far-ranging and long-lasting equality harms that result from it, simply cannot be addressed with the framework of corrective justice.”⁴³

Corrective justice is unique in requiring remedy for “consequences of past misconduct” instead of simply requiring punishment for a wrongdoer’s present misconduct.⁴⁴ It rests on the designation of an individual entity as the clear perpetrator of a harm directly connected to the designation of an individual entity as the victim of that specific harm. Where corrective justice requires arithmetic equality, “such that the gain to the wrongdoer is equal to the loss to his or her victim,” distributive justice requires geometric equality, “such that the just distribution of communal benefits and burdens demands the allocations of portions that are in the same ratio to one another.”⁴⁵ In short, corrective justice involves justice based on the individual, while distributive justice involves justice based on membership in a political community. Distributive justice’s focus on community is best suited for combatting racial discrimination since community is intrinsic to the concept of race. Race discrimination impacts sub-communities and therefore impacts “the lives and fortunes of people spatially and temporally beyond its immediate victims.”⁴⁶ Racial discrimination is therefore fundamentally at odds with individualistic notions outlined in the corrective justice framework.

Brown v Board put forth a conception of public education as “a communal resource to be distributed ‘on equal terms’ with respect to race.”⁴⁷ The Court’s denouncement of separate public schools as inherently unequal implies that unequal distribution of educational resources “should entitle plaintiffs to a judicial remedy even in absence of proof of misconduct by school officials.”⁴⁸ Little acknowledgement is given to the individual plaintiffs in *Brown I*. Rather, the Court uses distributive language in describing how black students are at a disadvantage in separate educational facilities. The Court then calls for this disadvantage to be remedied through equal distribution of educational resources, stating that “[education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁴⁹ Despite

42 Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More than Just a Tort*, 96 NW UL Rev 99 (2001).

43 *Id.* at 100.

44 *Id.* at 111.

45 *Id.* at 103.

46 Morgan, 96 NW UL Rev at 149 (cited in note 43).

47 *Id.* at 99.

48 *Id.*

49 *Brown v Board of Education*, 347 US at 493.

Brown's distributive ethos, the Court has been hesitant to apply the distributive approach in subsequent cases, because it rejects relying on individual responsibility, going so far as to suggest that distributive solutions violate the political ethos of the United States, and “thus, are doomed to failure.”⁵⁰ Instead, the Court has applied a corrective justice framework, “which requires proof of wrongful conduct rather than evidence of unjustified disparate harm to trigger a right to a remedy,” for a majority of education desegregation cases post-*Brown*.⁵¹

In *Brown II*,⁵² the Court espoused a theory of corrective justice by outlining a school district’s “legal obligation to compensate plaintiffs in desegregation cases,” noting that the plaintiff’s right to a legal remedy “were triggered not by plaintiffs’ misfortune in attending a racially segregated school, but by the defendant’s wrongful conduct,” defined in the *Brown II* decision as ensuring racial discrimination in public education.⁵³ Public, community-oriented concerns were made subordinate to private, individual-oriented concerns, whereby the main concern was the plaintiffs’ admittance into the offending schools.⁵⁴ In *Keyes v School District No. 1*,⁵⁵ the Court narrowly defined wrongful segregation as “intentional segregation” by requiring “proof of state-imposed segregation in a substantial portion of the district.”⁵⁶ Thus, a hard boundary between *de jure* and *de facto* segregation had been drawn along the line of intent. This boundary has made it much more difficult to prove misconduct on behalf of school boards in constitutional education discrimination cases because “intent is easier to conceal and harder to prove than are the natural consequences of acts and omission.”⁵⁷

The Court continues to uphold “proof of malicious intent [as] the only reliable indicator of the wrongfulness of harmful conduct,” thereby making “only those harms that are proximately caused by intentional misconduct. . .legally cognizable.”⁵⁸ These corrective justice frameworks and intent-based standards severely limit the Court’s remedies to “‘actual’ wrongdoers and ‘actual’ victims” and “insulates many of the consequences of public school segregation from judicial remediation.”⁵⁹ Overall, the use of corrective justice has failed to achieve the Court’s goals outlined in *Brown I* because it has not “ended school segregation. . .equalized education opportunity by race, or significantly enhanced the ability of public schools to serve their proper democratic function by weakening the link between the social, political, and economic circumstances of one generation and those of the next.”⁶⁰ This result stems from the way corrective jus-

50 Morgan, 96 NW UL Rev at 127 (cited in note 43).

51 *Id* at 100.

52 *Brown v Board of Education of Topeka*, 349 US 294 (1955).

53 *Id*.

54 *Id*.

55 *Keyes v School District No. 1*, 413 US 189 (1973).

56 *Miller v California*, 413 US 189, 203 (1973).

57 Morgan, 96 NW UL Rev at 110 (cited in note 43).

58 *Id* at 113.

59 *Id* at 114, 116.

60 *Id* at 112.

tice applications are often “undercorrective” as they fail to address racially segregated residential patterns, and how easily “intentional discriminators can obscure their illicit motivation and thereby avoid liability.”⁶¹

Distributive justice arguments are not constitutionally unfeasible and have been successfully adjudicated in state courts.⁶² For example, in *Jackson v Pasadena City School District*,⁶³ the California Supreme Court held that “plaintiffs in education discrimination cases are entitled to a judicial remedy based merely on a showing of racial imbalance in their public schools.”⁶⁴ And in *Booker v Board of Education*,⁶⁵ the New Jersey Supreme Court acknowledged that the school board in question did not intentionally segregate schools by race, but rather, that the plaintiffs were still “entitled to a desegregation plan capable of ‘achieving the greatest [racial] dispersal consistent with sound education values and procedures.’”⁶⁶ Moreover, notions of distributive justice have not gone without support by justices on the Court post-*Brown*. In his *Keyes* dissent, Justice Powell urged the Court to abandon its reliance on corrective justice and “the tortuous effort of identifying ‘segregative acts’ and deducing ‘segregative intent,’” noting that the Court’s hard distinction between *de jure* and *de facto* segregation lacks constitutional imperative and has resulted in “no comparable progress [in school integration]...in many nonsouthern cities with large minority populations.”⁶⁷ Justice Marshall, arguably the most well-known counsel for *Brown*’s plaintiffs, understood that racial oppression affects groups, noting that “for several hundred years, Negroes have been discriminated against not as individuals, but rather solely because of the color of their skins.”⁶⁸ In his *Milliken* dissent (a case that limited desegregation efforts to intra-district remedies such that school boards in suburbs surrounding urban school districts could not be forced to participate in integration plans outside their district), Justice Marshall also argued that desegregation should not be limited to seeking narrow “compensation for the defendant’s wrongdoing” in the vein of corrective justice.⁶⁹ Rather, he employed a more expansive view, citing the ultimate goal of desegregation as the “equitable distribution of educational opportunity.”⁷⁰

Funded by property taxes and maintained by federal, state, and local governments, public education is an inherently communal resource. The corrective justice framework is ill-equipped to address persistent discriminatory allocation of community resources because “public education poses a far-ranging public law problem and cor-

61 Liebman, 90 Colum L Rev at 1515 (cited in note 23).

62 Morgan, 96 NW UL Rev at 126 (cited in note 43).

63 *Jackson v Pasadena City School District*, 59 Cal 2d 876 (CA 1963).

64 Morgan, 96 NW NW UL Rev at 132 (cited in note 43).

65 *Booker v Board of Education of City of Plainsfield*, 212 A 2d 1 (NJ 1965).

66 Morgan, 96 NW NW UL Rev at 133 (cited in note 43).

67 *Miller v California*, 413 US at 189, 224, 21 (Powell concurring in part, dissenting in part).

68 *Regents of University of California v Bakke*, 438 US 265, 398 (1977) (Marshall separate opinion).

69 Morgan, 96 NW UL Rev at 128 (cited in note 43).

70 *Id* at 128.

rective justice provides private law solutions. . . most appropriate for atomized individual plaintiffs and defendants.”⁷¹ Experience of racial oppression is not just made up of isolated, individualized incidents; it is a systemic occurrence that targets groups. A solution to correcting this oppression must account for the vestiges of racial discrimination that target entire communities, not just individuals. This requires a look at how identifiable racial groups have been impacted. Justice Kennedy may argue that “if race is the problem, [then] race as the instrument with which to solve it cannot be accepted as an analytical leap forward.”⁷² However, ignoring the specific ways in which racial groups are disadvantaged simply because of their race, be it from explicit or implicit origins, does not make those disadvantages disappear. The Seattle and Jefferson County school districts understood what the plurality refused to acknowledge, and recognized that distributive justice is better equipped to “acknowledge the pervasive and long-lasting effects of discrimination against strong sub-communities.”⁷³ The Districts’ plans appropriately relied on efforts to distribute educational resources equitably, based on knowledge of the past and of the continued negative effects from segregation that burden minority communities.

There has been much discussion about the scope of educational benefits that stem from integration. Chief Justice Roberts does not deem it fit to engage in this debate because the districts’ plans were not narrowly tailored,⁷⁴ but the debate is necessary to show why integration and the equitable distribution of educational resources is so crucial. The discourse on segregation’s effects began in *Brown I*. Because the cases involved school districts working to equalize their segregated schools in an effort to stave off calls for integration, the Court stated that rather than looking at simply the “tangible factors” of separate facilities, they “must look instead to the effect of segregation itself on education.”⁷⁵

Brown rests on studies in the social sciences demonstrating the negative impact incurred by black children, yet does not seek irrefutable consensus from the social sciences in doing so. However, the Courts’ reliance on psychological analysis has weakened the opinion by opening the door to criticizing methods of psychological studies. Today, school resources, such as the high quality teachers and smaller class sizes characteristic of high-income, majority white schools, do matter in increasing test scores. However, they are “far less important predictors of student test scores than are the background variables.”⁷⁶

Other studies, however, show benefits accrued to minorities in segregated schools, namely that Latinos and African Americans feel more optimistic about ed-

71 *Id* at 154.

72 *Parents Involved in Community Schools*, No 05-908, slip op at 17.

73 Morgan, 96 NW UL Rev at 159 (cited in note 43).

74 *Parents Involved in Community Schools*, No 05-908, slip op at 17, 18.

75 *Brown v Board of Education*, 347 US at 492.

76 Marry O. Borg, et al, *Closing the Achievement Gap between High-poverty Schools and Low-poverty Schools*, 5 *Rsrch in Bus & Econ J* 1 (2012).

ucation in segregated-minority schools, especially those with many minority teachers. These feelings, in turn, result in reductions in black-white and Latino-white achievement gaps in math and reading.⁷⁷ Still, although African Americans and Latinos tend to be more optimistic about their educational and occupational aspirations, data is at best indeterminate in how much belief really correlates with higher achievement.⁷⁸ In contrast to Goldsmith, The Civil Rights Project cites research showing African American and Latino students “perform better in integrated schools than predominantly minority schools.”⁷⁹ This outcome is in part due to the fact that desegregated schools tend to have more middle class students and “decades worth of research has shown” that a class with a higher average socioeconomic status correlates with higher achievement. Studies suggest children from desegregated environments “tend to live and work in more segregated settings” when they reach adulthood and that integrated school settings “can reduce stereotypes and promote cross-racial understanding.”⁸⁰

It is unlikely that any experiment will be able to prove without a shadow of a doubt (i.e., in accordance with “vigorous standards of the scientific method”) that racially imbalanced schools are harmful. A minority student’s inferior educational opportunity must be assessed “in light of a community’s shared insights, which in turn will be enriched by developments in psychology and sociology.”⁸¹ This seemingly imprecise approach does not preclude an exercise of judicial power. While evidence of the positive effects of integrated education is inconclusive, Justice Breyer states that it is “strong enough to permit a democratically elected school board [to reasonably] determine that this interest is a compelling one.”⁸² Ultimately, the stakes are too high for the Court to avoid questions of equal access to education “because of the uncertainty involved.”⁸³

The Court applies a standard of strict scrutiny to the Districts’ plans, with the ultimate effect of appearing to reject integration and distributive justice efforts more generally, as a legitimate endeavor altogether. The plurality insists that precedent shows strict scrutiny must be applied in any case concerning the individualized use of race.⁸⁴ This contrasts with Judge Kozinski in the Appeals Court, who argued against using strict scrutiny at all for the Districts’ plans because they do not attempt to “benefit or burden any particular group.”⁸⁵ Instead, he argues for a “robust and realistic” rational basis.⁸⁶ Justice Breyer also disagrees with the application of strict scrutiny. In doing so,

77 P.A. Goldsmith, *Schools' Racial Mix, Students' Optimism, and the Black-White and Latino-White Achievement Gaps*, 77.2 *Sociology & Educ* 121 (2004).

78 *Id.* at 122, 123.

79 Civil Rights Project, 18 (2005).

80 *Id.* at 18.

81 Owen M. Fiss, *Racial Imbalance in the Public Schools*, 78.3 *Harv L Rev* 596 (1965).

82 *Parents Involved in Community Schools*, No 05-908, slip op at 38.

83 Fiss, 78.3 *Harv L Rev* at 597 (cited in note 82).

84 *Parents Involved in Community Schools*, No 05-908, slip op at 37.

85 *Parents Involved in Community Schools*, 426 F 1193–96 (2005).

86 *Id.* at 1193–96.

he cites the *Fullilove v Klutznick*⁸⁷ decision, which outlined that strict scrutiny, while necessary in examining “*exclusionary* use of racial criteria” did not apply equally to examining *inclusionary* use of racial criteria.⁸⁸ He concludes that despite precedent that makes differential use of strict scrutiny in exclusive versus inclusive uses of racial criteria, the plurality now expounds a standard of strict scrutiny that is “fatal in fact across the board.”⁸⁹ The application of strict scrutiny is at best contested. Even if strict scrutiny is accepted, the plurality still erred in deciding that the districts failed in enacting a narrowly tailored plan with a compelling interest.

Both districts continually readdressed the thinking behind their plans, “explored a wide range of other means” that included race-neutral factors, and “consulted widely within their communities,” resulting in a progressive diminishment of “explicit race-conscious criteria.”⁹⁰ The key determinative factor in Seattle’s plan was student choice, with school choice determining the high school assignment of ninth graders in “more than 80% of all cases.”⁹¹ Race was only a factor in “a fraction of students’ non-merit-based assignments.”⁹² Overall, Seattle’s plan imposed a minimal burden that is shared equally by all of the district’s students. This minimal burden should be taken as an advantage of the plan, rather than a disqualifier as Chief Justice Roberts characterizes it.

Furthermore, Seattle’s race-based tiebreaker did not “uniformly benefit one race or group to the detriment of another.”⁹³ The plurality still takes issue with the individualized use of race as a legitimate means to achieve an end of integrated schools, suggesting proxies like using socioeconomic or geographic factors, such as thoughtful placement of new schools. However, reliance on socioeconomic factors in integration plans is not an adequate, full substitution for race-conscious factors. Instead, “class should be a supplement to, rather than a replacement for, race in school assignments.”⁹⁴ Race-neutral geographic factors are also insufficient, especially considering how the United States’ segregated residential patterns are a primary force driving the continued segregation of schools. The districts’ methods mean nothing, however, if the Court does not even recognize its pursued ends as worthwhile. Distributive justice is the best approach to combatting racial oppression through allocating educational resources equitably and increased mutual understanding between members of different racial groups could possibly reduce the achievement gap. Indeed, Justice Kennedy is the sole judge in the plurality to give any credence to racial diversity as a compelling interest.

The Roberts’ opinion recognizes two compelling interests for integration plans

87 *Fullilove v Klutznick* 448 US 448, 482 (1979).

88 *Parents Involved in Community Schools*, No 05-908, slip op at 32.

89 *Id* at 33.

90 *Id* at 5, 18.

91 *Id* at 46.

92 *Parents Involved in Community Schools*, No 05-908, slip op at 47.

93 *Parents Involved in Community Schools*, 426 F at 1193–96.

94 *Parents Involved in Community Schools*, No 05-908, slip op at 37.

in education: remedying past discrimination and educational benefits from diversity in higher education. In striking down Seattle and Jefferson County's attempts to administer distributive justice, he first addresses the districts' pursuit of the second Court-sanctioned compelling interest by relying on *Grutter* to assert that the Seattle and Jefferson County plans must employ a broad sense of diversity similar to those in higher education admissions. Roberts states that while the Court of Appeals upheld the plans in *Parents Involved* by relying on *Grutter*, the Court of Appeals failed to acknowledge the unique circumstances at hand for institutions of higher education. Roberts makes this conclusion without going into too much detail about these differences, aside from *Grutter* noting "the expansive freedoms of speech and thought associated with the university environment."⁹⁵ In fact, the plurality largely ignores how the context of K–12 education differs from that of higher education. A major distinction between universities and K–12 public schools is that the latter "involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity."⁹⁶ *Grutter* addressed institutions of higher education, where the implication of pursuing blatant racial balancing in a system based on merit-based competition between applicants are decidedly different from assigning students to K–12 public schools, a right guaranteed to all students. Seattle and Jefferson County did "not seek to award a scarce commodity on the basis of merit."⁹⁷ Thus, no stigma results from any particular school assignment rendering absent the "dangers of substituting racial preference for qualification based competition."⁹⁸

Seattle's expert in the District Court case stated that "desegregated educational experience opens opportunity networks in areas of higher education and employment."⁹⁹ This reveals the necessary role public education plays in addressing the root problems of what makes affirmative action necessary. Affirmative action policies in cases like *Grutter* and *Bakke* would not have risen if K–12 educational resources were equitably distributed amongst all students before students of color applied to an institution of higher education. Recognizing that not all students graduating from Seattle's high schools go to college, the Appeals Court rightfully rejected "the notion that only those students who leave high school and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom."¹⁰⁰

In remedying past discrimination as another compelling interest for pursuing integration plans, the Court relies on a litmus test for past discrimination that creates a hard line between *de jure* and *de facto* segregation. School districts are allowed to address *de jure* segregation but addressing *de facto* segregation is verboten. Five years before *Parents Involved* and almost fifty years after *Brown*, the nation's schools

95 *Grutter v Bollinger*, 539 US at 329.

96 *Parents Involved in Community Schools*, 416 F at 513.

97 *Parents Involved in Community Schools*, No 05-908, slip op at 35.

98 Id at 513, 514.

99 Id at 513, 516.

100 Id at 513, 518.

remain segregated, with one in six black students attending a school that was majority-minority.¹⁰¹ Schools have become increasingly more segregated because neighborhoods have become increasingly more segregated.¹⁰² Young African Americans are ten times more likely to live in poor neighborhoods than young whites. Moreover, African-American families enjoy less social mobility, with 67% of families that lived in poor neighborhoods a generation ago continuing to live in those neighborhoods a generation later, compared to 40% of white families.¹⁰³ Segregated minority schools offer less advanced courses and tend to be populated by poorer students who “have less skills preparation outside of school” and teachers that “tend to be less highly qualified.”¹⁰⁴ While the aforementioned features do not characterize all minority schools, “separated institutions of any kind are rarely equal in quality and opportunity to those attended by the majority, or privileged, segment of our population.”¹⁰⁵

Justice Thomas says that nothing can be done about the “innocent,” “voluntary” choices parents make in determining where they want their child to attend school through neighborhood selection.¹⁰⁶ But there is nothing innocent about how this nation’s neighborhoods came to be. Starting from the New Deal, federal funding for public housing was “explicitly racially segregated, both by federal and local governments.”¹⁰⁷ The creation of suburbs was also a racially explicit project, with the federal government subsidizing the relocation of white families to suburbs but prohibiting such relocation for blacks.¹⁰⁸ Banks used “redlining” policies to refuse loans to black families in white suburbs and even in black neighborhoods, “leading to the deterioration and ghettoization of those neighborhoods.”¹⁰⁹ The building of highways, which often razed predominantly black neighborhoods that were “too close to white communities or central districts,” was treated by some city officials in the 1950s as an opportunity to “get rid of [them].”¹¹⁰ All of the aforementioned policies affected neighborhoods in all corners of the U.S., East to West, North to South. Furthermore, racially discriminatory federal labor markets and income policies have prevented African Americans from amassing the financial capital that could be passed down through generations. Indeed, the effect of the aforementioned (technically) illegal policies are still very much felt today.¹¹¹

Notions of *de facto* segregation “obscure the issue of governmental respon-

101 *Parents Involved in Community Schools*, No 05-908, slip op at 4.

102 Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 *Race & Soc Probs* 21 (2015).

103 *Id* at 22.

104 Civil Rights Project, 16 (2005).

105 *Id* at 17.

106 *Parents Involved in Community Schools*, No 05-908, slip op at 3.

107 Rothstein, 7 *Race & Soc Probs* at 24 (cited in note 103).

108 *Id* at 24.

109 *Id*.

110 *Id* at 25.

111 Rothstein, 7 *Race & Soc Probs* at 25 (cited in note 103).

sibility.”¹¹² It is difficult to prove intent as applied to “a multimember, multilevel bureaucracy mak[ing] a series of decisions over the course of several decades regard[ing] scores of schools, hundreds of teachers, and thousands of students.”¹¹³ In reality, nearly every case of racially imbalanced schools still falls under the realm of governmental responsibility because when, for example, school boards make the choice to assign students to schools purely based on geographic criteria, they do so knowing that housing patterns remain largely racially segregated. Therefore, a school board’s “decision not to mitigate the consequences of a prior choice reinforces the ascription of responsibility.”¹¹⁴ Moreover, a school board has more agency in remedying racially imbalanced schools than do low-income, minority complainants who have little financial and social ability to dramatically shift residential patterns.¹¹⁵ A school board’s moral imperative to maintain equal education access has been expressly addressed by the Court. *Swann v Charlotte-Mecklenburg Board of Education*¹¹⁶ sought to ensure that “school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race.”¹¹⁷ In doing so, *Swann* “clearly endorsed voluntary integration.”¹¹⁸ Building off the *Swann* decision, *Bakke* put forth considerably broader conditions for racial criteria as a means to address segregation and rejected the intent-based corrective approach, stating that “judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating.”¹¹⁹

Both Seattle and Jefferson County’s local school districts were highly segregated, with a federal district court finding that “school segregation [in Jefferson County] reflected pre-*Brown* state laws separating the races.”¹²⁰ Additionally, the Seattle school district settled a case characterizing their actions as facilitation discrimination by “pledg[ing] to undertake a desegregation plan.”¹²¹ In the 1950s, virtually all black students in Seattle attended majority-minority schools despite only making up 3% of Seattle’s population. Schools in the Seattle city-center had elementary schools that were 60–80% black while schools outside the city-center were “virtually all white.”¹²² A 1956 memo found that the levels of racial segregation in Seattle schools “reflected not only segregated housing patterns but also school board policies that permitted white students to transfer out of black schools while restricting the transfer of black

112 Fiss, 78.3 Harv L Rev at 584 (cited in note 82).

113 Liebman, 90 Colum L Rev at 1592 (cited in note 23).

114 Fiss, 78.3 Harv L Rev at 585 (cited in note 82).

115 Id at 585.

116 *Swann v Charlotte-Mecklenburg Bd. Of Education*, 402 US 1, 23 (1971).

117 Id at 23.

118 James E. Ryan, *The Supreme Court and Voluntary Integration*, 121.1 Harv L Rev 131, 153 (2007).

119 *Regents of University of California v Bakke*, 438 US 265, 364 (1978).

120 *Parents Involved in Community Schools*, No 05-908, slip op at 5.

121 Id.

122 Id at 6.

students into white schools.”¹²³ Community backlash on the part of black parents resulted in the school board revising its transfer policy to allow white students to transfer to a predominantly black school and black students to transfer to a predominantly white school.”¹²⁴ This new transfer program saw black students transferring to predominantly white schools at four to five times the rate of white students transferring to predominantly black schools, suggesting that superior educational opportunities were characteristic of predominantly white schools.¹²⁵ The National Association for the Advancement of Colored People (NAACP) filed a federal lawsuit against the Seattle school board in 1969, claiming that the school board maintained segregated schools by drawing boundary lines and mandating school attendance policies that created and preserved racially segregated schools.

The school board again responded to charges of segregation with “race-based transfers and mandatory busing.”¹²⁶ After creating three new middle schools, the school board used “explicitly racial criteria” by assigning white students from predominantly white schools and black students from predominantly black schools. Despite local opposition, a state court upheld this plan, reaffirming the right for local school boards to craft their own solutions to segregation.¹²⁷ The NAACP filed another legal complaint in 1977, this time with the federal Office of Civil Rights, charging the school board with, among other things, the “maintenance of inferior facilities at black schools” and “a construction program that needlessly built new schools in white areas.”¹²⁸ The OCR settled with the school board through an agreement requiring the school board to implement the ‘Seattle Plan.’ The Plan defined racially imbalanced schools as those with a minority population exceeding 20%. It implemented a rigorous mandatory busing system that ultimately “achieved the integration that it sought.”¹²⁹ Community backlash prompted Washington state voters to vote for a state law amendment that required students be assigned to schools based on geographical proximity. However, the Court ruled that this initiative violated the Fourteenth Amendment.¹³⁰ With racial demographics changing in the 1980s such that the population of whites decreased as the population of blacks and Asians increased, the school board deserted busing for a plan “that resembles the plan now before us.”¹³¹ Before reaching the Supreme Court, this plan was upheld by the Washington Supreme Court, the Federal District Court, and the Court of Appeals for the Ninth Circuit.¹³²

123 Id.

124 *Parents Involved in Community Schools*, No 05-908, slip op at 7.

125 Id.

126 Id.

127 Id.

128 *Parents Involved in Community Schools*, No 05-908, slip op at 8.

129 Id at 10.

130 Id.

131 Id.

132 *Parents Involved in Community Schools*, No 05-908, slip op at 10.

Meanwhile, Jefferson County, two years after *Brown* struck down legally sanctioned segregated public schools, implemented an “open transfer policy” but still remained segregated by 1972.¹³³ Accordingly, the District Court mandated Jefferson County desegregate its schools in 1975; it responded with a rigorous busing system. ‘Project Renaissance’ modified the previous busing system to make more room for school choice. In 1996, “with the help of a special ‘Planning Team,’ community groups, and unofficial study groups,” Project Renaissance was modified into the plan at issue in *Parents Involved*.¹³⁴ The District Court dissolved the desegregation decree in 2000 with the *Hampton v Jefferson*¹³⁵ decision, and struck down the use of race-based criteria in magnet school admissions.¹³⁶ Still, the Jefferson County school board decided to keep the assignment plan intact for all non-magnet schools with the justification that “the twenty-six years of past integration had helped to improve student achievement in the schools.”¹³⁷

Both districts’ race-conscious plans sought to address an unambiguous history of persistent, systematic racial segregation that the Court characterized as either innocuous in the case of Seattle, or ‘cured’ in the case of Jefferson County. Proof of intentional, individualized discrimination is “unnecessary” when “the racism of our society has been so pervasive that no [black person], regardless of wealth or position, has managed to escape its impact.”¹³⁸ The Court must take steps towards loosening its ties to the corrective approach and strict intent-standards by allowing judges to presume intent from the fact, foreseeability, or avoidability of action’s segregative impact.¹³⁹ As it stands, the line between *de facto* and *de jure* segregation, as the Court sees it, is not only unclear; it is “meaningless.”¹⁴⁰

The Court’s belief in *de jure* and *de facto* segregation as distinct institutions simplifies the complex nature of American legislative policy’s treatment of minorities. In this same manner, the Court’s treatment of the Fourteenth Amendments and *Brown* reduces its roots in specifically addressing the plight of African-Americans to a mere extolment of a colorblind freedom from racial classification. The Constitution may be “colorblind,” as Justice Harlan said in his famous *Plessy v Ferguson* dissent, but colorblindness does not preclude recognizing that “racial differences exist between individuals and that some schools are racially imbalanced while others are not.”¹⁴¹ A world in which racial differences disadvantage some and advantage others is not ideal, but that world describes the United States today. Subsequently, the Constitution is “both colorblind

133 *Id* at 12.

134 *Id* at 16.

135 *Hampton v Jefferson County Board of Education*, 102 F Supp 2d 358 (WD KY 2000).

136 *Parents Involved in Community Schools*, No 05-908, slip op at 17.

137 Hines, 83 Notre Dame L Rev at 2173, 2174 (cited in note 3).

138 *Regents of Univ. of California v Bakke*, 438 US at 398.

139 Liebman, 90 Colum L Rev at 1592 (cited in note 23).

140 *Parents Involved in Community Schools*, No 05-908, slip op at 4.

141 Fiss, 78.3 Harv L Rev at 575 (cited in note 82).

and color-conscious.”¹⁴² It is colorblind in that it avoids classification that burdens people based on race, but it is color-conscious to “prevent discrimination being perpetuated and to undo the effects of past discrimination.”¹⁴³ To that effect, the Court has not uniformly adhered to the “contention that, in the remedial context, the Congress must act in a wholly ‘colorblind’ fashion”¹⁴⁴ and has “expressly rejected this proposition on a number of occasions.”¹⁴⁵

In the spirit of *Grutter*, context around the enactment of the Fourteenth Amendment matters.¹⁴⁶ The Fourteenth Amendment was “enacted to ensure the Negro some measure of equality and only a peculiar reading of this history would abstract a principle that prevents a [school] board from equalizing the education opportunity of Negro children by correcting school imbalance.”¹⁴⁷ It should be noted that the state of primary and secondary education in the United States at the time of the Fourteenth Amendment’s passage was widely different, with widespread public schools not yet the norm, white children mainly educated by private institutions, and black children receiving almost no education. Thus, “it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.”¹⁴⁸ Perhaps the Fourteenth Amendment’s relationship with public education in the immediate post-Civil War period was unclear. However, the establishment of initiatives like the Freedman’s Bureau, which educated black people so that the latter could assume full citizenship, demonstrates how the importance of education was not far from consideration in the aftermath of the Amendment. Moreover, the Congress that created the Freedman’s Bureau (overriding *two* presidential vetoes to do so), whose benefits primarily served Blacks, was the same Congress that passed the Fourteenth Amendment.¹⁴⁹ And while the *Brown* Court may have found the original intent of the Civil War Amendments to be “inconclusive,” even the *Slaughter-House*¹⁵⁰ Court had no problem citing “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him” as the driving force of the Civil War Amendments.¹⁵¹

Rather than being uncritically colorblind, the Fourteenth Amendment has a truly integrationist purpose, as the Amendment’s drafters “u n d e r s t o o d the legal and practical difference between the use of race-conscious criteria in defiance of that

142 *United States v Jefferson County Board of Education*, 836, 837 (CA5 1966).

143 *Id* at 837.

144 *Fullilove v Klutznick* 448 US at 482.

145 *Regents of Univ. of California v Bakke*, 438 US at 356.

146 *Grutter v Bollinger*, 539 US at 15.

147 Fiss, 78.3 Harv L Rev at 576 (cited in note 82).

148 *Brown v Board of Education*, 347 US at 490.

149 *Regents of Univ. of California v Bakke*, 438 US at 356.

150 *Slaughter-House Cases*, 83 US 36, 69 (1872).

151 *Id* at 71.

purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.”¹⁵² This reading of the Fourteenth Amendment rests on a standard of inclusion, such that violations of the Amendment must involve an instance of *exclusion*. Applied to public schools, a violation of the Fourteenth Amendment occurs only insofar as a policy seeks to exclude people of a certain race, rather than include people of all racial backgrounds. *Cooper v Aaron*¹⁵³ affirmed this approach, holding that the “right of a student not to be *segregated* on racial grounds in public schools is so fundamental and pervasive that it is embraced in concept of due process of law.”¹⁵⁴ A distributive justice framework fits neatly into an integrationist treatment of the Amendment, as distributive justice fundamentally relies on the consideration and inclusion of all people in its goal of distributing educational resources equally. Thus, when the plurality characterizes the Fourteenth Amendment as being colorblind such that any mention of race in any policy constitutes a violation of that Amendment, they ignore the true intent of the Fourteenth Amendment, which invoked color blindness insofar as it was a rejection of “state treatment of Negroes [that] result[ed] in systematic inequality in some factual sense.”¹⁵⁵

The same critique applies to the plurality’s treatment of *Brown*. In stating that *Brown*’s primary concern was preventing students from being assigned to schools on a racial basis, the Roberts opinion circumvents how the Court was not satisfied with school boards simply adopting a race-neutral system. In actuality, the Court called on schools to create plans to “effectuate a transition to a racially nondiscriminatory school system,”¹⁵⁶ and later mandated that school boards come up with a desegregation plan that “promises realistically to work, and promises to work now.”¹⁵⁷ The Chief Justice has no problem citing the first part of Robert Carter’s (a counsel for the *Brown* plaintiffs) argument that school boards cannot make school assignments on race alone, but he neglects the latter part of Carter’s argument, which stated that segregated schools are unconstitutional because they “make it impossible for Negro children... to receive equal education opportunities.”¹⁵⁸ Roberts states that there is no “ambiguity in that statement.”¹⁵⁹ *Brown I* was fundamentally about asserting the equitable distribution of educational resources as a constitutional right.

Although the Kennedy concurrence does not adopt a totalizing colorblind approach, it does subscribe to a myth of diversity as the only real justification for voluntary integration plans. Again, the original intentions of the Fourteenth Amendment and *Brown* were not mere diversity but remedying the long-term ramifications of racial op-

152 *Parents Involved in Community Schools*, No 05-908, slip op at 28–29.

153 *Cooper v Aaron*, 358 US 1, 19 (1958) (emphasis added).

154 *Id* at 1402.

155 Fiss, 78.3 Harv L Rev at 594 (cited in note 82).

156 *Brown v Board of Education of Topeka*, 349 US 294, 301 (1955).

157 *Green v County School Board of New Kent County*, 391 US 430, 439 (1968).

158 *Brown v Board of Education*, 349 US 294 (Roberts L. Carter, transcript of oral argument at 7).

159 *Parents Involved in Community Schools*, No 05-908, slip op at 40.

pression. Jurisprudence must move away from this myth of diversity. Yes, integration can benefit children of all races by creating a richer learning environment that fosters understanding from a young age. However, distributive integration plans should not rest on needing to prove everyone's net gain. Students of color may indeed benefit more than white students from these plans, but this does not mean a zero-sum situation where white students "lose" and students of color "win," especially since students of color benefit by gaining equal footing with their white peers. As Justice Breyer notes, the cost of applying racial labels in present-day integration plans "does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation."¹⁶⁰

The plurality's descriptions of *Brown* and the Fourteenth Amendment are "radically incomplete."¹⁶¹ Let history not be rewritten to say that only "a restriction on an individual liberty" was at the heart of these seminal examples of distributive justice.¹⁶² The complainants in *Brown* did not seek the right, as the *Parents Involved* complainants did, to attend "whatever public school they wanted."¹⁶³ Nor did the Districts in the instant case exclude an entire group of students from schools on the basis of race alone. Equally comparing the Districts' integrationist actions to the Topeka school board's segregationist actions is at best misguided and at worst deliberately specious. The Districts' voluntary integration plans are a manifestation of *Brown*'s distributive ethos of equal education opportunity, not a betrayal, as the plurality would have it. More than arbitrarily assigning students to schools based on race, the issue *Brown* sought to remedy involved a perpetuation of "a caste system rooted in the institutions of slavery and 80 years of legalized subordination."¹⁶⁴ Superficially, the plurality may be correct in asserting that all U.S. citizens enjoy the rights guaranteed under the Civil War Amendments. However, "the evil which [the Amendments] were designed to remedy"¹⁶⁵ must not be obscured, lest they "become an exercise in which the winners are the ones who hide the ball."¹⁶⁶

For all of the dissent and plurality's passionate language, the Court's decision has had a minor impact on school districts' voluntary integration plans. Because Justice Kennedy's opinion for the plurality in *Parents Involved* still held that school boards have a compelling interest in diversity, "the Court did not definitively close the door" on race-conscious K–12 school assignments.¹⁶⁷ This opening leads Hines to suggest that the Court has only officially identified remedying the effects of past discrimination in higher education as a compelling interest, but that maintaining diversity in pri-

160 *Id.* at 67.

161 Ryan, 121.1 *Harv L Rev* at 152 (cited in note 119).

162 Fiss, 78.3 *Harv L Rev* at 592 (cited in note 82).

163 *Id.*

164 *Parents Involved in Community Schools*, No 05-908, slip op at 67.

165 *Slaughter-House Cases*, 83 US at 69, 72.

166 *Gratz v Bollinger* 539 US at 8 (Souter dissenting).

167 Hines, 83 *Notre Dame L Rev* at 2202 (cited in note 3).

mary and secondary schools is an alternative.¹⁶⁸ After the decision, the Bush Administration declared that all school assignment plans must be race-neutral, but the Obama Administration has revised that assertion and released a set of guidelines for school boards seeking to enact integration plans in a post-*Parents Involved* environment.

Despite the *Parents Involved* decision, “Jefferson County did not give up on the educational ideal of diversity” and sought the help of legal and educational experts to create a new student assignment plan.¹⁶⁹ The new plan broadened the definition of diversity to include “income and educational attainment along with race and ethnicity” and employed a geographic approach that created school assignment zones encompassing “a mix of demographic characteristics” that, in part, consider race.¹⁷⁰ The plan for the 2011–2012 school year was ruled invalid by the Kentucky Court of Appeals, which held that the plan violated a 1970s law, “created in resistance to court-ordered school desegregation efforts,” that stated a student has a right to a school assignment nearest to his/her home.¹⁷¹ The Kentucky Supreme Court then reversed this decision. Most importantly, Jefferson County’s new plan has not been challenged on constitutional grounds or on failure to comply with standards outlined in *Parents Involved*. The new plan increased diversity such that 61% of elementary schools “met the diversity guidelines” in 2011–2012, representing an increase from 54% in 2010–2011 and 48% in 2009–2010.¹⁷²

While DiPaolo shows an increase in racial diversity in Jefferson County public schools over the first four years of the new plan, Glenn posits that the rate of desegregation in Jefferson County’s schools actually decreased due to changes made after the *Parents Involved* decision. Conversely, he argues that the Court did not have a significant impact on Seattle’s integration efforts because its plan pre-*Parents Involved* had already undergone modifications that made it largely ineffective.¹⁷³ Undoubtedly, the new plans set forth in Seattle and Jefferson County post-*Parents Involved* are “just as race conscious...but they get their racially diverse results without saying directly what they are doing or why they are doing it.”¹⁷⁴ The issue the Court takes with explicit use of race in integration plans can therefore be characterized as an optics issue. There is still room for school boards to consider race, but they are left to “achieving similar numbers [in racial diversity] through winks, nods, and disguises.”¹⁷⁵

The real impact of *Parents Involved* is in the way the Court appears to be

168 Id at 2207.

169 John K. DiPaolo, *Sustaining Public School Diversity: An Innovative Strategy from Jefferson County, Kentucky* *1 (Lawyers’ Committee for Civil Rights Under the Law, 2011), archived at <https://lawyerscommittee.org/wp-content/uploads/2015/06/PICS-Policy-Brief-Publication12-2-11Final.pdf>.

170 Id at 1.

171 Id.

172 Id at 11.

173 Glenn, 63 Clev St L Rev at 297, 299 (cited in note 4).

174 *Gratz v Bollinger* 539 US at 8.

175 Id.

distancing itself from supporting integration and distributive justice measures in any capacity. The plurality's opinion "make[s] the goal [of integration] seem dastardly" or, in the case of the Kennedy concurrence, "voices intense distaste over the most straightforward means of achieving it."¹⁷⁶ In this way, the Court "does not take away much that is tangible," but it does take away the "hope that the Court would stand firmly on the side of school integration" and "it is no small thing to dash hope."¹⁷⁷ The Court's decision, then, is most profound in that it tells all those pursuing racial integration and distributive justice that these endeavors are "wrong, or at best, distasteful."¹⁷⁸ As Justice Breyer notes, "The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*."¹⁷⁹ *Brown I* is the only constitutional education discrimination case that has applied a distributive justice framework. *Parents Involved* represents yet another missed opportunity for the Court to return to that distributive sensibility. In the process of freeing "Americans to think about people and their problems in less rancorous ways," *Parents Involved* restricts Americans from effectively addressing the rancorous roots that are undoubtedly at the heart of racial inequality in this nation.¹⁸⁰ Distributive justice may have been rejected by the justice system, at least at the highest level, but it still has some traction in the states. It was once expounded by the Supreme Court, and it can and *should* be adopted once more when combatting the badges of slavery and racial discrimination that still plague America's public schools. Failure to do so will not only defer *Brown's* dream; it will deny it all together.

176 Ryan, 121.1 Harv L Rev at 133 (cited in note 119).

177 Id at 133.

178 Id at 154.

179 *Parents Involved in Community Schools*, No 05-908, slip op at 68.

180 Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121.1 Harv L Rev 1, 162 (2007).

ARTICLE

**“WOULD RFRA REQUIRE EXEMPTIONS IN CASES
OF THIS ILK?”: PUBLIC ACCOMODATIONS
PROTECTIONS FOR LGBT INDIVIDUALS
CONSIDERED IN LIGHT OF *HOBBY LOBBY*¹**

Hayley Hahn[†]

INTRODUCTION

The Supreme Court’s decision in *Burwell v Hobby Lobby Stores, Inc.*² (2014) marked one of the most divisive rulings in recent Court history. Following *Hobby Lobby*, many legal scholars worried that the decision might prompt businesses to seek religious exemptions to generally applicable laws other than the Affordable Care Act.³ This paper examines one such area of conflict: public accommodation for LGBT individuals. Part I focuses on the *Hobby Lobby* case itself, with particular attention paid to the role of religious objections and the application of the Religious Freedom Restoration Act (RFRA).⁴ Part II discusses the Court’s decision in *Employment Division, Department of Human Resources of Oregon v Smith*,⁵ the enactment of RFRA, and the Court’s ruling in *City of Boerne v Flores*,⁶ with a discussion of state forms of RFRA in Part A, general argument structures used in favor of religious liberty in Part B, and arguments against religious exemptions in Part C. Part III provides a selected history of civil rights laws in the United States, specifically those concerning public accommodation, with particular emphasis on the Identity Approach to civil rights legislation in Part A, an exploration of the freedom of association argument against anti-discrimination laws in Part B, and arguments in favor of extending antidiscrimination protection to LGBT individuals in Part C. Part IV provides analyses of contemporary cases concerning some businesses’ religious liberty objections to serving LGBT individuals at the state level, principally *Elane Photography*,⁷ with a brief look at the *Sweet Cakes by Melissa*⁸ and *Azucar Bakery*.⁹ Part V concludes

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¹*Burwell v Hobby Lobby, Inc.*, No 13-354, slip op at 33 (571 US June 30, 2014) (Ginsburg dissenting)

²No 13-354, slip op (571 US June 30, 2014).

³Patient Protection and Affordable Care Act, 42 USC § 18001 et seq (2010).

⁴Pub L No 42, 107 Stat 1488 (1993), codified at 42 USC § 2000bb et seq, archived at <https://www.law.cornell.edu/uscode/text/42/2000bb-1>.

⁵494 US 872 (1990).

⁶521 US 507 (1997).

⁷*Elane Photography, LLC v Vanessa Willock*, 309 P3d 58 (2013).

⁸*Sweetcakes by Melissa v Oregon Bureau of Labor and Industries*, 44-14 & 45-14, 6 (BOLI 2015).

⁹*Jack v Azucar Bakery*, Charge No P20140069X 1 (Colorado Civil Rights Division 2015).

the paper by stressing that, based on the facts considered in the previous sections of the paper, businesses open to the public cannot discriminate on the basis of a customer's sexual orientation, even if the owner's object to same-sex relationships on the basis of their religion.

I. HOBBY LOBBY AND RFRA

On March 25, 2014, the U.S. Supreme Court heard *Burwell v Hobby Lobby Stores, Inc.*, a case involving the Affordable Care Act's requirement that businesses provide contraceptive coverage for employees.¹⁰ *Hobby Lobby* considered "the circumstances under which it is immoral for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act of another."¹¹ In this instance, the "innocent act"—contested by the Hahns of Conestoga Wood Specialists and the Greens of Hobby Lobby and Mardel—was providing employees with access to four types of birth control, as these methods "may have the effect of preventing an already fertilized egg from developing any further from its attachment to the uterus," an effect that the Hahns and Greens equate with abortion, a procedure prohibited by both families' sincerely held religious beliefs.¹² Due to the families' religious objections to the contraceptive mandate, counsel for Conestoga Wood and Hobby Lobby sued under the Religious Freedom Restoration Act (RFRA). Though counsel for the Department of Health and Human Services (HHS) argued that Hobby Lobby could not lodge a complaint under RFRA as the law concerned individual people rather than corporations, Justice Alito, writing for the majority, noted that the Dictionary Act includes "corporations" in its definition of person; thus, RFRA applied.¹³ Moreover, Justice Alito contended, "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else," and therefore, a business may engage in policies in order to meet goals other than profit maximization.¹⁴ For instance, a corporation might enact "costly pollution-control" or labor or wage policies that "exceed the requirements of local law regarding working conditions and benefits," thereby sacrificing profits in order to further other interests, interests that include the company's environmental, humanitarian, and even religious, convictions.¹⁵ The decision in *Hobby Lobby* affirmed the notion that businesses, like the individuals that comprise them, may exercise religion; hence, RFRA entitles Hobby Lobby and other companies to "religious accommodation" in order to abide by their sincerely held religious

10 *Hobby Lobby*, No 13-354, slip op at 1–2 (syllabus).

11 *Id* at 5 (Alito) (plurality).

12 *Id* at 8 (syllabus and Alito) (plurality).

13 *Hobby Lobby*, No. 13-354, slip op at 19 (Alito) (plurality).

14 *Id* at 23 (Alito) (plurality).

15 *Id*.

beliefs.¹⁶

To fully appreciate the significance of *Hobby Lobby*, one must first understand the importance of RFRA alongside two other Supreme Court cases: *Employment Division, Department of Human Services of Oregon v Smith* (1990) and *City of Boerne v Flores* (1997). The next section will focus on these elements so as to provide proper context to *Hobby Lobby*.

II. SMITH, FEDERAL RFRA, AND CITY OF BOERNE

On April 17, 1990, the U.S. Supreme Court ruled on *Employment Division, Department of Human Services of Oregon v Smith*, a case that considered whether the Free Exercise Clause of the First Amendment prevented Oregon from denying unemployment benefits to two men who ingested peyote as part of a religious ritual of their Native American Church, violating the state’s controlled substance law in the process.¹⁷ Writing for the majority, Justice Scalia maintained that while state laws cannot ban an act just because it is part of a religious practice, a law that “incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids)” is constitutional.¹⁸ Although a religious exemption for peyote use was constitutionally “permitted,” Justice Scalia noted that it was not “constitutionally required.”¹⁹ Hence, though legislatures may issue laws aimed at accommodating religion, as Justice Scalia clarifies, such measures are not mandatory. Although “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in” – namely, the practices of religious minorities, such as those of the Native American Church – Justice Scalia endorsed this “unavoidable consequence of democratic government” as a far preferable alternative “to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”²⁰ In order to prevent citizens from selectively following the law, the *Smith* decision affirmed that the government may incidentally burden religious exercise, and that such burdens do not violate the First Amendment.

Though Justice O’Connor “agree[d] with the result of the case,” along with Justice Brennan, Justice Marshall, and Justice Blackmun, she did not endorse the Court’s reasoning. Indeed, members of Congress would later echo Justice O’Connor’s assertion that the “holding dramatically depart[ed] from well settled First Amendment jurisprudence,” as the decision overturned the *Sher-*

¹⁶ Id at 28 (Alito) (plurality).

¹⁷ *Employment Division v Smith*, 494 US at 875–76.

¹⁸ Id at 878 (Scalia) (plurality).

¹⁹ Id at 890.

²⁰ Id at 890 (Scalia) (plurality).

bert Test established in *Sherbert v Verner* (1963),²¹ under which “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.”²² Additionally, Justice O’Connor challenged the implication “that the disfavoring of minority religions is an ‘unavoidable consequence’ under our system of government,” positing instead that “the First Amendment was enacted precisely to protect the rights of those whose religious practices were not shared by the majority and may be viewed with hostility.”²³ Rather than break from established jurisprudence, Justice O’Connor applied the *Sherbert* test and in doing so found “that granting a selective exemption in this case would seriously impair Oregon’s compelling interest in prohibiting possession of peyote by its citizens.”²⁴ By applying the *Sherbert* test and adhering to judicial precedent, Justice O’Connor reached the same conclusion as the Court without discounting First Amendment jurisprudence.

Smith’s apparent dismissal of First Amendment jurisprudence sparked public outrage, as many felt it rendered the Free Exercise Clause of the First Amendment “virtually emasculated.”²⁵ Indeed, following the Court’s ruling, “a large and diverse number of civil liberties groups [...] and fifty-five constitutional law scholars petitioned the Court in May 1990 for a rehearing.”²⁶ Failing that, in 1993, in a sweeping show of bipartisan support, Congress passed the Religious Freedom Restoration Act (“RFRA”), which President Clinton signed November 16, 1993.²⁷ Though some scholars and journalists would later wonder “[w]hat [...] progressives [were] thinking” when they supported RFRA, it is likely that at the time, progressives viewed the proposed legislation as a means of “provid[ing] particular attention to small religious minorities whose free exercise of religion [was] most in jeopardy,” such as the Native American Church.²⁸ Thus, through RFRA, Congress attempted to safeguard religious exercise by explicitly limiting the instances in which “[g]overnment may substantially burden a person’s exercise of religion” to those measures enacted in service “of a compelling government interest,” and then, only when such measures constitute “the least restrictive means of furthering that compelling government interest.”²⁹ In order to realize this vision, RFRA’s statement of purpose included two goals: “restor[ing]

21 *Sherbert v Verner*, 374 US 398 (1963).

22 *Employment Division v Smith*, 494 US at 884.

23 *Id* at 902 (O’Connor concurring).

24 *Id* at 907 (O’Connor concurring).

25 James E. Wood, Jr., *The Religious Freedom Restoration Act* (Editorial), 33.4 J of Church & State 673, 673 (1991).

26 *Id* at 675.

27 Kimberlee Wood Colby, *The 20th Anniversary of the Religious Freedom Restoration Act*, 4 J Christian Legal Thought 12, 12 (2014).

28 Katha Pollitt, *Why It’s Time to Repeal the Religious Freedom Restoration Act* (The Nation, July 2014), archived at <http://www.thenation.com/article/why-its-time-repeal-religious-freedom-restoration-act/>; Wood, Jr., 33 J of Church & State 4 at 677 (cited in note 28).

29 RFRA, 42 USC § 2000bb–1 at 1489.

the compelling interest test set forth in *Sherbert v Verner*” and “provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government.”³⁰

The latter of these two purposes proved too broad an interpretation of federal power. In 1997, the Court’s ruling in *City of Boerne* narrowed the scope of RFRA by declaring it unconstitutional as applied to the states.³¹ The case concerned the Catholic Archbishop of San Antonio, who was denied a permit to enlarge his church in Boerne because the church was located in a protected historic district.³² The Archbishop challenged the denial based on RFRA, a claim the District Court denied, finding that “by enacting RFRA Congress exceeded the scope of its enforcement power under article 5 of the Fourteenth Amendment.”³³ The Fifth Circuit Court reversed this decision.³⁴ When the case reached the Supreme Court, the Court reversed the decision of the Fifth Circuit Court. Writing for the majority, Justice Kennedy contrasted RFRA with federal laws aimed at combating States’ unconstitutional behavior, such as racial discrimination, arguing that RFRA’s “[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting transactions of almost every description regardless of subject matter.”³⁵ Thus, RFRA’s application to “state law” constituted an overreach of congressional power, as “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”³⁶ Justice O’Connor, Justice Souter, and Justice Breyer issued dissenting opinions, each, to a degree, calling into question the Court’s ruling in *Smith*, with Justice Breyer going so far as to call “for reargument” of *Smith*.³⁷ Far from resolving the concerns raised by *Smith*, RFRA inaugurated a new era of debate concerning religious liberty, government interference, and the appropriate legislative and judicial recourse for reconciling a balance between the right of an individual to freely exercise his or her religious beliefs and the compelling interests of government to incidentally impose limits or otherwise hamper an individual’s religious expression.

While the Supreme Court stripped Congress’s RFRA of its applicability to state cases, some legal scholars argued that RFRA was unconstitutional even at the federal level. Marci A. Hamilton, for example, claimed that the RFRA, “like no other law enacted before, mimics the scope of the Constitution,” and that by seeking to reverse the Court’s ruling in *Smith*, Congress suggested that “the

30 Id.

31 *City of Boerne*, 521 US 507, 507 (1997) (syllabus).

32 Id.

33 Id.

34 Id.

35 Id at 509.

36 *City of Boerne*, 521 US at 527 (Kennedy) (plurality).

37 Id at 545 (O’Connor dissenting); id at 565 (Souter dissenting).

Supreme Court does not have the power to issue final word on the meaning of the existing Constitution,” thereby violating the principle of judicial sovereignty.³⁸ In addition, Hamilton contended that “[t]he Establishment Clause provides a ceiling that does not permit the government significant room with which to expand religious liberties,” and thus, RFRA unconstitutionally privileged religious beliefs at the expense of irreligious beliefs.³⁹ Although Hamilton’s appeal to history and separation of powers might appeal to readers’ sense of patriotism or constitutional propriety, upon closer inspection, her claims prove difficult to defend. First, as Justice O’Connor’s dissent in *City of Boerne* makes clear, though the early colonists and Founding Fathers advocated for freedom from a state-mandated religion, as evidenced in measures such as “state constitutional provisions and the Northwest Ordinance,” they also “generally accepted that the right to ‘free exercise’ required, where possible, accommodation of religious practice.”⁴⁰ Second, although it is important to note that Hamilton’s argument appeared in 1998, those reading her article in 2015 have the benefit of consulting *Hobby Lobby* and may interpret the Court’s willingness to uphold and apply RFRA in that instance as an affirmation of the law’s constitutionality. In other words, to a degree, the Founding Fathers did afford religious believers certain privileges or accommodations to practice their beliefs; therefore, RFRA’s advancement of this goal is consistent with both historical and constitutional tradition.

Similar to Hamilton, Christopher L. Eisgruber claims that RFRA is unconstitutional. His argument, like Hamilton’s, is unpersuasive in light of *Hobby Lobby* and an understanding of the historical origins of religious liberty. His discussion of the ways in which religious exemptions pose harm to those who are not religious due to cost-shifting, however, serves as an important reminder that at times, religious exemptions may pose a threat to furthering a compelling government interest, an idea explored further in the following sections of this paper.⁴¹ Indeed, pointing to potential religious exemptions to hunting laws, bankruptcy procedures, zoning ordinances, and health care and education services, Eisgruber illuminates the seemingly countless instances in which providing exceptions to generally applicable laws unduly transfers financial costs to the irreligious.⁴² Hence, although *Hobby Lobby* affirmed the constitutionality of RFRA, the concept of religious exemptions introduces the possibility of unduly burdening the non-religious, and thus, such exemptions necessitate further analysis.

38 Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U Pa J of Const L 1, 2–3, 6 (1998).

39 *Id.* at 11.

40 *City of Boerne*, 521 US at 554 (O’Connor dissenting).

41 Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 NYU L R 437, 441 & 458 (1994).

42 *Id.* at 455.

A. RFRA at the State Level: Consensus and Controversy

Despite the continued controversy associated with federal RFRA, today, over thirty states have some form of “heightened religious freedom protections.”⁴³ While many of these states enacted forms of RFRA through their legislatures, some gained heightened religious protections due to state court decisions.⁴⁴ The majority of these protections are, as Professor Douglas Laycock puts it, “far removed from gay rights or same-sex marriage” – but in recent years, due to the Marriage Equality movement gaining traction, some pieces of proposed legislation sought to provide defense for businesses who, on religious grounds, objected to serving same-sex couples.⁴⁵ For example, a bill proposed in the Kansas House of Representatives in 2014 would have amended the state’s existing Preservation of Religious Freedom Act in order to empower “any individual to refuse to recognize same-sex couples.”⁴⁶ More recently, some state legislatures, including those in Arizona and Indiana, passed bills that “allowed businesses that assert their religious beliefs to deny services to gay and lesbian couples.”⁴⁷ Governor Jan Brewer, following opposition from major businesses and Senators John McCain and Jeff Flake, vetoed Arizona’s bill.⁴⁸ Similarly, although Governor Pence signed Indiana’s bill into law, following business leaders’ public objections to the bill, Governor Pence also signed an amendment which bars “refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member of the general public,” and includes “sexual orientation” as unlawful grounds for refusing to provide services.⁴⁹ Similarly, in April, Michigan Governor Richard Snyder “promise[d] to veto a Religious Freedom Restoration Act if the bill makes it to his desk,” noting that a second bill aimed at combatting discrimination for LGBT individuals would need to be introduced for him to even consider signing any form of RFRA.⁵⁰ When confronted with forms of RFRA, many governors

43 Juliet Eilperin, *31 states have heightened religious freedom protections* (The Washington Post, Mar 1, 2014), archived at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>.

44 Id.

45 Id.

46 Id.

47 Catherine E. Shoichet and Halimah Abdullah, *Arizona Gov. Jan Brewer vetoes controversial anti-gay bill, SB 1062* (CNN Politics, Feb 26, 2014), archived at <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill>.

48 Id.

49 Eric Bradner, *Pence signs ‘fix’ for religious freedom law* (CNN, Apr 2, 2015), archived at <http://www.cnn.com/2015/04/02/politics/indiana-religious-freedom-law-fix/>.

50 Kathleen Gray, *Snyder: I would veto a religious freedom bill* (Detroit Free Press, Apr 2, 2015), archived at <http://www.freep.com/story/news/politics/2015/04/02/michigan-governor-veto-religious-freedom-legislation/70823112/>.

have gone to great lengths to ensure that freedom of religion does not equate to freedom to discriminate.

Although new RFRA proposals have proven controversial in recent months, many segments of the public continue to support forms of RFRA, even those without antidiscrimination protections. Indeed, in an op-ed for the *New York Times*, Governor Bobby Jindal defended the defeated RFRA bills in Indiana and Arkansas, claiming that the bills “would simply allow for an individual or business to claim a right of free exercise of religion in a court of law.”⁵¹ Moreover, Governor Jindal equated providing goods and services for a same-sex marriage to “participating” in the marriage ceremony, going on to assert that just as the law “would not compel a priest, minister or rabbi to violate his conscience and perform a same-sex wedding ceremony,” it ought not require people “who are not members of the clergy,” but nevertheless “live their faith through their businesses” to violate their religious convictions by providing services for a same-sex wedding ceremony.⁵² Just under four months later, Governor Jindal’s home state of Louisiana introduced House Bill Number 707, the Marriage and Conscience Act,⁵³ which prevents the government from pressing charges against a person who “acts in accordance with a religious belief or moral conviction about the institution of marriage.” In other words, a business that refuses to provide goods or services for a same-sex couple’s marriage due to their religious beliefs that marriage constitutes “the union of one man and one woman”—the definition of marriage provided in the bill—would not face any charges.⁵⁴ Thus, Louisiana’s bill ostensibly allows for discrimination.

Both defenders of religious liberty and combatants of discrimination voice legitimate concerns regarding the extent to which businesses, even those owned and operated by devoutly religious individuals, must serve the public, including a member of the public seeking goods and services for a wedding to his same-sex partner. In order to fully analyze and attempt to reconcile these disparate goals, it is necessary to first understand the historical, philosophical, and constitutional issues at play. Given that the discussion of Supreme Court cases and RFRA thus far has most directly concerned religious freedom, the next section will concentrate on arguments in favor of religious liberty.

B. Religious Liberty as a Legitimate Constitutional Concern

51 Bobby Jindal, *I’m Holding Firm Against Gay Marriage* (NY Times 2015), archived at http://www.nytimes.com/2015/04/23/opinion/bobby-jindal-im-holding-firm-against-gay-marriage.html?_r=0.

52 *Id.*

53 The Marriage and Conscience Act, Louisiana State Legislature, Assembly HB 707, 2015 Reg Sess (2015).

54 *Id.* at 4.

As explained in Justice O’Connor’s dissent in *City of Boerne*, religious liberty has comprised a central and celebrated tenet of America’s historical and legal heritage.⁵⁵ Even those who argue against the continued protection of religious exercise at the expense of preventing discrimination—arguments we will examine in greater detail later on—must concede that freedom of religious identity, association, and practice constituted a matter of compelling interest for those first American colonists and, to this day, continue to serve as foundational sources of identity and action for many Americans. Indeed, as Rena M. Lindevaldsen expresses, for Christians “[t]he Bible clearly instructs us not to compromise on principle; we are to do what He instructs and leave the results to Him.”⁵⁶ Even in business, Christians are expected to follow Biblical doctrine, including rejection, to accommodate same-sex relationships in order to safeguard “religious liberties and free speech rights,” as Lindevaldsen stresses.⁵⁷ Accordingly, many religious individuals would suffer “very concrete personal harms” if the government’s enactment and enforcement of antidiscrimination laws forced them to serve same-sex couples, as such accommodation might be interpreted as tacit endorsement of same-sex marriage, a practice that contradicts many Christians’ deeply held religious beliefs.⁵⁸

Some proponents of antidiscrimination laws for LGBT individuals might argue that the preservation of a traditional definition of marriage does not constitute a central religious concern, and thus, businesses refusing service to LGBT individuals based on their belief in traditional marriage do not deserve exemption from generally applicable laws in the way that, for example, a Seventh Day Adventist observes the Sabbath on Saturday instead of Sunday.⁵⁹ However, the Court has consistently found that sincerity, rather than centrality, of belief determines whether or not a religious exemption for an individual is warranted.⁶⁰ The Court’s decision in *Hobby Lobby* is significant in that it established that businesses, like individuals, might also hold and adhere to sincere religious beliefs.⁶¹ For the Majority in *Hobby Lobby*, “Hobby Lobby’s statement of purpose,” which promises that the Greens will oversee “the company in a manner consistent with Biblical principles,” testified to the sincerity of the Greens’ religious beliefs.⁶² Moreover, while Justice Alito conceded in response to the Third Circuit’s ruling on the case

55 *City of Boerne*, 521 US at 554 (O’Connor dissenting).

56 Rena M. Lindevaldsen, *The Fallacy of Neutrality from Beginning to End: the Battle Between Religious Liberties and Rights Based on Homosexual Conduct*, Liberty U L Rev (2010).

57 *Id* at 17.

58 Maggie Gallagher and William C. Duncan, *The Kennedy Doctrine: Moral Disagreement and the “Bare Desire to Harm,”* Case Western L Rev 62.3, 966 (2014).

59 *Sherbert*, 526 US 398 (1963).

60 *Employment Division v Smith*, 494 US at 908.

61 *Hobby Lobby*, No. 13-354, slip op at 20.

62 *Id* at 14.

that corporations cannot exercise religious liberty in the same sense as individuals, he also noted that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all,” and hence, for the purposes of freedom of religious practice, both corporations and individuals are entitled to religious liberty, so long as their religious beliefs prove sincere.⁶³ In cases where the religious beliefs of business owners and the desire of LGBT individuals for public accommodation come into conflict, and after establishing the sincerity of the business owners’ beliefs, religious liberty claims often hinge on two types of arguments: freedom of religious exercise and freedom of expression.

Arguments based on religious exercise center on the essential role religion plays in many individuals’ lives. As explored above, for many, religious doctrine dictates their conduct not only in matters of faith, but also in business matters. Much of the “religious activity” the faithful choose to engage in, as Douglas Laycock notes, “is self-restraining, burdensome, or meaningless to non-believers.”⁶⁴ For example, dietary restrictions, dress requirements, or prayer may constitute essential behaviors for people of faith; however, they rarely inconvenience others. Nevertheless, in the event that an individual requires an exemption in order to practice his faith, the government ought to grant it, even if a similar request is not granted for a secular purpose, as, according to Laycock, “[t]o distinguish between a yarmulke and a gimme cap is not to discriminate between indistinguishable head coverings, but to distinguish a constitutionally protected activity—religious exercise—from an activity not mentioned in the Constitution.”⁶⁵ Such a distinction hinges on the belief that religious exercise is worthy of protection, an assumption questioned by some legal scholars whose arguments will be discussed in greater depth later in the paper. For the purposes of exploring Laycock’s argument, here I assume that religious exercise is worth safeguarding. Thus, based on Laycock’s understanding of religious liberty, a business whose owner objects to providing services for a same-sex couple’s wedding on religious grounds—assuming that a state also has some sort of law that bans discrimination on the basis of sexual orientation—would receive a religious exemption and not be required to serve the same-sex couple. A business owner who is not religiously motivated, but does not wish to provide services for a same-sex couple’s wedding, is not afforded a religious exemption and must serve the same-sex couple. We will discuss the implications of this hypothetical later on; for now, it is enough to note that the right to religious exercise lies at the heart of religious exemptions, allowing individuals, and now businesses, to refuse to perform actions that would violate the doctrines of their faith.

63 *Id* at 18, 19.

64 Douglas Laycock, *The Remnants of Free Exercise*, S Ct Rev 1, 17 (1990).

65 *Id* at 16.

In addition to free exercise, arguments for religious exemptions often rely on freedom of expression. A key component of the majority’s reasoning in *Smith* rested on Justice Scalia’s observation that the Court only upheld religious exemptions to “neutral, generally applicable laws” when claims involved “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech.”⁶⁶ Indeed, in recent cases such as *Elane Photography, LLC v Willock* (2013), discussed in greater depth in Part V of this paper, business owners seeking exemptions from public accommodation laws have cited their right to freedom of expression alongside their freedom of religious expression.⁶⁷ For florists, bakers, photographers, and others who offer services one might consider creative, their products represent a form of artistic or symbolic speech. Some might interpret forcing businesses to provide goods and services for a same-sex wedding as a means of coercing business owners into endorsing same-sex marriage, thereby violating owners’ right to free speech.⁶⁸ On the surface, this sort of argument is persuasive, as goods and services provided for a wedding “are more cultural and personal.”⁶⁹ This renders the marketplace “a site of cultural conflict.”⁷⁰ However, in practice, many courts have declined to rule in favor of businesses who refuse to provide services for same-sex weddings on the basis of free speech, a trend explored in greater depth in Part V of this paper.⁷¹

It is worth taking a moment to dispel any fears that denying businesses voicing sincere religious objections the freedom to discriminate against members of the LGBT community would in any way infringe upon the autonomy of churches, synagogues, temples, or other religious institutions to pursue practices consistent with their religious doctrine. Put simply, churches and other religious institutions are not considered places of public accommodation, so concerns raised by some journalists that the law will prosecute “a Catholic church [that] denies a same-sex couple from getting married in their church” are unfounded.⁷² Indeed, Governor Jindal’s plea to “ensure that musicians, caterers, photographers and others should be immune from government coercion on deeply held religious beliefs” follows from his acknowledgement that the government “would not compel a priest, minister or rabbi to violate his conscience and perform a same-

66 *Employment Division v Smith*, 494 US at 882.

67 *Elane Photography*, 309 P3d at 70.

68 *Sweetcakes by Melissa*, 44-14 & 45-14 at 6.

69 Justin Muehlmeier, *Toward a New Age of Consumer Access: Creating Space in the Public Accommodation for the LGBT Community*, 19 *Cardozo J L & Gender* 781, 810 (2013).

70 Paul Horwitz, *Hobby Lobby Is Only the Beginning* (NY Times, July 1, 2014), archived at <http://www.nytimes.com/2014/07/02/opinion/for-the-supreme-court-hobby-lobby-is-only-the-beginning.html>.

71 *Elane Photography*, 309 P3d at 70.

72 Andrew Downs, *Oregon needs its own religious-protection law* (Opinion) (*The Oregonian/OregonLive*, Apr 9, 2015).

sex marriage.”⁷³ In employment practices, the observance of religious ritual, and adherence to doctrine, religious institutions enjoy greater freedom from generally applicable laws than do businesses or individuals and will continue to do so even as the legal definition of marriage changes. Indeed, the Supreme Court’s decision in *Hosanna-Tabor*⁷⁴ provided for “ministerial exceptions” for suits “including, but not limited to, nondiscrimination suits.”⁷⁵ Those performing ministerial functions or employed by those performing ministerial functions are not required to abide by antidiscrimination laws.⁷⁶ Some states, such as Colorado, have further affirmed the unique sovereignty of religious institutions in their antidiscrimination laws, as Colorado Revised Statute 24-34-601 specifies that a “[p]lace of public accommodation” shall not include a church, synagogue, or other place that is principally used for religious purposes.⁷⁷ Hence, moving forward, it is necessary to recognize that any measures preventing businesses from discriminating against LGBT individuals on the basis of owners’ sincerely held religious beliefs will not hamper the ability of religious institutions to govern their own practices, particularly with respect to marriage and wedding ceremonies.

C. Arguments Against Religious Exemptions

The above arguments operate on the assumption that religious exemptions are permissible, even preferable, features of American law. However, some scholars contend that religious exemptions hamper the development of civic society, and it is worth briefly exploring and refuting their claims before proceeding. For example, in *Why Tolerate Religion?*, Brian Leiter argues that toleration’s “selective application to the conscience of only religious believers is not morally defensible.”⁷⁸ Leiter compares the Canadian Supreme Court’s decision in *Multani v Commission scolaire Marguerite-Bourgeois*,⁷⁹ a 2006 case in which the Court allowed Sikhs to carry *kirpans*, ceremonial knives central to Sikh religious practice, in schools, to a hypothetical situation in which a rural boy’s request to carry a knife in order to honor the traditions of his community, a claim that is denied because it is based on cultural rather than religious practice.⁸⁰ Based on this hypothetical, Leiter argues that in contrast to “generally applicable laws” which

73 Jindal, *Against Gay Marriage* (cited in note 54).

74 *Hosanna-Tabor Evangelical Lutheran Church & School v Equal Employment Opportunity Commission*, 565 US __ (2012).

75 Thomas C. Berg, et al, *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 Nw U L Rev 175, 176 (2011).

76 *Id.*

77 Colorado State Legislature, CRS. 24-34-601 (2008).

78 Brian Leiter, *Why Tolerate Religion?* 133 (Princeton 2013).

79 1 SCR 256 (SCC 2006).

80 Leiter, *Why Tolerate Religion?* at 25 (cited in note 82).

“unintentionally burden minority claims of conscience [...] [religious] exemptions intentionally privilege claims of conscience, to the exclusion of others.”⁸¹ Hence, religious exemptions inadvertently disadvantage the irreligious.

Similar to Leiter, Katha Pollitt characterizes religious liberty as “a giant get-out-of-reality free card: your belief cannot be judged, because it’s a belief.”⁸² Unlike Leiter’s more nuanced approach to religious freedom, Pollitt blames religious exemptions for “forcing [government] to support [...] sectarianism, bigotry, superstition and bullying.”⁸³ Pollitt’s depiction of religious liberty is inflammatory, and ultimately, her appraisal fails to properly consider religious liberty’s historical importance and continued cultural relevance. Indeed, the Supreme Court upheld exemptions from the draft for those whose religion banned violence or participation in war, reasoning that the exemption would only “marginally increase” the odds that “secular pacifists” would be drafted.⁸⁴ In *Hobby Lobby*, the Majority found that granting a religious exemption did shift the burden slightly from the company to the women seeking contraceptives; however, as with the draft, the “burden” on the nonreligious only “marginally increased,” and thus, the exemption proved acceptable.⁸⁵ For this reason, apart from instances where granting a religious exemption would significantly burden the irreligious, contrary to Leiter and Pollitt’s assessment, religious exemptions are permitted. In order to argue against a religious exemption, then, one must first demonstrate that the burden imposed by such an exemption is significant.

In contrast to Leiter and Pollitt, while arguing against the establishment of religion, a practice already expressly forbidden in the First Amendment, Timothy Macklem also acknowledges the potential benefits conferred by religious belief—namely, “that the collective character of religious belief is capable of contributing to human well-being.”⁸⁶ Although Macklem’s characterization of religious beliefs as “idiosyncratic” and conclusion that religious exercise “must be protected idiosyncratically” might strike some as offensive, it also serves as an effective compromise between those seeking an absolute right to religious exemption and those who desire to abolish religious exemptions altogether.⁸⁷ Following Macklem’s lead allows the government to pay proper deference to citizens’ deeply held religious beliefs while also allowing courts a bit of leeway in determining when to limit the exercise of religion for the sake of some other

81 *Id.* at 102.

82 Pollitt, *Why It’s Time to Repeal* (cited in note 31).

83 *Id.*

84 Kathryn Kovacs, *Hobby Lobby and the Zero-Sum Game*, 92.1 Wash U L Rev Commens 255, 261–262 (2014).

85 *Hobby Lobby*, No. 13-354, slip op at 8 (Ginsburg, dissenting); Kovacs, 92.1 Wash U L Rev Commens at 261 (cited in note 88).

86 Timothy Macklem, *Faith as a Secular Value*, 45 McGill L J 1, 28–63 (2000).

87 *Id.* at 63.

compelling government interest. In the next section, one such government interest—preventing discrimination—is explored.

III. CIVIL RIGHTS AND PUBLIC ACCOMMODATION: HISTORICAL PRECEDENT AND PARALLELS

The most prominent periods of civil rights legislation, including antidiscrimination laws pertaining to public accommodation were the Reconstruction Era in the 1870s and the Civil Rights Movement in the 1960s. Some historians such as Mark Grimsley consider Reconstruction as “the second civil war,” and in this war, conservative whites won.⁸⁸ Through measures such as “customary and de jure system of segregation,” “a systemic and successful campaign [from 1888 to 1908] to disfranchise African Americans,” and “rob[bing] African Americans of economic independence,” white supremacists deprived African Americans of political and financial clout, and with it, the security and dignity of full and equal citizenship.⁸⁹ In an effort to address public accommodation rights, Congress attempted to provide African Americans with equal access to goods and services such as “railroads” and “licensed theatres” through the Civil Rights Act of 1875.⁹⁰ Unfortunately, such efforts proved largely futile when in *The Civil Rights Cases* (1883), the Court ruled that the “public accommodation provisions of the Civil Rights Act of 1875” were unconstitutional since “they exceeded congressional power to enforce both the Thirteenth and Fourteenth Amendments.”⁹¹ The inability of the federal government to pass and implement civil rights legislation coupled with the prolonged, violent resistance of white supremacists in the South meant that Reconstruction and public accommodation protections amounted to “an unmitigated catastrophe for African Americans, the South, and the nation.”⁹²

In contrast to the widespread failures of Reconstruction, the passage and implementation of civil rights legislation during the Civil Rights Era proved largely successful due to a confluence of social, political, and legal factors as well as the structure of the civil rights laws themselves. First, the Civil Rights Movement of the 1950s and 1960s benefitted from grassroots support. The movement was led and predominantly sustained by African Americans; however, “[t]hrough

88 Mark Grimsley, *Wars for the American South: The First and Second Reconstructions Considered as Insurgencies*, 58.1 *Civil War Hist* (2012).

89 *Id* at 23.

90 Aderson Bellegarde Francois, *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action*, 57 *Howard L J* 573, 575–6 (2014); George Rutherglen, *The Thirteenth Amendment, the Power of Congress and the Shifting Sources of Civil Rights Law*, 112 *Colum L Rev* 1551, 1552 (2012).

91 Rutherglen, 112 *Colum L Rev* at 1152 (cited in note 94).

92 Adam Fairclough, *Congressional Reconstruction: A Catastrophic Failure*, 12.3 *J of Historical Society* 271, 282 (2012).

television and the press, whites witnessed the realities of racial injustice and oppression of which they had been ignorant or which they had chosen to ignore,” thereby inspiring greater acceptance of stronger civil rights protections among varied segments of the population.⁹³ Second, government officials began to support civil rights due to their evolving view that civil rights protections served “the self-interest of all Americans and the position of the United States in world and national levels” as a superpower charged with ensuring the welfare of all its citizens.⁹⁴ Thus, the passage of the Civil Rights Act of 1964, a landmark piece of legislation that included provisions for public accommodation in Title II represented both the evolving attitudes of the public and of public officials, since “[t]he events [...] in the spring of 1963 transformed public opinion.”⁹⁵

The structure of Title II also contributed to the success of public accommodations protections during the Civil Rights Era of the 1960s. In contrast to the 1875 Civil Rights Act, which depended “solely on the fourteenth amendment,” the Civil Rights of 1964 paired the protections afforded by the Fourteenth Amendment with “the power of the commerce clause.”⁹⁶ By referencing the Fourteenth Amendment in conjunction with Article I, Congress created a hybrid claim, thereby bolstering both their power and scope of enforcement. Moreover, in referencing a particular area of governmental oversight, interstate commerce, Congress cast Title II as a focused piece of legislation enacted in service of a particular, easily identifiable purpose. This distinguished it from the sweeping coverage of the 1875 Civil Rights Act.⁹⁷ Thus, Title II’s appeal to both the Fourteenth Amendment and the Commerce Clause coupled with the narrower scope of enforcement contributed to the success of public accommodations protections for African Americans during the 1960s.

It is important to note that contrary to the general public’s understanding of Title II as applying to all public businesses, the legislation only applies to particular types of businesses, such as hotels or inns with more than five rooms open for rent, restaurants, movie theaters and sports arenas, and businesses “physically located [within] any such covered establishment.”⁹⁸ Nevertheless, today, few businesses engage in overt racial discrimination, and those that do expose themselves to indictment in the court of public opinion as well as the legal courts

93 Emma Lou Thornbrough, *Breaking Racial Barriers to Public Accommodations in Indiana, 1935 to 1963*, 83 *Ind Mag of Hist* 301, 338 (1987).

94 *Id.* at 342.

95 Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 *SLU L J* 1095, 1095 (2005).

96 William H. Travis, *Constitutional Law—Public Accommodations—An Amusement Park Is a Place of Entertainment as Defined by Title II of the Civil Rights Act of 1964*, 1 *Memphis St U L Rev* 190, 191 (1970).

97 *Heart of Atlanta Motel, Inc v United States*, 379 US 241 (1964).

98 Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 *Stan L Rev* 1241, 1241–42 (2014).

themselves. Though racial prejudice persists, gone are the days of *Whites Only* lunch counters and theater sections. Hence, although Title II focused on specific types of businesses, over time, society began to recognize that offering separate, oftentimes incomplete or inferior, lists of services to African Americans violated the concept of equality of opportunity, a concept intrinsic to American identity. The next few sections of the paper will argue that similarly, businesses who refuse to provide services to same-sex couples, even those businesses motivated by sincerely held religious beliefs, breach the principle of equality of opportunity as it extends to citizens' rights in the marketplace.

A. Civil Rights Protections and the Identity Approach

Pieces of civil rights legislation such as Title II, which aim to offer additional protections to a particular class of people, operate on the basis of suspect-class identity. As Sonu Bedi puts it, a suspect-class is a group defined by a "history of discrimination, immutability [of identity], political powerlessness, and irrelevance."⁹⁹ Hence, the courts recognize "racial minorities" like African Americans as a suspect-class, due a) to the history of discrimination evidenced by slavery, Jim Crow laws, and persistent racism; b) immutability of identity, as race, from a practical perspective, is an inherent characteristic; c) political powerlessness, as evidenced by the failures of Reconstruction and underrepresentation of racial minorities to this day; and d) irrelevance, namely, that race ought not factor into decisions such as to whom a public business offers its services.¹⁰⁰ Similarly, one could argue that members of the LGBT community, like those of racial minorities or women, deserve suspect-class protection, due to the historical and continued discrimination, vitriol, and violence directed at the LGBT community.¹⁰¹ It is important to note that although some might claim that sexual orientation fails to meet the third criterion for suspect-class protection, interpreting recent Supreme Court victories for LGBT groups as evidence of political power, such victories (particularly *Obergefell*) hinged on applying the Equal Protection Clause, a constitutional protection closely associated with suspect-classes—to LGBT individuals.¹⁰² Moreover, although the Supreme Court has not explicitly identified sexual orientation as a suspect-class, many "state supreme courts [...] have held that gays do count as a protected group under their respected state constitutions."¹⁰³ Thus, applying an identity-based approach to civil rights protec-

99 Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* 38 (Cambridge 2013).

100 *Id.* at 37.

101 See *Bowers v Hardwick*, 478 US 186 (1986); *Lawrence v Texas*, 539 US 558 (2003).

102 Chuck Hickey, *Civil Rights Commission says Lakewood bakery discriminated against gay couple* (Fox 31 Denver KDVR, May 30, 2014).

103 Bedi, *Beyond Race* at 54 (cited in note 103).

tions for LGBT individuals is both logically sound in theory and, in many states, already an established legal practice.

B. Freedom of Association and Antidiscrimination Laws

One argument against measures like Title II concerns freedom of association and is worth briefly exploring here, as some individuals employ this same reasoning when arguing against public accommodation protections for LGBT individuals. In a 1963 article for *The New Republic*, Robert Bork feared that “justifiable abhorrence of racial discrimination [would] result in legislation by which the morals of the majority are self-righteously imposed upon a minority,” a fear that some opponents of public accommodation laws for LGBT echo today.¹⁰⁴ More specifically, Bork characterized both freedom of association and “property rights,” including the right for a business owner to dispense with her services and goods as she sees fit, as “human rights” worthy of preservation.¹⁰⁵ Although Bork acknowledged the inherent “ugliness” of racism, he shifted the discussion from “racial prejudice” to state coercion, urging that the cost of enforcing antidiscrimination protections—the forfeiture of freedom of association—is a price too great to justify.¹⁰⁶ In *Heart of Atlanta Motel, Inc. v United States* (1964) and its companion case, *Katzenbach v McClung*,¹⁰⁷ the Court implicitly rejected this line of thinking when it affirmed “the Commerce Clause,” as well as “the Thirteenth, Fourteenth, and Fifteenth Amendment” empowered Congress to secure the “legitimate end” of “protect[ing] Negroes from discrimination.”¹⁰⁸ In other words, ending racial discrimination, a goal that addressed both practical and moral concerns, trumped a business’s freedom of association.¹⁰⁹

Though Bork’s views on civil rights legislation later cost him a seat on the bench of the Supreme Court, some modern scholars, such as Richard Epstein, have taken up his argument, relying on the concept of freedom of association to argue that “it is the duty of the outsider,” the customer, “to win the contest,” or good, “not the duty of the owner to buy off all outsiders that she does not wish to admit.”¹¹⁰ Epstein acknowledges that the traditional view of free market sorting out discrimination on its own “does a very poor job describing the historical practices of the Old South.”¹¹¹ Accordingly, Epstein allows that in cases involving

104 Robert Bork, *Civil Rights—A Challenge*, 149 *The New Republic* 21, 21 (1963); Gallagher and Duncan, 64 *Case Western L Rev* at 954 (cited in note 62).

105 Bork, 149 *The New Republic* at 22–23 (cited in note 108).

106 *Id.* at 24.

107 379 US 294 (1964).

108 *Heart of Atlanta Motel, Inc v United States*, 379 US at 379.

109 *Id.* at 379.

110 Epstein, 66 *Stan L Rev* at 1284 (cited in note 102).

111 *Id.* at 1254.

“identity issues [...] the businesses may pay a financial price in order to act in accordance with their own beliefs,” such as a fine for violating antidiscrimination laws.¹¹² Applying this logic to current public accommodation cases, businesses that refuse to serve LGBT individuals on the basis of religious belief may pay a fine for discriminating against customers on the basis of identity. Though in general, businesses may exercise discretion in serving customers, for example, refusing to serve a belligerent, violent, or seemingly bigoted customer, such distinctions must be made on an individual basis.¹¹³ When a business discriminates on the basis of an identity class such as race, gender, or sexual orientation, however, its actions are not protected under the freedom of association, as both the Supreme Court and state courts have repeatedly upheld that preventing discrimination constitutes a compelling government.¹¹⁴ Thus, just as Bork’s argument did not sway the Supreme Court with respect to race-based civil rights protections, freedom of association arguments ought not prevent the courts from affording suspect-class protections to LGBT individuals.

Some scholars may point out that twenty-nine states have no form of antidiscrimination laws covering sexual orientation in public accommodation; thus, LGBT individuals lack legal claim to public accommodation protections in these states.¹¹⁵ Nevertheless, given that the EEOC recently found that “Title VII of the 1964 Civil Rights Act” protects against discrimination in employment on the basis of sexual orientation, it seems likely that some courts, even in states without formal legal protections for LGBT individuals, will elect to apply that same reasoning to cases involving public accommodation.¹¹⁶ Although the EEOC’s conclusions “are considered persuasive, but not binding, authority on the courts,” it seems likely that, given the majority of Americans do not feel “that wedding-related businesses should be able to refuse service” to members of the LGBT community, some state legislatures will pass their own laws to formalize protections for LGBT individuals and many judges will rule in favor of LGBT individuals in public accommodation cases.¹¹⁷ Additionally, Democrats in Congress will soon introduce a comprehensive LGBT rights bill, which includes public accommodations protections.¹¹⁸ Regardless of whether or not the federal govern-

112 Id at 1278.

113 *Elane Photography*, 309 P3d at 72.

114 Id at 62.

115 For examples of state employment non-discrimination laws of LGBT individuals, see http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

116 Garrett Epps, *What Makes Indiana’s Religious-Freedom Law Different?* (The Atlantic, Mar 30, 2015).

117 Dale Carpenter, *Anti-gay discrimination is sex discrimination, says the EEOC* (The Washington Post, July 16, 2015); Hunter Schwartz, *The real religious freedom fight is about to begin—in Louisiana* (The Washington Post, April 8, 2015).

118 Chris Johnson, *Comprehensive LGBT rights bill coming Thursday* (Washington Blade, July 20, 2015).

ment passes additional LGBT rights protections, Congress members' interest in the bill speaks to growing public sentiment in favor of increased legal security for LGBT individuals. Therefore, given support for LGBT rights at both the grassroots and federal level, it is likely that many states will soon pass their own forms of public accommodations protections, and that courts, following the lead of the Supreme Court's increasing protection of the LGBT community, will also rule in favor of LGBT individuals.

*C. Why the Law Ought to Extend Antidiscrimination Protections
in Public Accommodations to LGBT Individuals*

In response to arguments against legal antidiscrimination protections, scholars often raise two points. First of all, scholars such as Chai Feldblum advocate for antidiscrimination legislation as a means of "legislating equality."¹¹⁹ Comparing behaviors and identities that contradict societal norms, such as adhering to a minority religion or entering a same-sex relationship, to living life "on a tilt," Feldblum suggests that just as the government required all public buildings to provide accommodations for Americans with disabilities, so should the government legislate other forms of "ramps" in order to level the playing field and provide all citizens with reasonable access to goods and services.¹²⁰ Feldblum clarifies that in cases where "the person's norm that creates the tilt is morally problematic or threatening to society," such as pedophiles or physically abusive individuals, the government may reasonably refuse to level the tilt in order to safeguard society.¹²¹ Although in the past, courts and citizens alike have worried that members of the LGBT community pose a risk to society, nowadays both lawyer and laymen alike recognize that LGBT individuals may peaceably and productively live in society, and hence, their "tilt" is not morally suspect. While some individuals may object to same-sex relationships on the basis of their religion, LGBT individuals do not pose direct harm to those outside the LGBT community. Indeed, as referenced earlier in this paper, LGBT individuals have faced and continue to face violence, intimidation, discrimination, and humiliation. All of these instances contribute to the tilt under LGBT individuals' feet, a tilt that prevents them from enjoying full dignity and opportunity as members of American society. Thus, in order to rectify the tilt, society must not allow business to discriminate against same-sex couples, even if doing so violates sincerely held religious beliefs, since doing so aggravates rather than diminishes the uneven reality with which members of the LGBT community must contend.

119 Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 Me L Rev 159, 164 (2002).

120 *Id.* at 182–83.

121 *Id.* at 185–86.

The second type of argument in favor of antidiscrimination protections approaches discrimination as a systemic issue, rather than an affront to individual liberty. Indeed, in *Antidiscrimination Law and Social Equality*, Andrew Koppelman argues in favor of antidiscrimination legislation as a means of correcting societal inequality as it pertains to the impartiality of democracy and the justice system, the recognition of all individuals as “valued member[s] of society,” and the economic inequalities exacerbated by the pervasiveness of prejudice.¹²² Although both Feldblum and Koppelman recognize the ways in which prejudice and discrimination hamper the ability of individuals to fully enjoy all the benefits and opportunities of society, unlike Feldblum, Koppelman feels that the scope and intensity of prejudicial behavior ought to determine the breadth and strength of a legal remedy. Indeed, Koppelman maintains that if the “evil [that the government/society seeks to combat] is local or of modest scale, then measures to remedy it may be correspondingly confined,” but “[i]f the evil is broad and pervasive, then the effort to end it must be a correspondingly broad and ambitious project.”¹²³ Thus, under Koppelman’s approach, the sweeping antidiscrimination measures enacted during the 1960s were appropriate due to the comprehensive nature of racial prejudice and America’s history of racial bigotry and injustice. Koppelman’s argument suggests that same-sex couples seeking services from businesses that refuse to provide goods or services to same-sex couples on the basis of their religious beliefs deserve less extensive protections, due to the relative paucity of businesses refusing service to LGBT individuals.

Though both Feldblum and Koppelman raise interesting points, in the context of antidiscrimination protections for LGBT individuals in public accommodations, Feldblum’s argument ultimately proves more persuasive. Although few businesses may refuse to provide LGBT individuals with goods and services, their actions violate the principles of equal opportunity that form a core tenet of America’s political philosophy. Additionally, unlike the individuals protected under *Hosanna-Tabor*, owners of businesses open to the public, regardless of the sincerity of their religious beliefs, do not serve in a ministerial capacity. Instead, when business owners enter the marketplace, they serve as commercial agents offering goods and services in exchange for fair financial compensation. Though a business owner’s faith may influence his behavior in the marketplace, unlike a minister, strictly speaking, his faith is not his *business*, and thus, when faced with the choice between bending in order to accommodate a business owner’s religious beliefs and preventing LGBT individuals from facing discrimination in the marketplace, the government ought to protect LGBT individuals’ free access to public businesses. So long as businesses willingly enter the marketplace, they must willingly serve the general public without discriminating against classes

122 Andrew Koppelman, *Antidiscrimination Law and Social Equality* 9 (Yale 1996).

123 *Id.* at 13.

of people based on identity classes, including LGBT identification. Allowing for such discrimination provides for an unnecessarily tilted, prejudiced society, a society that betrays the very principles of equality and impartiality central to American democracy.

Having explored the historical, philosophical, and legal arguments surrounding disputes regarding freedom of religious expression and antidiscrimination concerns, it is necessary to discuss case studies of disputes between businesses and LGBT individuals. Throughout the analysis of these cases, I will reference my earlier evaluation of freedom of religious exercise and freedom of expression arguments, as well as suspect-class evaluation. In doing so, I will demonstrate that in cases of businesses open to the public, the government's compelling interest in preventing discrimination overrides concerns of religious expression.

IV. CONTEMPORARY CASES: FREEDOM OF CONSCIENCE DOES NOT ENTAIL FREEDOM OF CONDUCT

Following the Court's ruling in *Hobby Lobby*, many legal scholars voiced concerns that the decision empowered businesses to discriminate on the basis of their owners' religious beliefs; namely, to refuse service to LGBT individuals.¹²⁴ Even before *Hobby Lobby*, however, courts on the state level were forced to decide cases involving businesses that declined to serve LGBT individuals. This section will examine one such case, *Elane Photography*, already briefly referenced in previous sections of this paper, as well as a case unfolding in the summer of 2015, *Sweetcakes by Melissa*, involving an Oregon bakery whose owners refused to provide a cake for a same-sex wedding. As a point of contrast, this section will also briefly analyze *Azucar Bakery*, a case centered on a Colorado bakery that declined to bake a cake with an anti-LGBT message, in order to illustrate the distinction between refusing service to a class of citizens and refusing to serve an individual customer based on incompatible beliefs. The section will conclude with a final analysis of *Hobby Lobby* and its potential impact in light of these recent state decisions.

On August 22, 2013 the New Mexico Supreme Court ruled that in refusing to photograph a same-sex couple's wedding, *Elane Photography*, owned

124 Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 *Wm & Mary J of Women & L* 319, 324 (2015); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 *Harv L & Pol Rev* 25, 25–62 (2015); Jennifer C. Pizer, *Navigating the Minefield: Hobby Lobby and Religious Accommodation in the Age of Civil Rights*, 9 *Harv L & Pol Rev* 1, 1–24 (2015); Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 *Harv L & Pol Rev* 63 (2015); Paul Horwitz, *The Hobby Lobby Moment*, 128 *Harv L Rev* 154 (2014).

by a Christian couple named the Huguenins, violated the New Mexico Human Rights Act (“NMHRA”), despite the owners’ religious objections to same-sex marriage.¹²⁵ In the Opinion of the Court, Justice Chávez referenced *Smith* as a legal framework for the case, noting that NMHRA, as a “generally applicable” law, requires that businesses and individuals, regardless of their religious beliefs, act in accordance with the statute, and that the NMHRA, as “a neutral law of general applicability [...] does not offend the Free Exercise Clause of the First Amendment.”¹²⁶ Additionally, Justice Chávez “affirm[ed] the judgment of the Court of Appeals” by maintaining that “the NMRFRA [New Mexico Religious Freedom Restoration Act] is inapplicable,” since NMRFRA does not apply to disputes between private parties.¹²⁷ Moreover, Justice Chávez clarified that NMRFRA “is violated only if a ‘government agency’ restricts a person’s free exercise of religion.”¹²⁸ Although the New Mexico Human Rights Commission heard the case, the fact “the Commission [was] not a party to this case” and that its ruling “[had] no legal effect” following the case’s subsequent hearing in a district court, its role in adjudicating the case did not constitute government infringement on Elane Photography’s right to free exercise.¹²⁹ Thus, *Elane Photography* illustrates that enforcing public accommodations protections for LGBT people does not necessarily violate constitutional speech or religious exercise protections or state statutes defending religious exercise.

Elane Photography also presents several types of arguments against public accommodation laws explored in previous sections of this paper, namely, freedom of speech, freedom of association, and freedom of religious exercise. First, Elane Photography’s counsel argued that requiring the company to photograph same-sex couples violated the photographers’ right to free speech. In particular, Elane Photography argued that customers might interpret photographs of same-sex wedding ceremonies as a company endorsement of same-sex marriage, a position that violated the owners’ deeply held religious beliefs.¹³⁰ Moreover, Elane Photography held that photographing, editing, and compiling photographs for same-sex couples would take time away from working on photographs of heterosexual weddings, effectively undermining their artistic freedom to spend their time and talent according to their creative preferences.¹³¹ In response to these concerns, the New Mexico Supreme Court clarified that “[s]tate laws prohibiting discrimination by public accommodations do not constitute compelled speech.”¹³²

125 *Elane Photography*, 309 P3d at 80.

126 *Id* at 73, 75.

127 *Id* at 76.

128 *Id* at 76.

129 *Elane Photography*, 309 P3d at 77.

130 *Id* at 66.

131 *Id* at 70.

132 *Id* at 65.

Since Elane Photography qualified as a place of “[p]ublic accommodation,” as defined by the NMHRA, a classification Elane Photography “d[id] not contest,” it was subject to NMHRA, which bans discriminating against customers on the basis of sexual orientation.¹³³ Furthermore, Justice Chávez contended the “NMHRA does not violate free speech guarantees because it does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another.”¹³⁴ Indeed, Justice Chávez noted that Elane Photography is free to publish “a disclaimer on their website or in their studio advertising that they oppose same-sex marriage.”¹³⁵ However, such a disclaimer does not empower Elane Photography to refuse to provide a service it generally offers, wedding photographs, to a class of individuals, same-sex couples, on the basis of free speech, a distinction Justice Chávez makes clear by referencing *Rumsfeld v Forum for Academic & Institutional Rights, Inc.* (2006),¹³⁶ which found that “[The law schools’] accommodation of a military message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.”¹³⁷ In addition, Justice Chávez characterized the allocation of time to clients as “a matter of personal preference, not compelled speech,” and thus unprotected by the First Amendment.¹³⁸ Hence, the New Mexico Supreme Court discredited the free speech argument by distinguishing compelled speech, an impermissible requirement, from public accommodation obligations, permissible qualifications.

Second, Elane Photography argued that forcing the company to provide services for same-sex couples violated the owners’ freedom of association. In particular, counsel for Elane Photography submitted the possibility that requiring businesses to serve same-sex couples would compel other businesses, such as law firms, to work with individuals they “cannot in good conscience” serve.¹³⁹ This line of reasoning stemmed from the freedom of expression argument, as counsel for Elane Photography contended that providing a “compelled-speech [...] exemption” for businesses open to the public “would protect a firm’s decision not to advocate an argument that its partners cannot in good conscience advocate.”¹⁴⁰ This hypothetical does not present a valid concern, since businesses may refuse to serve an individual based on “ideology or personal dislike,” but businesses cannot “turn away a client because the firm [or other type of business] finds the

133 *Elane Photography*, 309 P3d at 59.

134 *Id.*

135 *Id.*

136 547 US 47 (2006).

137 *Elane Photography*, 309 P3d at 59, 69.

138 *Id.* at 70.

139 *Id.* at 72.

140 *Id.*

client offensive on the basis of a protected classification.”¹⁴¹ Additionally, in response to the hypothetical claim that under NMHRA, an African American photographer would be obligated to photograph a Ku Klux Klan event, the court observed that “political views and political membership, including membership in the Klan, are not protected categories under the NMHRA.”¹⁴² In other words, because political views and membership to political organizations constitute voluntary forms of association, identification with such groups does not constitute an immutable characteristic, and hence, does not merit the added protections afforded to members of suspect-classes. Therefore, in rejecting Elane Photography’s slippery slope argument, the New Mexico Supreme Court distinguished that freedom of association does not allow businesses that willingly advertise themselves as open to the public to refuse service to entire classes of citizens, since business owners, too, are members of the public.

Third, counsel for Elane Photography insisted that requiring the company to photograph same-sex weddings violated the owners’ right to freely exercise their religious beliefs.¹⁴³ Although Justice Chávez declined to definitively rule on whether or not Elane Photography, as a company, enjoyed a protected right to religious exercise, he allowed that regardless, such rights “are not offended by the enforcement of the NMHRA.”¹⁴⁴ Importantly, Justice Chávez referenced *Smith* as a legal framework for the New Mexico Supreme Court’s dismissal of Elane Photography’s religious exercise concerns.¹⁴⁵ Specifically, Justice Chávez called attention to Justice Scalia’s observation in *Smith* that the Court had granted religious exemptions to generally applicable laws in the past to ““hybrid situations”” involving free exercise claims alongside other concerns, such as freedom of speech.¹⁴⁶ However, although counsel for Elane Photography attempted a hybrid-rights claim, the “single three-sentence paragraph to its hybrid-rights claim” provided the New Mexico Supreme Court with insufficient briefing to consider the matter.¹⁴⁷ Furthermore, given the New Mexico Supreme Court’s rejection of Elane Photography’s free speech argument, it is unlikely that the Court would have found a hybrid-claim case reliant on freedom of speech concerns compelling, even with sufficient briefing. Finally, Justice Chávez found that NMRFA did not apply to *Elane Photography* because the case concerned two private parties—Elane Photography and Ms. Willock and her partner—rather than a private party and the government.¹⁴⁸ Moreover, though Justice Chávez noted the

141 *Id.* at 72.

142 *Elane Photography*, 309 P3d at 73.

143 *Id.*

144 *Id.* at 75.

145 *Id.* at 73.

146 *Elane Photography*, 309 P3d at 75.

147 *Id.* at 76.

148 *Id.* at 79.

“sobering result” of this case for the Huguenins and others with similar religious convictions, he ultimately maintained that while the Huguenins are free to follow their religious beliefs in their personal life, “[i]n the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for Americans who believe something different.”¹⁴⁹ Thus, in the sphere of public accommodation, “the price of citizenship” demands that business owners compromise on matters of conduct, rather than belief, in order to provide all citizens, regardless of identity classifications, equal opportunity to engage with the market.¹⁵⁰

In March of 2015, Oregon considered a case regarding a dispute between a business open to the public, Sweetcakes by Melissa, and a same-sex couple, and like the New Mexico Supreme Court, the Oregon Bureau of Labor and Industries found the business guilty of violating the state’s public accommodation laws.¹⁵¹ Like the Huguenins, the Kleins claimed that providing services for a same-sex wedding violated their “sincerely held belief that God ‘uniquely and purposefully designed the institution of marriage as the union of one man and one woman.’”¹⁵² Accordingly, counsel for the Kleins argued that forcing Sweetcakes to offer its services to same-sex couples violated “respondents’ right of conscience;” “right to free exercise of religion;” “free speech,” as it “compel[ed] Respondents to engage in a message they d[id] not want to express;” “den[ied] Respondents’ right to due process;” and “den[ied] Respondents the equal protection of the laws.”¹⁵³ Citing *Elane Photography*, however, the Oregon Bureau of Labor and Industries found that “when a law prohibits discrimination on the basis of sexual orientation, the law similarly protects conduct that is inextricably tied to sexual orientation,” such as same-sex wedding ceremonies.¹⁵⁴ Thus, by refusing to provide a cake for a same-sex couple’s wedding while continuing to offer cakes for heterosexual couples, the Kleins discriminated against the Bowman-Cryers on the basis of their sexual orientation, a practice prohibited under ORS 659A.409.¹⁵⁵ Furthermore, the Oregon Bureau of Labor and Industries rejected Respondents’ claims that baking a cake for the Bowman-Cryers infringed on their freedom of speech, as the “Respondents were not asked to issue a marriage license, perform a wedding ceremony, or in any way legally recognize Complainants’ planned same-sex wedding.”¹⁵⁶ As a business open to the public, the Kleins, like the Huguenins, cannot, as Justice Chávez articulated, “offer a ‘limited menu’ of goods or services

149 Id at 80.

150 *Elane Photography*, 309 P3d at 80.

151 *Sweetcakes by Melissa*, 44-14 & 45-14 at 109 (Proposed Order).

152 Id at 30.

153 Id at 6.

154 Id at 39.

155 *Sweetcakes by Melissa*, 44-14 & 45-14 at 109 (Proposed Order).

156 Id at 62.

to customers on the basis of a status that fits within one of the protected categories.”¹⁵⁷ Despite the Kleins’ sincere religiously motivated opposition to same-sex marriage, given that Oregon law prevents discrimination on the basis of sexual orientation in public accommodation, that Sweetcakes by Melissa is a business open to the public, and that Sweetcakes by Melissa offers wedding cakes to heterosexual couples, the Kleins were obligated to serve the Bowman-Cryers.

Some journalists have drawn comparisons between the Kleins’ refusal to bake wedding cakes for any and all same-sex marriages and a Colorado Bakery’s refusal to bake cakes with “[a]nti-gay phrases.”¹⁵⁸ The bakery in question, Azucar Bakery, owned by Marjorie Silva, declined to ice the cakes with “anti-gay imagery and phrases” due to the “derogatory language and imagery” of the requested messages, rather than the “religious nature of the request.”¹⁵⁹ This distinction clarifies that Silva did not discriminate against the customer, Bill Jack, on the basis of his religious beliefs, but instead, denied him service due to her discomfort with the sentiment of the messages, and thus acted within her rights as a business owner to decline service based on ideological differences.¹⁶⁰ Furthermore, Silva “reportedly told [Jack] that she would make him the cakes, but offered to provide him with icing and a pastry bag so he could decorate the desserts with the images he wanted.”¹⁶¹ In contrast to the Kleins, Silva did not refuse to provide a customer with a product she ordinarily offers to other customers; rather, she offered Jack the service she advertises to the public—cakes—while declining his personal, individualized request for a message she found personally objectionable. Silva’s actions speak to a desire to compromise and accommodate her customer without endorsing views she found repugnant due to ideological, rather than suspect-class, identity. If the Kleins had offered to provide a wedding cake to the Bowman-Cryers, but had declined to provide a personalized message or decoration, such as a supportive message on the cake or a cake-topper featuring a same-sex couple, then one might reasonably draw parallels between the two cases. However, in outright refusing to provide the Kleins with any services for their wedding, the Kleins demonstrated their aversion not to creating a particular message, but to serving a particular type of customer. Indeed, while one might reasonably conclude that Silva would refuse to provide a cake with an anti-gay message to any customer, religious or not, the Kleins only refuse to bake wedding cakes for same-sex couples, and thus engage in discriminatory behavior contrary to the principles of the American marketplace and American society. Therefore,

157 *Elane Photography*, 309 P3d at 62.

158 Abby Ohlheiser, *This Colorado baker refused to put an anti-gay message on cakes. Now she is facing a civil rights complaint* (The Washington Post, Jan 28, 2015).

159 Curtis M. Wong, *Colorado’s Azucar Bakery Did Not Discriminate by Refusing to Bake Anti-Gay Cakes, Court Rules* (The Huffington Post, Apr 6, 2015).

160 *Elane Photography*, 309 P3d at 72.

161 Wong, *Azucar Bakery Did Not Discriminate* (cited in note 163).

far from bolstering the Kleins’ case or the cases of other businesses seeking a legal exemption from antidiscrimination laws, the case involving Azucar Bakery illustrates the difference between refusing service on the basis of a customer’s ideology and denying service on the basis of a customer’s immutable identity.

Although the Kleins plan on appealing the Oregon Bureau of Labor and Industries’ decision, “it could be months or even years” before a court agrees to hear their case.¹⁶² Moreover, given that the Supreme Court declined to grant petition for certiorari for *Elane Photography*, it is unlikely that the issue of religious exemptions to public accommodation laws barring discrimination on the basis of sexual orientation will reach the Supreme Court.¹⁶³ For this reason, individual states must decide the issue. Though laws regarding public accommodation protections and religious freedom exemptions vary considerable from state to state, given the historical success, at least in the twentieth century, of civil rights protections in public accommodations, as well as public support for same-sex protections from secular and religious leaders alike, it is likely that courts will continue to rule in favor of same-sex couples.¹⁶⁴

Still, *Hobby Lobby*’s moment seemingly threatens to jeopardize recent progress for the LGBT civil rights movement. If reproductive rights must bend to accommodate religious exemptions, must civil rights provide exemptions for religious exercise? Ultimately, the answer is no. Upon closer inspection, one can distinguish *Hobby Lobby* from cases involving public accommodation. Although broadly speaking, *Hobby Lobby* and cases like *Elane Photography* center on the appropriateness of applying religious exemptions to generally applicable laws, the cases concern very different areas of law, and here, the devil is in the details. While both supporters and detractors have spoken of *Hobby Lobby*’s broad applicability, some scholars, such as Jennifer C. Pizer, have noted that while *Hobby Lobby* concerned “challenges to particular medical *treatments*, without regard to *who* wishes to access those treatments,” public accommodation exemptions seek

162 George Rede, *Sweet Cakes: Same-sex discrimination case still far from settled despite final order against Oregon bakery*, (*The Oregonian/OregonLive*, Jul 7, 2015), archived at http://www.oregonlive.com/business/index.ssf/2015/07/sweet_cakes_same-sex_discrimin.html.

163 Proceedings and Orders, *Elane Photography, LLC v Vanessa Willock*, Docket No 13-585, (SCOTUSblog filed Oct 2013).

164 Epps, *What Makes Indiana’s Religious-Freedom Law Different?* (cited in note 120); MJ Lee, *Is the GOP losing Walmart?* (CNN, Apr 2, 2015), archived at <http://www.cnn.com/2015/04/01/politics/walmart-religious-freedom-bill/>; Louise Melling, *ACLU: Why we can no longer support the federal ‘religious freedom’ law* (*The Washington Post*, Jun 25, 2015), archived at https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.4de3f3657a26; Lance Hernandez, *House Committee kills two bills that would have allowed some businesses to say ‘no’ to gays* (7News Denver, Mar 9, 2015), archived at <http://www.thedenverchannel.com/news/local-news/house-committee-kills-two-bills-that-would-have-allowed-some-businesses-to-say-no-to-gays>.

to challenge *who* may access a particular good.¹⁶⁵ Indeed, cases like *Elane Photography* revolve around exemptions to interacting with classes of people, rather than exceptions to offering particular types of services. This distinction is key, for although refusal to provide access to a treatment may incidentally burden a group of people—in *Hobby Lobby's* case, women seeking certain forms of contraceptives—they do not purposefully discriminate against a suspect-class.¹⁶⁶ Thus, despite the Court's ruling in *Hobby Lobby*, businesses who refuse to offer the same goods and services to same-sex couples that they do to heterosexual couples will likely face indictment both in courts of law and the court of public opinion.

Some may argue that in preventing business owners from discriminating against LGBT customers on the basis of sincerely held religious beliefs the government would force religious individuals into a metaphorical closet, similar to the treatment of LGBT individuals in prior decades. Though on the surface such comparisons appear apt, in reality, as explored briefly in prior sections, the religious enjoy a fair, even privileged, standing within American society, while members of the LGBT community continue to face pervasive prejudice and discrimination. Although antidiscrimination protections for LGBT individuals with respect to public accommodations may require religious business owners to compromise their conduct, the conduct in question is specific—namely, providing services to all customers, regardless of their identity-class—and thus, such protections are appropriately, narrowly tailored. Moreover, such protections will not—in fact, cannot—compel a religious individual to compromise his beliefs. Instead, these protections merely ensure that consumers, regardless of their sexual orientation, enjoy the freedom to access goods and services offered by businesses open to the public. Therefore, while antidiscrimination protections for LGBT individuals will require some religious individuals to adjust their business practices in order to accommodate those with whom they may disagree with on the basis of faith, such accommodation is well within the bounds of reasonable compromise required to ensure the preservation of a equality of opportunity in the marketplace, and with it, a freer, fairer, and more just society.

CONCLUSION

In her dissent in *City of Boerne*, Justice O'Connor wrote, "[o]ur Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law."¹⁶⁷ Though this statement accurately reflects the wishes of the Founding Fathers as understood through the available

165 Pizer, 9 Harv Law & Pol Rev at 14 (cited in note 128).

166 Note: This is not an endorsement of the Court's decision in *Hobby Lobby*.

167 *City of Boerne*, 521 US at 22 (O'Connor, dissenting).

historical and legal records of America’s foundational period, it is also important to note that not all generally applicable laws are created equal. Indeed, though the Founding Fathers certainly sought to protect religious exercise, surely they did not intend to privilege religious belief at the expense of protecting a pluralist democracy, a society that benefits from the diverse backgrounds and identity groups of its people. Within the last century, the United States has made great progress in securing civil rights protections in public accommodation for racial minorities, women, and now, members of the LGBT community. Such success depends, at least in part, on maintaining a truly open and free marketplace, so that individuals, regardless of their race, national origin, creed, gender, or sexual orientation, may frequent whichever public businesses they choose. Despite the Court’s ruling in *Hobby Lobby*, when faced with the choice between condoning discriminatory practices on the basis of religious tolerance and fining businesses that refuse services to a class of people based on their immutable, inherent identity, courts must hold businesses accountable for discriminatory practices. Yes, human dignity is a broad concept; however, in the context of public accommodation, it simply means that businesses that advertise themselves as open to the public are truly open to serving the public, including LGBT individuals.¹⁶⁸ If the owner of a business open to the public feels that his religion prevents him from offering a full range of products or services to LGBT individuals, the competitive market affords him a different sort of liberty to remedy the situation: freedom of market exit.¹⁶⁹

168 Gallagher and Duncan, 64 Case Western L Rev at 959 (cited in note 62).

169 Epstein, 66 Stan L Rev at 1251 (cited in note 102).

ARTICLE

GENDER NEUTRALITY IN IRISH RAPE LAW

Evie Clarke[†]

“Old norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics.”

-Victoria Nourse,

The “Normal” Successes and Failures of Feminism and the Criminal Law (2000)

INTRODUCTION

Rape and gender are perennially linked, considered contingent upon one another or difficult to entirely disconnect. There are many ways we can look at the divide within the law on rape: In terms of a predominantly gendered divide between the victim’s sex and the sex of the offender, in terms of legal text and practice, and in terms of liberal feminism or of difference feminism as approaches to rape law. The law on sexual offences has customarily been rooted in traditional social roles, and law reform has been reluctant to stray from this. This paper considers the effect of the efforts to move to a gender-neutral approach to rape. It also seeks to analyse gender-specific rape law and define the difficulties of a gender-specific legal definition of rape.

Part I is an overview of the development of rape law in Ireland. The first section analyses the historical context from which rape law stems and the progression towards the 1990 reforms. The second section will assess the 1990 reforms, both the development from common law rape to neutrality in the law under the section 4 definition of rape. It also examines the reforms and their shortcomings. The third section will examine the reasoning behind the retention of the common law definition of rape and considers the legitimacy of retaining both gender-specific and gender-neutral approaches to rape law in Ireland.

Part II considers the more general concept of gender neutrality in rape law. The first section discusses the incorporation of the victim’s perspective into the law. The second section discusses statistics on rape that illuminate the true nature of the offence. The third section discusses transgender persons in Irish rape law. The fourth section discusses views expressed in feminist literature towards

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both gender-specific and gender-neutral approaches to rape law. The final section provides an overview of the construction of the law as gender-neutral under the UK Sexual Offences Act 2003,¹ assessing rape law by considering what neutrality means in practice.

PART ONE: THE DEVELOPMENT OF IRISH RAPE LAW

The word “rape” is derived from the Latin term “rapere,” meaning to snatch, grab or carry off.² The etymology of the term indicates that it was used to refer to abduction with the intention of sexual intercourse, but that intercourse was not a requisite element.³ As the term came to be adopted by established legal systems, it was understood to mean forced intercourse by a man with a woman from whom consent had not been obtained. In “The History of the Pleas of the Crown,” Lord Hale depicts his own view of rape, which falls in line with this traditional understanding:

Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will. The essential words in an indictment of rape are *rapuit et carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit* are not sufficient in a legal sense to express rape... To make a rape there must be an actual penetration or *res in re*, (as also in buggery) and therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself it makes neither rape nor buggery, but it is only an attempt at rape or buggery, and it is severely punished by fine and imprisonment...⁴

In order to examine the state of Irish rape law as it currently stands, it is useful to first examine the context from which it stems. O’Malley observes that “the study of sexual offences is in many ways a study of social values.”⁵ The origins of the law on rape were based on perceptions of the hierarchy of status between sexes. Sexual violence was viewed as a crime against property, and rape

1 Sexual Offences Act 2003.

2 See *Rape*, n.3 *1–2 (Oxford University Press, Dec 13, 2015), archived at <http://www.oed.com/view/Entry/158145?rskey=3Othhq&result=3>.

3 *Id* at 1.

4 Lord Hale’s appreciation of the law on rape serves to encompass the doubt ascribed to a woman, at that time, who had been raped and the legal consequences for her as a result of this institutionalised suspicion. “[I]f she concealed the injury for any considerable time after she had opportunity to complain, if the place where the fact was supposed to be committed, were near to inhabitants, or common resource or passage of passengers, and she made no outcry when the fact was supposed to be done...these and the like circumstances carry a strong presumption, that her testimony is false or feigned.” See Lord Matthew Hale, 1 *The History of the Pleas of the Crown* 633 (1st Am ed 1847).

5 Thomas O’Malley, *Sexual Offences: Law, Policy and Punishment* 1 (Round Hall, Sweet & Maxwell 1996).

was thus a heinous act committed by one man against the property of another.⁶ The purpose of sexual intercourse was seen as being for procreation within the confines of marriage, and non-marital sexual intercourse was regarded as immoral, staining both the offender and the victim. Where the victim had previously been a valuable property right to her father or her husband, the rape represented a debasement of her worth.⁷ Waites noted that early rape law was “founded on a polarised view of male and female sexuality whereby the ‘beast’ of male lust required legal containment to preserve the virtue of a passive, innocent female sexuality.”⁸ This view was supplemented by “the overwhelming assumption that women did not initiate sexual activity.”⁹ Rape, and the sexualisation of women generally, demonstrated “the social disintegration that sexuality symbolized.”¹⁰

The social views of the differences between male and female sexuality shaped the development of rape law. The emergence of stereotypical views of rape, or rape myths, has been problematic because of the impact of these attitudes upon jury deliberations in rape trials. In comparing the facts of a case to widely understood rape myths, the jury holds unrealistic standards of what constitutes a “real rape.”¹¹ The gendered image in rape myths is often associated with traditional legal definitions of rape that stem from the same ideas of male and female sexuality. O’Malley noted that,

[t]he strength of a society’s commitment to certain core values such as bodily integrity, personal autonomy and gender equality can be measured by the effectiveness with which it outlaws sexual aggression and exploitation, the extent to which it tolerates consensual, non-exploitative sexual relations, and the fairness with which it treats both victims and perpetrators of sexual crime.¹²

In Ireland, rape law derives from the common law and was made punishable by section 48 of the Offences Against the Person Act 1861.¹³ The principal statutory formulation lies in section 2 of the amended Criminal Law (Rape) Act

6 Conor Hanly, *An Introduction to Irish Criminal Law* 279 (Gill & Macmillan 3d ed 2015).

7 *Id.* at 3–4.

8 Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* 70 (Palgrave Macmillan 2005).

9 *Id.*, citing Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality 1885-1914* (Penguin 1995).

10 Estelle B Freedman, *Their Sister’s Keepers: Women’s Prison Reform in America 1893-1930* 20 (Michigan 1981).

11 Susan Leahy, *Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland*, 14 *Irish J App Soc Stud* 18, 19 (2014).

12 O’Malley, *Sexual Offences* at 1 (cited in note 5).

13 Offences Against the Person Act 1861, 24 & 25 Vict c 100 (1861).

1981,¹⁴ which sets out the traditional definition in the following terms:

- (1) A man commits rape if:
 - (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
 - (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it, and references to rape in this Act and any other enactment shall be construed accordingly.
- (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.¹⁵

The Criminal Law (Rape) Act 1981 thus restates the traditionally understood definition of rape and retains notions pertinent to the socio-sexual behaviour of men and women.¹⁶ Limitations to this definition include its rigid approach to the gender of both parties and reference to the specific act of non-consensual penile penetration of the vagina.¹⁷ The marital rape exemption, which meant that by law a man could not be charged with the rape of his wife, was left untouched. The admission of previous sexual history evidence at trial was still considered to be relevant and legitimate evidence.¹⁸ In addition, the corroboration warning, a warning from the trial judge to the jury if a victim's evidence was uncorroborated, continued to be a mandatory requirement.¹⁹ Developments in rape law retained traditional views rather than advancing feminist aims of reforming rape law into a system reflective of victims' experiences. The marital rape exemption signified the notion that viewing women as property was not isolated in historicism. The admissibility of previous sexual history evidence meant that the sexual virtuosity of women was still considered a reliable indicator of trustwor-

14 Criminal Law (Rape) Act 1981.

15 The Criminal Law (Rape) (Amendment) Act 1990 affected an amendment that omitted the word "unlawful," which preceded the word "sexual intercourse" in section 2(1)(a). See The Criminal Law Act 1990, archived at <http://humanrights.ie/gender-sexuality-and-the-law/reform-of-irish-sexual-offences-legislation/>.

16 Susan Leahy speaks elsewhere about the socio-sexual behaviour of men and women being reinforced through the absence of a legislative definition of consent. This makes possible the situation where the victim's experience can be thwarted by the subjective construction of the honest belief defence. See Leahy, 14 Irish J App Soc Stud at 19 (cited in note 11).

17 O'Malley, *Sexual Offences* at 2 (cited in note 5).

18 Peter Charleton, Paul Anthony McDermott and Marguerite Bolger, *Criminal Law* 541 (Butterworths 2d ed 1999).

19 Id at 637.

thiness.

The early feminist movement in Ireland began a campaign for change within rape law. The Rape Crisis Centre was established in 1979, and limitations of the 1981 Act illuminated the need for an in-depth analysis and significant overhaul of the law on rape. The subjective test for the *mens rea* in rape has also been a significant impetus for change in the feminist movement. The construction of the 1981 Act dictates that even if it is proven that a victim did not consent to sexual intercourse, if the defence can prove that the accused honestly believed that the victim was consenting, he must be acquitted.²⁰ Though the jury may consider whether the belief held by the accused was reasonable, there is no requirement for the jury to be satisfied that the belief was reasonable. Leahy states that “[i]n effect, the existence of the honest belief defence means that, while the injury of rape lies in the meaning of the act to its victims, the standard for its criminality lies in the meaning of that same act to the accused.”²¹

In 1987 the Oireachtas Joint Committee on Women’s Rights issued their fourth report entitled “Sexual Violence,” stating that

the existing Criminal Law (Rape) Act, 1981 ignores the seriousness of other forms of sexual assault such as forced anal and oral sex, apart from penile penetration, and in so doing it implies that one form of sexual attack is more serious than another.²²

The following year the Law Reform Commission published their paper on Rape and Allied Offences. The Law Reform Commission stressed that “[t]he advantages of leaving the present law unchanged, where it has not been demonstrated that it is failing significantly to achieve its primary object, should not be overlooked.”²³ The Commission found that the law was failing to achieve its primary objective because of a stringent adherence to an unchanging definition that could not be justified solely on the basis of tradition.

From the perspective of the Commission, an unnecessary distinction between rape and other serious acts of penetration failed to appropriately incorporate the victim’s understanding of the offence within the labelling of the offence.²⁴ Neutrality, in this sense, could be achieved by focusing on the victim’s experience rather than emphasising the specific act of penile-vaginal penetration. The Commission highlighted:

20 Susan Leahy, *When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in Irish Rape Law*, 23 ICLJ 1, 2–4 (2013).

21 Susan Leahy, “*In a Woman’s Voice*” – *A Feminist Analysis of Irish Rape Law*, 26 Irish L Times 1, 6 (2008).

22 Oireachtas Joint Committee on Women’s Rights, *Sexual Violence* PL 4697, at 11 (1987).

23 The Law Reform Commission, *Rape and Allied Offences*, LRC 24, 5 (1988).

24 *Id* at 4.

that it was the violation of the bodily integrity of the victim which should be the distinguishing feature of rape as a crime and that victims of such assaults would feel psychologically vindicated by a conviction for rape rather than for indecent assault or some other offence.²⁵

Amongst its recommendations were the abolition of the marital rape exemption and an expansion of the definition of rape.²⁶ The Law Reform Commission's recommendations to move towards neutrality, however, stemmed from the desire for inclusion as well as a departure from paternalism, submitting that:

[t]hose who do not accept that forced vaginal intercourse is a particularly distinctive form of sexual assault may conclude that its continuation as a separate offence reflects at best an unwanted paternalism towards women. Many regard it as a legitimate task of law reform to rid the law of features which are unnecessarily sex specific, particularly where those features have historical roots in the common law's proprietary or paternalistic attitudes towards women.²⁷

The gender specific formulation of the offence of common law rape was recognised as being under-inclusive. The implications of what a gender specific approach to rape meant, in terms of the sexual behaviour that only men could engage in and the place of the victim in which only the female could be identified, were recognised as a broader issue. In the words of the Commission, "rape, when confined to non-consensual vaginal intercourse, arbitrarily selects for special classification a form of sexual assault which is no more distinctive than any other similarly serious forms of sexual assault which are grouped together within a single offence."²⁸ The Law Reform Commission had laid down six options for reform of the definition of rape, ranging from an unchanged position, to dropping the term "rape" from the law in favour of an offence named "sexual violation" or "sexual assault".²⁹ The option favoured by the Commission and that later adopted into the Act was the following recommendation:

(4) Rape could be redefined by statute so as to include other forms of non-consensual penetration. At the same time, the two new offences of aggravated sexual assault and sexual assault would be created, the former carrying a maximum sentence of life imprisonment, to accommodate

25 *Id* at 6.

26 *Id* at 6.

27 *Rape and Allied Offences*, LRC 24 at 6 (cited in note 14).

28 *Id* at 4.

29 *Id* 4–5.

other forms of degrading sexual assault sufficiently serious to be equated with rape, but not involving bodily penetration. This was the approach favoured by the majority of those who made submissions to the Commission and participated in the Seminar.³⁰

1990 Reforms

The majority of the recommendations put forward by the Commission were included in the Criminal Law (Rape) (Amendment) Act 1990,³¹ which affected a range of positive changes in the law. Section 5(1) of the Act provided that “[a]ny rule of law by virtue of which a husband cannot be guilty of the rape of his wife is hereby abolished.”³² Section 13 of the Act amends section 3 of the Principal Act to provide that sexual history evidence may only be adduced from the complainant on application to the trial judge.³³ Section 9 of the Act provided that, “in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person, any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act.”³⁴ Thus, the absence of resistance does not imply that consent had been given. The offence of sexual assault was introduced into the Act and stated in gender neutral terms.³⁵ The offence of aggravated sexual assault was incorporated into the Act to include “a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted” which would produce the same penalty as the offence of rape and which would also be tried in the Circuit Criminal Court.³⁶ In addition, section 7 provides that the warning given by the trial judge to the jury, on the basis that evidence is uncorroborated, is discretionary.³⁷ Yet Fennell notes that,

30 *Id* at 4.

31 Criminal Law (Rape) (Amendment) Act 1990.

32 Criminal Law (Rape) (Amendment) Act 1990 § 5, ¶ 1.

33 Criminal Law (Rape) (Amendment) Act 1990 § 13, ¶ 1 substitutes in the following for section 3 of the Principal Act: “(1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person; and in relation to a sexual assault tried summarily pursuant to section 12— (a) subsection (2) (a) shall have effect as if the words ‘in the absence of the jury’ were omitted, (b) subsection (2) (b) shall have effect as if for the references to the jury there were substituted references to the court, and (c) this section (other than this paragraph) and subsections (3) and (4) of section 7 shall have effect as if for the references to the judge there were substituted references to the court.”

34 Criminal Law (Rape) (Amendment) Act 1990 § 9.

35 Criminal Law (Rape) (Amendment) Act 1990 § 2, ¶ 2.

36 Criminal Law (Rape) (Amendment) Act 1990 § 3.

37 Criminal Law (Rape) (Amendment) Act 1990 § 7.

in many ways, the crime of rape can be seen as paradigmatic of [a] sometimes conflicting (if not contradictory) relationship: seeing the law as oppressive of women (classically the cross-examination of a rape victim in a witness box), while yet heralding its potential as a vigorous feminist instrument (rape law reform).³⁸

The majority recommendation made by the Law Reform Commission had been to introduce a single unified definition of rape within the law that would broaden its scope, in recognition of the reality of rape. Despite this, the offence of rape under section 4 was introduced as an addition to, rather than in replacement of, the common law offence. It can be seen as a compromise approach to reform. The Minister for Justice explained this on the basis that it would “provide the psychological reassurance sought for victims of rape without attracting any of the disadvantages of interfering with the definition.”³⁹ In spite of this decision to retain the traditional definition for its supposed historical authority, section 4 of the 1990 Act provided a necessary broadening of the parameters of the traditional offence, defining it thus in gender neutral terms:

- (1) In this Act ‘rape under section 4’ means a sexual assault that includes-
 - (a) penetration (however slight) of the anus or mouth by the penis, or
 - (b) penetration (however slight) of the vagina by any object held or manipulated by another person.
- (2) A person guilty of rape under section 4 shall be liable on conviction on indictment to imprisonment for life.
- (3) Rape under section 4 shall be a felony.

Since the introduction of the Criminal Law (Rape) (Amendment) Act 1990, two separate definitions of rape have existed in Irish law. Common law rape and “rape under section 4 of the 1990 Act” work in tandem with one another to confer “two parallel definitions of rape.”⁴⁰ Common law rape involves sexual intercourse by a man with a woman, absent of her consent.⁴¹ Rape under section 4 involves sexual assault by penetration other than penile-vaginal penetration.⁴²

38 Caroline Fennell, *Criminal Law and the Criminal Justice System: Woman as Victim*, in Alpha Connolly, ed, *Gender and the Law in Ireland* 151 (Dublin Oak Tree 1993).

39 402 Dáil Debates 1255 (13 Nov 1990).

40 Conor Hanly, Deirdre Healy, and Stacey Scriver, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor, and Court Responses to Rape* 1 (Liffey 2010).

41 The offence of common law rape is defined under section 2 of the Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990.

42 Section 4 of the Criminal Law (Rape) (Amendment) Act 1990.

O'Malley observes,

that the offence encompasses two classes of acts. The penetration of the anus or mouth by the penis may be committed by a male against either a male or a female. The penetration of the vagina by an object may be committed against a female by either a male or a female. The offence does not include the penetration of the anus by an object.⁴³

This omission was justified by the Minister by reference to the imagined scenario that anal penetration by an object could result from the “horseplay” between schoolboys.⁴⁴ The exclusion of anal penetration by an object illustrates a desire to retain a traditional understanding of rape but such a desire may also be prompted by what O’Sullivan identifies as the law’s sustained preoccupation with “enforcing heterosexuality.”⁴⁵

Analysis of Reforms

Looking to Oireachtas debates surrounding the enactment of the 1990 Act illuminates the contentious issues which arose over the course of its introduction. The debates also highlight, in some instances, a reluctance to adopt the Law Reform Commission’s recommendations to depart from the traditional definition of rape. The fact that legislative reform was again taking place within a decade of the introduction of the 1981 Act was, perhaps, emblematic of a rapidly expanding understanding of the circumstances under which rape does occur, or of a previous failure to recognise the prevalence of rape through legislative reform. In acknowledgement of its underdevelopment, the law surrounding sexual offences was described as “grossly inadequate and in urgent need of reform.”⁴⁶ Importantly, it was acknowledged that “[w]hile it appears that [the legislators] are giving remarkably vigilant attention to this area of the law, it is certainly an area where there was a huge amount of neglect unaddressed for decades and there is a lot of improvement needed.”⁴⁷ Consequentially, measured efforts to reform legislation were unlikely to sufficiently bridge the gap between reality and the law. This is an issue also raised by Fennell in relation to the repercussions that failed efforts in the legislative reform of rape law have led to with the “stymieing of future women’s voices on reform of the law in this area.”⁴⁸ The participation of

43 O’Malley, *Sexual Offences* at 72 (cited in note 5).

44 402 Dáil Debates (cited in note 34).

45 Catherine O’Sullivan, *Protecting Young People From Themselves: Reform of the Age of Consent Law in Ireland*, 31 DULJ 386, 389 (2009).

46 394 Dáil Debates 8 (30 Jan 1990).

47 Id.

48 Fennell, *Criminal Law and the Criminal Justice System* at 152 (cited in note 38).

women's voices within the debate has given "credibility and the appearance of consensus to what has ensued", whether or not the reforms had made the desired changes.⁴⁹

In his Second Stage speech on 1 February 1989, the Minister for Justice expressed the Government's refusal to accept the recommendation by the Fourth Report of the Oireachtas Joint Committee on Women's Rights, and of a majority of the Law Reform Commission in their paper on Rape and Allied Offences, that the definition of rape be extended to that which is now contained under section 4.⁵⁰ The Minister stressed that the Government's decision not to extend the definition of rape was,

a legal and social issue which must be considered in the context of what is the best provision we can make for the purpose of fulfilling our obligations to the public generally and in particular to the victims and would-be victims of these offences.⁵¹

The Minister's response suggested a conservative position against the expansion of recognition for victims publicly but not legally considered to have been raped, one which reflected a view resistance to the expansion of sexual freedom more generally. The view was not expressed in recognition of the violent nature of the crime, but instead, by way of response to a moral judgment of permissible sexual acts, "it would surely be regarded as strange and misleading to read that a man had a number of convictions for rape where the offences were, in fact, buggery of men or boys."⁵² A reluctance to replace the common law definition has been disguised with the ostensible effectiveness of the traditional understanding of rape but the question to pose is whether an antiquated understanding of rape is being confused with a ubiquitous understanding. The effect of this is a failure to move away from traditional views of the victim and offender within the common law rape paradigm.

Arguments for Retaining the Common Law Definition

Three arguments for the retention of the common law definition of rape can be identified. Firstly, discussion surrounding the relevance of differentiation between the sexes has observed that such a definition represents the relative proportions of victims of rape. Equivalently, Hanly suggests that "[t]he gender-bi-

49 Id.

50 121 Seanad Debates 17 (1 Feb 1989).

51 Id.

52 Despite the unlawfulness of consensual homosexual activity at the time, an unnecessary correlation was drawn here between rape and the sexual act rather than between rape and violence. See Dáil Debates 8 (cited at note 41).

ased formulation in section 2 can be justified in that it is a reflection of the fact, established by all official and non-official statistics, that women face a vastly greater threat of rape than men”.⁵³ The definition contained within section 2 is here justified on the logic that formal equality cannot be achieved where substantive evidential inequalities exist.

The second argument for the retention of the common law definition is to maintain the status quo. The Minister argued that “a broadening of the definition of rape could work against the interests of women” on the basis that taking account of similarly serious sexual assaults would reduce the stigma normally attached to rape.⁵⁴ The acceptance that “forcing a bottle into the vagina of a woman”, or the buggery of a man, could not be defined as rape, by reason that this would detract from the validity of common law rape, perhaps signifies an overly narrow approach.⁵⁵ In addition, the solution to retain common law rape as a parallel offence to rape under section 4 does not necessarily maintain the seriousness of the traditional definition so much as cause a divide between the two offences.

Finally, the risk of pregnancy may be seen as a justification for maintaining a gender-specific approach to rape, one which creates a clearer distinction between common law rape and rape under section 4, and one in which categorisation is based on a possible outcome rather than a focus on the act of sexual violence. While the traditional use of pregnancy as a justification for gender specificity would be used to employ the offence of common law rape, those offences falling outside of that category would, at variance with this justification, be employed by examining the act of sexual violence rather than the outcome. Referring to the Law Reform Commission of Victoria’s 1987 Report on Rape and Allied Offences, the Irish Law Reform Commission quoted,

The modern emphasis is not on the protection of virginity, the risk of pregnancy or disease, or the defilement of another man’s wife or daughter, but rather upon providing the appropriate level of protection for the sexual autonomy of men and women.⁵⁶

How the state chooses to govern the law relating to sexual relationships and sexual violence is, consequentially, a statement much broader in impart than its crime-prevention objective. It is instead a stripping down of outer layers of governance to look at the bare policy of the state. The present view in Irish society attempts to minimise the level of sexual violence and exploitation of individuals while having as little an impact as possible upon the sexual freedoms

53 Hanly, *An Introduction to Irish Criminal Law* at 281 (cited in note 9).

54 121 Seanad Debates 1989 (cited in note 45).

55 *Id.*

56 Law Reform Commission, *Rape and Allied Offences* 35 (cited in note 23).

of individuals.⁵⁷ The question relating to the validity of sex discrimination on the basis of the possibility of pregnancy is necessarily contentious. To consider the possibility of pregnancy a justification for differential treatment between the sexes on a legal basis is paternalistic and, in some instances, could be seen to conflate biological function with the nature of the sexual violence. Emphasising the possibility of an outcome of sexual violence is invariably limiting. If the risk of pregnancy is given as a justification for maintaining rape as a crime separate from the other most aggravated forms of sexual assault, then indeed the pool of successful complainants would be narrowed even further to include only women falling within the age limits of fertility, excluding those who are otherwise infertile and those on contraception. Emphasising the possible outcome of pregnancy over the act poses threats of prejudice and exclusion. If the function of the criminal law is “an evidence-led means of appropriately labelling criminal conduct,” attempts should be made to mitigate the gravitation towards an overt focus on gender, where doing so detracts from the act to focus on a possible outcome of that act.⁵⁸

Reluctance to depart from gender exclusivity is an anomaly, but it is not unique to the offence of common law rape. The capacity to justify gender exclusivity within the offence of unlawful carnal knowledge amongst minors is almost solely based upon the risk of pregnancy. In the case of *MD (A minor) v Ireland*,⁵⁹ the Supreme Court upheld the constitutionality of a provision allowing difference in treatment between males and females.⁶⁰ The case involved a challenge to section 5 of the Criminal Law (Sexual Offences) Act 2006,⁶¹ which was enacted in response to the decision in *CC v Ireland*.⁶² Section 5 provides that “[a] female child under the age of seventeen years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse.”⁶³ Under consideration in the Supreme Court was whether the sex discrimination contained within section 5 was permissible. The 15-year-old male appellant had had sexual

57 O’Malley, *Sexual Offences* 1 (cited in note 5).

58 Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 Seattle J of Soc Just 481, 481 (2007).

59 2 JIC 2308 (2012).

60 *Id.*

61 Criminal Law (Sexual Offences) Act 2006.

62 *CC v Ireland* 4 IR 1 (2006). The case involved the striking down of legislation as unconstitutional because there was no defence of honest belief incorporated into the offence of unlawful carnal knowledge. The Supreme Court judgment left a lacuna in the law for the prevention of the sexual exploitation of minors which was dealt with through the hasty introduction of the Criminal Law (Sexual Offences) Act 2006. The 2006 Act replaced the offence of unlawful carnal knowledge under the Criminal Law (Amendment) Act 1935 with the two separate offences of defilement of a child under 15 years of age and defilement of a child under 17 years of age, which contained the additional defence of honest mistaken belief as to the complainant’s age in both offences.

63 § 5 of the Criminal Law (Sexual Offences) Act 2006.

intercourse and committed an act of buggery with the female complainant, who was 14 years of age, and who was not charged with any offence.⁶⁴ Denham CJ referred to Article 40.1 of the Constitution in upholding the positive discrimination under section 5 of the Act, stating that the law must have “due regard to differences of capacity, physical and moral, and of social function.”⁶⁵ The distinction was justified on the basis that the law has an obligation to protect young women from the risks inherent in the effective criminalisation of teenage pregnancy.⁶⁶

The decision in *MD* represents a confirmation by the Supreme Court that the Oireachtas may justifiably retain a gender-specific approach on policy grounds. What comes to question is whether the same reasoning can be used to justify the law in the case of consensual, non-exploitative sexual intercourse amongst minors, with justifications used for gender distinctions in rape. Development of Irish rape law has been to remove the unnecessary focus on gender within the law. Progress in the area of rape law has been made due to the introduction of the 1990 Act. However, the schism between common law rape and rape under section 4 is illustrative of a failure to expound a gender-neutral approach to rape. It also illustrates the impracticality of defining an experience and punishment of rape on the capacity to become pregnant. This general movement should stimulate questions in any area where the offence is being defined by the characteristics of the victim, rather than the act of the offender.

PART TWO: GENDER NEUTRALITY IN RAPE LAW

Incorporation of the Victim's Perspective

Having examined the reasons supporting the gender specific definition, the arguments for gender neutrality in rape law will now be examined. Susan Leahy argues that since the success gained for victims' rights by the feminist movement in the field of Irish rape law “came to fruition with the rape reforms of the 1980s and 1990s, much less thought has been given to the female perspective on sexual violence.”⁶⁷ Leahy argues that the “upshot of this failure to eradicate sexist myths and stereotypes is that the law remains orientated around male values and the female perspective on rape is largely excluded.”⁶⁸ The law thus continues to

64 2 JIC 2308 (2012).

65 *Id* at 2310.

66 The Criminal Law (Sexual Offences) Bill 2015 proposes that the age of consent will remain at 17, though it includes a proximity of age defence which can be relied on if the parties are within two years of age of each other and have engaged in a non-exploitative and consensual act. This proposal goes some way towards realising fairer legal terms for underage sex amongst peers while still acknowledging anatomical differences.

67 Leahy, 26 *Irish L Times* at 1 (cited in note 21).

68 *Id*.

focus on “rape myths” rather than reflecting reality. Leahy argues that “the ‘real rape’ stereotype creates a perception of what constitutes a genuine allegation of rape. The ‘real victim’ stereotype generates an image of a genuine or worthy victim, that is, a chaste individual who has not engaged in ‘risky’ behaviour.”⁶⁹ While rape under section 4 is defined in gender neutral terms, the applications of the law are structured around sexed notions of behaviour and violence. The more the realities of rape can be absorbed into and reflected by the law, the more rape myths can be discouraged. To encourage a realistic view of rape within the law, a structure must first be put in place. While numerous statutory changes have been introduced, only paltry changes have resulted for victims of rape.

Leahy’s depiction is that victims of rape tend to be treated with hostility and suspicion. Furthermore, traditional ideas of common law rape and its separation from the offence of rape under section 4 is immediately linked to this hostility.⁷⁰ The separation of the two offences creates competing interests between the elements of the crime under each definition. While both offences remain, rape as defined in Irish law will continue to represent symbolically outdated and paternalistic views of male and female sexuality.

An approach to rape which recognises the psychological element understands that victims who process such an act of sexual violence cannot compartmentalise the crime in the same way that the law does. Rather, the act of sexual violence can only be understood as it is experienced, and the law should attempt to incorporate and represent this experience. An overly narrow definition of rape may fail to contribute in a positive sense to the victim’s own understanding of the attack. In the same way, it may fail to incorporate the public’s understanding of the perpetrated offence. It may divide, rather than unify, understandings of experiences. The prevalence and means of distinguishing different categories of rape based on either violence or non-violence is further evidence of efforts to compartmentalise the crime into levels of gravity and credibility, contrary to benefit of the victim. Fennell notes that,

[t]he resultant schema of four offences now found in the 1981 and 1990 Acts presents a curious amalgam of the ‘rape as violence’/‘rape as sex’ approaches. Its potential for plea bargaining is manifest, as is the concentration on anatomical distinctions as indicative of the gravity and degree of violation evident.⁷¹

Fennell notes an additional difficulty with “the importance of the ‘nomenclature’ rape for victims of both sexes,” while perpetuating a distinction

69 Leahy, 14 Irish J App Soc Stud at 19 (cited in note 11).

70 See Leahy, 14 Irish J App Soc Stud 18 (cited in note 11).

71 Fennell, *Criminal Law and the Criminal Justice System* 157 (cited in note 38).

between common law rape and rape under section 4.⁷² “[W]omen themselves remain particularised in the ‘rape’ victim category - centering on the gravity or significance of the penis and a particular female orifice.”⁷³ There are two distinct categories of offences: the rape by a man of a woman, understood with reference to traditional roots of dominance, submission and paternalism by the State, and rape as subversive sexual acts.

Reality of the Experience

Recent studies have contributed to our knowledge of the incidence and reality of rape in Ireland. Studies containing empirical research have made it possible to analyse the difficulties with a system of rape law that is stated in gender neutral terms, while the majority of complainants are female and the majority of offenders male. *Rape and Justice in Ireland*, an extensive study undertaken by Hanly *et al*, provides research and statistics on the realities and the myths of rape, while additionally focusing on the causes of attrition in rape cases in Ireland.⁷⁴ The study was conducted in three parts. The first part consisted of a national survey of one hundred victims who had been raped since 2002, all of whom were women. The second part involved a quantitative analysis of all five hundred and ninety-seven files received by the Office of the Director of Public Prosecutions (DPP) between 2000 and 2004. The third part comprises of an overview of one hundred and seventy-three cases which had been received by the Central Criminal Court between 2000 and 2005.

The study examined various characteristics of rape, including the location of the assault, the relationship between the victim and the offender, the extent of the use of threat or force, and the personal attributes of the victim. The resulting comparison showed a dramatic variation between myth and reality. The two opposing positions make it possible to examine the role of socio-sexual myths in the trial process as a whole, and the extent to which myths are gendered.⁷⁵ On a more constructive note, the study enabled a realistic view based on experiential evidence, rather than preconceived notions of the “real rape” stereotype. It also suggested reforms to the criminal justice system in-tune with reality.⁷⁶ The disparity between preconceptions and reality is an indicator of sexual myths’ overwhelming influence on the criminal process. As a result, the underlying question remains: In a system that purports to be gender neutral, how can such significant gendered myths exist?

The reality is that two-thirds of rape cases involve an offender known to

72 *Id.*

73 *Id.*

74 Hanly, *Rape & Justice in Ireland* (cited in note 40).

75 *Id.* at 127–181.

76 *Id.* at 213–216.

the victim and the most common location of the offence is in the victim's own home.⁷⁷ Contrary to the commonly understood rape myth relating to the incidence of "stranger rape," only a minority of victims who participated in the survey revealed that the rape had occurred in public.⁷⁸ The most common relationships between the victim and the offender were either friends or acquaintances. Just over one third of the incidents involved an offender who was a stranger to the victim.⁷⁹ This finding questions the law's role in portraying myths through its legislative construction of rape. Introducing a parallel offence based on gender neutrality cannot easily dispense the myths which have been engrained into the system.

The study provides that 70 percent of victims who participated in the first strand survey had been drinking alcohol at the time of the occurrence.⁸⁰ The significance of gender within this figure is the attitudinal approach towards gender specific behaviour while under the influence of alcohol. Part of Hanly's study represented the effect that alcohol or drug use has on the likelihood of reporting.⁸¹

The fact that "alcohol use decreases the likelihood of reporting, and increases the likelihood of blame being attributed to the victim" is compounded by the particularly harsh efforts to undermine the credibility of the victim in a rape case.⁸² Coupled with the fact that past judicial decisions have used comparatively excusatory reasoning for the male offender of common law rape, there is a clear disparity in how victims are treated.⁸³ The common law rape paradigm reinforces ideas of socio-sexual behaviour, while rape under section 4 attempts to neutralise them. In instances where alcohol tends to be exculpatory for an offender and inculpatory for a victim, the system necessarily fails to operate in gender neutral terms.

Temkin and Krahé's study explores the "justice gap" between record-

77 Id at 132.

78 Hanly, *Rape & Justice in Ireland* at 132 (cited in note 40).

79 Id at 133.

80 Id at 138.

81 Id at 146 (Six participants in the survey named their own alcohol or drug use as their reason for non-reporting. Five of these reasons were borne out of uncertainty as to how their complaint would be received and one complainant blamed herself for the assault as a result of drug use).

82 Hanly, *Rape & Justice in Ireland* at 146 (cited in note 40) (Hanly's study records the statistics that roughly 60% of complainants and 88% of defendants had been binge drinking at the time of the offence. The study notes the particular difficulties that alcohol abuse plays in Irish rape cases. A serious cause of attrition is the memory of the victim coming into question because of the presence of alcohol at the time of the offence).

83 O'Malley noted that "[w]hat justifies mitigation is not the drunkenness itself but the evidence that it may provide for spontaneity or lack of premeditation." Thus in *People (DPP) v X*, 2 WLR 913 (1975), a man who had been convicted of the rape of his friend's wife was sentenced to four years' imprisonment. O'Malley further notes that a more appropriate tailoring of the sentence would be in a treatment facility rather than a reduction of sentence. See O'Malley, *Sexual Offences* 246 (cited in note 5).

ed cases of sexual violence and the number of convictions.⁸⁴ The study results demonstrate that increasing attrition rates cannot simply be evidential problems. Rather, “research suggests that at every stage in the process, rapes which fail to bear the hallmarks of the classic rape or which are committed against complainants who, for extraneous reasons, do not pass muster are weeded out and consigned to the scrap heap.”⁸⁵ Intoxication only adds complication to existing evidential issues. Links between gender and credibility, which have historically been a feature of rape myths, have been difficult to separate from one another. As a result, the added element of intoxication leads to a disparity in credibility dependant on whether or not the female complainant is the intoxicated party. Temkin and Krahe’s study gave evidence that “if the complainant is portrayed as drunk, she is perceived as less credible and the perpetrator is seen as less likely to be culpable.”⁸⁶ This perception is that “[A] complainant who is drunk at the time she is raped is very far removed from the real rape stereotype. Her claim is thus more likely to be regarded as false by the police, and her complaint is less likely to result in conviction.”⁸⁷

Transgender Persons and Rape Law

The difficulty of a gendered nature law becomes clear when looking at individuals who have transitioned from one gender to another. Common law rape of a post-operative transgender person has been problematic in the past because of an absence of provision in the law to provide recourse. Before the introduction of the Gender Recognition Act 2015,⁸⁸ the law failed to recognise the new gender of a transgender person. Hanly notes that because the common law construction of rape requires the establishment of “the *actus reus* of rape, the prosecution must prove that a man had sexual intercourse with *a woman* without the woman’s consent.”⁸⁹

Commitment to biological sex can in some instances be reductive. While the Gender Recognition Act now recognises the gender of a transgender person, the law largely fails to take account of gender ambiguity. In circumstances where a transgender person is involved in a rape case, the law fails to properly commit

84 Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008).

85 *Id* at 161.

86 *Id*.

87 *Id* at 170.

88 Gender Recognition Act 2015.

89 In the case of *R v Tan*, 2 All ER 12 (1983) the English Court of Appeal ruled that “common sense, and the desirability of certainty and consistency” require that the test for gender in marriage also be applied to criminal charges. In *Foy v Registrar for Births, Deaths and Marriages*, IEHC 116 (2002) the Irish courts adopted a similarly biological test for gender. See Hanly, *Rape & Justice in Ireland* 303 (cited in note 40).

to gender recognition. Section 23(1) of the Gender Recognition Act 2015 contains a section relating to gender specific offences:

Where (apart from this subsection) a relevant gender-specific sexual offence could be committed or attempted only if the gender of the person to whom a gender recognition certificate is issued were not the preferred gender, the fact that the person's gender has become the preferred gender does not prevent the sexual offence being committed or attempted.⁹⁰

The above definition presents an anomaly in the law. Under the common law definition, gender is considered the conclusive element of rape. Although the Gender Recognition Act recognises the gender of an individual on the basis of self-identification, it is undermined by the existence of common law rape. This section of the Act contends that a male to female transgender person will be recognised as his/her new identity unless she commits common law rape. In that case, the law then refuses to recognise his/her new gender.⁹¹ This inconsistency not only reduces the coherence of the Gender Recognition Act, but additionally illustrates the necessity to taking a broader look at gender and the law. A commitment to biological sex, rather than to the act of sexual violence itself, confuses the purpose of gender recognition and confines it to a traditional definition of rape. An alternative solution would be to recognise the self-identified sex of the offender. This would prevent the law from unnecessarily reverting to the original sex of an individual to provide protection.

For transgender people, the existence of any gender specific provision raises difficulties. Common law rape is one of these areas. The traditional approach within common law rape conflicts with the gender shift permitted by the Gender Recognition Act. Section 23(1) also recognises that the recognition provided by the Gender Recognition Act is not absolute.⁹² It is unclear when courts would consider reverting a gender recognition certificate in order to charge an individual with common law rape rather than rape under section 4. While the introduction of the Gender Recognition Act was a much-needed development for the recognition of transgender rights, it is not absent of flaws. To project a more coherent and consistent understanding, the law would apply the offence of rape without exception. The law would also abandon traditional notions of attempting to redefine the gender of an individual by biological sex when alternative recourse is available within the law.

⁹⁰ Gender Recognition Act 2015, § 23, ¶ 1.

⁹¹ *Id.*

⁹² *Id.*

Feminist Literature

Feminist jurisprudence has been intrinsic to the application of critical perspectives upon rape law. It has been the driving force behind progress in a system laden with antiquated notions of socio-sexual behaviour to an attempt to understand and serve the victim. An ongoing aim of feminist jurisprudence is to further develop the law on rape to process the needs of the victim into a coherent legal structure as effectively as possible. They also strive to prevent the trial process from becoming a second assault, and to reshape the discourse surrounding rape from victim-blaming to one refocusing the fault on the offender. Nicola Lacey provides an extensive analysis of the links between feminism and conventional legal theory relevant to an analysis of rape law.

At a methodological level, feminist legal theorists are almost universally committed to a social constructionist stance: in other words to the idea that power and meaning of sex/gender is a product not of nature but of culture. Feminist legal theorists are hence of the view that gender relations are open to revision through the modification of powerful social institutions such as law.⁹³

For the purposes of this part, feminism is a useful tool to analyse different perspectives on viewing gender within rape law in a way that most effectively harnesses the rights of women. Views affirming both gender-exclusivity and gender-neutrality have arisen. The two opposing strings of feminist theory which emerged in the arena of rape law are the position of liberal feminism, and the second position which Lacey names “difference feminism.”⁹⁴ While liberal feminism locates itself on the same line as mainstream legal theory, espousing the ideal of gender neutrality before the law, difference feminism is suspicious of an unbending approach to equality.⁹⁵ Instead, it maintains that an appreciation of the subtleties of rape law can be better understood and acknowledged when in-tune with structural and gendered differences and applied by a less mechanical approach.

Lacey refers to the hierarchically gendered nature of the legal system that goes deeper than individual laws, to the structure of modern law as a whole.⁹⁶ Feminist legal theory is a tool to explore the impact of this hierarchy on a current system of rape law. The fact that,

93 Nicola Lacey, *Feminism and Conventional Legal Theory*, 11 *Humboldt Forum Recht* 1, 2 (1996).

94 *Id* at 2.

95 *Id* at 2.

96 *Id* at 1.

laws set up standards which are applied in a neutral manner to formally equal parties [and that] the questions of inequality and power which may effect the capacity of those parties to engage effectively in legal reasoning has featured little in mainstream legal theory, is perhaps because of “the possible ‘masculinity’ of the very process of legal reasoning.”⁹⁷

It is suggested that this possible masculinity may seep into legal reasoning with the presence of “relationality,” or the valuing of certain relationships over others. For example, proprietary relations, or interests based on ownership, are highly valued in the process of legal reasoning, and this associated value is mirrored in the criminal law procedure. While liberalism in the rule of law sees neutrality as the process of formal equality, feminism, amongst other critical legal theories, takes account of the fact that “the questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning has featured little in mainstream legal theory.”⁹⁸ Although in the past “relationality” has used gender as a dichotomy to benefit the patriarchy, viewing the same dichotomy as a means of solving the inequality fails to appreciate the subtleties of the inequality. In recognition of the patriarchal power structures that govern the law, a feminist restructuring of rape law would represent a comprehensive inclusion of victim-experience rather than a reiteration of events judged by sex. How neutrality is perceived by the law can therefore have different meanings.

In legal language, experience and perspective are translated as bias, as something that makes the achievement of neutrality more difficult. Having no experience with or prior knowledge of something is equated with perfect neutrality.⁹⁹

Neutrality that eliminates the appearance of difference only seeks to hide, rather than solve, issues with gender in the law. MacKinnon similarly argues that by eliminating certain perspectives, the law thus remains inherently masculine.

Where liberal feminism sees sexism primarily as an illusion or myth to be dispelled, an inaccuracy to be corrected, true feminism sees the male point of view as fundamental to the male power to create the world in its own image, the image of its desires, not just as a delusory end product. Feminism distinctively as such comprehends that what counts as truth is

97 Lacey, 11 Humboldt Forum Recht at 6 (cited in note 93).

98 *Id.* at 6.

99 Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, Faculty Scholarship Series Paper 4011 (1989).

produced in the interest of those with power to shape reality, and that this process is as pervasive as it is necessary as it is unchangeable.¹⁰⁰

If the law is viewed as inherently masculine, then a legal process of formal neutrality will fail to be neutral in practice. In MacKinnon's view, because the law on rape is shaped within a "masculine modality," it fails to serve the victim at the outset.¹⁰¹ Since the law on rape is shaped within a preset-standard, the offence and the outcome are judged as a product of preexisting masculine structure. Committing to the idea of formal neutrality before the law submits to the existing power structures and to the weaker sections of society affected by these power structures. A system that would recognise the difference in law and overcome traditional common law model of rape could pursue the aims of feminism by attending to the needs of the victim.

Susan Estrich wrote that,

Most of the time a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is 'boy's rules' applied to a boy's fight. In rape the male standard defines a crime committed against women and male standards are used not only to judge men but also to judge the conduct of women's victims. Moreover, because the crime involves sex itself the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality - areas where differences between a male and female perspective may be pronounced.¹⁰²

The interplay between sex-roles and the legal definition of rape is precarious. Sex-roles have borne the weight of the problems with rape law in various criminal law systems, not because of its incorrect application, but because of any application. A confusion between sex inequality due to historical treatment and re-enforcing sex-roles has meant that the two issues became intertwined. The problem with conflating the two issues is that they are negatively correlated with one another. Larcombe stated that, "[l]aw's 'ideal victim' is no longer sexually chaste but she is consistent, rational and self-disciplined; she rarely has a history of mental illness or sexual abuse, and she does not drink alcohol to excess or otherwise engage in 'risky' behaviour."¹⁰³ This description of the law's "ideal victim" depicts the limiting effect of imposing sex-roles. However, clear links can

100 Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635, 640 (1983).

101 *Id.* at 643–644.

102 Susan Estrich, *Rape*, 95 *Yale J of L* 1087, 1098 (1986).

103 Wendy Larcombe, *Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law*, 19 *Fem Leg Stud* 37, 37 (2011).

be drawn between the modernised version and the traditionally defined victim. Even within a law characterised by neutrality, the victim is fitted into the confines of this definition. While the scale of what is legally defined as rape has expanded, the scale of who is defined as the victim has largely remained confined within barriers less clear than the law.

Novotny raises concerns with the prospect of reforms to a gender-neutral approach to rape law and their impact on female victims of rape.¹⁰⁴ The rise in male-victimisation may detract from the reality of the incidence of female rape.¹⁰⁵ She marks the implementation of gender-neutrality within rape law as a counter-measure to the prevalence of feminist opinion in this area of the law, viewing gender neutrality as a mode of “gender disguise.”¹⁰⁶ Yet, promoting gender-specificity over neutrality is nevertheless a categorisation of the victim and offender on the basis of sex, rather than on an experiential basis. On a similar note, Rumney equates Novotny’s view to an “institutional failure to understand the harm and impact of rape and sexual abuse.”¹⁰⁷ Questioning the value of a gender neutral definition of rape can only be genuinely approached in consideration of the existing inequalities. As Novotny proposed, is allowing the characterisation of male victims and female perpetrators an attempt at a backhanded slight against the place of feminism within rape law?¹⁰⁸ Once again, the underlying argument here questions whether gender neutrality in rape law appreciates the nature of the crime. As Rumney submits, gender neutrality in rape is “concerned with the appropriate labelling of criminal conduct” instead of an attempt to disregard female victims. Moreover, the relationship between neutrality and equality can only properly be reconciled by taking an approach which recognises the precepts that can colour even attempts to be neutral.¹⁰⁹

Ngaire Naffine argues that despite radical changes made to Australian rape law, defining it as a gender-neutral offence has not succeeded in permeating the deep-rooted gender roles within the system.¹¹⁰ “Though the crime has been sexually democratised on the statute books, faith has been kept with a simple, reductive and orthodox view of sexual relations between the sexes.”¹¹¹ A blanket-application of neutrality in the law does not sufficiently displace what Naffine labels as the erotic love, which continues to encompass the dichotomous roles

104 Novotny is writing about the possibility of reform to a gender-neutral definition of rape in America, but her views are nevertheless relevant in an Irish context.

105 Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?* 1 Seattle J for Soc Just 62, 745 (2003).

106 Id at 748.

107 Rumney, 6 Seattle J of Soc Just at 489 (cited in note 58).

108 Novotny, *Rape Victims in the (Gender) Neutral Zone* 750 (cited in note 105). Novotny asks whether gender neutrality is “just another ‘backlash’ story.”

109 Id at 481.

110 Ngaire Naffine, *Possession: Erotic Love in the Law of Rape*, 57 Modern L R 10 (1994).

111 Id.

of men and women and their sexual interaction in relation to one another. The fact that a charged meaning is attached to each term means that there has been “a compulsory and naturalised heterosexuality” as the only possible form of sexuality.¹¹² By virtue of being defined as man or woman, one absorbs characteristics that are stringently applied, whether or not they hold true. The only possible way of understanding the rape is in terms of dominance and submission. The only possible understanding is by definitions which are self-defining, “human beings are only intelligible as two sexes, two ways of being which appear simply to be there, already full of meaning.”¹¹³

The traditional view regarding man and the woman as two sides of a heterosexual binary implies structures, not only of sex-roles, but also of deviance from these roles falling outside of any generally accepted understanding. Rape law and traditionally defined sex-roles are contentious because they are deeply linked. Progress is therefore understood as a departure from “the assertion of the sexual autonomy of men defined as appropriation and possession of the other and the consequent denial and erasure of women’s sexuality.”¹¹⁴ However, compartmentalising within the binary presents problems, as issues are viewed in pre-set terms, conclusions are predicated, and facts are lost to the false dichotomy that fails to locate the individual. “[T]hus, to distil the lives of women down to a single Romantic idea of ‘woman’ hood, an archetype of ‘woman’, is to participate in a mythology which does damage.”¹¹⁵ The law may begin to recognise victims of rape in their own sense by abandoning the mythology while still recognising its presence.

The UK Sexual Offences Act 2003

In the UK, the Sexual Offences Act 2003 was brought into force to replace the Sexual Offences Act 1956, which had previously been described by Lord Falconer as “archaic, incoherent and discriminatory.”¹¹⁶ The 2003 Act updates and redefines many of the offences defined under the previous legislation, but it also introduces a host of newly defined offences.¹¹⁷ As with any system in the wake of significant reform, there can be a tendency to see the progress brought by the new legislation as being the final solution. Smith and Hogan reiterate this point in relation to the 2003 Act, stating that,

112 Id at 11, with reference to Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 22 (Routledge 1990).

113 Id.

114 Id at 34.

115 Id at 12.

116 Sexual Offences Act, HL vol 644, col 771 (statement of Lord Falconer, Minister of State).

117 David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* 817 (Oxford 4th ed 2015).

[t]here is a danger that the Act will be seen as a panacea for the problems of investigating and prosecuting sexual offences, and for the high attrition rates. There are deeper underlying causes for: the prevalence of sex offences, the reluctance to report and the problems of proof at trial; an issue raised by the fact that conviction rates have, to a large extent, remained the same since its coming into force.¹¹⁸

Card Cross and Jones note that before the introduction of the 2003 Act, the law reflected traditional societal attitudes in relation to the gender specificity of both the victim and offender in rape cases.¹¹⁹ “Where a sex was specified, it was, with one exception, the masculine sex in the case of the offender, and, normally, the feminine sex in the case of the other party.”¹²⁰ As an exception, the treatment of homosexual activity was concluded as unlawful for both parties involved. By contrast, the 2003 Act is gender-neutral in all terms and inclusive regardless of sexual orientation. The Act does, however, separate the offence of rape and that of assault by penetration.¹²¹ Rape is defined under section 1(1) of the 2003 Act:

A person (A) commits an offence if -

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.¹²²

The separate offence of assault by penetration is defined under section 2(1) of the 2003 Act:

A person (A) commits an offence if -

- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- (b) the penetration is sexual,
- (c) B does not consent to the penetration, and
- (d) A does not reasonably believe that B consents.¹²³

Smith and Hogan highlight the decision to distinguish between rape and assault by penetration:

118 Id at 888.

119 Richard Card, *Criminal Law* 328 (Oxford 21st ed 2014).

120 Id.

121 See Sexual Offences Act 2003 § 12.

122 Sexual Offences Act 2003 § 1 ¶ 1.

123 Sexual Offences Act 2003 § 2 ¶ 1.

The Sexual Offences Review team were eager for the offence of rape to resonate with the general public's understanding of the term, and concluded that although it would perpetuate gender inequality, penile penetration should nevertheless remain an essential element of the offence.¹²⁴

Within this consideration, the possibility of pregnancy and transmission of diseases were justifications for the separation of a specifically gender-contingent definition of rape from the gender-neutral definition of assault by penetration. A commitment to this "principle of fair labelling" claims to represent public perception of rape and to serve as a stigma carried by the term to the acts falling within the definition.¹²⁵ Though representing an extension, the definition still claimed that only penile-penetration illustrated public understanding of rape. However, the Sexual Offences Review team did acknowledge the "abhorrent, demeaning and traumatising" effect that non-consensual oral sex has on a person.¹²⁶

Motivations behind the introduction of the 2003 Act were to create a system which would broaden the definition of rape, to clarify the law on consent, and to achieve a balance between gender neutrality without detracting from the offence.¹²⁷ In the 2003 Act, rape remains the single offence that may only be committed by a man, but its definition is extended in the sense that rape may be committed against a man or a woman.¹²⁸ In addition, "[v]agina includes vulva and references to parts of the body throughout the Act include those which have been surgically constructed."¹²⁹ Criticisms of the 2003 Act have referred to the complexity of the system in conclusive and rebuttable presumptions of consent.¹³⁰ The general scheme of a combination of gender specificity and neutrality within the Act seems to achieve the appropriate balance. However, Temkin and

124 Ormerod and Laird, *Smith and Hogan's Criminal Law* at 850 (cited in note 117).

125 *Id.*

126 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*, National Archives, 15 (2000).

127 A noteworthy element of the 2003 Act is its abandonment of the concept of recklessness from the offence of rape. While before, the law required proof that that (A) knew or was reckless as to the fact that (B) had not consented, the 2003 Act replaces this with a requirement of reasonable belief. Temkin and Askworth are critical of this approach as it does not necessarily impose a higher duty on the defendant to enquire about consent. See Temkin, J. and Ashworth, A., *The Sexual Offences Act 2003: Rape, Sexual Assault and the Problems of Consent*, Crim L R 328 (2004).

128 Sexual Offences Act 2003 § 1 ¶ 1.

129 *Id.* at 1.

130 The prosecution has three options to prove the absence of consent. § 76 contains two conclusive presumptions including: "(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant." § 75 contains a list of irrefutable presumptions. The third option is to rely on the definition of consent under § 74.

Ashworth question whether the three-track system that proves lack of consent “intended to reflect some kind of moral hierarchy, so that the most serious cases of non-consent give rise to irrebuttable presumptions and the next most serious to rebuttable presumptions, with the remainder falling within the general definition?”¹³¹ An alternative position suggests labeling the worst cases of non-consent with an irrefutable presumption, rather than separating them into two distinct categories. Similarly, Smith and Hogan question the overall structure of the 2003 Act as being unduly complex, as “[i]t produces confusion and inhibits optimal development of case law, with no guarantee that similar conduct will be treated consistently by the courts.”¹³²

CONCLUSION

Neutrality in the law is language, and “[I]anguage, and the thoughts that it expresses, is socially constructed and socially constituting.”¹³³ Language may have an ability to change the understanding of some, but to be effective, it must also promote neutrality that appreciates the nuances required to achieve it. By retaining the offence of common law rape and introducing the 1990 offence, Irish law created a gradated schema of offences, thereby maintaining the common law model’s paternalistic view of sexuality.

While some feminist jurisprudence on rape has focused on the benefits of a gender-specific approach, these aims cannot be achieved by following a traditional model. Common law rape was structured around traditional and sexist views of male and female sexuality, rendering a contradictory application to feminist aims. A feminist analysis of the gendered nature of rape law allows analyses of different approaches, thereby elevating the overarching importance of victims’ experience. Further, examining the nature of the offence highlights that a lack of victims’ experience has been incorporated into the law. Though Irish rape law’s attempts at neutrality have been motivated by desires to abandon traditional views on sexuality, the retention of a schema of offences arguably undoes some of these efforts by retaining the traditional understanding of common law rape.

Arguably, a better approach would be to move to an entirely gender-neutral scheme except for the offender of rape, as with the UK model – or, similarly, to retain a gender specific offence as argued by feminist writers like MacKinnon, or even to develop an entirely new model of the offence of rape rather than one based on the old common law definition. This would reflect the gendered reality that most rapes are perpetrated by men against women, and would also enable the development of a definition of rape that would more accurately reflect women’s

131 Temkin and Ashworth, *The Sexual Offences Act 2003* at 8 (cited in note 127).

132 Ormerod and Laird, *Smith and Hogan’s Criminal Law* at 855 (cited in note 117).

133 Finley, *Breaking Women’s Silence in Law*, at 887 (cited in note 99).

ARTICLE

**NUCLEAR COURTROOMS AND ADMINISTRATIVE LAW:
UNDERSTANDING THE FAIL-TO-PREVAIL TREND
IN ANTI-NUCLEAR LITIGATION**

Evelyn Atwater[†]

ABSTRACT

Nuclear licensing litigation has been a cornerstone of anti-nuclear movements since the 1970s, but today nuclear lawsuits are considerably smaller and remarkably less successful. Since 1989, all public-interest plaintiffs have failed to prevail in federal appellate courts against nuclear power plants and the Nuclear Regulatory Commission (NRC). This paper examines this trend by analyzing these thirty cases, their plaintiffs, their claims, and the legal superstructure in which they reside. Though the trend of consistent failure is surprising, it may be explained by a combination of factors: limited judicial review and considerable administrative deference to the NRC. Litigation is regarded as a valuable tool for anti-nuclear groups, but recent failures in the courts raise important implications for anti-nuclear and public-interest litigation. Despite these losses, suing the NRC is often the best option for anti-nuclear groups to create policy change.

INTRODUCTION

Nuclear power—some people love it while some people litigate it. Since the birth of the nuclear power industry in 1954, nuclear power plants have created controversy and sparked protest from citizens, states, and a variety of anti-nuclear groups. The rise of nuclear power coincided with the rise of environmental public interest litigation, and anti-nuclear groups quickly moved from protesting nuclear power plants to suing them.¹ Anti-nuclear lawsuits and debate peaked in the 1970s, and especially increased during and after the 1979 Three Mile Island nuclear accident.² Following Three Mile Island, public opinion of nuclear pow-

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¹ Brock Evans, *Sierra Club Involvement in Nuclear Power: An Evolution of Awareness*, 54 Oregon L Rev 607 (1975).

² Herbert P. Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16.1 Brit J Polit Sci 57, 71–73 (1986). A partial reactor meltdown and release of radioactive substances made Three Mile Island the most serious nuclear

er plummeted and citizens increasingly pushed for stronger regulations or the abolishment of nuclear power altogether. Anti-nuclear groups saw some success as they protested construction of new plants, sued nuclear power plant operators, and took landmark cases to the Supreme Court.³

The Nuclear Regulatory Commission (NRC), the federal agency tasked with licensing nuclear power plants and regulating nuclear power, responded with thorough regulations and increased public access to nuclear licensing procedures. Even as protests and anti-nuclear political movements tapered down in the mid-1980s, some groups took on watchdog roles to monitor the NRC and nuclear power plants.⁴ Litigation developed as a powerful tool for challenging nuclear power, because anyone—from the Sierra Club to a concerned group of mothers—could sue the NRC to improve a rule, tighten a restriction, or revoke the operating license of a nuclear power plant. The process of licensing a nuclear power plant became the main target for complaints; aside from lawsuits following a nuclear accident, the licensing process provided the only viable avenue for anti-nuclear litigation.

Today, anti-nuclear groups continue to monitor the NRC and sue when they find a legal problem or disagree with an NRC decision. However, the frequency of cases, types of claims, and success rates of these public-interest lawsuits have seriously changed since the 1970s. The Supreme Court ruled on twelve nuclear power cases in the fifteen years from 1969 to 1984; in contrast, it heard only four nuclear cases in the past thirty years, and none of these directly concerned nuclear licensing.⁵ This study started with a simple question: what does nuclear licensing litigation look like today? Since licensing cases are not reaching the Supreme Court, it is necessary to examine cases at the appellate level in order to answer this question.

This research project reveals an overwhelming trend in anti-nuclear litigation: every appellate-level nuclear licensing case in the past twenty-five years was decided in favor of the defendant, NRC, and nuclear power plant. In other words, all anti-nuclear plaintiffs lost their legal challenge. These thirty cases span twenty-five years, eight appellate circuits, and address countless different licensing issues, and yet they all rule in favor of the NRC. These results are puzzling—

accident in American history (see *Backgrounder on Decommissioning Nuclear Power Plants* (US Nuclear Regulatory Commission, May 14, 2015). Online at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/decommissioning.html>). Though no one was injured, the accident actualized fears about nuclear power and legitimized some claims of anti-nuclear groups.

3 Gregory L. Hassler and Karen O'Connor, *Woodsy Witchdoctors Versus Judicial Guerrillas: The Role and Impact of Competing Interest Groups in Environmental Litigation*, 13 BC Envir Affairs L Rev 487, 519–520 (1986).

4 Kitschelt, 16.1 Brit J Polit Sci at 68–77 (cited in note 2).

5 Sheldon Trubatch, *How, Why, and When the U.S. Supreme Court Supports Nuclear Power*, 3.1 Ariz J Envir L & Pol 2, 4–6 (2012).

though suing a federal agency is difficult, consistent failures are unusual given the diversity of cases. The trend is especially troubling since nuclear licensing litigation is expected to significantly increase in the next decade.⁶ These findings lead to a pressing question: why have the courts universally ruled against anti-nuclear plaintiffs in the past twenty-five years?

This study examines recent nuclear licensing lawsuits in order to understand the state of nuclear power lawsuits and their implications for regulating the industry. The Background and Literature Review sections present an overview of nuclear licensing and litigation and the debate surrounding nuclear power. Following a description of this study's methodology, the bulk of this paper is devoted to analyzing the plaintiffs, their claims, and the legal system that surrounds the thirty nuclear licensing lawsuits. An analysis of the current system of nuclear regulations demonstrates that administrative deference and limits on judicial review can help explain why all anti-nuclear groups lost their respective cases. This study concludes with a discussion of the implications for the trends of nuclear litigation and opportunities for further research. Despite constant losses, nuclear litigation remains one of the best tools activists have for creating nuclear policy change.

BACKGROUND

Since its introduction to the United States, nuclear energy has steadily become more and more crucial as an alternative energy source. As of March 2015, sixty-one nuclear power plants operate in thirty different states.⁷ In 2014, nuclear power generated 797.1 billion kilowatt hours of electricity, or 19.5% of the total United States electricity production.⁸ As a result, nuclear energy has become a part of the national policy debate. The federal government is objectively pro-nuclear; both the Obama administration and Congress (through the Energy Policy Act of 2005⁹) support the development of nuclear power plants under the careful control of the NRC.¹⁰ The NRC is structured and bound by regulations set forth in the National Environmental Policy Act¹¹ (NEPA), the Administrative

6 As of 2011, the owners of 22 reactors have the potential to apply for an extension of their operating license, creating significant new opportunities for anti-nuclear litigation [*Nuclear Reactor Operational Status Tables* (US Energy Information Administration, Nov 22, 2011), online at http://www.eia.gov/nuclear/reactors/stats_table3.html].

7 *U.S. Nuclear Power Plants* (Nuclear Energy Institute, accessed Jan 11, 2016), online at <http://www.nei.org/Knowledge-Center/Nuclear-Statistics/US-Nuclear-Power-Plants>.

8 *Id.*

9 42 USC § 15801 et seq (2005).

10 Stephanie Cooke, *After Fukushima, Does Nuclear Power Have a Future?* (NY Times, Oct 10, 2011), online at <http://www.nytimes.com/2011/10/11/business/energy-environment/after-fukushima-does-nuclear-power-have-a-future.html>.

11 42 USC § 4332 et seq (1969).

Procedure Act¹² (APA), and the Atomic Energy Act¹³ (AEA).¹⁴

Nuclear power plants operate in a relatively unique legal niche where federal administrative agencies, power plant companies, environmental groups, and scientific authorities all intersect in the regulation of the industry. They are run by private companies and are heavily subsidized by federal and state funds. The nuclear power industry is arguably the most regulated industry in the United States; through the NRC, the government is highly involved in all aspects of building and maintaining nuclear power facilities.¹⁵ Any private company that intends to engage with nuclear power or nuclear materials must first receive a license from the NRC. These licenses give companies permission to construct a power plant, operate the nuclear energy facility, and handle nuclear waste, among other activities. The previously mentioned laws mandate that proposed plants are held to strict safety, engineering, and environmental standards before a license to operate may be issued. After obtaining a license, a nuclear power plant may operate for a maximum of sixty years before being permanently decommissioned;¹⁶ licenses last forty years and may be extended for one twenty-year period after an administrative review.¹⁷ The licensing and re-licensing processes for nuclear power plants are transparent, and welcome public opinion in the form of public comments or formal hearings. These hearings represent the only opportunities that environmental groups, concerned citizens, and state officials receive to voice their concerns. Outside of these carefully defined periods, it is difficult for a complaining group to achieve policy change, since a court will only hear cases after complaints have gone through an NRC hearing.¹⁸ Except for lawsuits following nuclear accidents, the licensing process is the only arena where concerned individuals can monitor the legality of a nuclear power plant and NRC actions.

The NRC is also distinctive as a regulatory agency in legal matters. Due to its regulatory structure, the NRC has more power than any other type of governmental regulator.¹⁹ Where an agency like the Environmental Protection Agency regularly sues and is sued by the companies it regulates, the NRC has a much more collaborative relationship with nuclear power plants. Issues between

12 5 USC § 500 et seq (1946).

13 42 USC § 2011-2021, 2022-2286i, 2296a-2297h-13 (1954).

14 *Governing Legislation* (US Nuclear Regulatory Commission, Sept 30, 2014), online at <http://www.nrc.gov/about-nrc/governing-laws.html>.

15 "...the government remains more involved in commercial nuclear power than in any other industry in the USA" [*US Nuclear Power Policy* (World Nuclear Association, July 2016), online at <http://www.world-nuclear.org/info/Country-Profiles/Countries-T-Z/USA--Nuclear-Power-Policy/>].

16 *Backgrounder on Decommissioning Nuclear Power Plants* (cited in note 2)

17 *Reactor License Renewal Overview* (US Nuclear Regulatory Commission, Mar 9, 2015). Online at <http://www.nrc.gov/reactors/operating/licensing/renewal/overview.html>.

18 See *Public Meetings and Involvement* (US Nuclear Regulatory Commission, 2014), online at <https://www.nrc.gov/public-involve.html>.

19 *US Nuclear Power Policy* (cited in note 15).

the NRC and nuclear power plants are internally resolved within NRC processes, where plants can argue for exemptions and permissions, but ultimately must obey the NRC under threat of license revocation.²⁰ This fact also gives nuclear power plants a unique legal status. Since the NRC approves and oversees the license of a nuclear power plant and ultimately makes decisions concerning its operation, it is not possible for a public-interest group to directly sue a plant over a licensing issue.²¹ In these cases, the NRC is always the primary defendant, and is often joined by the nuclear power plant at question. In this way, the NRC offers power plants some legal protection—plaintiffs must sue the NRC, and only if they prevail will the NRC be forced to compel the nuclear power plant to take action.

Figure I on the following page provides a simplified summary and timeline of the process by which a nuclear power plant obtains a license.²² It also includes the points at which anti-nuclear groups may intervene and file claims against a plant and the NRC. Though it is not necessary to understand the full technical details of licensing a nuclear power plant, it is important to note that the process is lengthy, complex, and provides considerable opportunities for public intervention.

20 Revocation, Suspension, Modification, Amendment of Licenses and Construction Permits, Emergency Operations by the Commission, § 50.100 (US Nuclear Regulatory Commission, Dec 2, 2015). Online at <https://www.nrc.gov/reading-rm/doc-collections/cfr/part050/part050-0100.html>.

21 See *Annual Report on Court Litigation (Calendar Year 2014)* (US Nuclear Regulatory Commission: Policy Issue, Jan 30, 2015), online at <https://www.nrc.gov/docs/ML1503/ML15030A265.pdf>.

22 Table adapted from information found at *Public Involvement in Hearings* (US Nuclear Regulatory Commission, Dec 22, 2015), online at <http://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html>; *Backgrounder on Nuclear Power Plant Licensing Process* (US Nuclear Regulatory Commission, 2005), online at <http://www.nrc.gov/reading-rm/doc-collections/factsheets/licensing-process-bg.html>.

Figure I.
The Nuclear Licensing Process and Intervention Opportunities

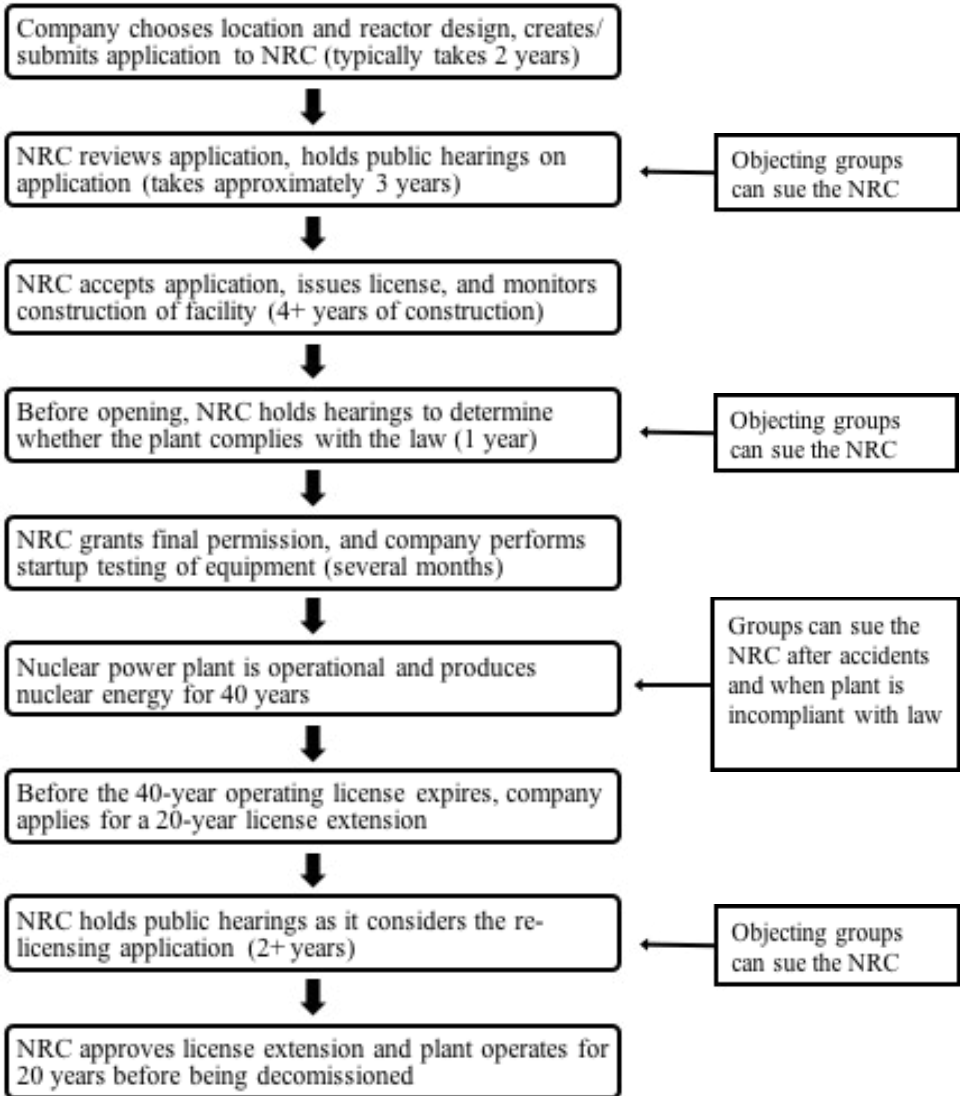


Figure I shows five windows of legal opportunity—the only five opportunities—where plaintiffs may instigate legal action against a nuclear power plant. The thirty cases examined in this study take place at all the various stages of the licensing or rulemaking process.

A few key issues encompass the debate surrounding nuclear power today; these issues motivate environmental and citizen groups to monitor nuclear power plants closely. Groups oppose nuclear power plants based on overlapping environmental, financial, and safety concerns. Their main objection is the lack of a permanent storage site for dangerous nuclear waste; radioactive byproducts are stored on site at nuclear power plants presenting security and terrorism risks.²³ The Yucca Mountain site has been proposed as a permanent safe storage location, but after thirty-six years of studies, laws, opposition, lawsuits, and inconsistent funding, the future of the site is still unknown and not a currently dependable solution.²⁴ While the risk of a nuclear accident is quite low for an individual facility, several catastrophic events—Fukushima, Three Mile Island, and Chernobyl—demonstrate that the high stakes of nuclear accidents warrant careful monitoring. These incidents also serve to turn public opinion against nuclear power generally.²⁵ Nuclear power plants create jobs and clean, reliable domestic electricity, but governments and groups argue that the enormous costs and risks outweigh the benefits of nuclear power.²⁶ Many of the issues detailed here are either explicitly referenced or mentioned as part of legal claims against nuclear power plants.

LITERATURE REVIEW

Considerable scholarship has been devoted to understanding nuclear regulation, environmental lawsuits, public participation in administrative law, and principles of judicial deference to government agencies. The debate and context surrounding these ideas provide an important basis for understanding the current state of nuclear litigation. Scholars have examined these themes almost exclusively in the realm of Supreme Court cases; this research fills a gap by analyzing these themes at the appellate level.

Scholars disagree vehemently about best practices for nuclear regulation, but there is a general consensus: both the substantive regulations and the licensing process require serious improvement. Pro-nuclear authors argue that licensing is an unreasonably lengthy process, bureaucratic hurdles are enormous, design requirements are outdated, and the government should do more to support nucle-

23 Robert Busby, *The United States's Failure to Establish a High-Level Nuclear Waste Storage Facility is Threatening Its Ability to Effectively Support Nuclear Nonproliferation*, 30 *Geo Wash J Intl L & Econ* 449, 457 (1996).

24 Todd Garvey, *The Yucca Mountain Litigation: Breach of Contract Under the Nuclear Waste Policy Act of 1982* (CRS Report for Congress, Dec 22, 2009).

25 Daniel A. Dorfman, *Changing Perspectives of U.S. and Japanese Nuclear Energy Policies in the Aftermath of the Fukushima Daiichi Disaster*, 30 *Pace Envir L Rev* 255, 264 (2012).

26 Richard Sieg, *A Call to Minimize the Use of Nuclear Power in the Twenty-First Century*, 9 *Vt J Env L* 305, 306–7 (2007–8).

ar power financially and politically.²⁷ These problems are exacerbated as nuclear power plants built in the 1970s age rapidly and few companies are willing to start the burdensome process of building new nuclear power plants.²⁸ Other authors have determined that economic uncertainties, environmental risks, and safety failures are signs that nuclear power should be more strictly regulated²⁹ and/or treated with caution.³⁰ Some discuss the prospects of a total nuclear power ban and phase-out, similar to Germany's plan to phase-out nuclear power entirely by 2022.³¹ The controversy surrounding nuclear regulation demonstrates that the laws and practices of the NRC can and should be improved.

Generally, scholars argue that the institutional framework of a government affects its propensity for change; more access to government authorities makes policy change more likely.³² Access points include both citizen actions (referendums, lawsuits, public hearings) and political abilities to drive change (presidential vetoes, congressional hearings, powers and rights of states).³³ Jack Barkenbus describes the political muddle regulating nuclear power as a "pluralistic, interest group model of political interaction," one that is highly susceptible to change and allows for a broad spectrum of public interest groups, individuals, and corporations to participate in the regulatory process.³⁴ This can also be referred to as an open "political institution structure," where non-governmental groups have ready access to the regulatory process.³⁵ This is in direct contrast to countries like France, whose robust and inaccessible regulatory institutions have promoted nuclear power without allowing public interest groups to politically express their discontent.³⁶ The generally accessible political structure of the NRC licensing process makes the question all the more salient: why are anti-nuclear

27 T. L. Fehring, *Nuclear Uncertainty: A Look at the Uncertainties of a U.S. Nuclear Renaissance*, 41 *Tex Envir L J* 279 (2010); John Gray, *Choosing the Nuclear Option: The Case for a Strong Regulatory Response to Encourage Nuclear Energy Development*, 41 *Ariz St L J* 315 (2009); Ernest Moniz, *Why We Still Need Nuclear Power - Making Clean Energy Safe and Affordable*, 90 *Foreign Affairs* 83 (2011); Per F. Peterson, Michael R. Laufer, and Edward D. Blandford, *Nuclear Freeze: Why Nuclear Power Stalled - and How to Restart It*, 93 *Foreign Affairs* 27 (2014).

28 Peterson, Laufer, and Blandford, 93 *Foreign Affairs* at 27–8 (cited in note 27).

29 Sieg, 9 *Vt J Env L* at 371 (cited in note 26);

30 Karl S. Coplan, *The Externalities of Nuclear Power: First, Assume We Have a Can Opener....*,

35 *Ecology L Currents* 17, 28, (2008).

31 Lars Kramm, *The German Nuclear Phase-out after Fukushima: A Peculiar Path or an Example for Others*, 3 *Renewable Energy L & Pol L Rev* 251 (2012).

32 See Hendrik Spruyt, *Ending Empire: Contested Sovereignty and Territorial Partition* (Cornell 2005).

33 *Ibid.*

34 Jack N. Barkenbus, *Nuclear Power and Government Structure: The Divergent Paths of the United States and France*, 65.1 *Soc Science Q* 37, 44 (Mar 1, 1984).

35 Felix Kolb, *Protest and Opportunities: The Political Outcomes of Social Movements* 54 (Campus Verlag 2007).

36 Barkenbus, 65.1 *Soc Science Q* at 37.

cases always losing in a system designed to include dissent?

Lawsuits are regarded as invaluable tools of social movements, especially in environmental and nuclear litigation.³⁷ Though some argue that lawsuits and courts are too weak to create meaningful political reform, environmental scholars agree that nuclear litigation plays an important role in defining nuclear policy.³⁸ Since the birth of the environmental movement in the 1970s, environmental interest groups have been successful in taking claims to the courts, winning, and enacting policy changes.³⁹ Scholars have identified several key factors in the general success of environmental special-interest litigation. These include “the extent to which the issue is sharply defined; the level of coordination and cooperation with other interest groups; and the intervention or support offered by the federal government.”⁴⁰ Anti-nuclear groups generally sue on sharply defined issues and have varying levels of coordination within their coalitions, but paradoxically face challenges in litigating against the federal government.⁴¹

Judicial deference to agency decision-making is an important component of understanding anti-nuclear litigation. On this topic, scholars are unanimous: environmental and nuclear lawsuits are marked by combination of extreme statutory and voluntary deference to government agencies. Sheldon Trubatch examines the sixteen most important Supreme Court cases related to nuclear power plants and determined that the Supreme Court has tended to be deferential to nuclear power plants and the NRC.⁴² Scholars argue that deference can make sense, as in the case of *Chevron*: judges are generalists who often lack a scientific background, and scientific decisions are best left to the judgment of NRC experts.⁴³ However, some scholars believe that legal principles such as public participation and administrative transparency are lost when courts are deferential to agency decisions. Emily Mezell argues that the intersection of scientific and administrative law creates a “super-deference” principle that undermines the ex-

37 Lettie McSpadden Wenner, *Interest Group Litigation and Environmental Policy*, 11.4 Pol Stud J 671 (1983).

38 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 2d Ed 2008); Edward M. Davis, *Nuclear Regulation: The Court Changed Nothing* (NY Times, May 1, 1983), online at <http://www.nytimes.com/1983/05/01/opinion/1-nuclear-regulation-the-court-changed-nothing-133960.html>; Trubatch, 3.1 Ariz J Envir L & Pol (cited in note 5); Richard S. Harper, *Pacific Gas & Electric Revisited: Federal Preemption of State Nuclear Moratoria*, 2 Geo Wash J Energy & Envir Law 76 (2011).

39 Hassler and O’Connor, 13 BC Envir Affairs L Rev at 519–520 (cited in note 3).

40 Ibid.

41 Evans, 54 Oregon L Rev at 619–620 (cited in note 1).

42 Trubatch, 3.1 Ariz J Envir L & Pol at 2–3 (cited in note 5). Note, however, that the Supreme Court has also “held in favor of states’ rights in areas not directly related to health and safety matters regarding radioactivity” (2).

43 Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 Admin L Rev 429 (2006); David R. Woodward and Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31.3 Admin L Rev 329 (1979).

pectation of fair judicial review.⁴⁴ Scholars suggest that courts must increase their efforts to separate science from policy and create more predictable standards for reviewing agency decisions.⁴⁵

This study builds on the existing scholarship of nuclear regulation and nuclear court cases, and broadens it to include the thirty most recent appellate-level cases. The research conducted fills a gap in the field by addressing nuclear licensing cases that did not go on to the Supreme Court but are nonetheless important. Scholars have focused on the most important nuclear Supreme Court cases and examined what *did* happen; this paper examines appellate cases and explains why something *did not* happen.

METHODS

This paper examines thirty appellate-level nuclear licensing cases that were published in the Federal Record from 1989-2014. The federal court of appeals has original and exclusive jurisdiction over claims against the NRC, meaning these cases were appealed from NRC hearings rather than district courts.⁴⁶ The cases were selected from LexisNexis based on the initial search terms “license” and “nuclear power plant.” This paper excludes cases that dealt with employment or waste management issues at nuclear power plants, focusing only on cases where licensing was explicitly addressed. This research starts with the most recent cases and works backwards, eventually reaching thirty cases that covered a twenty-five year time frame. The examination is limited to cases after 1989 due to time constraints and an interest in discussing only the most recent case trends. The fail-to-prevail streak may have started before 1989; a cursory survey of cases from 1988 did not reveal any successful plaintiffs.

Each case included in this study is categorized based on its date, circuit, plaintiffs, legal issue, subsequent history, and outcome (see Appendix A). The NRC is the defendant in every case, and is usually joined by the relevant nuclear power plant. Plaintiffs are composed of an array of citizen groups, state and local governments, private individuals, and coalitions of the three. All 30 lawsuits raise questions about the licensing process of nuclear power plants, and they do so by raising a variety of safety concerns, liability fears, environmental issues, consti-

44 Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109.5 Mich L Rev 733 (2011).

45 Laura Anzie Nelson, *Delineating Deference to Agency Science: Doctrine or Political Ideology*, 40 Envir L, 1057 (2010).

46 28 USC § 2342(4). There is one exception, *Brodsky v United States Nuclear Regulatory Comm’n.*, 704 F3d 113 (2d Cir 2013), in which the *Brodsky* coalition sued the NRC twice. The second lawsuit initiated in district court and was appealed. See the *Technical Plant Problems* section for further discussion of the *Brodsky* cases.

tutional questions, and challenges to NRC decision-making. Of these 30 lawsuits, 17 dismissed the plaintiffs' claims entirely and five were dismissed for lack of jurisdiction. Five were reviewed and ruled in favor of the NRC, and three decisions dismissed major claims but remanded minor claims that were ultimately rejected by the NRC.

Throughout this paper, the term "fail-to-prevail" is used to describe the trend evident in the thirty cases, in which no court ruled in favor of the plaintiff. While each plaintiff failed to win their case, it does not necessarily mean that they failed to accomplish something with their case. In the three court decisions labeled as *remanded and rejected*, the plaintiffs did prevail on one of their issues. However, each of these issues was minor, failed to reverse a decision of the NRC, and ultimately failed to accomplish concrete goals; these will be discussed further in the analysis of *remanded and rejected* cases. For the purposes of this paper, the trend should be understood as a failure to force the NRC to alter a decision, and a failure of the plaintiff to prevail on the fundamental claim of a case. The findings of this study only apply to the thirty cases from the appellate courts. The fail-to-prevail trend is not necessarily evident within the public participation opportunity structure of the NRC, as groups regularly use NRC hearings to present their arguments and advocate for change.⁴⁷ Further research may investigate the success rates of anti-nuclear groups within the structure of the NRC; this paper investigates the fail-to-prevail trend that occurs once anti-nuclear groups take their claims to the courts.

Initial coding establishes that the thirty cases form a general national trend. The cases span twenty-five years and eight circuits, and cover a variety of legal issues surrounding nuclear power plant licensing.⁴⁸ In analyzing these cases, this study attempts to answer several questions about judicial review of NRC decisions, public participation in the nuclear licensing process, and the limitations of anti-nuclear lawsuits. Categorizing the cases has shown that despite considerably different variables, none of these lawsuits resulted in victory for the plaintiffs and a direct impact on nuclear regulatory policy. This paper examines the thirty cases in aggregate by first evaluating their plaintiffs, organizing their claims into *Technical Plant Problems, Hearings, and Rulemaking* categories, and analyzing the regulatory framework that surrounds nuclear litigation. Additionally, it clarifies how public participation fits within the nuclear licensing process and isolates the points at which anti-nuclear groups may sue nuclear plants. In the last section, it addresses the outcomes of these types of cases and discusses the context of nuclear litigation by examining reasons why anti-nuclear groups continue to litigate despite continuously disappointing results.

47 *Public Participation*, (US Nuclear Regulatory Commission, Oct 22, 2014), online at <http://www.nrc.gov/public-involve/open/public-participation.html>.

48 Cases come from the 1st, 2d, 3d, 5th, 6th, 7th, 9th, and DC Circuits.

POSSIBLE CAUSES OF THE FAIL-TO-PREVAIL TREND:
ANALYSIS OF PLAINTIFFS

When attempting to determine why a number of parties lost their cases, it is useful to examine first the plaintiff, their claims, and the legal context of the case. The continual losses of licensing claims raise two questions of validity: first, the competency of the plaintiffs, and second, the value of the issues at hand. Do the plaintiffs lose because they are unorganized groups and incompetent litigators? An examination of the plaintiffs reveals that this explanation is largely invalid. In twenty-nine of the thirty cases, at least one of the plaintiffs or the plaintiffs' attorney can be confidently identified as a competent and strong litigator.

Plaintiffs in these cases include forty-three environmental groups, public interest groups, local anti-nuclear groups, states, and government officials, and cases are most often brought by coalitions of these various organizations. Parentheses around a number indicate that a group participated in multiple lawsuits.

Figure II.
List of Plaintiffs

States, Cities, and Govt. Officials	Environmental Groups	Anti-Nuclear Groups	Public Interest Groups and Citizens
<ul style="list-style-type: none"> • Connecticut • Massachusetts (5) • New Jersey • New York (2) • Ohio • Vermont (2) • Brook Park, OH • Cleveland, OH • County of Westchester, NY • Hampton, N.H. • Andrew J. Spano, County Executive of Westchester 	<ul style="list-style-type: none"> • Blue Ridge Environmental Defense League (3) • Environmental and Resources Conservation Org. • New Jersey Environmental Federation • Rockland County Conservation Association • Riverkeeper Inc. • Sierra Club (5) 	<ul style="list-style-type: none"> • Beyond Nuclear • Citizens for Fair Utility Regulation • Grandmothers for Energy Safety • Limerick Ecology Action • New England Coalition (2) • Nuclear Energy Information Service • Nuclear Information and Resource Service (3) 	<ul style="list-style-type: none"> • American Public Power Association • Anthony J. Celebrezze et. al • Dr. Zinovy Reytblatt • Jacob Arnov et. al • National Whistleblower Center • New Jersey Public Interest Research Group • Ohio Citizens for Responsible Energy

States, Cities, and Govt. Officials (Continued)	Environmental Groups (Continued)	Anti-Nuclear Groups (Continued)	Public Interest Groups and Citizens (Continued)
<ul style="list-style-type: none"> • Richard Brodsky, New York Assemblyman (2) 	<ul style="list-style-type: none"> • Union of Concerned Scientists (2) 	<ul style="list-style-type: none"> • Public Health and Sustainable Energy (2) • Safe Energy Coalition of Michigan • San Luis Obispo Mothers for Peace • Seacoast Anti-Pollution League (2) • Toledo Coalition for Safe Energy • Westchester Citizen's Awareness Network (2) 	<ul style="list-style-type: none"> • Ohio Citizens for Responsible Energy • Public Citizen (2) • Robert L. Anthony • Sisters, Servants of the Immaculate Heart of Mary Congregation • Thomas Martin, prison inmate

See Appendix B for additional information on plaintiffs.

The diverse group of plaintiffs contains many well-funded and established litigators. The Sierra Club pioneered environmental litigation strategies in the 1970s and continues to be an influential environmental litigator today.⁴⁹ With over thirty full-time attorneys and countless pro-bono lawyers on their records, the Sierra Club has legitimacy, funding, and a strong record of environmental court victories.⁵⁰ The Blue Ridge Environmental Defense League (BREDL) is an experienced watchdog organization that focuses heavily on anti-nuclear litigation. Their anti-nuclear webpage solely contains information about BREDL's legal activities, licensing procedures they currently monitor, and press releases covering petitions and motions made against the NRC.⁵¹ The Union of Concerned Scientists has a strong reputation and multi-million dollar budget; Public Citizen can claim hundreds of court victories in public interest cases; Riverkeeper Inc.

49 See Evans, 54 Oregon L Rev (cited in note 1).

50 Ibid; *Sierra Club Environmental Law Program: Staff* (Sierra Club), online at <http://content.sierraclub.org/environmentallaw/staff>.

51 *BREDL Nuclear Campaign* (Blue Ridge Environmental Defense League 2015), online at <http://www.bredl.org/nuclear/index.htm>.

has successfully advocated and litigated for legal change in New York State.⁵² It can safely be assumed that these groups and others similar to them are legitimate plaintiffs with competent legal counsel. Sixteen of the thirty cases have at least one competent and experienced litigation group.⁵³

The heavy presence of state and city governments also affirms that the losses in these cases cannot be explained by inadequate plaintiffs. Six states, five cities, and two politicians are represented as parties in the cases; their interest and legitimacy are undeniable. Some states, such as Vermont, are determined to end the use of nuclear power within their boundaries; most others, such as New York, are interested in strictly regulating nuclear power and holding both individual plants and the NRC to high standards.⁵⁴ Twenty-six of the thirty cases have at least one plaintiff who is a government official or a well-established litigation group.

This leaves four cases that do not have well-established litigation groups or government officials as plaintiffs. A local citizen's group and a religious public-interest group filed suit in *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*; they were represented by an environmental litigator with 30 years of experience and previous victories against the NRC.⁵⁵ Two other cases brought by similar local interest groups hired attorneys with considerable experience in environmental public interest law.⁵⁶ Though the capabilities of these attorneys cannot be definitively proven, their backgrounds make it safe to assume that they are experienced, competent, and qualified to argue nuclear licensing lawsuits. The only questionable plaintiffs appear in *Arnow v. United States Nuclear Regulatory Comm'n*, which was brought by six citizens and argued by an attorney who specializes in wrongful imprisonment and police brutality cases.⁵⁷

52 *Nuclear Power* (Union of Concerned Scientists), online at <http://www.ucsusa.org/our-work/nuclear-power>; *Accomplishments* (Public Citizen 2014), online at <http://www.citizen.org/Page.aspx?pid=2307>; *Close Indian Point* (Riverkeeper: NY's Clean Water Advocate 2014), online at <http://www.riverkeeper.org/campaigns/stop-polluters/indian-point/>.

53 Appendix B contains the full list of coalitions, with each competent and experienced litigator noted.

54 Hope Babcock, *Can Vermont Put the Nuclear Genie Back in the Bottle: A Test of Congressional Preemptive Power*, 39 *Ecology L Q* 691 (2012).

55 *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*, 866 F2d 1473 (DC Cir 1989), represented by Bob Guild: Sammy Fretwell, *Veteran Columbia Conservation Lawyer Enjoys the Fight* (The State, Sept 18, 2014), online at <http://www.thestate.com/2014/09/18/3688364/veteran-columbia-conservation.html>.

56 Kimberley K Walley and Eric R. Glitzenstein, counsel on *Reyblatt v. United States Nuclear Regulatory Comm'n*, are attorneys at environmental public interest firm Meyer Glitzenstein & Crystal; see *About Us* (Meyer Glitzenstein & Crystal), online at <http://www.meyerglitz.com/>; Charles Elliott, counsel on *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n*, specializes in environmental and public interest law: see *Charles Elliott* (LinkedIn), online at <https://www.linkedin.com/in/charleselliottlaw>.

57 John Stainthorpe, counsel for *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F2d 223

The NRC found Arnow's petition groundless and the court dismissed the case for lack of jurisdiction and citing the inexperience of the plaintiffs. However, one case with inadequate complainants cannot explain the trend of established environmental plaintiffs consistently losing cases; the explanation lies outside of the plaintiffs and their litigation histories.

ANALYSIS OF CASES

The second question of validity concerns the content of the cases themselves. Are plaintiffs losing licensing challenges because their lawsuits are frivolous and their issues invalid? An examination of the issues shows that groups are largely raising legitimate issues that the courts can address. The complaints raised in these cases cover a wide variety of issues that range from fears about safety procedures to questions about the NRC's ability to grant exemptions. Under the Atomic Energy Act, any action taken by the NRC is subject to judicial review, but the licensing process limits when and how a group may raise a claim.⁵⁸ As outlined in Fig. I, there are five different public access points in the nuclear power plant licensing process. A group may sue after it has engaged with the NRC at one of the following points:

- I. A nuclear power plant company applies for a construction and operating license, and the NRC holds hearings allowing the public to voice opposition and support.⁵⁹ Groups may sue if they are denied a hearing or the NRC does not consider their arguments made in a hearing.
- II. After building a nuclear power plant, the NRC holds hearings to determine whether the plant complies with the law, providing more opportunities to sue over the hearing.⁶⁰
- III. Once a plant is operational, groups may sue after an accident or if a problem arises at the plant.⁶¹
- IV. A nuclear power plant applies for an extension of its license, and the NRC holds public hearings, again providing opportunities for lawsuits.⁶²
- V. Groups may sue at any point after the NRC makes a new rule governing the licensing process, the NRC's ability to issue licenses, and the NRC's

(7th Cir.1989): *John Stainthorp* (People's Law Office), online at <http://peopleslawoffice.com/about-civil-rights-lawyers/attorney-staff-bios/john-stainthorp/>.

58 42 USC § 2239(b).

59 *Public Involvement in Hearings* (cited in note 22).

60 *Ibid*.

61 *Public Involvement in Licensing* (US Nuclear Regulatory Commission, Oct 20, 2014). Online at <https://www.nrc.gov/about-nrc/regulatory/licensing/pub-involve.html>.

62 *Ibid*; *Public Involvement in Hearings* (cited in note 59).

standards for licensing plants.⁶³

These different access points lead to different types of claims that can be broken down into three categories: *Rulemaking*, *Hearings* and *Technical Plant Problems*. Rulemaking cases result from groups objecting after the NRC changes a licensing rule (point V). *Hearings* cases are claims that arise from an NRC hearing (points I, II, and IV). *Technical Plant Problems* describe which cases involve a physical problem at an operational plant (point III). Understanding each type of complaint is crucial to understanding both the validity of claims and why the courts rejected them.

Rulemaking

The eleven cases with a *Rulemaking* issue concern instances when the NRC changed its own rules regarding the licensing process. These cases are more general than the other two types, as they focus on an NRC rule rather than a specific nuclear power plant. Rulemaking cases demonstrate the effect that external events and disasters can have on agency rules. Some of these lawsuits generally seek to hold the NRC to high standards, but many of them are direct results of the 9/11 attacks or the 2011 Fukushima nuclear accident in Japan. After both disasters, the NRC responded with task forces to examine policies and make recommendations to protect American nuclear plants from terrorist attacks, natural disasters, and catastrophic shutdowns. The NRC implemented several new policies to address the potential threats, but groups, believing that the new policies were inadequate, sued the NRC. These *Rulemaking* issues revolve entirely around NRC decision-making. Under the AEA, the NRC has broad jurisdiction to respond to catastrophes and determine nuclear policy. Groups can only overturn NRC rules if they can prove that the NRC ignored crucial evidence while making policy decisions.

Hearings Cases

The seven *Hearings* cases address the NRC's conduct during the re-licensing of nuclear power plants, where plaintiffs argue that the NRC did not comply with laws regulating the agency. Unlike *Technical Plant Problems*, these cases do not involve a problem at a plant—they involve purely procedural problems that arise during the licensing process. These cases share a common theme: plaintiffs are suing for the right to be heard. Examples of complaints include claims that a group was improperly denied a hearing, that the NRC refused to consider a

63 *The Rulemaking Petition Process* (US Nuclear Regulatory Commission 2012), <http://www.nrc.gov/about-nrc/regulatory/rulemaking/petition-rule.html>.

group's objections to a plant, and that the NRC denied a hearing to a late-filing group. In order to win a *Hearings* case, plaintiffs must prove that the NRC acted unreasonably or otherwise improperly in granting or denying a hearing.

Technical Plant Problems

These twelve cases involve technical issues with specific nuclear power plants that call into question the technical decision-making power of the NRC. Generally, claims originate from problems that occur at plants. If the NRC allows the problem to continue or inadequately addresses the issue, outside groups may sue because they disagree with the NRC's decision. *Technical Plant Problems* cases include charges regarding an operator's plans for inspecting corrosion in a safety structure, a protective barrier that did not meet fire safety standards, and a small leak of radioactive material.⁶⁴ In bringing these cases, groups challenge the NRC's technical decision-making ability, and attempt to force the NRC to correct the problem or shut the nuclear power plant down entirely. Plaintiffs have the high burden of proving that the NRC was unreasonable or incorrect in making a technical decision.

The Limits of Anti-Nuclear Claims

Breaking the thirty cases into three subcategories highlights important trends in nuclear licensing litigation, and clarifies why anti-nuclear groups choose to raise these types of issues. Whether the goal is to shut down a nuclear plant or to hold it to stricter standards, groups raise similar types of narrow and procedure-based claims. These are the only types of claims that groups can bring under the current framework of nuclear regulation.

Foremost, the majority of these claims attempt to use procedural errors to overturn substantive decisions. Groups cannot sue a nuclear power plant simply because they disapprove of nuclear power; they must find a specific procedural error or problem in order to make a claim under the APA.⁶⁵ These cases show that groups have tried varied and creative methods of overturning NRC decisions within this narrow framework; so far, all of them have failed. Many objections are based in environmentalism and consideration of alternative energy sources. Others use antitrust laws to argue that licensing a plant amounts to commissioning an illegal trust.⁶⁶ The NRC licensed a plant in an area near a prison; a prisoner joined the plaintiff coalition, arguing that the plant and state had inadequate

⁶⁴ See cases listed in appendix A.

⁶⁵ 42 USC § 2239(b).

⁶⁶ *American Pub. Power Ass'n v United States Nuclear Regulatory Comm'n*, 990 F2d 1309 (DC Cir 1993).

plans for protecting prisoners in the event of a nuclear accident.⁶⁷ Unfortunately for anti-nuclear groups, these limited and specific claims are often the strongest charges, other than those relating to nuclear accidents, that can be brought against the NRC.

Given that plaintiffs can only make narrow and interpretable claims, it is fortunate that the NRC is not making illegal policy decisions. If the NRC was blatantly violating its statutory jurisdiction, anti-nuclear groups would have strong claims against the agency, and the record would likely show more plaintiffs winning their cases. Groups can also bring strong claims when there are nuclear accidents and leaks; the lack of these types of claims indicates a dearth of nuclear accidents. In some sense, these cases reflect a trend that the NRC is doing its job and acting well within its legal limits, since the judiciary does not need to correct its decisions. Instead, the thirty cases largely hinge on matters of interpretation, where a group uses administrative procedure to make a legal argument against the substance of a disagreeable decision. As these cases show, it is difficult, if not impossible, to prevail with these limited and interpretable claims.

ANALYSIS OF NUCLEAR POWER LEGAL STRUCTURE

While the fail-to-prevail trend cannot be explained by incompetent plaintiffs or frivolous claims, it can be explained by the statutes that govern the conduct of the NRC and limit judicial review of NRC actions. The field of nuclear administrative law is structured so that heavy presumption and deference is afforded to NRC actions, and groups face serious difficulties in overcoming this deference. Judicial review is limited by the APA, NEPA, the AEA, and several Supreme Court decisions that increased agency deference, limited the scope of reviewable claims, and created the *Chevron* Test. These laws, standards, and precedents create barriers that can explain why all recent anti-nuclear plaintiffs have failed to prevail in court.

Statutory Limitations

The Administrative Procedure Act (APA) governs all federal agencies and sets important standards for agency rulemaking, public participation, and transparency in administrative procedures. It also defines the scope of judicial review over the NRC, and allows the judiciary to intervene in order to:

- (1) compel agency action unlawfully withheld or unreasonably delayed;
- and

⁶⁷ *Limerick Ecology Action, Inc. v United States Nuclear Regulatory Comm'n*, 869 F2d 719 (3d Cir 1989).

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.⁶⁸

These provisions might appear to be broad, but, as the cases show, the actual abilities of the courts to review NRC actions are both limited and held to relatively low standards. This scope of review is largely designed to both hold the NRC to its procedural guidelines and to correct the agency if it makes a blatantly illegal decision. It contains within its legal purview no measures for judging the discretion of an agency. Therefore, groups have to meet an incredibly high standard to prove that the NRC abused its discretion or acted inadequately to solve a problem. These standards can be generalized in the form of a question: did the NRC act in a reasonable manner? The answer to this question is nearly always “yes,” regardless of the action or statute invoked. This puts an enormous burden of proof upon the plaintiffs, as they must prove that the NRC acted unreasonably, arbitrarily, or capriciously.

The nature of the National Environmental Policy Act (NEPA) also limits judicial review. NEPA requires the NRC to consider the environmental impact of a plant before offering a license, and several plaintiffs make their claims under NEPA. NEPA forces the NRC to take a “hard look” at the environmental consequences of licensing a nuclear power plant but, to the detriment of anti-nuclear groups, “NEPA seeks to guarantee process, not specific outcomes.”⁶⁹ If the NRC can prove that their actions satisfied the “hard look” requirement, the courts have no ability to demand additional environmental actions or to offer plaintiffs their requested relief. In two separate cases, Massachusetts and the Blue Ridge Environmental Defense League sued the NRC after the Fukushima accident, claiming that the NRC should supplement its environmental impact statements using information revealed in the wake of the accident.⁷⁰ In submitting this suit, the plain-

⁶⁸ Administrative Procedure Act, 5 USC § 706.

⁶⁹ *Commonwealth v United States Nuclear Regulatory Comm'n*, 708 F3d 63, 67 (1st Cir 2013).

⁷⁰ *Ibid*; *Blue Ridge Envtl. Def. League v United States Nuclear Regulatory Comm'n.*, 716 F3d 183

tiffs asked the NRC to act beyond the minimum requirements for considering environmental impact. The reviewing courts determined they had no legal ability to require the NRC to act beyond its statutory requirements, and since the NEPA requirements were fulfilled, the plaintiffs' claims were denied.⁷¹

Supreme Court Precedents

It is also important to recognize the role that previous Supreme Court cases played in defining the scope of nuclear litigation today. The period of heightened nuclear litigation during 1969–1984 created important precedents that sometimes helped but often hampered anti-nuclear lawsuits. States pushing for more regulatory power over nuclear power plants were rebuffed by *Northern States Power Co. v Minnesota*⁷² (1972), which established federal preemption over most nuclear regulations and gave the NRC exclusive jurisdiction over nuclear hazards.⁷³ Three Supreme Court cases argued that alternative energy options should be considered as part of the nuclear licensing process; they were directly defeated by precedents set in *Vermont Yankee v Natural Res. Def. Council*,⁷⁴ which requires the NRC to consider only feasible alternatives.⁷⁵ The 1978 Vermont Yankee case is one of the most important turning points in nuclear litigation, as the cases that followed it became increasingly narrow and event-focused.⁷⁶

The 1983 Supreme Court case *Baltimore Gas & Electric Co. v Natural Res. Def. Council*⁷⁷ created some of the strongest standards for judicial deference to NRC decision-making. The original claim, brought by the Natural Resources Defense Council (NRDC) and State of New York, sought to force the NRC to consider the environmental impact of waste storage when licensing a nuclear power plant.⁷⁸ Not only did the plaintiffs fail to prevail in the Supreme Court, but the 8-0 decision also raised standards of judicial deference to the NRC, stating that:

(DC Cir 2013).

71 *Blue Ridge*, 716 F3d 183 at 200.

72 447 F2d 1143 (8th Cir 1971), aff'd 405 US 1035 (1972) (mem).

73 *Ibid*. In 1974, the NRC was created from a slightly different regulatory body known as the Atomic Energy Commission. Functionally their duties and regulations are indistinguishable, so in order to simplify acronyms for the reader, I refer to the AEC as the NRC.

74 *Vt. Yankee Nuclear Power Corp. v Natural Res. Def. Council, Inc.*, 435 US 519 (1978).

75 *Ibid*; see *Beyond Nuclear v United States Nuclear Regulatory Comm'n*, 704 F3d 12 (1st Cir 2013), *Env'tl. Law & Policy Ctr. v United States Nuclear Regulatory Comm'n*, 470 F3d 676 (7th Cir 2006), *City of Cleveland v United States Nuclear Regulatory Comm'n*, 68 F3d 1361 (DC Cir 1995).

76 *Trubatch*, 3.1 *Ariz J Envir L & Pol* at 12 (cited in note 5).

77 *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 US 87 (1983).

78 *Ibid*.

...a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.⁷⁹

Twelve of the thirty fail-to-prevail cases cite this particular passage, and it is considered an instance where the Court offered “super-deference” to agency decisions.⁸⁰ The heavy presumption of NRC expertise and limited judicial review are highly evident in these cases, with one opinion stating, “After all, judges are neither scientists nor technicians,” before denying a petition for review.⁸¹

The *Chevron* test is arguably the most important test used during judicial review of administrative law, and it expands upon the deferential language found in *Baltimore Gas & Electric Co. v Natural Res. Def. Council*.⁸² The *Chevron* test is rooted in a 1984 Environmental Protection Agency case and is the standard for giving deference to agency decision making. It is usually applied in cases where ambiguous statutory language leaves room for differing interpretations of an issue. The test consists of two steps: 1) Did Congress specifically address or define the issue? If so, both the court and agency defer to “the unambiguously expressed intent of Congress.”⁸³ 2) If Congress is silent or ambiguous on the issue, the court does not make a determination itself. Rather, the court must question whether the agency’s decision is an acceptable interpretation of the statute.⁸⁴ *Chevron* prevents generalist judges from ruling on specific technical questions, and instead forces judges to review the laws that govern the science. Hence, under *Chevron*, judges attempt to defer first to Congress and then to the NRC, leaving little room for groups to object to statutory interpretations by the government agency.

The *Chevron* test provided a somewhat creative solution to a serious problem in administrative law, but the test has largely been detrimental to anti-nuclear groups. Plaintiffs in *American Pub. Power Ass’n v. United States Nuclear Regulatory Comm’n*. were defeated by the *Chevron* test. The NRC and plaintiffs disagreed on the meaning of the word “application”; plaintiffs argued that the existing NRC definition should be broadly interpreted, which would require plants seeking a license renewal to undergo anti-trust review.⁸⁵ Under *Chevron*, judges could not rule on whether “application” should be read broad-

79 Ibid at 103 (Justice Powell “took no part in the consideration or decision of the cases,” resulting in an 8-0 decision).

80 Trubatch, 3.1 Ariz J Envir L & Pol at 14 (cited in note 5).

81 *Riverkeeper Inc. v Collins*, 359 F3d 156 (2d Cir 2004).

82 May, 58 Admin L Rev (cited in note 43).

83 *Chevron U.S.A. v Natural Res. Def. Council*, 467 US 837 (1984).

84 Ibid.

85 *American Pub. Power Ass’n*, 990 F2d 1309.

ly or narrowly, or whether plants should undergo anti-trust review during their re-licensing process. Instead, they examined the legislative history and context behind the NRC's interpretation of "application" and found the following:

The balance of petitioners' arguments are basically policy oriented. . . . We suppose the *NRC could have accepted petitioners' arguments* and determined to conduct antitrust review as a matter of discretion, but we *cannot say that the Commission's construction of the statute is unreasonable*. We have no warrant to quarrel with the Commission's policy judgment. . . . The Commission has permissibly chosen to limit its antitrust review duties to situations where it issues a new operating license.⁸⁶

This deference was offered even after judges recognized that the plaintiffs had substantive, legally sound, and historically reasonable arguments.⁸⁷ This passage demonstrates the effects of the *Chevron* test, *Baltimore* precedents, and the "reasonableness" standards under the APA; courts must treat the NRC with deference unless their actions are unreasonable.

The Supreme Court cases also demonstrate the inherent risk associated with litigating nuclear issues: the risk of big losses that ultimately harm anti-nuclear efforts. Many of the cases that granted increased deference to the NRC and limited the scope of anti-nuclear litigation originated from an anti-nuclear group's attempt to shut down nuclear power plants through legal means. A particular irony surrounds *Baltimore Gas & Electric Co. v. Natural Res. Def. Council*, as it is very comparable to the thirty fail-to-prevail cases. The NRDC, a well-established environmental litigator, and the State of New York originally brought the case and initially won in appellate court. Though they were supported by briefs of amici curiae from fourteen states and two environmental groups, they failed to prevail over the NRC and the Baltimore Gas Co. in the Supreme Court.⁸⁸

Structure in Action: How Rulemaking, Hearings, and Technical Plant Problem Cases Lose

Anti-nuclear plaintiffs sue within a legal structure that makes it difficult for them to prevail in court. Returning to the categories of *Hearings, Technical Plant Problems, and Rulemaking* specifically reveals how these plaintiffs fail.

Why Rulemaking Cases Lose. Rulemaking cases concern the NRC's abil-

⁸⁶ *Ibid* (emphasis added).

⁸⁷ *Ibid*.

⁸⁸ Minnesota, Wisconsin, Kansas, Louisiana, Connecticut, Vermont, Missouri, Tennessee, South Dakota, New Mexico, Hawaii, West Virginia, Wyoming, Texas, Kansans for Sensible Energy, and Limerick Ecology Action, Inc. all supported defendants with briefs of amici curiae. *Baltimore Gas & Elec. Co.*, 462 US 87 (1983).

ity to make and enforce rules. Many of these plaintiffs had logically valid arguments that were legally based on speculation and outside of the scope of judicial review. *Riverkeeper Inc. v Collins* is a post-9/11 case in which plaintiffs requested that the NRC force nuclear power plants to bolster anti-terrorist defenses, especially against attacks from hijacked airplanes.⁸⁹ After 9/11, the NRC formed a taskforce that analyzed and recommended new security measures, but groups sued the NRC claiming that the taskforce's recommendations were not extensive enough. Legally, *Riverkeeper Inc.* could not prove that the NRC's taskforce efforts were inadequate, as the NRC was able to demonstrate that it took specific actions to respond to terrorist threats.⁹⁰ The reviewing court also noted that it had no jurisdiction under the APA to demand specific policies from the NRC:

The issues *Riverkeeper* raises are plainly serious and of pressing concern. But as a court established by Congress under Article III of the Constitution, we have jurisdiction to decide only those disputes that the Constitution or Congress gives us the power to decide. . . . It is clear under the Administrative Procedure Act, and its interpretation by the Supreme Court in *Chaney*, that we have been given no such power here.⁹¹

This passage, and other language from the *Riverkeeper* decision, clearly indicates the limits of judicial review. Though the judges recognize the important role of public-interest groups in ensuring that the public is protected from nuclear threats, they ultimately state that the NRC is the sole body that “must decide the difficult questions concerning nuclear power safety.”⁹²

Why Hearings Cases Lose. In the seven *Hearings* cases, plaintiffs alleged that the NRC misinterpreted the APA in failing to grant a hearing. In court, the NRC had to satisfy the low burden of proof that they reasonably followed the correct procedures for denying the hearing. *Env'tl. & Res. Conservation Org. v United States Nuclear Regulatory Comm'n*⁹³ was an exercise of judicial review at its most basic level: the Ninth Circuit reviewed the NRC's decision to deny the plaintiff a hearing, found “the NRC committed no reversible errors in arriving at its decision,” and affirmed the NRC decision in a simple two-page opinion.⁹⁴ *Citizens for Fair Utility Regulation v. United States Nuclear Regulatory Comm'n*⁹⁵

89 *Riverkeeper Inc.*, 359 F3d at 156.

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Env'tl. & Res. Conservation Org. v. United States Nuclear Regulatory Comm'n*, 996 F2d 1224 (9th Cir 1993).

94 *Ibid* at 1224.

95 *Citizens for Fair Utility Regulation v. United States Nuclear Regulatory Comm'n*, 898 F2d 51 (5th Cir 1990).

followed a similar path: the NRC followed the correct procedures in denying a late-filed petition for a hearing, and the Fifth Circuit found that the NRC acted entirely within its statutory discretion.⁹⁶ The following passage from the *Citizen for Fair Utility Regulation* opinion emphasizes the high levels of agency deference:

In reviewing agency action, this Court will defer to agency judgment unless the action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. Sec. 706(2)(A). *See, e.g., Baltimore Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87 (1983). This standard is even more deferential where, as here, a Court is reviewing an agency’s application and interpretation of its own regulations.⁹⁷

This significant burden of proof upon the plaintiffs explains why seven Hearings cases ruled in favor of the defendant; without overwhelming evidence that the NRC acted arbitrarily or capriciously, the courts deferred to the decision of the Commission.

Hearings cases emphasize the limited potential that groups have for anti-nuclear litigation. Even if these groups had won, their victory would not have stopped the licensing of a nuclear power plant; they would have merely gained the right to a hearing and a chance to present their anti-nuclear arguments to the NRC. The cases *Beyond Nuclear v United States Nuclear Regulatory Comm’n* and *Envtl. Law & Policy Ctr. v United States Nuclear Regulatory Comm’n* demonstrate these limits.⁹⁸ As part of the licensing process, NEPA requires the NRC and a prospective plant to “take a ‘hard look’ at environmental impacts of project and make a reasoned decision between various reasonable alternatives.”⁹⁹ In these two cases, plaintiffs petitioned the NRC for a hearing in order to present their arguments that alternative energy sources should be considered instead of re-licensing a nuclear power plant. After following the correct statutory procedures for considering the merits of the claims, the NRC rejected both applications for hearings. Both groups sued, contending that they legally deserved a hearing because the NRC had misapplied NEPA.¹⁰⁰

The NRC proved it acted legally and reasonably in denying the hearings, and both plaintiffs lost their claims in court.¹⁰¹ Even if these plaintiffs had

⁹⁶ *Ibid* at 54.

⁹⁷ *Ibid*.

⁹⁸ *Beyond Nuclear*, 704 F3d 12 (1st Cir 2013); *Envtl. Law & Policy Ctr.*, 470 F3d (7th Cir 2006).

⁹⁹ 42 USC § 4332; see *Natural Resources Defense Council v Morton*, 458 F2d 827, 838 (DC Cir 1972).

¹⁰⁰ *Beyond Nuclear*, 704 F3d at 12; *Envtl. Law & Policy Ctr.* 470 F3d at 682.

¹⁰¹ *Beyond Nuclear* 704 F3d at 23; *Envtl. Law & Policy Ctr.* 470 F3d at 684.

won, their underlying claim—that the potential for alternative energy sources is grounds for denying a license—would likely end with a similar rejection. A victory would have granted more administrative procedure but would have guaranteed no results. These cases hinge on an important concept: there is a difference between being rejected for a hearing and having arguments rejected after they have been heard. Both lead to the same result, but the difference in procedure is important enough that groups will readily litigate for their right to be heard.

Why Technical Plant Problem Cases Lose. The best example of these cases comes from the Richard L. Brodsky coalition, a group that sued multiple times to fix a technical problem at the Indian Point nuclear power plant in New York State.¹⁰² This case was based on the NRC's rule that electrical cables must have fireproof insulation that lasts at least sixty minutes in a fire or disaster situation. The cables at Indian Point only lasted twenty-seven minutes in a fireproofing test. Instead of forcing Indian Point to upgrade their cables, the NRC issued an *ex post facto* exemption that lowered the standard to twenty-four minutes, and therefore legalized the cables at Indian Point.¹⁰³ The NRC did not inform the public until after the exemption had been granted.¹⁰⁴ The Brodsky coalition sued with two goals: (1) force the NRC to reverse the exemption, thereby forcing Indian Point to upgrade its cables and (2) force the NRC to open the exemptions process to the public.¹⁰⁵

The first *Brodsky* case was brought under an unreviewable statute and rejected for lack of jurisdiction.¹⁰⁶ Plaintiffs reorganized and reargued their claims under the Administrative Procedure Act (APA) and National Environmental Policy Act (NEPA) in New York district court, then appealed after the district court ruled in favor of the NRC. This second appellate opinion denied review of claim (1) but remanded a portion of claim (2) to the NRC.¹⁰⁷ In both appellate opinions, judges emphasized their lack of willingness and ability to judge the technical decision-making power of the NRC. Since the NRC completed its paperwork and statutory processes before issuing the exemption, the judge deferred to the NRC's decision that twenty-four minutes of fireproof testing was an acceptable exemption to the sixty minute requirement.¹⁰⁸

102 *Brodsky v United States Nuclear Regulatory Comm'n.*, 578 F3d 175 (2d Cir 2009), *Brodsky v United States Nuclear Regulatory Comm'n.*, 704 F3d 113 (2d Cir 2013).

103 *Brodsky*, 704 F3d 113 at 117.

104 *Ibid.*

105 *Ibid.* at 115, 117.

106 *Brodsky*, 578 F3d 175 at 177. The 2d Circuit determined that it did not have jurisdiction to review plaintiff's claims brought under the Hobbs Act and dismissed without prejudice. This did not preclude plaintiffs from bringing similar claims under different laws, and the Brodsky coalition later sued in district court at *Brodsky v United States Nuclear Regulatory Comm'n.*, 783 F Supp 2d 448 (SDNY 2011).

107 *Brodsky v United States Nuclear Regulatory Comm'n.*, 507 Fed Appx 48 (2d Cir 2013).

108 *Brodsky*, 704 F3d 113 at 125.

The 2013 *Brodsky* opinion offered a very narrow procedural victory for the plaintiffs that ultimately made no difference in the substantive technical decision. The court agreed that the NRC can create fire safety exemptions but required the NRC to either justify its reasons for making exemptions private or open exemptions to public comment. The ruling did not guarantee that the public would be heard or that exemptions will be stopped: it merely required the NRC to justify its actions in writing. The *Brodsky* cases demonstrate the limited successes and judicial difficulties that arise when addressing technical issues with nuclear power: judicial deference to the NRC is the standard, and small victories add more procedure, rather than changing outcomes or guaranteeing results.

Understanding Outcomes of Cases

Low standards of review and considerable agency deference can explain why thirty out of thirty plaintiffs failed to prevail in court. In each case, plaintiffs petitioned the court to review an action of the NRC, but they lost their cases in slightly different ways. The different types of losses offer additional insight into why and how these lawsuits fail. Seventeen of the thirty court opinions examined plaintiffs' arguments and dismissed their petition for review, thereby deferring to the decisions of the NRC.¹⁰⁹ Five cases were dismissed for want of jurisdiction, as plaintiffs asked courts to make determinations about premature actions or under inapplicable laws. Five petitions received review, but each reviewing court ultimately affirmed the decisions of the NRC.

The three cases where petitioners were granted a *remanded but rejected* outcome highlights an important fact of nuclear licensing issues. If a group initially prevailed on a claim, the solution was to remand the claim to the NRC for further explanation, justification, or consideration. *Massachusetts v United States Nuclear Regulatory Comm'n*¹¹⁰ (1991) required the NRC to further explain its reasoning behind a decision; *Limerick Ecology Action, Inc. v United States Nuclear Regulatory Comm'n*¹¹¹ required the NRC to consider adding evacuation training requirements to a plant's license; and *Brodsky v. United States Nuclear Regulatory Comm'n* (2013) required the NRC to justify why public participation in a fire safety exemption procedure is impracticable or "take other such action as it may deem appropriate to resolve this issue."¹¹²

However, these minor victories ultimately did nothing to change nuclear policy. The remanded decisions offered more procedure but not the desired results. The Massachusetts appeal was dismissed as moot.¹¹³ As a result of

109 See Appendix A for full breakdown of case outcomes.

110 *Massachusetts v United States Nuclear Regulatory Comm'n.*, 924 F2d 311 (DC Cir 1991).

111 869 F2d 719 (3d Cir 1989).

112 *Brodsky*, 704 F3d 113 at 125.

113 ALAB-946, 33 NRC 245 (1991).

Limerick, the NRC considered evacuation training and other safety measures but ultimately did not require them in a plant's licensing application.¹¹⁴ *Brodsky* achieved an intermediate procedural goal: the NRC opened the fire safety exemption issue to public comment, but the public comments ultimately did not change the original substantive NRC exemption.¹¹⁵ Furthermore, none of these cases came close to achieving their primary goals: revoking a plant's license to operate, preventing a plant from receiving a license, or forcing the NRC to reverse a safety exemption.

The *remanded and rejected* cases show that the judiciary is not always entirely deferential to the NRC. In places where they thought an agency decision lacked justification, judges were willing to demand additional explanation and to give the NRC a chance to support its decisions. The *remanded and rejected* cases follow the pattern established by earlier cases: courts readily rule on whether procedure was followed, but avoid making a determination on the outcome of a procedure. Even though these plaintiffs prevailed on a small issue in the appellate court, they were unable to use judicial review to force the NRC to change a substantive decision.

FURTHER DISCUSSION:

NUCLEAR LITIGATION WITHIN THE ANTI-NUCLEAR MOVEMENT

In the past twenty-five years, public-interest plaintiffs have repeatedly failed to prevail in court against the Nuclear Regulatory Commission. Although this study has shown that groups face steep legal challenges in bringing a lawsuit, many anti-nuclear groups continue to do so. Despite their persistent lack of success, lawsuits against the NRC rank among the best options that public interest groups have for influencing nuclear power plants. Other methods of public-interest activism, such as protests and Congressional lobbying, are more costly, difficult, and time-consuming, and they promise fewer direct opportunities for creating policy change.

Public protests, once the cornerstone of the anti-nuclear movement, have lost momentum, supporters, and power in recent years. Anti-nuclear protests peaked in the 1980s following the Three Mile Island accident, and the anti-nuclear power movement benefitted greatly from associating with proponents of nuclear disarmament.¹¹⁶ Protests during this time were relatively common and well-supported: on June 12, 1982, over one million anti-nuclear activists gathered

114 *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed Reg 28467, 28481 (1996).

115 *Environmental Assessment and Finding of No Significant Impact; Issuance*, 78 Fed Reg 166, 52987 (2013).

116 Jonathan Schell, *The Spirit of June 12* (The Nation, June 14, 2007), online at <http://www.thenation.com/article/spirit-june-12/>.

in New York City for what would become the nation's largest political protest in history.¹¹⁷ Anti-nuclear protests, however, declined alongside environmental and social activism throughout the 1990s.¹¹⁸ Post-Fukushima, anti-nuclear groups hoped that the disaster would galvanize the movement for nuclear safety, but the two largest recorded U.S. protests attracted only 600 and 200 activists, respectively.¹¹⁹ As one author describes it, "The aftermath [of Fukushima-related activism] has been dispiriting."¹²⁰ Additionally, even well-attended protests or international nuclear accidents do not guarantee political change—there exists considerable scholarship on the difficulties of translating social activism into policy results.¹²¹

Anti-nuclear groups have even less clout in Congress. The Nuclear Energy Institute (NEI) is the industry's main trade and congressional lobbying organization, and many energy companies also run their own lobbying programs. From 1999-2009, the NEI spent roughly \$645 million on congressional lobbying and campaign contributions; \$84 million of this was spent in 2009 alone.¹²² This spending helps create a pro-nuclear network of allies, experts, and politicians; the result in Washington is "an echo chamber of support for nuclear power."¹²³ In 2011, the NEI budgeted \$13 million for its lobbying and public relations response to the Fukushima accident.¹²⁴ In the same year, the Sierra Club and Natural Resources Defense League spent \$520,000 and \$473,000 on lobbying respectively—but it is unknown how much, if any, of these funds were spent on anti-nuclear causes.¹²⁵ There is a well-established link between high political spending

117 As of March 2015, this protest remains the largest political demonstration of any kind that took place in the United States (Ibid).

118 Jeffrey Broadbent, *Environmental Politics in Japan: Networks of Power and Protest* 386 (Cambridge 1999).

119 Jameson Steed, *Anti Nuclear Groups Protest San Onofre* (Daily Titan, Mar 12, 2012), online at <http://www.dailytitan.com/2012/03/anti-nuclear-groups-protest-san-onofre/>; *Vermont Yankee: Countdown to Closure* (WCAX.com, Mar 21, 2011), online at <http://www.wcax.com/story/14288307/one-year-until-vermont-yankee-closure>.

120 Schell, *The Spirit of June 12* (cited in note 116).

121 Kolb, *Protest and Opportunities* (cited in note 35); Marco Giugni, *Social Protest and Policy Change: Ecology, Antinuclear, and Peace Movements in Comparative Perspective* (Rowman & Littlefield 2004); Diana Johnstone, *The Decline of Political Protest* (CounterPunch, Aug 28, 2012), online at <http://www.counterpunch.org/2012/08/28/the-decline-of-political-protest/>.

122 Judy Pasternak, *Nuclear Energy Lobby Working Hard to Win Support – Nuclear Energy's Lobbying Push* (Investigative Reporting Workshop, Jan 24, 2010), online at <http://investigativereportingworkshop.org/investigations/nuclear-energy-lobbying-push/story/nuclear-energy-working-hard-win-support/>.

123 Ibid.

124 William Freebairn, *US Nuclear Lobby Budgets \$13 Million for Fukushima Response: Sources* (Platts, McGraw Hill Financial, May 20, 2011), online at <http://www.platts.com/latest-news/electric-power/washington/us-nuclear-lobby-budgets-13-million-for-fukushima-6122753>.

125 The Sierra Club and the Natural Resources Defense Council are two of the best-funded and most politically active plaintiffs mentioned in this study. Both lobby for a number of environmental

and beneficial political outcomes, and given the enormous gap in spending, it is clear that the nuclear industry holds significantly more political power than anti-nuclear groups.¹²⁶ Other anti-nuclear entities have even more limited financial resources, which leaves the movement as a whole in a difficult situation. Judges repeatedly assert that Congress is the only body capable of addressing many nuclear issues, but activists are significantly outspent and overpowered by the well-funded nuclear industry. A pivotal shift in power or, more likely, a large domestic nuclear accident is necessary before Congress will take action against the nuclear power industry or change the powers of the NRC.

Suing the NRC is often the best of a number of difficult options. The legal system has long been a destination for minority and public-interest groups looking to create policy change.¹²⁷ Though lawsuits can be costly, it is far easier for an anti-nuclear group to obtain legal services than it is to stage a major protest or to lobby politicians. In the courtroom, anti-nuclear groups stand on relatively equal footing with nuclear giants, and can expect immediate legal results if they are successful – it is important to remember that anti-nuclear lawsuits were very successful in earlier years, and, despite recent losses, the potential for change still remains.¹²⁸ Protests against the entire system of nuclear power are unlikely to bring down the industry, but lawsuits against specific power plants have decent potential for improving plant safety. Even in the face of continual losses, anti-nuclear lawsuits offer the most accessible opportunities for impacting the state of nuclear power.

Furthermore, anti-nuclear lawsuits often have secondary beneficial effects. This study did not examine whether nuclear power plants have voluntarily made policy changes in response to a lawsuit—even when groups fail to force an issue in court, there is a possibility that lawsuits encouraged plants to willingly make changes.¹²⁹ Though these are never explicitly stated goals, lawsuits have the effect of slowing down the already lengthy nuclear licensing process and they force plant operators to incur legal and other costs. During the 1970s and 1980s,

causes along with anti-nuclear causes, and it is therefore undeterminable how much each spent on anti-nuclear lobbying. See *Natural Resources Defense Council* (OpenSecrets.org, 2011), online at <https://www.opensecrets.org/lobby/clientsum.php?id=D000036133&year=2011>; *Sierra Club* (OpenSecrets.org, 2011), online at <https://www.opensecrets.org/lobby/firmsum.php?id=D000000259&year=2011>.

126 Scott Addison, *Lobbying Expenditures Yield Big Returns for Companies* (Vanderbilt University Owen Graduate School of Management, Research Articles, Feb 2009), online at <http://www.owen.vanderbilt.edu/faculty-and-research/vanderbilt-business-inbrief/lobbying-expenditures-yield-big-returns-for-companies.cfm>.

127 Donald L. Horowitz, *The Courts and Social Policy* (Brookings Institution 1977).

128 Trubatch, 3.1 *Ariz J Envir L & Pol* (cited in note 5); Magali Delmas and Bruce Heiman, *Government Credible Commitment to the French and American Nuclear Power Industries*, 20.3 *J Pol Analysis & Mgmt* 433 (2001).

129 Delmas and Heiman, 20.3 *J Pol Analysis & Mgmt* (cited in note 128).

extensive and successful litigation prompted the NRC to proactively create more regulations; in 1982, during the peak of anti-nuclear litigation, the NRC was sued eighty-three times and proposed 474 new rules, a far cry from the modern state of anti-nuclear activism.¹³⁰ Further research should examine the secondary effects of lawsuits in order to better determine the modern value of an anti-nuclear lawsuit both in and out of the courtroom.

It is also important to recognize that suing the NRC is often not an activist group's primary objective. Many of the anti-nuclear plaintiffs act as nuclear watchdogs, and anti-nuclear lawsuits operate on the principle that the industry and the NRC should not be allowed to run unchecked. Typically, groups observe the public licensing proceedings and initially use NRC hearings to advocate for their concerns. Achieving a successful outcome in a hearing is the primary goal; lawsuits are the next step when a group feels its concerns are not adequately addressed. This study examines these concerns once they have left the NRC system and entered the legal arena. Additional research should aggregate and examine the outcomes of hearings within the NRC's regulatory framework.

CONCLUSION

This study shows how thirty nuclear licensing cases failed to prevail in appellate courts. This trend of NRC deference would be less surprising if all cases came from the same circuit, were brought from weak plaintiffs, or raised weak claims. Instead, the thirty cases show considerable diversity in their claims and circuits. Their plaintiffs are often historically successful litigators and state governments with considerable interests in nuclear power plants. Plaintiffs bring cases that can be categorized as *Technical Plant Problems, Hearings, and Rulemaking* cases, but they end with the same result regardless.

Suing a government agency is no small task, and the thirty fail-to-prevail cases demonstrate the difficulty and limitations of using judicial review to change nuclear policies. The APA and AEA limit the type and scope of complaints that groups may raise, and many cases are solely based on alleged procedural errors. Plaintiffs in NRC cases are often met with high burdens of proof, limited legal options, and the challenge of overriding automatic deference to the NRC. Judicial deference to NRC decision-making can defeat a variety of valid claims. The APA, AEA, and several key Supreme Court cases also limit the type of relief available to groups challenging the NRC. Even in the *remanded and rejected* cases, groups prevailing on one small issue, were met with more procedure and ultimately no substantive results.

This article's conclusions open the field to opportunities for additional research. Further analysis can address whether the fail-to-prevail trend is indicative

¹³⁰ Ibid at 447.

of a well-functioning NRC or an agency allowed to run unchecked by the judiciary. This pattern of legal failure also raises questions about judicial deference in administrative law—are other government agencies treated with the super-deference that the NRC often receives? Finally, the rejection of suits against the NRC calls into question the actions and strategies of anti-nuclear groups who continue to litigate in the face of consistent losses. Even amidst significant losses, litigation often remains the most viable option for public groups to influence nuclear policy; further studies can examine the relative successes of anti-nuclear strategies in more detail.

This paper's findings have implications for future nuclear licensing cases and the field of nuclear energy. The current system of nuclear regulation is primarily determined by administrative law and Supreme Court precedent, and is unlikely to change in favor of anti-nuclear groups. Anti-nuclear plaintiffs should take this into consideration when crafting legal strategies. Moreover, academic interest in the field of domestic nuclear energy is long overdue. Nuclear power continues to quietly expand in the United States, but it does not face the same kind of rigorous scrutiny that it did in the 1970s and 1980s.¹³¹ This time period saw many excellent studies on the nuclear licensing process, the NRC, and litigation as an anti-nuclear strategy; these studies should be revisited and updated to reflect decades of legal and nuclear development.¹³²

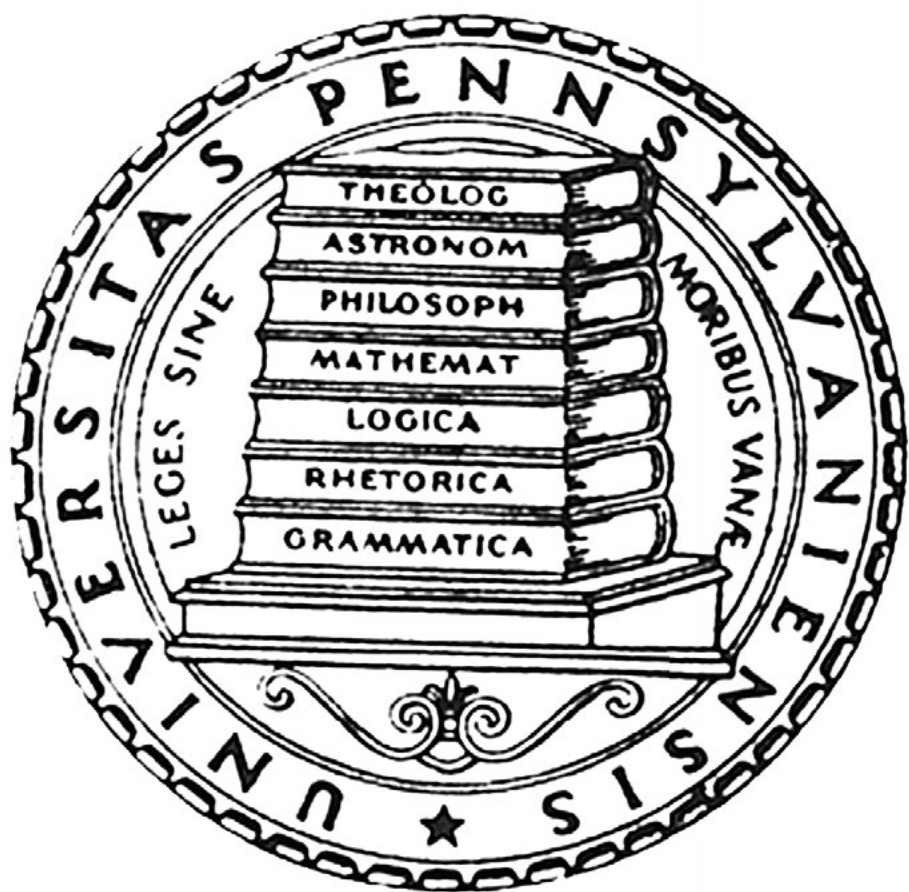
In the coming years, twenty-two nuclear power reactors will become eligible for re-licensing, and twenty-eight applications for new reactors are currently under NRC review.¹³³ Anti-nuclear groups are ready to monitor these licensing procedures, attend hearings, and litigate if problems arise. Though their motivations and solutions differ, the NRC, nuclear power plants, states, and anti-nuclear groups all want to exist in a nation where nuclear power is not a threat to human existence. Since 1989, appellate courts have unanimously agreed that the NRC is the best authority for balancing interests and achieving that goal. It will be interesting to see what cases arise from these upcoming licensing proceedings,

131 This is the author's opinion, based on the experience of reading relevant literature, searching for secondary sources, and finding that the vast majority of nuclear power-related articles were published in the 1960s and 1980s. Modern nuclear scholarship tends to focus on international nuclear power and nuclear weapons rather than domestic nuclear power.

132 Particularly, the following three studies merit modern updates: Harold P. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 Wm & Mary L Rev 503 (1973); Wenner, 11.4 Pol Stud J (cited in note 37); Howard E. McCurdy, *Public Administration in the Wilderness: The New Environmental Management*, 42.6 Public Administration L Rev 584 (1982).

133 The most recent data states that, as of 2011, the owners of 22 reactors have the potential to apply for an extension of their operating license. As of 2015, there are 28 active applications for new reactors (*Nuclear Reactor Operational Status Tables*, cited in note 6); *Location of Projected New Nuclear Power Reactors* (Nuclear Regulatory Commission, Nov 6, 2015), online at <http://www.nrc.gov/reactors/new-reactors/col/new-reactor-map.html>.

and whether the fail-to-prevail trend continues into the next decades of nuclear litigation.







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