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PUBLISHER’S NOTE

The 2012 Brigham Young University Prelaw Review (the “Journal”), like other volumes in the past, continues to demonstrate Brigham Young University’s commitment to excellence in scholarship and student development. Throughout this past year it has been a privilege to work with ambitious students who want to produce the best possible undergraduate legal journal.

Continuing the vision of the Journal, this year’s staff has worked arduously to present professional and current legal scholarship. As undergraduates, the depth and breadth of the topics addressed required that these students do much more than just editing. The authors and editors studied to find court cases and law review articles to support their arguments. During the year, as new information became available, authors and editors continually updated and refocused their arguments to provide timely discussions of the current issues. Consequently, each of these articles reflects the latest decisions from the courts and scholarship from the legal community.

It is always the goal to produce a reputable legal journal. However, this experience also provides the opportunity for members of the staff to prepare themselves for future professional scholarship and work in the legal field. Each student has become proficient in the Bluebook system of legal citations, and all have spent countless hours editing and source checking each other’s legal articles. The students have also learned to analyze pressing issues, incorporate legal citations, and present cogent legal arguments, while receiving training in journal publishing. These students leave the 2012 edition of this Journal possessing the ability to excel in law and other professional pursuits.

We continue to be grateful for the endowment from the Rawlinson Family Foundation that funds the Journal and the support of Brigham Young University’s resources to create and print this publication. As you read the topics addressed in this Journal, I am sure that you will agree that this is an impressive work produced by these
BYU undergraduate authors and editors. It continues to be a pleasure to work with such fine individuals and students on a daily basis.

Kris Tina Carlston, J.D., MBA
Prelaw Advisor, BYU
EDITOR-IN-CHIEF & MANAGING EDITOR’S NOTE

We are extremely grateful for the daunting yet exciting task of managing the 2012 BYU Prelaw Review. It is hard to describe to an outside observer the transformative process the journal goes through over the course of two semesters: a melting-pot of students from different majors and papers that may not be any more than just a good idea somehow converge into a well-oiled editing machine and a polished body of compelling legal academia. We recognize that this transformation did not happen by magic but rather by the help of talented and hard-working team members. After spending eight months working with and learning from these individuals, we feel like we gained much more than we gave.

We would like to thank each of our individual authors and editors. The authors came onto the team with interesting and exciting ideas and worked tirelessly make those ideas a concrete product. We are grateful for the way they managed their teams and listened respectfully to suggestions from us and from their editors. Our editors were probably the most qualified and talented group of editors the Prelaw Review has ever had, and we appreciate the way they dealt with high-pressure deadlines and unforeseen setbacks. We would also like to thank our authors and editors for their efforts outside of class to boost the quality of next year’s team through vigorous advertising and fundraising.

Special thanks go out to our Senior Staff Editor Andrew Bean for going above and beyond his responsibilities and single-handedly doing a job that should have taken three people to do. The proactive way he took the lead on everything ranging from fundraising to advertising to giving individual writing help to editing groups was always welcome and needed. And without the InDesign help of his wife, Laura, we would have been completely lost in formatting and publishing the journal.

Lastly, we would like to thank our advisor and publisher, Kris Tina Carlston. Her tireless guidance and thoughtful suggestions
were just what we needed to maintain the highest quality in the journal and help students master the skills of legal research and writing.

Dane Thorley    Noah Driggs
Editor-in-Chief    Managing Editor
THE “Mysteries of Human Life”\textsuperscript{1}: Dealing with an Ambiguous Right to Privacy

Brian Reed\textsuperscript{2}

I. Introduction

In 1919, the American philosopher Zechariah Chafee told the story of a peculiar case brought before a judge. The defendant was a man accused of hitting another man in the nose. Pleading his case to the judge, the defendant asked whether he had the right to swing his arms in a free country. The judge responded with this statement: “Your right to swing your arms ends just where the other man’s nose begins.”\textsuperscript{3}

Nearly one hundred years have passed since this story was told, yet the importance of individual rights and their limitations has only increased. Indeed, the metaphorical line separating where one man’s right applies and where it does not has become increasingly more complicated to distinguish.\textsuperscript{4} Nevertheless, the point of the story is clear: there are limits to individual rights.

This is particularly true in the context of the right to privacy. Laws and regulations initially seen as appropriate, even expedient, are later seen as blatant violations of privacy. Laws protecting social norms face this challenge. As social norms develop and evolve,

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\textsuperscript{1} Planned Parenthood v. Casey 505 U.S. 833, 851 (1992).

\textsuperscript{2} Brian is a junior studying political science and economics at Brigham Young University. He plans to attend law school in the fall of 2013. Afterwards, Brian plans to work in corporate law, and perhaps also in business consulting. Thank you to Gerrit Winkel, Andrew Christensen, Ashley Gengler, Kyle Patterson, and James Tringham, who each provided exceptional guidance and assistance as this paper was being written. It would not have made the progress it has without their help.

\textsuperscript{3} Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).

the laws protecting established norms frequently restrict developing ones (such is the case with gay marriage, abortion, and even physician assisted suicide). Further, while many judicial opinions acknowledge that privacy is a legitimate individual right, privacy is not explicitly mentioned in the Constitution. In addition, an appeal to judicial opinions does not settle the definition of privacy; among legal philosophers and scholars, the conceptual definition of privacy is also vague and contested.\(^5\) In short, although interpretation of the Constitution reasonably allows for a right to privacy, there is no consensus on the correct interpretation, and certainly no consensus on an explicit definition.\(^6\)

Despite the lack of consensus, the effect of the right to privacy cannot be understated. Some of the most significant Supreme Court cases of the last century have been decided in the name of the right to privacy.\(^7\) While judges support the existence of the right to privacy with various interpretations of constitutional amendments, academics attempt to further define the right to privacy by enumerating what it allows and where it applies. Considering the perpetual evolution of privacy issues along with the unsettled definition of the right to privacy, the important question becomes: How will we know when the right to privacy should not be expanded?

Rather than contribute to the already sizable literature on whether the right to privacy exists or what the right to privacy allows, my

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5 See John Locke, Second Treatise of Government 95 (1690) available at EBSCOhost ("By property I must be understood here, as in other places, to mean that property which men have in their persons as well as goods."); see also John Stuart Mill, On Liberty (David Spitz, ed. 2007); Ruth Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421 (1980); Jeffrey L. Johnson, Constitutional Privacy, 13 Law and Philosophy 161; Johnathan O’Neill, Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court, Review of Politics 325, 325-351 (2003).


argument highlights the limits of the right to privacy, or what privacy should not allow. I acknowledge that privacy is a legitimate right reasonably implied in the Constitution and established in numerous Supreme Court cases. Yet less attention is given to limitations of this right. In my argument, I will show that the right to privacy should be maximized, but I will also show that expansion beyond privacy’s proper “point of maximization” will decrease individual rights, even (ironically) the right to privacy itself. Given the abstract, conflicting definitions of the right to privacy, my argument identifies limitations in previous court rulings (and the reasons behind these limitations) that should be generalized and applied to future cases concerning the right to privacy. These limitations will serve to solidify the definition of the right to privacy in the future.

The Evolution of Privacy in the Constitution:

As illustrated in what follows, interpretations of the Fourteenth Amendment have shaped the right to privacy for more than a century. The Due Process Clause, contained in Section 1 of the Fourteenth Amendment, was originally intended to prevent the violation of individual rights without proper legal actions in the context of outlawing slavery. The purpose of the Due Process Clause was quickly expanded (and rightly so) to prohibit and prevent any form of violation of individual rights without proper legal action. While the changes introduced with this new legislation were needed and appropriate, its vague wording has also provided justification for a dramatic expansion of individual rights, perhaps even beyond the amendment’s original intent. This section explores the evolution of the application of the Fourteenth Amendment and, specifically, how it relates to the right to privacy.

II. The Lochner Era

The earliest instance in which the Fourteenth Amendment was used to justify the right to privacy occurred in 1905 in *Lochner*
v. New York.\textsuperscript{9} The case involved a baker who contracted with an employee to work more than the maximum number of hours allowed under New York law. Although intended to protect individuals from harm caused by exposure to unsafe and hazardous work environments, the law was challenged because it restricted an individual’s privacy to buy and sell labor (in this context labor was considered an individual’s possession).\textsuperscript{10} In the majority opinion, the U.S. Supreme Court struck down the New York law saying,

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment.\textsuperscript{11}

\textit{Lochner}’s appeal to the Due Process Clause established a precedent that was repeatedly cited in cases throughout the early twentieth century, invalidating numerous economic and labor regulations. Soon after \textit{Lochner}, in \textit{Adair v. United States}, the Due Process Clause was applied to uphold a “yellow-dog contract” (prohibiting employees from forming a union).\textsuperscript{12} Interestingly, while the Due Process Clause was used in \textit{Lochner} to strike down state legislation limiting the “right to contract,” the same clause was used in \textit{Adair} to protect legislation preserving the right to contract.

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

\begin{itemize}
  \item[10] See \textit{id.} at 54.
\end{itemize}
So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.\footnote{13}{Id. at 174-175.}

Although the context of Adair is different from Lochner, it represents yet another protection of an individual’s privacy, specifically the right to contract. According to Adair, just as employees had the privacy to sell their labor for however many hours as they saw fit—regardless of how unwise such action may be—employers had the privacy to determine the conditions under which they will purchase an employee. Though the actions of employer and employee may be unwise, it was deemed unconstitutional for the government to interfere.\footnote{14}{See Adair v. United States, 208 U.S. 161, 175 (1908).}

As an epilogue to Adair, the Supreme Court again protected employers’ privacy to create yellow-dog contracts in Coppage v. Kansas. The majority opinion, by Justice Pitney, stated:

\begin{quote}
No doubt, wherever the right of private property exists, there must and will be inequalities of fortune. . . . It is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of [the freedom of contract and the right of private property] . . . the Fourteenth Amendment, in declaring that a State shall not “deprive any person of life, liberty or property without due process of law,” gives to each of these an equal sanction; it recognizes “liberty” and “property” as co-existent human rights, and debars the States from any unwarranted interference with either.\footnote{15}{Coppage v. Kansas. 236 US 1, 17 (1915).}
\end{quote}
At this time, the Supreme Court appeared to reach a consensus that the right to privacy did in fact include the right to contract and that this right found its place in the Due Process Clause of the Fourteenth Amendment. This clause, however, was not the only support for court rulings against economic regulation during the Lochner era. For example, the Supreme Court referred to the Tenth Amendment in *Hammer v. Dagenhart* and *Carter v. Coal Company* in order to invalidate federal regulation of the economy.\(^{16}\) Still, the precedent for protecting economic privacy was largely a product of interpretation of the Fourteenth Amendment described above, which defined privacy—in the context of the right to contract—as fundamentally inherent in the Due Process Clause.

### III. Post-Lochner Era

In the late 1930s, the Supreme Court shifted dramatically from its Fourteenth Amendment, Due Process Clause foundation for the right to privacy. Under the Lochner era interpretation of privacy, the federal government was prohibited from intervening in intrastate economic activity (see *Hammer v. Dagenhart*).\(^{17}\) However, faced with the crisis of the Great Depression, the Supreme Court chose to nullify its previous interpretation of the Due Process Clause to enable the passage of New Deal legislation. For instance, yellow-dog contracts—previously protected by the Supreme Court—were outlawed in 1932 by the Norris-LaGuardia Act.\(^{18}\) As the attention of U.S.

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17 See *Hammer v. Dagenhart*, 247 U.S. 251, 273-274 (1918) (The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution).

legislation and Court rulings shifted toward economic recovery, the controversy over the definition of privacy faded into the background.

After the Depression, privacy again took center stage in numerous laws and court rulings. While the context of the privacy debate was limited to economic privacies during the Lochner era, the debate now focuses on social privacy. Without question, privacy in the social and economic context is an important element of liberty. Clearly, the right to privacy should be recognized in many situations, yet the Supreme Court’s decision to allow New Deal legislation (in effect, disregarding the privacy definition found in the Due Process Clause) made it difficult to determine where to draw support for a right to privacy in the Constitution.\(^\text{19}\) Even today, the controversy over the answer to this question is apparent in a number of Supreme Court decisions involving social privacy. While most recognize privacy, there is significant disagreement regarding the basis for the existence of privacy as a right established in the Constitution.

_Griswold v Connecticut_ is perhaps the most significant Supreme Court decision expanding the right to privacy in the social context. _Griswold_ questioned whether the right to marital privacy was legitimate and, if so, was compromised by a Connecticut law prohibiting the use of birth control. Established in 1879, this law had been challenged repeatedly, but had been upheld until _Griswold_ in 1965. At this time, the law was invalidated because according to the Court it did violate the right to marital privacy. In this sense, _Griswold_ was revolutionary because it was the first unequivocal recognition of privacy as a right inherent in the Constitution since the Lochner era, thus bringing privacy back to the foreground of attention.

Although _Griswold v. Connecticut_ established the legitimacy of social privacy, it added to the ambiguity of the Constitutional definition of privacy. Despite the Court’s 7-2 decision, there were multiple arguments about the source of privacy in the Constitution. While most Justices agreed that privacy in marriage—and privacy in general—is a right protected by the Constitution, they differed on the definition of privacy. In one of the most controversial definitions,

Justice Douglas explained privacy’s existence in the Constitution as follows:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Though Douglas’ opinion certainly clarified the issue of marital privacy, his discussion of “emanations” and “penumbras” made it difficult to know where privacy does not apply. Adding to the ambiguous definition of privacy, several other Justices provided concurring opinions explaining their own definition of privacy. For instance, Justice Goldberg refers to a marital privacy right “not confined to the terms of the Bill of Rights,” but “supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment.”

In addition to the opinions of Goldberg and Douglas, Justice Harlan wrote a third concurring opinion but argued that privacy was inherent in the Due Process Clause, reverting back to the Loch-
ner era definition of privacy. Harlan claimed that “the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty.”

Indeed, dissent among Supreme Court Justices is clear from *Griswold* alone. Douglas claims that privacy comes from “emanations” and “penumbras” throughout the Constitution. Meanwhile, Goldberg points to the Ninth Amendment and the Liberty Clause as the source of privacy. Finally, Harlan disregards the Court’s previous decision to invalidate the relationship between privacy and the Due Process Clause, claiming due process as sufficient support for the existence of privacy. Since *Griswold*, the debate over the source of privacy in the Constitution has continued in other cases.


> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.

Again, O’Connor’s opinion resolves any doubt regarding the defense of privacy in the right to abortion, but it does not clarify where privacy should be limited. Recent debate surrounding the new health care legislation suggests that issues relevant to privacy will continue to evolve. As the government attempts to enforce a law demanding that citizens buy health insurance, Supreme Court review of this leg-

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22 Id. at 500.

islation will be heavily influenced by the definition of privacy they choose to support. According to the Lochner era Court rulings and definition of the right to privacy, it is likely that such a provision would be classified as economic regulation and deemed unconstitutional. However, if the Supreme Court chooses to emphasize the socially concerned emanations and penumbras of the right to privacy, the outcome of its review could be significantly different.

Review of the recent health care legislation provides just one example of the critical importance of a clearly defined right to privacy. Without a unified conclusion regarding the source of the right to privacy in the Constitution, the Supreme Court risks arbitrary expansion of the right to privacy beyond its proper point of maximization, even to the extent that privacy expansion may violate other rights that are explicitly included in the Constitution. In an attempt to clarify the limits of the right to privacy and establish the point of maximization, I will identify a few instances in which the Supreme Court has limited the right to privacy in specific circumstances. I will then discuss how these context-specific limitations could be used as general limitations for future privacy cases and legislation.

III. Limitations of Privacy

While there is plenty of discussion on whether privacy legally exists and whether the right to privacy should apply to specific new “zones of privacy,”24 there is significantly less discussion of the proper limitations of privacy. This may be because privacy is so difficult to define, and specific limitations require a fixed, clear definition. On the other hand, the disparity may exist because scholars are more concerned with violations of individual privacy than they are with instances of too much privacy (not many people will complain about having too many privacy rights). An argument in favor of establishing limits on privacy could even be misinterpreted as a threat, aiming to take rights away from individuals. Nonetheless, limiting privacy with the intent of maximizing it will yield the greatest amount of utility. Though not often considered, it is possible for privacy—when there is too much of it—to have a negative effect on society, as will

be shown in the following examples. In mathematics, identifying the point of maximization on a bell curve is simple: find the highest point on the curve or the point immediately before the values of the graph begin to decrease. Alas, this concept is much more abstract in the law. Therefore, it is important to study indicators of maximization, or instances when expanding the right to privacy to a new zone would compromise other constitutional rights. Recognizing these indicators will help, in turn, to recognize when the right to privacy has approached its point of maximization. The decisions in Washington v. Glucksberg, Kelley v. Johnson, and Olmstead v. U.S. can help us better identify indicators of maximization when considered under a new light.

IV. The Equal Protection Limit

The emergence of physician assisted suicide illustrates the expanding boundaries of privacy. Though physician assisted suicide is illegal in most states, the simple fact that the right to physician assisted suicide is considered shows that privacy is, indeed, an evolving issue. In 1997, Dr. Harold Glucksberg petitioned the U.S. Supreme Court to overturn the Washington law prohibiting physician assisted suicide. While the Washington law banned physician assisted suicide, it did allow a doctor to withhold life-sustaining treatment from a patient if the patient so desired. According to Glucksberg, if a mentally competent, terminally ill patient could elect to refuse life-sustaining treatment, then a patient should not be prohibited from direct physician assisted suicide if the patient so desires. In short, Glucksberg claimed that a patient’s right to die with dignity and in peace should be considered a constitutional right to privacy. Banning qualified patients from making this choice placed an “undue burden” on the Liberty Clause of the Fourteenth Amendment.

Prior to the Supreme Court hearing, however, the Washington law was overturned, then re-established upon a subsequent appeal.

26 See id. at 702.
The case eventually reached the Ninth Circuit Court of Appeals. At this point, the Circuit Court declared

After “[w]eighing and then balancing” this interest [the right to physician assisted suicide] against Washington’s various interests, the court held that the State’s assisted-suicide ban was unconstitutional “as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians.”27

Once again, the Washington law was overturned. Indeed, the ambivalence surrounding Washington’s law on physician assisted suicide reflects the difficulty found in establishing a proper limit on the right to privacy.

Despite Glucksberg’s appeal, the U.S. Supreme Court limited the right to privacy in large part to avoid a conflict with the Equal Protection Clause, which states that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”28 After surveying the legal history regarding suicide, the Court claimed that in hundreds of years the law has never facilitated any form of taking life. Further defending the Court’s position, Justice Rehnquist argued that there is a legitimate state interest to protect the sanctity of life, referring to the severe punishments in place for those guilty of homicide. However, for the purposes of this discussion, the most important reason for his decision was to preserve the rights of those who would be disproportionately disadvantaged by the legalization of the right to privacy: “The State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.”29 Rehnquist cited the decision in *Cruzan v. Missouri* along with research done by the New York Task Force (a group created to investigate the potential consequences of physician assisted suicide in New York in the context

27 Id. at 709.
28 U.S. Const. amend. XIV, § 1.
of *Vacco v. Quil*). From these sources, Rehnquist drew the conclusion that the legalization of physician assisted suicide would create a legitimate, systematic bias against discrete and insular minorities, specifically the poor and disabled.  

Later arguments have strengthened Rehnquist’s equal protection rationale. According to Siegel, legalization of physician assisted suicide would place a significant disadvantage on the disabled (1998). Theoretically, physician assisted suicide would create a legal environment where it would be easier for the disabled to receive assisted suicide than it would be for the non-disabled. Courts and physicians would be tempted to see the disabilities as medical conditions which lower the quality of life. *Bouvia v. Superior Court, McKay v. Bergstedt,* and *Georgia v. McAfee* provide examples of instances in which the courts demonstrated unequal leniency in granting permission for assisted suicide to disabled plaintiffs. While the initial ruling in the Ninth Circuit Court of Appeals called the supposed threat against the disabled “ludicrous on its face,” the U.S. Supreme Court recognized the claim as a legitimate possibility. Based on the persuasive influence of doctors over patients in terminal conditions, the Court held that even subtle differences between the treatments of disabled patients versus non-disabled patients would likely influence the decision to choose physician assisted suicide, increasing the probability of suicide for those who are disabled (from the case description *Washington v. Glucksberg*).  

In addition to disadvantages imposed on the disabled, legalized physician assisted suicide would impose undue pressure on the lower

31 See id. at 725.
economic class. In an effort to lower the costs of palliative care which would be charged to family members after they die, or simply because the patient cannot afford the treatment costs that they would receive from choosing alternative treatment, poorer citizens would have greater economic incentives to choose assisted suicide than middle or upper class citizens. Their economic position may even bias the counsel given by physicians, making the physicians themselves more likely to suggest assisted suicide as a possible course of action to lower class patients than middle or upper-class patients. The disproportionate disadvantage placed on those in lower classes and the disabled violates the Equal Protection Clause of the Fourteenth Amendment.

Recognizing that expanding the right to privacy would, in reality, decrease the rights of the poor and disabled helps establish an important indicator of maximization. With other issues, it may be easier to recognize when a new application of a constitutional right goes too far. With privacy, however, this is more difficult. The Supreme Court’s decision to weight the rights of the poor and disabled more heavily than the privacy of those desiring physician assisted suicide can be generalized, making it easier to decide whether privacy should be expanded. Thus, any expansion of privacy which compromises the Equal Protection Clause should be considered an indicator of maximization. In these situations legislators and justices must be especially mindful of the possibility that privacy may be close to its point of maximization. Ironically, the Equal Protection Clause of the Fourteenth Amendment has been used more often as justification for

34 See Larry J. Pittman, Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups, 28 Seton Hall L. Rev. 776, 785 (1998); see also New York State Department of Health, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context (1994).

35 See Ronald A. Lindsay, Should we Impose Quotas? Evaluating the “Disparate Impact” Argument Against Legalization of Assisted Suicide, 30 J.L. Med. & Ethics 6, 7-8 (2002) (In this article, Lindsay actually argues against disparate impact. I cite him here only because he also provides a helpful and concise review of the literature in favor of disparate impact).
expansion of individual rights. However, in this context, it provides justification against such an expansion. In this way, the Fourteenth Amendment actually solidifies the right to privacy by providing a limitation of privacy, rather than obscuring it as it has in other interpretations.\textsuperscript{36}

V. The State Interest Limit

In 1976, Kelley brought a case all the way to the U.S. Supreme Court because he wanted to grow out his hair. The circumstances may seem like a non-issue, except that Kelley was a member of the Suffolk County Police Force in New York and as such was subject to a strict grooming standard, regulating both hair length and style. Kelley argued that the grooming standards were “not based upon the generally accepted standard of grooming in the community.”\textsuperscript{37} Thus, the regulation violated his individual privacy to determine his own appearance; this right was, according to Kelley, included in the Fourteenth Amendment.\textsuperscript{38} When the case was first tried, the District Court of the Eastern District of New York dismissed the case; however, upon appeal the Court of Appeals of the Second Circuit reversed the dismissal and invalidated the grooming standard. “The Court of Appeals went on to decide that ‘choice of personal appearance is an ingredient of an individual’s personal liberty’ and is protected by the Fourteenth Amendment.”\textsuperscript{39}

Despite the case’s appeal to the right to privacy (alluded to in the Fourteenth Amendment), the U.S. Supreme Court limited the right to privacy in the interest of preserving the efficacy and cohesion of the police force. The Court agreed that this interest outweighed and overruled Kelley’s interest to preserve individual privacy. Again, Rehnquist offered the majority opinion, explaining that an ordinary citizen claiming violation of privacy may be justified in this context, but because Kelley represented the Suffolk County Police Depart-

\textsuperscript{36} See U.S. Const. amend. XIV, § 1.
\textsuperscript{37} Id. at 241.
\textsuperscript{38} See id. at 238.
ment, he was not to be treated as an ordinary citizen. Acknowledging the danger of treating government employees as some form of lower-class citizen, Rehnquist defends his claim further:

More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. CSC v. Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973). If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment. 40

Prior to the Supreme Court’s decision on this issue, the Second Circuit Court had dismissed the claim that grooming standards were significantly related to the preservation of some “genuine public need.” 41 In response, Rehnquist held that the question at issue was instead whether there was a reasonable, rational connection between grooming standards and the protection of person and property. That policemen would be more easily recognizable to members of the public and would develop esprit de corps among the policemen themselves was seen as sufficient rationale for upholding the grooming standard.

It should be clear that the Supreme Court was not advocating for the removal of privacy; indeed, this would threaten even basic liberties explicit in the Constitution, such as freedom of speech and freedom of religion. Rather, the Supreme Court effectively elevated the privacy of possessions for the general public above the privacy of personal appearance for the individual. This ruling (along with the ruling in Washington v. Glucksberg) shows that privacy can only be expanded so far before it inevitably begins to compromise other

40 Id. at 245
41 Id. at 242
necessary, significant individual rights. In the context of *Kelley v. Johnson*, the Supreme Court provides precedent for the limitation of privacy when a proposed expansion would distort or decrease the efficacy of government institutions designed to protect the person and property of individuals.\(^{42}\) In this context, privacy (in the form of grooming standards) must be limited for privacy’s sake (the person and property of individuals). Here again we find an indicator of maximization when positive growth in one “zone of privacy” leads to negative growth in another.

Courts considering further proposals to expand or make explicit the right to privacy in the Constitution should consider a general state interest limitation—in addition to the equal protection limit discussed previously—before giving approval for expansion. Despite the legitimate value of privacy in maintaining a free society, *Kelley v. Johnson* suggests that too much individual privacy can be detrimental. Widespread recognition of this limitation will further solidify the definition of privacy in the future so that privacy is not expanded beyond the point where other privacies are compromised as a result.

VI. The National Security Limit

Though similar to the state interest limitation presented in the previous section, the national security limitation deserves consideration given the high level of controversy surrounding the issue. Of all the limitations presented, this limitation provides the most delicate delineation between appropriate and inappropriate expansions of the right to privacy. Support for the establishment of a national security limit can first be found in *Olmstead v. U.S.* (1928). In the case Olmstead, the leader of an organization involved in the illegal sale and distribution of alcohol during Prohibition, complained that evidence used in his conviction was illegally obtained. More specifically, four probation officers wire-tapped Olmstead’s telephone and recorded conversations between Olmstead and his partners that contained descriptions of their illegal business plans. When Olmstead was arrested and brought to trial, the evidence gathered from the

\(^{42}\) See id. at 247.
wire-tapping was used against him. After his conviction, Olmstead appealed his case on the grounds that his individual right to privacy, as granted him in the Fourth and Fifth Amendments, had been compromised; admitting the illegitimacy of the evidence would consequently exonerate Olmstead.

Initially, the Circuit Court of Appeals for the Ninth Circuit ruled to invalidate the evidence saying that it did violate the privacy given to Olmstead in the Fourth and Fifth Amendments (which protect against unreasonable search and seizure, as well as forced testimony against oneself). The Court argued, “It is of the very nature of the telephone service that it shall be private...The wire tapper destroys this privacy. He invades the person of the citizen, and his house, secretly and without warrant. Having regard to the substance of things, he would not do this more truly if he secreted himself in the home of the citizen.”

The Supreme Court reversed the decision, choosing instead to limit Olmstead’s right to privacy by allowing the evidence to be used in court. Regarding the supposed violation of the Fourth Amendment, the Supreme Court decided that evidence obtained unethically did not compel an individual to testify against himself in court. Further, regarding the supposed violation of the Fourth Amendment, the Supreme Court argued that the ability to invalidate evidence unethically obtained did not belong to the Supreme Court (though the Court did acknowledge the possibility of this outcome in the future, but only in the form of new legislation from Congress). Because there was no existing law prohibiting such evidence from consideration—and because no physical “search and seizure” had been conducted—the Court ruled that it did not have the authority to deny the evidence from consideration in the trial.

Based only on the Supreme Court’s ruling in Olmstead—especially referencing the Court’s allowance for legislation banning illegally obtained evidence—it is difficult to identify limitations of privacy. Thus, further investigation of subsequent court rulings and

43 Olmstead v. United States, 277 US 438, 454 (1928).
44 See id. at 465.
legislation is necessary. *Olmstead*, however, is significant because it presents the first balancing of national security and individual privacy.

*Olmstead* was partially overturned in *Katz v. U.S.* (1967). Katz, convicted of selling gambling information across state lines (a federal offence), claimed that evidence gained from wiretapped phone conversations was impermissible in Court because the process by which it was gained violated his right to privacy, inherent in the Fourth Amendment. Though the circumstances of the case are nearly identical to that of *Olmstead*, the Supreme Court ruled in favor of Katz, claiming that the interpretation of privacy had evolved since *Olmstead*.

Although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any “technical trespass under . . . local property law”.

Here again, we find evidence that the definition of the right to privacy continues to evolve and expand over time. I should be clear that I do not offer a claim regarding the appropriateness of this expansion; instead, I offer the claim that constitutional privacy continues to expand, and that it is possible for privacy to expand beyond the point that it continues to benefit society. With this in mind, it is important to mention the Supreme Court’s statement that the actions of the federal agents responsible for the wiretapping would likely have been justified had they first gained the proper consent from a third-party judge. Their actions were illegal primarily because the agents did not first acquire a search warrant. In essence, the Supreme Court did recognize that wiretapping was appropriate in certain situations, even when the suspect is unaware of the invasion of their privacy.

The issues of wiretapping, national security, and individual privacy again came to the foreground when the Patriot Act was instituted in 2001. A response to the September 11th terrorist attacks, the
Act significantly reduced legal restraints on federal law enforcement. Most important in this context was the sanctioning of roving wiretaps (wiretaps not restricted to any single communication device, but able to transfer to any device used by the suspect in question). While certain elements of the Patriot Act have been brought into question, the wiretapping clause was renewed by President Obama as of 2011.\textsuperscript{45} Until now, there have been no further court cases involving the issue.

There is no question that there should be strict and detailed restrictions on the appropriate circumstances for wiretapping. However, the principle illustrated in the legal history of wiretapping again suggests that it is possible for privacy to overstep its appropriate bounds. In the event that privacy were expanded to the point that wiretapping was totally marginalized, national security would be reduced by a significant extent. Seen in this light, increasing individual privacy would risk the preservation of privacy because an individual’s right to be left alone would be legitimately endangered. Recognizing that threats to national security on a grand scale are unlikely to be a daily occurrence, it should still be a significant consideration. The decision to establish a national security limit on the right to privacy in the future should be taken seriously.

\textbf{VII. Conclusion}

It may be intuitive to assume that all individual rights are independent; thus it is possible for everyone to maintain an unlimited level of one’s own liberty without affecting the liberty of those around him. This assumption, however, is faulty. While personal liberty (or privacy) should be maximized, there is a point at which privacy begins to decrease in its utility to society, and even becomes destructive. As the constitutional support for the right to privacy continues to be molded over time, it is especially crucial to limit the expansion of privacy at its point of maximization so that privacy does not expand beyond its appropriate “zones.”\textsuperscript{46} The challenge will


\textsuperscript{46} Id. at 500.
be to distinguish these zones of privacy, where they begin and where they end.

Analysis of the limits placed on the right to privacy in the past strongly suggests that the point of maximization for privacy occurs when privacy begins to compromise other rights explicitly guaranteed in the Constitution. Given the nature of individual privacy, it is possible, even likely, that continued expansion of privacy rights for individuals in specific zones can in other zones decrease the protection of privacy. This point is clear in Washington v. Glucksberg, where the right of a terminally-ill, mentally competent individual to commit suicide is limited in order to preserve equal protection under the law lower-class or disabled citizens. The point is reiterated in Kelley v. Johnson and Olmstead v. U.S., where an expansion of privacy comes at the expense of a legitimate state interest or at the expense of a nation’s ability to protect its citizens, the right to privacy has expanded beyond the point at which it continues to benefit society.

When taken to the extremes, privacy can be a double-edged sword. On one edge, privacy can be regulated so heavily that individuals have very little privacy, if any at all. Given that the major focus of public attention centers on the expansion of privacy, it is necessary to increase awareness regarding the other edge of the sword: the trend towards absolute privacy also decreases individual rights, even the right to privacy itself. Privacy is a legitimate right; indeed it is crucial for a free society. However, the unrestrained expansion of individual privacy may be just as damaging to individual privacy (as well as other constitutional rights) as is unrestrained privacy. Thus, future decisions to expand privacy should not be granted until the limitations of privacy are fully considered.
A Middle-Ground Treatise on Same-Gender and Religious Marriage

J. Braden Fraser

As proponents of same-sex marriage grow increasingly vocal in their appeal for equal rights and social status, they seem increasingly at odds with the religious communities who hold that only marriage between a man and a woman should be legally recognized. In return, these religious groups express concern about maintaining their religious freedoms. While the interests of these two groups are both important, many solutions proposed up to this point only serve the apparently irreconcilable interests of one group or the other.²

In the course of this review I will highlight some important aspects of the current debate and suggest a possible resolution. Section 1 will address the current state of the same-sex marriage debate. Section 2 will focus on the potential economic, religious, and social ramifications of legalizing same-sex marriage. In light of these potential ramifications, Section 3 will highlight the system used by other countries, namely legalizing only those marriages solemnized by a government authority. In addition, it will propose a solution which may satisfy both same-sex and traditional marriage advocates based on the models of these other countries. I propose that, to resolve this issue, states should separate civil marriage ceremonies from religious marriage ceremonies. This will allow state govern-

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ments to decide who can be joined civilly, which will likely lead to the legalization of same-sex marriage across the nation. It will also separate civil and religious marriage, thus protecting religious institutions from the economic and legal consequences that would follow the legalization of same-sex marriage.

I. Background

A. Is Same-Sex Marriage On the Rise?

Currently seven states and Washington, D.C. have legalized same-sex marriage.\(^3\) Proposition 8, which was added to the California Constitution in 2008, is under national scrutiny for stipulating that heterosexual marriages are the only marriages recognized in California.\(^4\) Proposition 8 was a 2008 ballot initiative in which the people of California voted to add the phrase, “Only marriage between a man and a woman is valid or recognized in California,” to the state constitution.\(^5\) Supporters of Proposition 8 were concerned about maintaining the traditional definition of marriage, and, while not all of them oppose same-sex couples living together, they maintain that same-sex marriage advocates should not be allowed to force their views of marriage on those who oppose calling same-sex unions “marriage.”\(^6\) *Perry v. Schwarzenegger*, the lawsuit filed against California in response to Proposition 8, appeared before the U.S. District Court of Appeals in February of 2012, confirming an earlier decision by the California Supreme Court that overturned Proposition 8.\(^7\) The *Perry* case could potentially go before the Supreme Court sometime in the next year, so California could soon be added to the list of

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3 See Id.

4 See Id.


states in which same-sex marriage is legal. According to available poll data, the nation is split on whether same-sex marriage should be legalized, but sixty percent of those questioned in a recent poll fall in the combined category of believing same-sex marriage should be legalized or believing same-sex couples should be granted civil unions.\(^8\) It is possible that opinions on this issue, which seemed to be dominated by those opposed to such unions, may eventually shift sufficiently to allow same-sex couples equal opportunity to marry or enter into civil unions.

With this possibility in mind, religious institutions and other entities opposed to such unions must consider the effect legalizing same-sex marriage will have on their organizations. These institutions will likely be affected socially, religiously, and economically. Social issues revolve primarily around the tension between same-sex marriage advocates and opponents. As this tension is not likely to be resolved even if same-sex couples are allowed to participate in civil unions, I will not address the social issue further. Religiously these institutions face the possibilities of anti-discrimination lawsuits and of being forced to perform same-sex marriages. The primary economic factor which concerns religious institutions is losing their tax exempt status on property. These two categories of potential problems will be addressed in subsequent sections of the paper.

**B. A State or Federal Issue?**

Currently the power to decide the scope of civil marriage belongs to the states; however, as the interests of traditional marriage and same-sex marriage advocates become more disparate, the federal government may be tempted to interfere. I argue that the right to marry should remain with the states since the purview of marriage is not specifically granted to the federal government in the Constitution, except in cases regarding the interstate recognition of marriages and civil unions. Since same-sex marriage legislation does involve

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federal laws (First Amendment, The Religious Freedom Reformation Act, Fourteenth Amendment, etc.) which are being interpreted on a state level, interstate conflicts are likely to arise, highlighting the need for a neutral third party like the federal government to manage the dispute.

The aforementioned Perry v. Schwarzenegger case and other cases that have or will likely arise from this divisive issue may influence the rights of religious institutions to practice their beliefs. This is a Constitutional issue. Thus, while it is important that the power to create laws regarding marriage remains a state issue, the federal government may need to step in and decide whether current and forthcoming state laws are in keeping with the First Amendment. To further this discussion it is important to highlight Proposition 8 and New York Senate Bill A8354, a 2011 bill that legalized same-sex marriage in that state.

II. Religious Ramifications

The First Amendment protects one of the most essential liberties: religious freedom. In recent history religious groups have called upon this constitutional protection in their push to reserve marriage rights solely between a man and a woman. Some of these religious groups fear that, if same-sex marriage is legalized, those with the ecclesiastical authority to perform traditional marriages will be required to perform same-sex marriages as well.9 However, this fear is not legally grounded, since government interference in religious activities violates the Free Exercise Clause of the First Amendment, the second of two clauses which compose the right to religious freedom. This clause states, “Congress shall make no law . . . prohibit-

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ing the free exercise [of religion].” A law that prohibits religious institutions from the free exercise of their religion would violate this clause. To establish this we will first examine the Religious Freedom Restoration Act to show what the government must prove in order to require religious institutions to perform these marriages.

According to The Religious Freedom Restoration Act of 1993 (RFRA), “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless government can prove “that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” The Supreme Court has not always held the RFRA to be a legitimate test for whether or not something violates the Free Exercise Clause. However, in a 2006 decision the Court used the language of the RFRA to assert that it was illegal for the State of New York to restrict illegal drug use in the religious ceremonies of the O Centro Espirita Beneficente Uniao Do Vegetal church. In Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (O Centro), the Supreme Court held that it is illegal to unduly burden religious institutions in cases where government officials cannot establish both that the burden furthers a compelling government interest and that it does so in the least restrictive way possible. Therefore, even if the Supreme Court considers the RFRA to be unconstitutional, they still hold that the language of the bill serves as an effective test for compelling government interests.

Prior to the passage of New York Senate Bill A8354 in July of 2011, Republican state senators urged Governor Andrew Cuomo to include broader protections for religious institutions. The legis-

10 U.S. CONST. amend. I.
14 Id. at 1.
lation had originally included exemptions for religious institutions and private charitable organizations to “provide accommodations, advantages, facilities or privileges related to the solemnization or celebration of a marriage.” Furthermore, the bill stated that the refusal of religious groups to perform these ceremonies “would not result in any state or local government action to penalize, withhold benefits, or discriminate against such religious corporation . . . .”

However, stipulations such as these are already granted to religious entities under the Free Exercise Clause of the First Amendment. In light of similar First Amendment issues, the compelling interest doctrine emerged in the Supreme Court in the early 1960s. This doctrine requires states to have a convincing reason for enacting laws that infringe on religious conduct. For example, in Employment Division v. Smith, the Supreme Court ruled against the religious use of peyote, claiming that the Oregon law against peyote is a “neutral law of general applicability,” and therefore does not violate the First Amendment. In addition, the Court prohibited “mak[ing] the pro-fessed doctrines of religious belief superior to the law of the land.”

Although cases such as this have led to an increasingly narrow interpretation of the compelling interest doctrine, legalizing same-sex marriage directly relates to religious marriage, and attempting to require religious organizations to perform these marriages would therefore be in violation of the Free Exercise Clause. A recently decided Supreme Court case, Hosanna-Tabor v. EEOC, further reinforces the protections offered to religious organizations as established in the Free Exercise Clause. This case involved a woman who was fired from a private religious university. Claiming discrim-

16 See Id.
18 See Id.
20 See Id.
ination, this woman appealed to the government, and the case was recently heard by the Supreme Court. Hosanna-Tabor established a precedent for the ability of the government to interfere in religious matters. It is obvious that the Federal Government will remain reticent to infringe on religious institutions’ right to autonomy in hiring and firing ministers and other employees in accordance with their religious beliefs.

III. Economic Ramifications

Legalizing gay marriage also carries a potential economic burden on religious institutions, including potential court costs and losing tax-exempt status. In his review *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, Roger Severino, legal counsel for the Becket Fund, makes note of the looming vulnerabilities religious institutions face. Although religious exemptions exist to prevent lawsuits aimed at religious institutions who refuse to perform same-sex marriages, “a separate question, however, is whether governments must provide equal funding and access to programs to otherwise ‘discriminatory’ religious organizations.” State and federal anti-discrimination laws may serve as rational grounds for the dissolution of government association and subsequent assistance to these institutions if they do not comply with marrying same-sex couples. Since these religious and charitable groups would be operating in contrast to public policy, governments may be inclined to cancel funding and tax-exemption—critical for many faith-based organizations which rely upon these funds to adequately perform charitable services—on grounds of discrimination against same-sex couples.

As stated by the California Supreme Court in 2008, “affording same-sex couples the opportunity to obtain the designation of

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22 See Id.
23 See Id.
25 See id. at 972
26 See In re Marriage Cases, 183 P.3d 384, 451-52 (Cal. 2008)
marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples . . . .” 27 Furthermore, supreme courts in other states have also affirmed that the legalization of same-sex marriage would place no bearing or limits on the religious liberties of those who oppose it. Fredric J. Bold of the University of Pennsylvania Law Review argues that “there are a host of areas in which conflict seems likely: violations of anti-discrimination law in public accommodations, employment, housing, education, or charitable services; loss of tax-exempt status for violating public policy; and violation of hate-crime laws.” 28 Legislation may continue to assure protection from the compelled performance of these marriages, but religious organizations remain vulnerable to the other facets of federal and state law. 29 With increased public approval of same-sex marriage, it is reasonable to believe that “religious actors and institutions do face the prospect of losing tax-exempt status or other government privileges as a result of their advocacy against same-sex marriage or their desire to avoid the appearance of its endorsement by forced association with the practice.” 30

The loss of an organization’s tax-exemption would truly become a substantial threat due to several stipulations within the Internal Revenue Code. 31 This code is comprised of Federal statutory tax law that covers domestic tax areas such as income tax and gift taxes. In accordance with section 170 and section 501 (c) (3) of the Internal Revenue Code, tax-exempt organizations must not engage in any activity contrary to settled “public policy.” 32 Shifting political tides

27 See id.
29 Severino, supra note 23, at 943.
30 Bold, supra note 27, at 199.
31 See id. at 201.
32 See id.
indicate the inevitability of same-sex marriage becoming legalized throughout the nation, effectively making it public policy. Religious institutions that refuse to perform these marriages will face conflict as they operate in defiance of public government policy. This issue is similar in scope to that of religious adoption agencies like the Catholic Charities. The State of Illinois requires Catholic Charities and other adoption agencies to consider same-sex couples when deciding where to place foster children. If these groups fail to comply, the State Government is authorized to reduce the amount of state funding they receive. This is particularly a concern for religious institutions because their extensive tax-exempt holdings could be at stake if current trends regarding same-sex marriage continue. Along with this, religious institutions face the potential withdrawal of funding from state and federal governments on grounds of discrimination; state and federal anti-discrimination laws would serve as rational grounds for the dissolution of government association and subsequent assistance to these institutions. Since these religious and charitable groups would be operating contrary to public policy by not performing same-sex marriages if these unions were pronounced legal, governments may be inclined to cancel funding and critical tax exemptions that faith-based organizations rely upon to adequately perform charitable services.

This action could have a significant impact on the charitable arms of these religious institutions and the lives of those whom these organizations help. The Catholic Church is one such institution that would be negatively affected by such action. Catholic Charities USA funds many disaster relief efforts and poverty campaigns across the nation. According to “Catholic Charities: At A Glance,” a sta-


34 See id.

35 Bold, supra note 27, at 199.

36 Severino, supra note 23, at 943.

37 Severino, supra note 23, at 943; Bold, supra note 27, 199.
tistical analysis produced by Catholic Charities USA in 2009, the organization “provided help and created hope for 9,164,981 (unduplicated) people regardless of their religious, social or economic backgrounds.”\(^{38}\) If the tax-exempt status of these organizations were revoked for their stance against same-sex marriage, it could significantly affect the service-oriented branches of these religious institutions and others like them.

IV. Separating Civil and Religious Marriages

As the movement for same-sex marriage progresses and the norms of anti-discrimination laws broaden, society must ask how a pluralistic society can “commit to both equality and tolerance of religious differences.”\(^{39}\) Past social movements for racial and gender equality led to the creation of civil rights laws and government authority to enforce them.\(^{40}\) Proponents of marriage equality have pursued this legislation on similar premises and have subsequently encountered mixed reactions from a government that constantly struggles to balance their interests with those of religious groups.\(^{41}\) As Minow argues, “the protection of religious freedom is itself a civil right, and working out room for both religious freedom and freedom from discrimination should motivate government officials and advocates who care about civil rights, restrained government, and respect across differences.”\(^{42}\)

In light of these issues I propose that every marriage be preceded by a civil union and that the state governments be given exclusive control over such unions. To explain why my proposal is relevant I will discuss again *Hosanna-Tabor v. EEOC*. As stated previously, this case involves a woman who was fired from a private religious


40 Id.

41 Id.

42 Minow, supra note 38, at 815.
university. Claiming discrimination, she appealed to the government. As a friend-of-the-court brief stated, filed in defense of the religious institution involved, “The reason for the church’s decision is beside the point. The point is that under our constitutional structure, who decides the question is determinative, not what is decided or why.”43 The Supreme Court’s recent decision matches the sentiments of the friend-of-the-court brief by asserting that while deciding how to meet the frequently conflicting demands of the Establishment and Free-Exercise Clauses of the First Amendment, “both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.”44 This supports the claim that the federal government is continuing to ensure that religious organizations maintain their autonomy. However, to create additional protections for these institutions regarding their decisions on who to marry, the powers to solemnize civil and religious marriage ceremonies should be separated. I will now discuss similar systems in other countries which may highlight why adopting such a system is a viable option.

A. Examples Outside the United States

It’s important to examine the satisfaction of both same-sex and religious groups in the countries that have separated civil and religious marriages so that we can speculate how effectively this policy will solve our current problems. Germany has allowed registered partnerships for same-sex couples since 2001.45 Although registered partnerships give same-sex couples equality in inheritance, alimony, health insurance, immigration, and name change, they do not grant same-sex couples tax benefits.46 As a result, the people of Germany are calling for a change to the current policy. The majority of Ger-

46 See id.
mans favor marriage equality, and a marriage equality bill has been introduced to the German legislature to change the policy and allow marriage for same-sex couples.\(^{47}\)

Brazil is another country that requires civil processes for marriage. While a couple can have a religious marriage, they are not considered legally binding.\(^{48}\) A civil marriage must be performed in order for the marriage to be recognized by law. In May of 2011, Brazil’s Supreme Court voted unanimously to recognize civil unions.\(^{49}\) Although civil unions give same-sex couples all of the same 112 rights given to straight married couples, same-sex couples in Brazil are fighting for marriage.\(^{50}\) In June 2011, a Brazilian state judge decided to uphold a same-sex marriage, based upon the Supreme Court’s May decision, the Brazilian Constitution’s objective of “promot[ing] the good of everyone,” and provisions in the Constitution that allow the conversion of a civil union to a marriage.\(^{51}\) It is obvious, then, that Brazil’s homosexual couples want more than just civil unions, but that they are not trying to force religious institutions to perform marriages for them. While gay couples still want more rights, the separation of civil and religious marriages seems to have alleviated the tension between religious and gay groups. Perhaps with similar policies in the United States, conflicts between religious and gay communities will dissipate.

\(^{47}\) See id.


Laws such as these may quell tensions that arise when religious beliefs conflict with the laws of the state. In accordance with the Establishment Clause of the Constitution, the ability of the government to establish a religion by law was denied.\textsuperscript{52} Furthermore, cases that followed set precedents for the distinct separation between church and state affairs. The landmark decision in the 1962 Supreme Court case of \textit{Engel v. Vitale} was based on the conclusions that “the Establishment Clause’s first and immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”\textsuperscript{53} My solution, modeled after systems found both in Europe and South America, would truly allow moral and religious-based arguments to “continue to apply with full force on religious marriage, but no longer carry such great weight in the argument over who is entitled to civil marriage.”\textsuperscript{54} While recognizing the limitations in resolving the entire issue at hand, this solution would provide benefits to both sides as the religious sacrament of marriage would be “preserved in whatever form a particular sect deems holy” and same-sex partners would be able to be married.\textsuperscript{55}

\textit{B. Adopting a Similar System}

In an opinion piece in the New York Times in 2009, David Blankenhorn and Jonathan Rouch asserted that to find a common ground in this issue the Federal Government needs to take action and legalize same-sex civil unions while strongly maintaining the freedoms of religious institutions to not condone or perform such marriages.\textsuperscript{56} If states do choose to separate religious and civil unions, the Federal Government would not need to become involved in this issue. Under

\textsuperscript{52} U.S. \textsc{cons}t. amend. I.
\textsuperscript{53} Hobson, \textit{supra} note 46, at 21.
\textsuperscript{54} Hobson, \textit{supra} note 46, at 25.
\textsuperscript{55} Amelia A. Miller \textit{Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage}, 38 \textsc{loy. l.a. l. rev.} 2185, 2215 (2005).
\textsuperscript{56} David Blankenhorn & Jonathan Rauch, \textit{A Reconciliation on Gay Marriage}, N.Y. \textsc{times}, Feb. 22, 2009, at WK 11.
this system, individuals would be required to marry civilly under state authority and would then be able to participate in religious marriage ceremonies as long as they meet the requirements set by the particular religious institution through which the desired additional ceremony would be performed. Thus, religious institutions will be free to perform religious marriage ceremonies as they see fit. This would allow them to continue to set reasonable requirements on such ceremonies, separating such practices from the legal process.

The exclusive right to perform civil marriages should be given to state governments, rather than federal, in order to limit federal government regulation and preserve state autonomy in this sensitive issue. The Tenth Amendment to the Constitution states “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”57 Marriage is not a right delegated to the United States through the Constitution; therefore, it must belong either to the States or to the people. Currently it is in the jurisdiction of the States to decide how to regulate marriage and as a result, some states have already legalized same-sex marriage.

Allowing state governments to exercise exclusive marriage rights may benefit society. It seems that if state governments remain responsible for performing marriages, many states will move in the direction of legalizing same-sex marriage. However, religious institutions would not need to fear being forced to perform ceremonies for same-sex couples because the government would lack a compelling interest to interfere in those ceremonies. This option would represent a compromise which would allow both sides to have most of what they want. Supporters of same-sex marriage would have their marriage, and government would not interfere in the religious ceremonies of institutions opposed to the practice.

One possible contention against allowing the federal and state governments to have exclusive marriage rights is that this may not appease same-sex marriage advocates as it is intended to. Should we believe these advocates would be appeased by the state government legalizing same-sex marriages? It is reasonable to suppose that this

57 U.S. Const. amend. X.
might not stop them from trying to force religious institutions to perform religious ceremonies for same-sex couples. People who support this assertion might say that the problem with granting same-sex couples the right to marry is that the social momentum by which same-sex marriages became legal would then become active in pursuing laws that would require religions to accommodate same-sex couples in religious ceremonies. However, I do not believe that such a situation necessarily follows from granting government the right to perform marriages.

Another objection may be that taking the right to solemnize civil marriages from religious institutions would remove a right that religious institutions originated and would present it to those who are antagonistic to their views. This is not the case. In granting government the exclusive right to perform civil marriages, religious institutions would be placing that right in the power of an institution entrusted with the protection of their religious rights as well as the rights of same-sex marriage advocates.

V. Conclusion

I suggest that state governments seriously consider this option as a means of appeasing some of the demands of those on both sides of the same-sex marriage debate. Although the government would never force religious institutions to perform same-sex marriages, there may be other social and economic ramifications that these institutions should be aware of. Granting government exclusive rights to perform civil marriages may allow an adequate separation between church and state which would mitigate these negative ramifications while serving as a means to appease same-sex marriage advocates. With this policy, religious institutions would also be free to perform their own religious marriage ceremonies as they see fit. This would protect religious institutions and enable a peaceful resolution to the same-sex marriage debate.
SUBPOENAE D MEDIA MEMBERS AND THE 1917 ESPIONAGE ACT

Timothy Allen¹

Introduction

In a 2012 Rolling Stone interview with Julian Assange, the infamous instigator of Wikileaks, Assange spoke about a situation involving 24-year-old Army veteran Bradley Manning. Manning, an alleged informant of Wikileaks, has been kept in a military prison for the last 600 days as he has awaited trial and a possible life sentence. Assange is reportedly in contact with Manning’s defense, who stated that they believed Manning’s treatment was an attempt to get him to testify that Assange is a spy. He went on to talk about how the government’s plans to prosecute him and to interpret the Espionage Act in such a way that any media member who tries to solicit classified information from a government official could be prosecuted as a spy.² The government’s future attempts at prosecuting Assange will give insight as to how they wish to handle the media and transparency in the future.

With recent events, such as Wikileaks, the question of prosecuting private individuals, members of the media, and news organizations for publishing classified information has become a topic of debate.³ In 1970, the Justice Department adopted guidelines for federal prosecutors that protected news organizations and journalists

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3 Id.
under the First Amendment in an attempt to promote greater government transparency. These guidelines state that source subpoenas should only be ordered when they “strike the proper balance between the public interest in the free dissemination of ideas and information and the public interest in effective law enforcement and the fair administration of justice.”

However, in direct opposition to these guidelines, the government has recently employed two tactics to limit the media and their sources. First, they have threatened to use the 1917 Espionage Act, which was enacted during World War I to protect the nation from spies, to prosecute the media along with their confidential sources. Over the years this act has created controversy; in 2006, Judge Ellis said that it is “unconstitutionally vague and might violate the First Amendment.” Second, along with this threat of using the Espionage Act against the media, there have been high numbers of media source related subpoenas, which cause reporters to lose their confidential sources or go to jail for contempt.

In order to quell these threats on the media and protect the media’s important role in government transparency, 40 states and the District of Columbia have adopted forms of a shield law. These laws protect media members by establishing criteria for media subpoenas, which strike a balance between the media’s role to foster transparency and the government’s right to protect classified information. Although some states have shield laws, there are no federal laws that

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4 Title28: Judicial Administration § 50.10
afford the media such protection. Attempts to pass such federal laws have failed in the years 2005, 2007, and 2009. While a federal shield act would help limit the numerous source subpoenas, the use of the 1917 Espionage Act would continue to hamper the media’s ability to keep the government responsible for its actions and promote transparency. Therefore, to ensure protection of the media system, the 1917 Espionage Act must be partially amended so that it cannot be used against media and their sources when published information benefits the public more than it potentially harms national security. Both an amendment of certain parts of the Espionage Act and an adoption of a federal shield law are necessary to ensure protection of public interest through the role of the media.

Section one of this article will set forth what constitutes public interest and show the important role of the media in protecting public interest. Section two will then discuss how media subpoenas and the Espionage Act have been used to violate public interest by threatening the transparency provided by the media. Finally, section three will enumerate specific provisions for a federal shield law, to protect media members and their sources, and changes needed in the Espionage Act, to ensure protection of public interest.

Section One

While there is no consensus on what specifically constitutes public interest, it is often viewed as what is best for citizens of a country as a whole. Throughout the history of democratically established countries, especially the United States, it has been the role of the

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government to protect public interest. President Theodore Roosevelt concluded, “The object of the government is the welfare of the people.”11 The United States Constitution charges the government with the obligation to protect the public interest of each citizen by ensuring that each citizen has the right to assemble peaceably, keep and bear arms, practice religion, and enjoy privacy in all matters in which the rights of others are not violated.12 While these rights are explicitly outlined in the Constitution, over the years the United States government, in an effort to protect the welfare of the people, has become larger and more involved in the lives of its citizens. With this growth has come the increasing need for transparency to ensure that the government does not overstep its authority and, ironically, infringe upon public interest.

One way transparency in government has been established in the United States is through the media, which serves as a watchdog over government actions. In Richmond Newspaper v. Virginia, newspaper reporters solicited a review from the Supreme Court of Virginia regarding a closure order that denied the reporters the right to access to a murder trial.13 These reporters argued that it was their right to attend the trial as stated in the First and Fourteenth Amendments to the Constitution. On appeal, the Supreme Court defended the media’s role as a watchdog over government actions, including those pertaining to the judicial branch. Justice Stevens, in offering a concurring opinion, referenced the position he took in another case regarding the media, Houching v. KQED, where he said that he was “convinced that...concealing...knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and the press protected by the First and Fourteenth Amendments to the Constitution.” He continued by stating that, in the case of Richmond Newspaper v. Virginia, the Court “unequivocally holds that an arbitrary interference with access to

12 U.S. Const. amend. I.
important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”

Along with watching over the actions of the judicial branch by reporting on the rulings of court cases, the media also protects public interest by reporting on new legislation, politicians’ behavior, and incidents of corruption within the government. The information provided by the media influences how citizens vote and how they pressure government officials. The media serves as a safeguard against government actions and provides important information to citizens in order to promote an effective democratic system.

However, in recent years the government has employed two main tactics to mitigate the effectiveness of the media’s role in protecting public interest by attacking the media and their sources: media subpoenas and the Espionage Act of 1917. Media source subpoenas are court orders which force a media member to disclose their confidential source, who is often a member of a government organization, or go to jail for contempt. Meanwhile, The Espionage Act of 1917, enacted by Woodrow Wilson in order to deal with public concern over national security, is now being used by the government to prosecute media informants under the same laws as spies. Thus, these subpoenas and this Act cause fear among media sources and cripple the media system leaving the government unchecked and public interest undefended.

Section Two

The first method used by the government to impede the media’s role to protect public interest has been the use of media subpoenas. Informants often leak classified government material that they feel is in the public interest to know. Historically, the practice of leaking information to the media in this way was accepted by many members of government organizations, and the government did not attempt to find or prosecute the individuals. Recently, however, the govern-

14 Id.

ment has continuously sought to find and prosecute media informants through media-source subpoenas. For example, in 2006, Frontline news submitted a Freedom of Information Act (FOIA) request to the Justice Department inquiring about the number of media related subpoenas. They reported that there were “approximately 142 matters” spanning from 1991, the beginning of keeping such records, until October 2006. From those 142 subpoenas, it was reported that fewer than 20 were seeking a reporter’s confidential source. This number, however, is not fully inclusive of all source related subpoenas. According to the Justice Department’s Director of Public Affairs, the number of journalists who have received source subpoenas is unknown because the work of special prosecutors is “not run through the department.” In the FOIA request received by Frontline, there was not a recording of four of the most prominent cases of source subpoenas in recent years, including the Valery Plame investigation; furthermore, in just these four cases there were at least 20 reporters subpoenaed for sources.16

The experiences of New York Times reporter James Risen show how the government is impeding public interest when they subpoena media members for their sources. James Risen has won the Pulitzer Prize twice and reported on many of the biggest news breaks of the last decade.17 He was subpoenaed twice in 2008 and again in 2010 for the United States’ case against Jeffery Sterling.18 Upon having his subpoena reissued in 2010, Risen wrote an affidavit to the court in order to explain his lack of compliance. In his affidavit he wrote, “Reporting on intelligence and national security has often included major revelations of great public interest.” He goes on to state some of these revelations: the waterboarding of terrorist suspects, the CIA’s withholding of intelligence that showed Iraq had no weapons


17 The Pulitzer Prizes, _http://www.pulitzer.org/faceted_search/results/Risen._

of mass destruction, and the NSA’s eavesdropping on phone calls and emails of private U.S. citizens without congressional approval.

Many of the stories published by Risen revealed information that hurt and embarrassed the Bush administration, but he states that he has never published information, even if it was newsworthy and true, if it would cause real harm to national security. This did not stop the Bush administration from organizing picketing outside Risen’s office, along with hate mail from right wing groups, including “personal threats.” Public threats of prosecution or contempt continued throughout the case, and Congressman Peter Hoekstra said that Risen and his associates would “be sitting in jail by the end of the year until they reveal their sources.”19 No matter the amount of public support or public interest involved, the government continued to threaten Risen into the Obama administration.20 The government did not care that Risen was merely informing the people of an illegal government action against the public, such as when the U.S. illegally tapped into Americans’ phones. Presidential administrations and other organizations, such as the CIA, that keep information confidential for reasons other than national security want to stop the media from reporting those secrets. They cover their mistakes and misconducts and want to claim national security to silence the media from revealing information that has public interest in mind.

James Risen is just one example when it comes to media being threatened and undermined by the government. Judith Miller, a reporter for the New York Times, was subpoenaed to reveal her source of information in relation to Valery Plame.21 Plame was an undercover CIA officer who had her identity leaked to various members of the media by “Scooter” Libby, Vice President Cheney’s Chief of Staff at the time. Libby was reportedly angered by Plame’s husbands’ criticism

19 Myron Kukla, Hoekstra Predicts Jailing of Reporters (NYT Traitors To Be Jailed By Year End), GRAND RAPIDS PRESS, Aug. 31, 2006 at B1.


of the Bush administration. Both Libby and Miller were convicted, but Miller alone spent six months in jail. Libby was commuted of his 30 month sentence by President Bush. Notably, Miller never actually published an article outing Plame; that was done by Robert Novak. Miller just had the information and refused to give up her source when in court. In fact there were many reporters subpoenaed in this case, which goes against the common practice of only subpoenaing media members for their sources if there is no other way to get the same information. Miller’s situation further shows the disregard for media and in turn public interest. The administration leaks information to hurt political opponents and protect their own politicians, while subpoenaing public interest minded media members. Public interest cannot be protected if the government is manipulating the media in these ways.

The second way the government has been attacking the media and their sources is the current and threatened potential use of the 1917 Espionage Act. Established far prior to the contemporary practice of media subpoenas, Woodrow Wilson enacted the 1917 Espionage Act in order to deal with public concern over national security during World War I. The United States had never before engaged in such an international altercation, so the nature and provisions of the 1917 Espionage Act naturally followed a more radical nature. Some provisions simply expounded on the Sedition Act of 1798, but


26 Title28: Judicial Administration § 50.10.
others represented a drastic departure from previous legislation.\textsuperscript{27} The minority opposition deemed these controversial provisions an infringement on individual freedoms and liberties.

One of the first uses of the 1917 Espionage Act came in 1919 when Charles Schenck was prosecuted for passing out fliers that compared conscription in the army to slavery.\textsuperscript{28} In \textit{Schenck v. United States}, it was decided that the act was not a violation of free speech; the ruling judge stated that freedom of speech is not protected when it is encouraging insubordination. This set the standard “clear and present danger” test concerning what was protected by the First Amendment and eligible for prosecution under the Espionage Act. The “clear and present danger” doctrine set forth the famous example of yelling “fire” in a crowded theater, showing that originally the Espionage Act could be used for prosecuting people who made a “clear and present danger” to the public. Other than the clear obstruction of peaceful protest, this case shows that the Espionage Act’s range of use was originally very broad, and while it is no longer used for such cases, its original wording creates an unreasonably wide range for it to be interpreted. The “clear and present danger” doctrine was slowly weakened by several rulings ending with \textit{Branzburg v. Ohio} (1969), in which the current precedent was set at any speech that would incite “imminent lawless action.”\textsuperscript{29}

The next major case the law was used in was in the 1970’s, when the government attempted to stop the publication of the “Pentagon Papers.”\textsuperscript{30} In \textit{The New York Times Co. v. US}, the government tried to stop the publication of documents that detailed classified aspects of the Vietnam War. The judge ruled that the government could not continue its injunction but never officially ruled whether or not

\begin{itemize}
\item \textsuperscript{28} Schenck v. US, 249 U.S. 47, 49-50 (1919).
\item \textsuperscript{29} Branzburg v. Hayes, 408 U.S. (1972).
\item \textsuperscript{30} New York Times Co. v. United States, 403 U.S. 713 (1971).
\end{itemize}
the Espionage Act could be used against a publication.\footnote{Jamie L. Hester, The Espionage Act and WikiLeaks, 12 N.C. J.L. & Tech. ON. 177, 182 (2011).} Possibly because the papers were already leaked, the newspapers were not charged further under the Espionage Act, but the two men who copied and handed out the papers were punished. Anthony Russo and Daniel Ellsberg believed that what the United States had done in Asia was wrong and wanted the public to know exactly what happened. While the contents of the documents did show that the Johnson Administration had lied, they were classified as top secret, and whoever knowingly gave them out qualified for prosecution under the Espionage Act.

The case was eventually dismissed by the judge when Ellsberg’s psychiatrist’s office was burglarized and the FBI lost tapes that may have been used to illegally record phone conversations. The judge of the case was also reportedly offered the position of FBI Director during the trial.\footnote{Douglass Martin, Anthony J. Russo, 71, Pentagon Papers Figure, Dies, N.Y. TIMES, Aug. 8, 2008, http://www.nytimes.com/2008/08/09/us/politics/09russo.html.} The details of the Russo and Ellsburg case show that the Espionage Act can be used to prosecute people who are trying to inform the public of the truth, not cause significant damage to national defense. The case was more of a means to cover embarrassment and discredit the men who leaked the information. The fact that the judge threw out the case when he realized how much government corruption was involved highlights the need for informants to be able to leak documents that are defined as classified. These men clearly had public interest in mind when they leaked the information, but there was nothing in the law which allowed them to fulfill their duty to public interest.

The 1917 Espionage Act gives several relatively vague guidelines as to what type of information should not be published. One part of the law states that anything “concerning the communication intelligence activities of the United States or any foreign government” is classified information.\footnote{18 U.S.C. §§ 792—798 (2006).} Judge Young said in his memorandum of
US v. Morison that the jury can decide what is or is not a matter of national defense, but the Espionage Act merely states that the government needs to prove willfulness in knowingly transmitting information to prosecute an individual for leaking confidential information. He goes on to say that the jury only needs to determine two things to decide whether something is a matter of national defense: first, that the information could be potentially damaging to the US or could be useful to an enemy of the US, and second, that the information was something that the US was trying to keep secret.\textsuperscript{34} This shows a key problem with the potential of prosecutions under this law, because while information could be potentially damaging and had been keep secret by the government, there is nothing that allows for a beneficial function of releasing the information to supersede the potential damage to the nation.

In the last thirty years, courts have continued to convict media members unjustly under the Espionage Act. In 1985, a United States intelligence analyst for the Navy was charged and imprisoned for two years for publishing three photographs in a British defense magazine. The photos were of a Soviet nuclear powered aircraft carrier. This analyst, Samuel Morison, said that he published them so the United States and Britain could see what they were up against and increase funding for their own defense programs.\textsuperscript{35} Much later, in 2001, he received a presidential pardon from Bill Clinton. In this case, a publisher of information was technically prosecuted under the Espionage Act, and Morison was still prosecuted even though all parties admitted that the photos did not harm national defense.

This flaw in the Act was also shown more recently when Stephen Jin-Woo Kim, a senior analyst for the Office of National Security, was convicted under the Espionage Act in 2010 for telling a reporter


that North Korea would be testing a nuclear bomb in the near future.\textsuperscript{36} The threat of using the Espionage Act against publications and the practice of convicting minor offenses with no damages to national security show a pattern of executive branch attempts at causing fear among potential whistle blowers. Public interest is protected by the media, and the media is losing its ability to keep confidential sources and publish news about government due to the use of media subpoenas and the 1917 Espionage Act.

Section Three

This media threat is not stagnant but is actually being supported in a way to make the Espionage Act even stronger and hurt the role of the media even more. In contrast to the obvious need to protect media and public interest, last year legislators pushed a bill called The Shield Act (s4004). However, far from the shield acts passed in most states that protect media sources, this act, the Securing Human Intelligence and Enforcing Lawful Dissemination Act, proposed to widen the already broad prosecution powers of the 1917 Espionage Act. For example, it defined a transnational threat as any group or individual that threatens national security. Then, it made publishing information that could have been deemed beneficial to any of these transnational threats a crime punishable under the Espionage Act.\textsuperscript{37} Even though this bill did not pass, it is disturbing to think that some members of the government promoted something that would have hurt free press even more. It shows a concerted effort in the last year to stop any potentially sensitive or embarrassing information from leaving government oversight. With the public interest afforded from media already under attack, the government is still seeking to frighten journalists and informants alike. There needs to be legislation that will strengthen and protect the media’s ability


to communicate with confidential sources and in turn protect public interest. The following will prescribe a federal shield act as well as a public interest clause added to the Espionage Act.

The Free Flow of Information Act has been introduced as a federal shield act on four occasions. Currently, the bill has been referred to the Subcommittee on the Constitution. In its previous introduction, the bill died on the Senate floor even though it seemed like there was a good amount of support for it. The only public arguments made against the bill claim that it negatively affects criminal investigations, but, compared to state shield laws, the proposed federal version contains strong provisions to prevent the law from interfering with criminal investigations. For example, the proposed act specifically details that anyone involved in a criminal investigation who is a sole witness does not qualify for the act’s protection. This proposed bill would allow judges to see “that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Media source subpoenas would still happen, and people could still be compelled to testify in a criminal case; however, this would be done only when necessary to national security and would not jeopardize public interest.

While this bill does have many positives, media is not defined explicitly in the current form of the bill. There have been conflicts


\[41\] Id.

\[42\] Id.
in state cases about who should qualify to use the protection.\textsuperscript{43} The bill’s sponsor, Representative Mike Pence, stated, “The Free Flow of Information Act is not about protecting reporters; it is about protecting the public right to know.”\textsuperscript{44} Since the bill is not meant to give special rights to media members, it should protect anyone who is providing the role of media.

This type of federal shield law still has some details to iron out; however, the repeated rejection of such bills is due in larger part to widespread antagonism, apathy, and ignorance. Public support of the bill must rise, and pressure must be placed on members of Congress and the President for the bill to pass. The public’s role is especially imperative due to many high ranking government officials who would not like to provide the public with transparency by letting the media operate freely.\textsuperscript{45} Experience can guide future amendments to the law, but it needs to be in place so that public interest will be protected as soon as possible.

Along with the federal shield law, an amendment must be added to the 1917 Espionage Act to fully protect the role of the media and thus, public interest. While a federal shield act would protect media members from losing their sources and going to jail, their sources could still face prosecution under the Espionage Act. This amendment would be a public interest clause, allowing public interest to be weighed much like is done in the Free Flow of Information bill. This clause would allow a judge to decide if the leaked information significantly hurt national security or was done with malice. If the information was leaked with intent to inform the public of something important, such as an illegal operation by the government, and if the benefit to public interest outweighed potential damage to national security, then the individual would not be guilty of espionage. Much

\textsuperscript{43} Aaron Mackey, Two recent cases highlight tension in applying new media, Will extending the reporter’s privilege too far weaken shield laws?, The News Media & The Law, page 26, Summer 2011, http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2011/two-recent-cases-highlight-.

\textsuperscript{44} Derrick, supra note 7.

\textsuperscript{45} Supra note 38.
like the shield act, the details of this amendment would have to be fine-tuned over time, but it is imperative to first implement the law.

These two laws, when implemented together, would help protect the media’s vital role in government. They would not be passed to protect the media, but to protect public interest. In *US v. Steelhammer*, Judge Bryan of the 4th Circuit Court overturned a judgment of contempt for two reporters that had refused to testify. He wrote that his “decision now is but the product of a balancing of two vital considerations: protection of the public by exacting the truth versus protection of the public through maintenance of free press... Weighing in the scales in favor of this solution is its avoidance of unnecessary incurrence of any potential danger of sterilizing the sources of newsworthy items.”

This process, written into law via a federal shield law and amendment to the Espionage Act, would protect public interest from the strong hand of government. It would promote transparency, honesty, trust, and public education while attacking corruption, ineffective government, and crime. That is why these two laws which protect the public must be passed. A federal shield law in congruence with the amended Espionage Act will protect well-intentioned journalists and allow the media to fulfill its role as an important check and balance to America’s government.

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As former Supreme Court Justice Felix Frankfurter wisely stated, “if facts are changing, law cannot be static.” This maxim keenly describes the Equal Access Act of 1984, a 28-year-old law that was designed to protect the free speech rights of Christian clubs within the public school system but has become increasingly ambiguous as the facts surrounding it continue to change. These changes, instituted in 1991 by the formation of the first public school Gay-Straight Alliance (GSA) club in Newton Centre, Massachusetts, have resulted in increasing confusion about how schools should handle the emergence of controversial clubs. In the midst of this confusion, the GSA and similar clubs continue to grow rapidly; since their small beginning in 1991, 30% of Massachusetts schools now have GSA clubs and over 1,000 GSA’s have formed nationwide within the last 10 years. On the coattails of this emerging student group, other controversial clubs have sought formation

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1 Braden Johnson will graduate from Brigham Young University in April, 2012 with a degree in Political Science. He will enroll in law school in the fall of 2012, and plans to practice law. He wishes to thank Professor Byron Daynes for his mentorship throughout the creation of this article.


under the same auspices. These clubs include groups based on racial discrimination, reproductive issues, and anarchic political views, among others.

As such clubs emerge, school administrators face the difficult task of interpreting the antiquated Equal Access Act (EAA), despite the Act’s failure to treat these contemporary issues. A revision of the Equal Access Act of 1984 is necessary to provide realistic legal standards for dealing with the emergence of controversial and divisive clubs while protecting the free speech rights of students. I address the legal issues surrounding the EAA by (A) outlining the background of the act, (B) identifying its weaknesses, and (C) positing prescriptive solutions, after which I will offer a brief conclusion.

A. Background

The courts first addressed the issues relating to controversial clubs in *Windmar v. Vincent*, which eventually led to Congress’ Equal Access Act. *Windmar v. Vincent* involved the University of Missouri at Kansas City’s refusal to allow a student religious group to use its facilities for club functions, citing a conflict with the Establishment Clause. The students sued, citing a violation of their First Amendment rights, and eventually prevailed. The Court, in an 8-1 decision, ruled that student-led religious clubs were entitled to protections under the Free Exercise Clause outweighing any potential Establishment Clause concerns. In an effort to canonize the Court’s ruling, the 98th U.S. Congress enacted the Equal Access Act in 1984, which prevented schools from discriminating against student-led organizations based on the content of the club’s curriculum.

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6 For the purposes of this article, controversial clubs will be defined as any student-led group that cannot realistically expect to receive the full-fledged support of students, parents, or administrators within the school.


The EAA focuses on clubs unrelated to the core curriculum of the school. It holds that any school allowing at least one non-curriculum related club to form is thereby prohibited from preventing the formation of any additional non-curriculum related club based on content. Schools are either to prohibit all non-curriculum related clubs or to allow all such clubs; they are not permitted to pick and choose which clubs they will accept or reject. Schools with at least one non-curriculum related club are labeled as limited-open forums for discussion. Schools that choose to ban all non-curriculum related extracurricular activity are termed closed forums.

This new legislation was first tested in 1990, when the Supreme Court heard *Westside Schools v. Mergens.* The Court again ruled that a religious club should be entitled to the same rights as any other club. Because Westside Schools already supported such non-curriculum related organizations as a scuba club and a chess club, the Court said the school could not prohibit the formation of any other non-curriculum related club, religious or otherwise. The Court highlighted Westside School’s scuba and chess clubs as evidence that the school created a “limited open forum” for student expression. Because Westside School allowed for a “limited open forum,” they could no longer prevent any subsequent non-curriculum related clubs from forming. If Westside had disallowed all clubs that do not relate directly to the school curriculum, they would have retained the right to stop any non-curriculum related student group from forming, regardless of its content. The Court’s decision left schools with a difficult choice: disallow all non-curriculum related clubs and retain the freedom to stop controversial clubs from forming (creating a so-called closed forum), or allow at least one club not directly related to the curriculum, and thereby become bound to allow any


11 Id. at 243.

non-curriculum related club to form (creating a so-called “limited open forum”).

B. Weaknesses of the EAA

Since the Mergens case, the Act has been a magnet for controversy and is vulnerable to criticism on several grounds. (1) The vague language that comprises the EAA invites conflict among schools, students, and parents who may have different interpretations of their rights. (2) Controversial and divisive clubs, citing the protections offered by the Equal Access Act, have sought acceptance in public school systems, creating additional conflict. (3) Because the EAA contains no means for enforcement, the previously stated sources of conflict often lead to expensive and time-consuming litigation for injunctive relief and, in some cases, punitive damages. (4) In light of the threat of expensive litigation, administrators are shown strong incentive to seek the protection offered by the EAA to schools which disallow all non-curriculum related clubs. This ironically results in blanket suppression of the same free speech the Act was created to protect.

Nonspecific Language in the Act

The Equal Access Act relies on a nuanced taxonomy of words to classify individual cases, yet it is surprisingly nonspecific in defining these concepts. For example, the Act offers no guidelines or definitions with which to classify a club as curriculum related or non-curriculum related. This presents problems as the Act continues because the critical distinction of how to classify a “limited open forum” is defined in terms of an undefined curriculum related distinction. Thus, schools unfamiliar with the extensive jurisprudence surrounding this issue find it difficult to know whether or not they have created a limited open forum. Such organizations as the library


14 See Id.
club, key club, and even the student council blur the already hazy line between curriculum related and non-curriculum related student groups. As Justice John Paul Stevens said regarding the vagueness of the act, “every high school football program [is now a] borderline case.” Consequentially, schools may realistically believe they have created a “closed forum” by disallowing all clubs they believe to be “non-curriculum related.” Yet, if the courts disagree with the school’s interpretation of what clubs are related to the curriculum, the school is open to legal liability.

The nonspecific wording also saddles schools with vaguely defined powers to control or discipline clubs. The EAA states that schools have the authority to “maintain order and discipline . . . to protect the well being of students and faculty . . . .” and to ensure that club meetings “[do] not materially and substantially interfere with the orderly conduct of educational activities within the school.” Under this indistinct standard, schools do not have the ability to stop dangerous clubs from forming, only to discipline them if they misbehave. Therefore, schools are forced to allow the formation of clubs such as Students Against Faggots Everywhere (S.A.F.E.). This example demonstrates the difficult situation faced by schools under the current nonspecific rendition of the EAA.

Emergence of Controversial and Divisive Clubs

In its broadest sense, the EAA provides that every club within a public school should have the same set of rules and opportunities, irrespective of the individual platform or message of the club. Yet the Supreme Court has supported censorship in the public school “in light of the special characteristics of the school environment.” In Bethel v. Fraser, the Supreme Court sent a strong message that the rights of students in public schools are not the same as the rights of adults in other settings, by upholding the suspension of a student

for “indecent speech and lewd conduct in [a] school assembly.” The Court also allowed censorship of a school newspaper in 

**Hazelwood v. Kuhlmeier**, stating “a school need not tolerate student speech that is inconsistent with its basic educational mission.”

However, the issue of extracurricular education invites some gray area. The most controversial clubs are generally unrelated to the curriculum of the school and take place outside of instructional time. This is an entirely different circumstance than a disruption during a compulsory class or assembly, and school boards should be careful not to over assert their censorship power. However, the school is the body granting legitimacy to the club and therefore school boards should have more oversight than if the students were meeting off campus, in a park or a friend’s basement.

These controversial clubs have provoked parental concern across the nation, which creates distraction and conflict within the public school system. Although the views of parents should not be an authoritative factor in school board decisions, these frustrated parents often push lawsuits and organize campaigns, both for and against controversial clubs. Attention is needed to mitigate this parental uproar on both sides of controversial issues.

**Incentive Toward Litigation**

The Act falls short in another key category: it contains no independent means for enforcement. Because Part A states that the Act applies to all schools who receive federal funding, some are under the impression that this funding will be withheld from schools found to violate the Act. In fact, Part E specifies no federal funds will be withheld from any school with relation to this Act.

This lack of enforcement shifts the burden to our judicial system. When a student thinks their school is in violation of the Act, they have very few options before bringing a lawsuit against their school; there is no federal provision for mediation, no appeal process, and no

20 Broberg, *supra* note 8 at 97.
outside means of addressing the disagreement. In an effort to bolster students’ rights, organizations such as Lambda Legal and the American Civil Liberties Union (ACLU) frequently offer free and reduced cost legal services to students fighting these battles making litigation all the more likely. Such litigation can be very expensive for the state, creating long delays in the correct enforcement of the law.

The case of *East High School GSA v. Board of Education* provides a textbook example of the penalties schools can face for being on the wrong side of an Equal Access Act conflict. In this case, the Court ordered the Board of Education of the Salt Lake City School District to pay the plaintiff’s legal fees in addition to paying for their own legal defense despite East High having successfully brought itself into compliance with the Act during the process of the trial. Additionally, in *Sharon Gernetzke v. Kenosha School District*, the plaintiffs sought damages against the school in addition to injunctive relief. These types of financial penalties could negatively affect the quality of education within the entire district and demonstrate another example of why a revision to the EAA is necessary.

**Incentive toward Blanket Suppression of Expressive Speech**

The cost and distraction associated with circuit, appellate, and Supreme Court conflict serve as strong motivations for schools to err on the side of caution with respect to the Equal Access Act. This influence can provide incentives for schools to act with interests other than what is best for their students by encouraging administrators to disallow all non-curriculum related clubs entirely.

Schools wanting the assurance of avoiding such conflict must select from two options. They can choose to cancel their receipt of Federal Aid to rid them of the jurisdiction of the EAA, or stop all non-curriculum related clubs. Waiving public funds would leave schools in a difficult financial predicament and would not be a practical solution. Stopping all clubs would create a de facto


(albeit equal) ban on expressive student speech, which would provide legal protection for the school. The Act holds that schools must treat all non-curriculum related clubs equally, and equally prohibiting all non-curriculum related clubs is considered equal treatment. Schools that pursue this choice would find themselves without such organizations as the National Honor Society, the Key Club, and Future Business Leaders of America.

Stopping the non-curriculum related clubs has the ironic effect of suppressing the expression which the EAA was designed to protect. This scenario curtails the Act and negates the benefits it was created to provide. While stopping all non-curriculum related clubs should be an option for school boards to consider, the current structures create an atmosphere where this choice will be utilized more and more by schools unless the effects of the Act are negated. Justice John Paul Stevens shared this sentiment and lamented that schools preventing the formation of student-versions of “the Ku Klux Klan” or “gay rights advocacy groups,” will be forced to close down groups that are “[no] more controversial than a grilled cheese sandwich.”

C. Prescriptive Ideas

Revisions to the Act can provide clear guidelines to school administrators while insulating schools against frivolous lawsuits and ensuring that students receive prompt responses to complaints. These revisions should include: (1) Provisions which mandate alternate dispute resolution (ADR) in certain cases to promote fair and efficient dispute resolution; (2) required parental consent for any student under the age of 18 to join any extracurricular organization within the school; (3) increased specificity in language; and (4) a definitive list of clubs that are detrimental to the educational surroundings of a school.

Mandatory Provisions for Alternate Dispute Resolution

First, a new rendering of the Act should include a provision for arbitration and other alternate dispute resolution (ADR) techniques in the event of a conflict. While the current system offers only civil litigation, a revised Act could include mediation procedures in an effort to avoid trial or mandatory arbitration provisions. Such techniques can save time and money for both parties.

ADR has already been successfully implemented by Congress in other federal arenas. In the 2004 revision of the Individuals with Disabilities Education Act, schools are instructed to create individual education plans for students with disabilities. In the event parents are not satisfied with the efforts of their school, they are legally bound to seek resolution through ADR before suing the school in open court. This provision has secured significant savings of time and money, while promoting fair dispute resolution.25

Mandatory mediation for EAA conflict would require that students and school administrators have the opportunity for face-to-face dialogue before further action is pursued. Both parties would meet in the presence of an impartial third party and attempt to reach an agreeable decision. There would not be much room for bargaining because the school’s position would be dictated by federal law, yet students would be given an opportunity to state the merits of their clubs, make assurances that they would operate within the scope allowed by law, and answer any questions or concerns put forth by the school officials. This could also serve as a formal venue for each party to be apprised of their rights and instructed about further pursuit of grievances.

If mediation does not resolve the conflict, arbitration procedures should follow. Arbitration will allow both sides to present their case before an impartial group of arbitrators with experience in state and federal education law and Supreme Court precedent. The ruling of the arbitrators is a legally binding decision, and the Act should specify that this ruling is only reviewable by the United States Supreme Court. Arbitration services can be secured through the American Arbitration Association, the National Academy of Arbitrators, the

Federal Mediation and Conciliation Service, or a new arbitration branch created under the Department of Education. Schools found to be in violation of the EAA will forfeit one-half the salary of the school board and school administrators until they are ruled in compliance. This will provide enforcement power to the arbitrators and promote swift compliance with rulings.

ADR is a better solution than civil litigation because it saves state resources and promotes an efficient timetable for resolution. Under the current system, large numbers of students who brought grievances against their school had graduated before the conflict was resolved. ADR also promotes the government’s interest in protecting the education and free speech rights of the rising generation.

**Mandatory Parental Consent**

The state of Utah’s policy of requiring parental consent to join extracurricular clubs should be included in a new version of the Act.\(^{26}\) This will solve many of the issues raised by divisive clubs and will provide an alternative to the blanket ban of clubs that can be imposed by school officials.\(^{27}\) Parents or guardians who feel strong opposition to particular clubs, be they Christian themed, GSA, or any other, will feel confident in their ability to limit the exposure of their minor child to clubs they deem detrimental.\(^{28}\) Additionally, parents will have the opportunity to be better informed of their children’s participation in school and can use this information to help their students.

Parental consent will provide a gatekeeper effect, ensuring that only clubs which can garner support of parent and student will be allowed to form. A student may believe it would be fun to create a cannabis club or a tagging club, but it is likely their parents will think otherwise and will refuse to provide their consent for their student to get involved in such an organization. Parental consent can filter some conflicts before they reach the school level.

\(^{26}\) **Utah Code Ann.** § 53A-3-419 (1997).

\(^{27}\) Broberg, *supra* note 8, at 105.

\(^{28}\) Broberg, *supra* note 8, at 112.
Additional Specificity in Language

A revision of the Act would be incomplete without providing additional specificity in defining main concepts. Of special importance is the concept of noncurricular clubs, a concept undefined by Congress in this Act.\(^{29}\)

In the *Mergens* case, the Supreme Court acknowledged a loophole in the Act which could allow a school to structure their definition of noncurricular in such a way that would enable the school to strategically label student groups to avoid conflict with the Act.\(^{30}\) Thus, by labeling every student club of which they approved as curriculum related they would not be forced to allow the creation of other student-led groups. In considering the ambiguity invited by the current wording of the Act, the Court placed prohibitions on such behavior.\(^{31}\) This clarification in the jurisprudence provides the legal ability to close some loopholes, but creating specific language within the Act would greatly simplify the burden on schools as they attempt to follow the laws.

A canonized definition of “curriculum related” should highlight the need for such organizations to be (1) expressly created or approved by the school (2) for the primary purpose of re-enforcing the content of at least one school class or institution, (3) open to all students, and (4) non-compulsory.

Explicit Prohibition of Dangerous or Detrimental Clubs

Finally, despite the sensitive nature of censorship in public schools, a revision of the Act should provide general guidelines about what clubs are acceptable for membership by minors. The language of the Act should provide against the formation of any club

\(^{29}\) *Id.* at 91.

\(^{30}\) *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990); *Broberg*, *supra* note 8, at 92.

\(^{31}\) *Id.* at 92.
that encourages violence, criminal activities, drug use, discrimination, or that contains explicit content related to human sexuality.32

In congruence with the current version of the EAA, school administrators have the right to attend any meeting they desire with the exception of religious meetings. No administrator will be compelled to attend a club meeting if the content is contrary to their personal beliefs, and no nonschool person will be able to regularly attend any club meeting.33

The Act should allow the school the power to regulate the actions of clubs, so long as their regulations are consistent and impartial. This will strengthen the school’s ability to protect students and preserve a peaceful atmosphere.

It should be noted that, as the court stated in Healy v. James, schools cannot “restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”34 The sole purpose for the explicit prohibition of dangerous clubs is to promote the safety of students and faculty members. This is a compelling state interest and is critical to the success of the public school system.

D. Conclusion

Much has been written about the controversy and legal battles surrounding the Equal Access Act of 1984, yet few have proposed any real solutions to correct the current and future problems invited by this piece of legislation. By integrating ADR techniques, requiring parental consent, increasing the specificity of language, and explicitly prohibiting dangerous clubs, Congress can stop short sided incentives and protect schools from harmful lawsuits while safely guarding students’ rights to free speech and expression. Realistic

32 Banning sex based clubs will only take effect on clubs that are organized with sexual practices as a main tenant—This definition is designed to protect gay straight alliances, which have been largely upheld by courts. See Jordan Blair Woods, Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act, 34 N.Y.U. REV. L. & SOC. CHANGE 373 (2010).


and uniform legal standards, coupled with effective enforcement, can protect the reputation of the public school system and ensure students are kept safe from physical and mental dangers. This can also appease worried parents and encourage an open family dialogue that will benefit students and parents. As controversial student clubs continue their advancement into schools, clear guidelines are the only way to ensure that administrators and students retain their constitutional liberties without infringing upon the liberties of others.
HOW CHINESE IS THE SOUTH CHINA SEA?

Steve Tensmeyer

The past summer has seen a flare-up in the longstanding feud between China and the ASEAN nations over the South China Sea. Since that time, China has used more strident language in staking its claims, has authorized increased naval drills in the area, and has warned several countries, including the U.S., not to “interfere” with what it considers its central security interests. The most remarkable aspect of this most recent phase of the debate, however, is not China’s aggressiveness, but rather its desire to couch its claims in terms of universal norms. This has made China’s behavior somewhat more predictable than it has been in previous decades, but this predictability does not necessarily make China less of a threat to its neighbors; in fact, it may only give a cooperative veneer to a fundamentally aggressive foreign policy.

This increased aggressiveness certainly presents a problem for other countries with claims in the area, but China’s increased commitment to international norms also suggests a way to resolve these disputes. China has certainly not been shy about what it considers its sovereign rights, and the cooperation of other states may have done more harm than good by convincing China that it can act with impunity. With China becoming a greater threat by the day, the best choice for the other nations with claims in the South China Sea (all of which are members of ASEAN, the Association of Southeast Asian Nations) may be to seek some legitimation of their claims from an international body. In this paper, I will investigate one way in which

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ASEAN may be able to obtain an international ruling on at least part of its claims by proposing to the International Seabed Authority (ISA) a contract for exploration of seabed features and polymetallic nodules in the open ocean. Since this kind of mining is legally permitted only beyond all international boundaries, when considering ASEAN’s petition, the ISA may be compelled to determine whether the area targeted for exploration belongs to China.

China would of course interpret this move as aggressive, and the political, economic, and perhaps even military blowback would be significant. A final decision on whether to pursue this line would have to include a careful evaluation of the possible consequences in each of these areas. However, in this paper I intend to address only the legal consequences of such a decision—it may be that, even if this option would result in a legal victory for ASEAN, political or economic calculations would make it inadvisable. This essay is therefore limited in its scope and its conclusions should be interpreted with this limitation in mind.

I. Disputed Areas

The dispute over the South China Sea involves more than just China’s disagreements with other Southeast Asian countries. There are many disputes in the region that do not directly involve China. The Philippines and Vietnam, for example, have had long-standing disagreements and in 1995 issued a joint statement outlining principles for bilateral relations. However, the ASEAN-China dispute is by far the most important because China claims the entire South China Sea, contradicting every other country’s claim, and because ASEAN member states are generally willing to cooperate to counter China.

One of the major disagreements in the South China Sea area is over the Paracel Islands, which are claimed by both China and Vietnam. After Vietnam was divided in 1954, the Paracels were administered by South Vietnam. In 1974, when the Vietnamese Civil War

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was at its height, China invaded and took over the Paracels. At the
time, because it was China’s ally and because it was involved in a
war with the United States and South Vietnam, North Vietnam did
not strongly object to China’s claim to sovereignty over the islands.\footnote{See King C. Chen, China’s War with Vietnam, 1979: Issues, Decisions,
and Implications 45, (1987).} However, after Vietnam had stabilized, and particularly after rela-
tions between the two countries deteriorated to the point of war in
1979, Vietnam began to call for the return of the Paracels and the
renegotiation of maritime borders that had been established by trea-
ties with France before Vietnam won its independence. China has
consistently refused to consider returning the Paracels to Vietnam
(or giving them to the ROC, which also claims them), and as recently
as July of 2010, Communist Party officials asserted that “China will
never waive its right to protect its core interest [including the Para-
cels] with military means.”\footnote{Jacobs, supra note 1.} China has backed up these statements
with the construction of new military infrastructure in the archi-
pelago, including a new airstrip on Woody Island, one of the larger
islands in the group.\footnote{See Felix K. Chang, Beijing’s Reach into the South China Sea, ORBIS,
Summer 1996, at 353, 361.}

Another disputed chain of islands, the Spratly Islands, has been
claimed by China since the end of World War II, when the ROC
government took control from the defeated Japanese and established
a small military outpost on the largest island. After relocating to Tai-
wan, the ROC has maintained control of the largest island to this day,
though it does not control the entire archipelago. The Spratly Islands
consist of mostly small, rocky, and uninhabitable outcrops controlled
by small military contingents from China, Vietnam, Malaysia, Bru-
nei, and the Philippines. The Spratly and Paracel groups are the most
hotly contested islands, but there are other, smaller islands, reefs,
and atolls whose statuses are still unsettled. The Pratas Islands, for
example, are claimed by the PRC and the ROC, and both the Mac-
clesfield Bank and the Scarborough Shoal are claimed by the PRC,
the ROC, and the Philippines. There are also maritime disputes that do not deal with islands, but most of these stem from varying interpretations of the 1982 Convention on the Law of the Sea, which will be dealt with in detail in the next section.

Military clashes over the islands are currently uncommon and unlikely, though not unprecedented (China’s 1974 invasion of the Paracels, for example, demonstrates its willingness to back up its rhetoric with action). However, displays of military strength, almost exclusively by China, have become commonplace. Among the most recent was Jiaolong 2010, a round of naval exercises featuring 1,800 soldiers and over 100 ships firing live ammunition. Beyond these displays of power, China has also found other ways to assert its rights to the area and to showcase its technical superiority; in 2010, for example, the Chinese Navy used a manned submarine to plant a PRC flag at the bottom of the South China Sea. While there is no legal significance to such an act, it is symbolically very important.

II. Framework for a Settlement

Several documents have laid the groundwork for future progress in resolving the South China Sea dispute, and each will need to be taken into account in any eventual settlement. The most important of these are the UN Charter, joint statements between the PRC and other countries regarding the area, the 2002 Declaration on the Conduct of Parties in the South China Sea between China and ASEAN, and the UN Convention on the Law of the Sea. I will consider each

7 See Richard E. Hull, The South China Sea: Future Source of Prosperity or Conflict in South East Asia?, STRATEGIC FORUM, Feb., 1996, at 1, 2.


of these in turn and determine both the process and terms of settlement to which they oblige signatory nations.

The UN Charter forms the foundation of modern international relations, and there are several provisions that relate to the South China Sea dispute. The most obvious is Chapter I, Article 2, which states that “all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All members shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any state.”\(^{10}\) Of course, such a provision puts limits on China’s actions. It cannot simply stage a military takeover of the South China Sea without significant blows to its legitimacy and status in the world. Because of China’s desire to be seen as a responsible player on the world stage, it is unlikely to take any action that is not amenable to the rhetoric of international justice and security. But the requirement to protect peace, security, and justice gives significant latitude. Most countries have interpreted this provision quite liberally, and China is no exception. In fact, as we have seen, China explicitly maintains its right to defend its core interests with force.

The UN Convention on the Law of the Sea (which will be considered in detail in the next section) and the UN Charter are both legally binding treaties, and China and the ASEAN nations must be careful to follow at least a plausible interpretation of them. The next documents I will consider, the bilateral PRC-Philippines Joint Statement of 1995 and the 2002 Declaration on the Conduct of Parties, do not carry such explicit legal weight. Because both of these documents (and others that I will not consider here) contain similar statements, I will analyze both before evaluating their legal status and the disputant countries’ level of commitment to each of them.

The PRC-Philippines Joint Statement is a declaration of the policy of both parties. In it, both China and the Philippines express their intent to settle disputes “in a peaceful and friendly manner through consultations on the basis of equality and mutual respect,” to not use force or the threat of force, to increase cooperation, and to “settle

\(^{10}\) U.N. Charter art. 2, paras. 3-4.
their bilateral disputes in accordance with the recognized principles of international law, including UNCLOS.”

The Declaration on the Conduct of Parties employs similar language, though this document applies to all members of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) and China. Like the Joint Statement, the Declaration calls for equality, respect, renunciation of force or the threat of force, increased cooperation, and using international institutions and rules, including UNCLOS, to resolve disputes. However, the Declaration also states the parties’ intention to work for conservation of wildlife, the reduction of piracy, the development of international regimes, and other issues of mutual concern even in the absence of a final resolution.

The Joint Statements and 2002 Declaration have fewer legal provisions to explore, and instead mostly contain positive rhetoric and expressions of goodwill. Although most of the provisions are unambiguous, their legal status is not. Kittichaisaree, for example, argues that these declarations and statements have something akin to the force of law based on a precedent set by the International Court of Justice in cases involving nuclear testing. In making declarations, the court found that “when it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State thenceforth being legally required to follow a course of conduct consistent with the declaration.”

13 *See id.* at 283.
14 *Supra* note 3, at 136
is prefaced with phrases such as “the parties are committed to” and “the parties undertake to.”

Despite this precedent, however, these statements cannot be considered legally binding in the same way that the aforementioned treaties are. Most of the language in these statements is ambiguous and rhetorical, and to the degree that the parties commit themselves anything, it is to mutual goals rather than particular courses of action. It is much easier to argue that any given course of action is consistent with vague goals of cooperation and respect than it is to argue that it is consistent with legally phrased restrictions on behavior.

Whatever their status, however, these agreements and joint statements offer a window into the priorities of China and the ASEAN nations. All parties are clearly worried about tensions spiraling out of control, and the ASEAN countries are understandably wary of provoking China. Militarily, China has the strength (assuming the U.S. does not intervene) to take over the entire South China Sea; economically, China also has weapons to deploy against Southeast Asia. If there were a war in the area, ASEAN would not only lose territory and prestige, but its economic livelihood would also be threatened. China, on the other hand, is also hesitant to go to war. The fear of a rising China, already high in the U.S., Europe, and elsewhere, would reach a fever pitch if it were to flex its muscle by imposing its will in the South China Sea. And just like ASEAN, China would be hurt by the loss of trade in the area and beyond, where it would likely be the subject of international sanctions. Perhaps most importantly, in the event of war, China would lose much of the rapport that it has developed in the international community through cooperative participation in international organizations and regimes.

The most important clues that these documents give us, however, is that they all emphasize working through the UN and other international organizations, particularly through the UN Law of the Sea. Because all parties have agreed to pursue a settlement that conforms to the principles and provisions of the Convention, understanding it is essential to predicting and influencing the future of the dispute.

16 Thao, supra note 11, at 283.
III. The UN Convention on the Law of the Sea

The UN Convention on the Law of the Sea (UNCLOS) is the most important document bearing on relations in the South China Sea: all parties have agreed that any final settlement will be based on its principles. The first round of this convention was held in 1956, but for our purposes, the most important document is UNCLOS III, which was adopted in 1982 and went into effect in 1994.17 Many of its provisions were merely codifications of common practices, but there were some innovations, and many issues that previously had been matters of tradition and convention were given the force of law. Most importantly, UNCLOS III defines territorial waters and rights to waterways, which neither of the previous rounds of treaties had done. States were given different rights in six different areas: internal waters, territorial waters, archipelagic waters, contiguous waters, exclusive economic zones, and continental shelves.18 In internal waters, such as rivers and lakes, states have full sovereignty, and no other states have rights of passage. In territorial waters, which extend 12 nautical miles from every shore, states have sovereignty, but all other states have the right of “innocent passage”; that is, any state can sail non-military ships (except in specific straits deemed necessary for military transport, in which case military presence is permitted), but these ships may not stop or engage in commercial activities without permission.19 Rights in archipelagic waters are especially important in the South China Sea. Archipelagic waters are basically the waters bounded by the outermost islands in an archipelago. Archipelagic waters are treated similarly to internal waters, but other states still have the right of innocent passage through them. The difference between archipelagic and territorial waters is that two islands may be over 24 nautical miles apart, but if

17 See Michael Wood, International Seabed Authority, the First Four Years, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 2007, at 52.
19 See id. art 17.
they are considered to be in one archipelago, the state will still have
territorial rights between them.\textsuperscript{20} The contiguous zone extends 12
nautical miles beyond territorial waters, and in these areas, states
can enforce their own laws regarding pollution, taxation, customs,
and immigration.\textsuperscript{21} In a state’s exclusive economic zone, which
extends 200 nautical miles from the shore, states have full economic
rights, including fishing, mineral, and other resource rights. Finally,
a state has exclusive mineral rights on the entire continental shelf
(with some exceptions) extending from its shores, though fishing
and other activities are not regulated. Most importantly, all of these
rights, including those associated with archipelagic waters, apply to
all and only \textit{habitable} pieces of land.\textsuperscript{22}

These provisions clearly put a premium on occupying islands
and making them habitable. This is one of the primary reasons that
small military contingents from Taiwan, the PRC, the Philippines,
and other countries are stationed on rocks that would naturally be
underwater at high tide; having a qualifying piece of land extends a
state’s economic and political rights that much farther into the open
ocean. Unfortunately, UNCLOS does not give clear rules applying
to situations in which these zones overlap. In the South China Sea,
the problem of overlapping zones has been addressed only in the
Malacca Strait, which has been designated a strategically important
area in which all states have a right to military transport.

There are three primary reasons that China is likely to abide by
and work within the framework of these provisions of UNCLOS.
First, China has signed and ratified the treaty (as have all other coun-
tries with claims in the South China Sea. The U.S., another important
actor in the region, has signed the treaty but not ratified it), and it has
a good track record of keeping such treaties. Second, several other
statements and agreements, such as the 2002 Code of Conduct and
China’s joint statement with the Philippines in 1995, have mentioned
the importance of working within the framework of UNCLOS to

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\textsuperscript{20} See \textit{id.} art 48.
\textsuperscript{21} See \textit{id.} art 33.
\textsuperscript{22} See \textit{id.} art 48.
\end{flushleft}
resolve differences. Third, the Chinese government’s public rhetoric and actions emphasize that it considers the treaty advantageous for China. The provisions give China the right to military transport through the Malacca Strait and through any waters in the South China Sea except those that are within a non-overlapping portion of another country’s territorial waters. It has used these rights to protect its security interests in the Indian Ocean, to patrol the South China Sea, and to occasionally stage naval exercises in the area. Because of the advantages the Law of the Sea affords Beijing and its desire to seem supportive of international organizations, China can be expected to respect and support these rights as a necessary price to pay for the advantages it believes that UNCLOS provides.

Though all parties have expressed their commitment to resolve disputes under the framework of UNCLOS, the formal dispute resolution channels under the Convention have not been used. UNCLOS III establishes three mechanisms for the peaceful resolution of maritime disputes: the UN Tribunal on the Law of the Sea, the International Court of Justice, and ad hoc dispute resolution tribunals. All of these mechanisms, however, are venues of optional jurisdiction, meaning that they can only be used if both parties agree to be bound by their decisions. Unsurprisingly, China has steadfastly refused to be bound by the decisions of any of these chambers. This refusal makes its frequent avowals to resolve the South China Sea dispute within the framework of the Law of the Sea somewhat hollow and raises questions about its sincerity. By committing all parties to resolve the dispute through UNCLOS but then refusing to submit the dispute to any UNCLOS-approved channels, China is simply perpetuating the status quo, a course that is decidedly in Beijing’s favor.

In the following sections, however, I will show how ASEAN may be able to break this stalemate. Though it may be regarded by some as legal trickery, there is a mechanism under UNCLOS that may allow these countries to force the International Seabed Authority, a chamber created by the Law of the Sea, to make a binding decision about international boundaries in the South China Sea even

23 See Kittichaisaree, supra note 2, at 136.
if China does not agree to appear before the chamber or be bound by its decisions.

IV. The International Seabed Authority

Part XI Section 4 of UNCLOS III established the International Seabed Authority, which began operations in 1994. The Authority is headquartered in Jamaica and has established branches in several countries across the world. It is governed by an Assembly, in which all 159 signatories to the Law of the Sea are represented, and a Council, composed of 36 countries with particular interests in seabed exploration. Contract applications for open ocean mining are evaluated and approved by the Council, which turns them over to the ISA’s Legal and Technical Commission upon receipt and bases its decision primarily on the Commission’s recommendation. The Commission itself is composed of 25 experts in law and the science of deep-sea mining elected by the Council. These members come from many different countries but are meant to act in their capacity as experts and not as representatives of their states. The Commission also recommends regulations and rules regarding the exploitation of certain types of mineral deposits. To date, it has ratified rules for only three types of mineral deposits: polymetallic nodules, polymetallic sulfides, and ferromanganese crusts.

The ISA’s mandate is to “organize and control activities in the Area, particularly with a view to administering the resources of the


25 Id.
The Area is defined as the seabed and waters outside the jurisdiction of any nation: that is, any area beyond the furthest extent of any state’s Exclusive Economic Zone. Significantly, the convention itself does not establish the status of disputed areas. Perhaps this is because they did not anticipate a circumstance in which one country would dispute another’s claim not with its own counterclaim but with an argument that the area in question is in fact beyond any national jurisdiction. However, this is precisely the dispute in the South China Sea. All ASEAN countries have expressed some willingness to agree to a plan whereby UNCLOS provisions would be applied as though all islands and waters in the South China Sea were considered res nullius, or newly discovered islands, and if such a policy were formally adopted by ASEAN, there would still be an area that belonged to no state (fig. 1). The existence of this “no man’s land” will be crucial to my argument for ASEAN’s options under the Law of the Sea.

The International Seabed Authority’s mandate is quite vague, and there is no consensus on the precise limits of its activities. Some scholars argue that its authority is strictly limited by article 82.4, which states that the authority shall arrange for an equitable distribution to all nations of resources taken from the Area. Others take a more expansive view. Whatever the theoretical powers of the ISA are, however, in practice the ISA has interpreted its responsibility to organize activities in the Area very broadly. All development and exploration of resources in the Area seabed, for example, must first be approved by and contracted with the Authority. Contract applications are submitted to the Legal and Technical Commission, which evaluates whether the proposed work conforms to the regulations

26 Id.
27 See Kittichaisaree, supra note 2, at 136.
governing exploration or mining of the relevant mineral. If the contract conforms to these regulations, the Commission accepts the application, and the Council then approves the contract.

To date, the Authority has approved nine contracts. Most are in the Clarion-Clipperton Zone south of Hawaii, which contains the world’s richest polymetallic sulfide deposits and most abundant polymetallic nodules. The only other other area that has been opened for exploration and development is in the Indian Ocean just to the southeast of the Maldives. The contract for this area, which was concluded with the China Ocean Mineral Resources Research and Development Association in May 2001, has been widely controversial, because many observers, particularly India, have interpreted it as part of China’s effort to extend its reach to south Asia and blunt India’s influence. The Authority’s relevance to the South China Sea is particularly striking considering that in this case, China used mineral exploration contracting as a geopolitical tool.

V. ASEAN and the International Seabed Authority

If all members of ASEAN with claims in the South China Sea can agree to a framework that includes the application of boundaries based on the Law of the Sea (as shown by the dotted lines in figure 1) a contract with the International Seabed Authority may offer a unique opportunity for them to legitimate their claims. If ASEAN applies for an exploratory contract in the area claimed by China but not by any other Southeast Asian nation, when considering the contract, the ISA (or more particularly, the Legal and Technical Commission) may be forced to decide whether the piece of seabed in question is indeed part of the Area, that is, whether it falls within any nation’s jurisdiction. To decide that it is in the Area would not only invalidate China’s claim to that particular part of the ocean, it would also legitimate ASEAN’s broader claims to a delineation

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29 See Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18 (July 20, 2000), at 15.

of boundaries based strictly on exclusive economic zones evaluated from each country’s coasts.

For such a result to be possible, however, ASEAN would have to do considerable preparation beforehand. Any contract application that it submitted would have to conform to the Authority’s regulations in every detail. This would be particularly important because it is unlikely that a functionalist institution like the ISA would relish being asked to step into the middle of one of the most important boundary disputes in the world. If the application could be rejected on a technicality, therefore, it is likely that the Commission would reject it on that basis to avoid having to decide the limits of national jurisdiction.

If the application were sufficiently foolproof, however, the regulations and procedures of the Authority suggest that the Commission would either have to decide on its own the limits of China’s EEZ or refer the matter to the Law of the Sea Tribunal for a decision. The regulations for the exploration of polymetallic nodules state that after an application is received, the secretary general first reviews the application. If the secretary general determines that it conforms to the Convention and the regulations, he or she will give notification and send it on to the Legal and Technical Commission. The Commission then confirms that proper assurances have been made, that the project will not pose a significant danger to marine life, and that the project conforms to several other technical specifications. The regulations state that “if the Commission. . .determines that the proposed plan of work for exploration meets the requirements. . . the Commission shall recommend approval of the plan of work for exploration to the Council.” In other words, if the applications do not violate the Convention or the regulations, then the Commission shall recommend approval. The Council’s subsequent approval is largely pro forma.

Considering the geopolitical consequences of having some areas determined to be outside of national jurisdiction, one might assume that disputed areas are off-limits for exploration. However, whether

31 See Supra, at 4.
32 Supra at 15.
because of simply an oversight or because of a conscious decision, neither the Convention in its definition of the Area nor the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area contain any mention of disputed areas. The closest guidance here is the statement that the Area is any part of the ocean beyond any states’ jurisdiction. The International Seabed Authority, in its role as approver of contracts, can reasonably be expected to decide if certain parts of the seabed fall within the Area, and if ASEAN can force the ISA to make such a decision, it seems most likely that the Authority will not side with China, as we will see in the next section.

VI. The Case for ASEAN

There is not enough space here to give a complete analysis of the case for and against China’s claims to the South China Sea. Such analyses have also already been given in great detail by experts in the field on both sides of the issue. In this section, I aim only to give enough evidence to show that an argument for boundary delimitation based on the law of the sea is *prima facie* stronger than China’s argument based on historical records and archaeological discoveries.

First, it seems reasonable to accept the Law of the Sea principles unless there is compelling evidence or extraordinary circumstances that necessitate adopting some different rule. In the South China Sea dispute, China claims that because it has historical maps purporting to show the South China Sea islands as part of its territory as well as archaeological evidence that the Chinese had visited the islands as early as the voyages of Zheng He in the early 15th century, its claims extend much farther into the South China Sea than they would if
the EEZ were simply calculated with the islands being considered *res nullius*.\(^{33}\) As can be seen in figure 1, China’s claims extend even to the beaches of Malaysia! If this evidence cannot be conclusively shown to support China’s claim to historical ownership of the islands, therefore, our preference *prima facie* should be for treating the islands as *res nullius* and drawing the EEZs accordingly.

China’s evidence is not nearly as conclusive as Beijing claims that it is. As the government of Vietnam has argued, the map that the Chinese have produced gives no reason to believe that the islands belong to China.\(^{34}\) In fact, it seems that if they are labeled or demarcated at all, the map indicates that these islands were outside of China. The archaeological evidence is similarly ambiguous. In the pre-modern era, Chinese commerce was common throughout East Asia, and communities of overseas Chinese have existed in Malaysia and the Philippines for centuries.\(^{35}\) A Chinese artifact, therefore, is almost as likely to have come from any other nations in the area as it is to have come from China. Furthermore, even if these artifacts could be shown to have come from China, they are more likely to have been dropped by a ship temporarily docking on the island than to have come from a permanent settlement. In the time period that the artifacts are dated to, it is unlikely that a community on even the largest of the islands would be able to survive because of how isolated it would have been.

Other members of ASEAN, such as Vietnam, which occupied the Paracels until the Chinese invaded, have equally valid claims to many of the islands. And many, including the Philippines, have argued that because of the islands long occupation by the Japanese, World War II effectively made the area a *res nullius*.\(^{36}\) Indeed, when

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33 See Historical Evidence to Support China’s Sovereignty over Nansha Islands, MINISTRY FOREIGN AFF. CHINA (Nov. 17, 2000) http://www.fmprc.gov.cn/eng/topics/3754/t19231.htm# (China).

34 See Ian James Storey, Creeping Assertiveness: China, Philippines, and the South China Sea Dispute, CONTEMP. SOUTHEAST ASIA, Apr. 1999, at 95, 95. (Sing.).

35 See id. at 95.

36 See id. at 95.
Japan and the United States signed the San Francisco treaty, which ended World War II, the islands of the South China Sea were ordered to be returned to their rightful owners, but unlike almost every other square inch of former Japanese territory, no nation was named as owner of the islands. The Philippines has the additional claim that, as an archipelagic nation, the Spratly islands more naturally belong to it, seeing that geologically they are arguably part of the same archipelago.

In addition to this evidence based on international law and precedent that the area should be evaluated based on the Law of the Sea EEZ lines, there is also good evidence that the International Seabed Authority does not consider China’s claims totally valid. And since under the scenario I have outlined the Authority’s opinion is the essential element in legitimating ASEAN’s claims, this evidence is extremely important. According to the ISA’s own maps (fig. 2), part of the South China Sea is outside all national boundaries. It would be very difficult for the Authority to deny ASEAN’s application on the basis that the area is in dispute or on the basis that it belongs to China when its own maps show it to be beyond any state’s EEZ.

Even if one does not accept this evidence as conclusive, it still seems that in the absence of compelling evidence either way, it is most reasonable to start from a clean slate and simply evaluate the area based on the Law of the Sea as it is currently written. In other words, the burden is on China to prove its claims. If it cannot do so (as is likely), then evaluating boundaries as though the area were res nullius is the only principled and tenable compromise position. It therefore is likely that if the International Seabed Authority did agree to decide whether the piece of seabed in question were part of the Area, it would decide that at least some portion of the sea is beyond all international boundaries. This would invalidate China’s strident claims and pave the way for a settlement that favors ASEAN.


VII. Conclusion

The dispute in the South China Sea has only become more intractable since it began, and if decisive steps are not taken, the situation is likely to continue to deteriorate. The discovery of important oil reserves and the increasing geopolitical importance of the region have raised the stakes tremendously. Because China is quickly rising as a military and economic force in the region, ASEAN can no longer afford to simply sit back and hope that the crisis turns out in its favor.

As I have shown, one option that has striking legal benefits is pursuing a contract for mineral exploration from the International Seabed Authority. Though it is certainly an unconventional avenue for legitimating or arbitrating territorial claims, the provisions of the UN Convention on the Law of the Sea and the Authority’s regulations on mineral exploitation are written in such a way that the ISA may be compelled to decide whether the center of the South China Sea belongs to China or is the “common heritage of mankind” and falls beyond any national jurisdiction. China has refused several times to have its disputes adjudicated before the International Tribunal of the Law of the Sea, and this response is unsurprising and even rational. After all, Beijing knows that its claims are contrary to commonly accepted international norms and laws and unlikely to stand up to international legal scrutiny. Because any settlement must be based on the Law of the Sea, appealing to the International Seabed Authority may be the only peaceful way for ASEAN to force China to live up to the international agreements it claims to uphold.

39 Wines, supra note 7.
In July 2011, a massive cheating scandal in the Atlanta public education system shocked the nation and became fodder for critics of federal education programs. Governor Nathan Deal ordered an investigation that eventually implicated one hundred and seventy-eight teachers and principals, alleging that they had systematically changed answers on standardized tests for more than ten years. Prior to the school district’s exposure, Atlanta was thought to be advancing considerably: Atlanta’s superintendent, Beverly Hall, was named Superintendent of the Year in 2009. The city was considered a model for the success of the No Child Left Behind Act (NCLB) legislation, when in actuality, this reputation was largely falsified. 

Atlanta’s failure is one unfortunate example of the problems associated with federal education mandates like NCLB; it also demonstrates how such mandates can be a violation of federalism and may even encroach on sacrosanct constitutional boundaries. The Supreme Court has ruled repeatedly that public education is with-

1 An undergraduate student double majoring in Political Science and French Studies, Ryan has ambitions to work in international business and politics. He would like to give a special thank you to the editors who worked tirelessly on this article, including Brock Laney, Camila Trujillo-Medina, Jon Bird, Kurt London, Stephanie Corine, and Stephen Richards.

2 No Child Left Behind Act 115 § 1425 (2002).

3 See Are They Learning? Rampant Cheating by Teachers in Atlanta’s Schools Hurts Students and Destroys Trust, N.Y. TIMES, July 17, 2011, at SR11; see also Kim Severson, A Scandal of Cheating, and a Fall From Grace, N.Y. TIMES, September 7, 2011, at A16.

in the domain of the state, but the reality is that under the current system states are mostly reliant on federal funding to support their schools. Accordingly, federal funds have essentially become an instrument of control used alternatively for reward and punishment. This reliance on federal funds provides the federal government with significant latitude in its legislative power and scope. In fact, federal funding is often a sufficient incentive for states to accept federal programs which may or may not be properly under federal jurisdiction.

This “carrot-and-stick” approach is problematic in two key ways: first, mandates frequently do not include enough funding for states to accomplish the federal government’s goals. These unfunded mandates place undue burden on the states and directly oppose the “general welfare” intended by the Spending Clause. Second, even when federal mandates are sufficiently funded, the importance of the attached funding creates a situation where the mandate supersedes state education law; thus, it blurs the line between mandate and legislation. Essentially, the federal government legislates under the guise of funded mandates. The constitutionality of this practice is unclear and will be the primary issue addressed within this article.

Federally funded, and by extension unfunded, mandates have the force of law and therefore should be subject to constitutional constraints. This article examines recent Supreme Court decisions that discuss the role of the federal government in public education. Recent court challenges regarding NCLB offer an excellent case study concerning the validity of federal mandates. These cases indicate that federal mandates have the force of law due to the

5 United States v. Lopez, 514 U.S. 549 (1995) In the majority opinion, Justice Rehnquist argued that if Congress has power to regulate both crime and education, as they seem to be implying, then there is no end to their power under the Commerce Clause. Thus, he affirmed the decision of The Fifth Circuit Court of Appeals finding that in banning guns from school areas Congress had exceeded its constitutional power.

6 U.S. Const. art. I, § 8, cl. 1 (James Madison noted that the General Welfare Clause is exceptionally broad and may be used to increase or centralize power. Most often a statute is considered the general welfare if it is universally applicable as well as generally supported).

exceptional leverage created by federal funding. In most cases, the consequence of non-compliance is a withdrawal of funding for key programs, effectively debilitating the state’s education programs.\textsuperscript{8} If federal mandates have the force of law, it follows that federal mandates ought to operate within the Constitution similar to standard law. Therefore, federal mandates should not be acceptable with respect to education.

I will organize the article as follows: (I) First, I examine federal mandates and explain why constitutionality ought to be the primary consideration of their legality. This will include the argument that federal mandates can gain the force of law. (II) Next, I demonstrate that NCLB is an example of a coercive federal mandate, since the opt-out was unrealistic and in most cases would have been debilitating to local education systems. (III) I then apply several recent decisions to the question of the constitutionality of federal education mandates (specifically NCLB), showing that significant judicial support exists for the position that education is strictly a state issue. (IV) Finally, I consider certain implications of this position on both federal funding as well as future court decisions concerning federalism and education policy.

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\textbf{I. Federal Mandates:}
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For many years, the Federal Legislature has used federal mandates to implement national policies and programs. These mandates are similar to law in their construction and passage and are obeyed as law with few exceptions. Federal mandates are passed as a part of legislative bills or joint resolutions and are intricately tied with decisions made by the Appropriations Committee.\textsuperscript{9} Mandates are a func-

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\textsuperscript{8} South Dakota v. Dole, 483 U.S. 203 (1987) In the few cases where states have not fully complied with federal mandates, the consequences have most often been financial. The exception is when the federal government grants a waiver to that state such as in the recent case of President Obama granting 10 state waivers concerning the No Child Left Behind Act. \\
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tion of budgets and are frequently made a prerequisite for receiving funding.\textsuperscript{10} Federal mandates have steadily increased in number since 1960. In January 1996, the Advisory Commission of Intergovernmental Relations (ACIR) observed “more than 200 separate mandates… involving about 170 federal laws reaching into every nook and cranny of state and local activities.” In a separate report, they identified “3,500 decisions involving state and local governments relating to more than 100 federal laws…”\textsuperscript{11} Mandates have become an intricate part of federal oversight although they are technically not law.

Federal laws and mandates are very similar in both their method of passage and their power; the principal differences between them are the consequences associated with noncompliance. For instance, if a state were to disregard a federal law, the matter would likely go to a federal court which then decides whether to enforce it (often by force) or to support the state.\textsuperscript{12} On the other hand, the federal government cannot forcibly compel a state to uphold such a federal mandate; they only have the power to withdraw the associated funding.\textsuperscript{13} There are two types of mandates: unfunded mandates are those law-like institutions and statutes, which are given to the states without compensation or funding but may be attached to other program funding (such as federal highway provisions), and funded mandates, which are given with the necessary funding to carry out the proposed action.

\textsuperscript{10} Id. at 3.

\textsuperscript{11} The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report, U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS (Feb. 16, 2012 11:00 AM), http://www.library.unt.edu/gpo/acir/Mandates.html.

\textsuperscript{12} Wiley A. Branton, Little Rock Revisited: Desegregation to Resegregation, 52 THE JOURNAL OF NEGRO EDUCATION 3 (1983) (After the landmark supreme court case Brown v. Board of Education, Dwight D. Eisenhower ordered the national guard to compel the admittance of nine black students to a Little Rock High School. On their first day, the students attended class under armed guard).

Unfunded mandates must be accompanied by legal justification as to why there is an absence of funds, except when the mandate is an enumerated federal power. For example, in *United States v. Lopez*, the Court ruled that Congress had not provided “sufficient justification” of a substantial relationship between the Gun-Free School Zones Act and congressional commerce power, thus showing that the courts still enforce constitutional compliance. This tradition was later codified in the 1996 Mandate Reform bill in which Congress sought “to end the imposition, in the absence of full consideration by Congress, of federal mandates on State, local, and tribal governments without adequate federal funding.” In cases where the funded or unfunded mandate is not an enumerated federal power, states must be given the necessary funds to carry out the federal program.

Although federal mandates themselves are not binding, they are often part of legislative acts such as bills and joint resolutions. State and local governments have in the past, been able to ‘opt-out’ of federal mandates. However, because they are connected in appropriations to significant funding, sometimes unrelated to the law in question, states rarely attempt noncompliance. When such attempts are made, however, federal mandates may carry considerable repercussions. For example, in 1987 the state of South Dakota sued the federal government over the loss of federal highway funds. This punishment was administered in response to the state’s refusal to change the minimal drinking age to 21 as was required by federal statute. Ultimately, the courts upheld the federal mandate because

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17 Id at 2.
18 Id at 3.
they considered it to be in the general welfare.\textsuperscript{20} In order to keep millions of dollars of necessary funding for their highways, South Dakota was forced to accept the federally mandated change although it was against the wishes of the state.\textsuperscript{21}

This case marked a turning point in the way in which Congress created and administered statutes, ushering in the age of federal mandates. Since \textit{South Dakota v. Dole}, there have been hundreds of federal mandates and, most noteworthy, almost uniform compliance. As one of the scholastically worst school districts in the nation, the Atlanta school district had little chance for success within the federal system. Poor testing and dropout rates would have resulted in school closures and significant funding cuts. Why would the state willfully enter into such a losing system? Why would they sacrifice probity for the appearance of improvement rather than customizing a state system? The answer is the same as in the \textit{South Dakota} case: there is no reasonable alternative funding outside of the related federal mandate. The financial consequences of noncompliance are simply too great.

Significantly, the 1996 Mandate Reform Bill does not provide any meaningful restriction for federally funded mandates. In fact, in the last several decades funded mandates have grown significantly in proportion to statute. Additionally, the implementation of funded mandates has often been upheld by the courts, as in \textit{South Dakota v. Dole}. In one noteworthy part of the majority decision the judges state that, “economic coercion could be a factor that invalidates an otherwise legitimate exercise of the spending power.”\textsuperscript{22} Despite ruling in favor of the government, the judges recognized that the price of non-compliance could be high enough to be considered compul-

\textsuperscript{20} South Dakota v. Dole, 483 U.S. 203 (1987). The secretary of transportation Elizabeth Dole. The petitioners alleged that this statute violated the spending clause found in U.S. constitution article 1 section 8 clause 1. In their decision, the appellate court upheld the defendants saying that this statute was constitutional pursuant to the “general welfare” of the several states.


sion, although this threshold was never explicitly created. In *United States v. Butler*, Judge Owens, in the majority opinion stated that, “The power to confer or withhold unlimited benefits is the power to coerce or destroy.”

Ruling on agricultural subsidies, the reasoning of the court was as follows: “If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin.” Again, the courts concluded that funded mandates have the potential to reach compulsory levels.

Despite the possibility of becoming *de facto* legislation, federally funded mandates are rarely challenged or relinquished. Thus, there has been little need for the federal government to justify its use of mandates, except in cases where they are unfunded and non-enumerated. This is likely the case because federal funding has become increasingly vital to state government functionality. That is, although federally funded mandates have become more and more compulsive, the states are less and less inclined to challenge them due to the risk of losing millions—and in some cases billions—of dollars in federal funding. There is nothing constitutional which prohibits federal coercion of state law via economic or other incentives. On the other hand, the courts have made it clear that there exists a point at which federal incentives essentially gain the force of law.

In individual cases, this happens when rejecting payments may lead to “financial ruin;” for states, these conditions are the same. If rejecting federal funding as a result of *opting out* of a federal program cripples or threatens ruin on the state system, then such a mandate has gained the force of law.

The deficiency in past court rulings is that there is no definitive estimate of the threshold where a funded federal mandate becomes compulsive. However, there have been several cases which dem-

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23 US v. Butler, 297 U.S. 1, 71 (1936). In this decision, Owens clarifies that while Congress may tax and apportion funding for the ‘general welfare’, they may not use taxation as a means of control over state powers.

24 *Id.* at 71.


26 Butler, 297 U.S. 1, 71 (1936) at 71.
onstrate that any system of federal funding that is contingent on a set of requirements, and which has no viable alternative, must be compulsive. On the other hand, would an alternative opt-in system which receives equivalent federal funding be any less compulsive? The answer is that federal funding in any form has the potential to create dependency. In the case of education, Elementary and Secondary Education Act (ESEA) and the subsequent No Child Left Behind Act provide hundreds of millions of dollars in federal funds to states each year. States that opt-out of this system would lose their funding, and this would seem to be in violation of the General Welfare Clause of the Constitution. In short, if a funded federal mandate is not inherently in the federal domain, and if it exacts debilitating penalties in case of non-compliance, then it becomes compulsive and thus non-constitutional. This will be discussed further in section IV.

II. No Child Left Behind:

One of the most important federal mandates for the U.S. education system is NCLB. Conceived by the Bush administration, NCLB amended and reauthorized the already existing ESEA. The purpose of NCLB was to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” NCLB is a “standards” based education reform, and accordingly requires all schools that receive federal funding to comply with national standardized testing and school evaluation. The federal government creates—and states administer—requisite standardized testing. School benchmarks are created by the federal government and administered

27 No Child Left Behind Act 115 § 1425 (2002).
28 The Elementary and Secondary Education Act 79 § 27 (1965). ESEA was renewed several times in the legislature, the most recent reincarnation being No Child Left Behind.
by the states. Additionally, this act reauthorizes Title I funding, mandates that teachers be “highly qualified,” institutes a new reading program, redistributes education funding to focus on low income areas, and allows the schools greater leeway in their use of federal funds. All states were automatically required to implement this federal program in place of ESEA.

Both the accolades and punishments in the program were implemented via financial incentives, much as other federal mandates. Unfortunately, the incentive structure ultimately had some negative consequences. In the Atlanta School District, teachers felt pressured to keep test-scores artificially high. In this case, the schools and students were compelled to make improvements according to NCLB in order to extend and maintain their funding. As a result, they had to resort to cheating in order to keep their jobs and their schools open. It may be that fundamental change in a school’s academic progress requires more than just an increase in funding and more than just a few years. The quality of an education system likely has to do with the socio-economic, cultural, and familial environment to which the child is exposed. If this is the case, then it stands to reason that education policy must be made and adapted to local circumstances. Educators and lawmakers in Georgia and other areas understood that NCLB would ultimately limit their funding whether they complied or not. Their actions epitomize the essence of NCLB, which is that it has the force of law. Not abiding by the requirements of this federal mandate, or opting out, would have resulted in the loss of significant funding; in most instances, a majority of state education funding. It is a case where the “power to confer or withhold unlimited benefits is the power to coerce or destroy.”

30 Id. (This act was initially accompanied by 42.2$ billion in funding which increased until about 2007 when there were significant spending cuts).

31 20 U.S.C. § 101 (2001) (Title I funding are moneys that are apportioned specifically to low-income children in order to equalize the educational experience).

32 Supra 27.

33 No Child Left Behind Act 115 § 1425 (2002).

34 Supra 23, at 71.
The financial incentives themselves are a systemic problem which applies to federal mandates in general; however, NCLB has had other significant problems since its inception. The principal problem as presented in appellate courts was the lack of funding for certain NCLB requirements. This has manifested itself in two ways: (1) Higher standards and specific tests required by the act were found by some states to cost more than the money allocated; and (2) many of the provisions were not funded at all, thereby increasing the burden on the states.\(^{35}\) Ultimately this resulted in several lawsuits, of which none was more definitive than *State of Connecticut v. Margaret Spellings, Secretary of Education.*\(^{36}\)

While many states simply accepted the No Child Left Behind Act because of the financial incentives or for other reasons, for many states it required significant reformation. Connecticut’s educational system was one of the most successful in the country because of their high standards and state-specific testing. NCLB, however, required that the state make non-essential changes, for example implementing additional testing. Connecticut attempted to receive a waiver from the Secretary of Education, Margaret Spellings, because it already had its own standardized testing that ensured test scores well above the national average, but requests for waivers were denied. Thus, Connecticut became the first state to file a lawsuit against the federal government because it lacked the funding necessary to carry out the required annual testing for elementary schools. Connecticut’s complaint was that the federal government had violated the unfunded mandates prohibition of NCLB by requiring Connecticut’s schools to comply with unfunded standards.\(^{37}\) Furthermore, the cost of non-compliance was significant. The federal government could have withheld $435,946,380; this represents a substantial portion of the state’s education budget. This federal funding is tied to Title I funding, and was used as leverage to force the state to accept NCLB.\(^{38}\)

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37 *Id.* at 474.
38 *Id.* at 473.
Thus, in August 2005, Connecticut challenged the federal government’s use of the Spending Clause.

The underlying question was whether the spending clause justified this educational program which would otherwise be left to the states generally. *Connecticut v. Spellings* is a persuasive example of the devastating consequences of non-compliance with a federal mandate. Here the federal government had attempted to coerce a state, in lieu of compelling them with statute, to act contrary to its own will by withholding funds. The text of NCLB specifically states that the state would not have to pay for implementation of the Act. However, the federal government did not fund up to $41 million of the actual cost. Additionally, non-compliance would have taken away federal funding which had existed previously, essentially a tax on the state. Despite this apparent contradiction, the federal government continued to justify the use of federal mandates in NCLB with the Spending Clause.

In order for the federal government to justify NCLB pursuant to the Spending Clause, it should be required to demonstrate that NCLB is providing for the “general welfare” of the states. Connecticut needed to either show that this mandate violated the 1996 Unfunded Mandate Law or that it had become coercive in accordance with *South Dakota v. Dole*. As discussed in section one, appellate case law offers no definition as to how many federal dollars must be at stake in order to qualify as undue coercion. The Fourth Circuit, however, has acknowledged that the theory of coercion is

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40 U.S. CONST. art. I, § 8, cl. 1. (The General Welfare Clause, as was previously discussed, includes the power to tax, pay debts, and provide for the common defense and general welfare of citizens of the United States. Congress has often used this to justify unfunded and funded mandates since they are supporting the states and providing funds for public goods. This was used as justification in several of the NCLB court cases).

viable and that its explanation is persuasive.\textsuperscript{42} As such, it is an argument well-grounded in the Tenth Amendment’s reservation “to the States respectively, or to the people” of those “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.”\textsuperscript{43} The State of Connecticut may very well be the first state filing suit to have reached the phantom threshold between funding and coercion.

Connecticut did not win the case\textsuperscript{44} because they did not adequately show that NCLB lacked required funding. However, the decision showed that the education mandate had coercive force because it carried significant consequences in case of non-compliance. The Court’s action also makes it clear that they considered NCLB the equivalent of law. Similar cases followed the Connecticut ruling which further substantiated the limitations inherent in federal mandates. \textit{Pontiac v. Spellings} claimed that NCLB was simply an unfunded mandate.\textsuperscript{45} The plaintiffs, the National Education Association along with several school districts from Michigan, Texas and Vermont, alleged that although NCLB promises to cover all related costs, the states are forced to assume a significant financial burden. On the other hand, the cost of non-compliance was even greater. These cases exemplify the debilitating tax which many federal mandates would incur in the case of non-compliance. Using federal mandates, Congress has the ability to circumvent the frontiers of its jurisdiction.

\begin{thebibliography}{9}
\bibitem{1} West Virginia v. U.S. Dep’t of Health and Human Services, 289 F.3d 281, 286 (4th Cir. 2002).
\bibitem{2} U.S. \textsc{Const.} amend. X.
\end{thebibliography}
III. Enumerated Federal Education Powers?

Education is not a specifically enumerated power given to Congress.\textsuperscript{46} Administration over a state scholastic system should fall under the authority of the Tenth Amendment.\textsuperscript{47} However, other constitutional clauses have been used at various times to justify the use of federal education mandates, especially the General Welfare Clause and the Commerce Clause of the Constitution.\textsuperscript{48} Such justification is acceptable so long as it is certified by the courts. The problem is that the technical difference between a law and a mandate has eliminated the need for constitutional oversight.

Laws have been justified most often under the Commerce Clause of the Constitution.\textsuperscript{49} This justification has dramatically expanded federal power, but recent court decisions have also provided important insight into the defined limits of enumerated powers.\textsuperscript{50} There are several cases which required the Courts to specify congressional legislating limits. Two of the most influential cases that have been

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  \item 439 N.E.2d 359, 370 (N.Y. 1982) [hereinafter Levittown] (Fuchsberg, J., dissenting) (stating that “primary concern for education was to be that of the States rather than of the Union”).
  \item U.S. \textit{Const}, art. I, § 8, cl. 3. (the power given to Congress to regulate interstate commerce. This clause was not enacted very often in the first several decades of the United States; however, it has since been regularly used as a means of expanding congressional power. The Court has recognized that these powers must not infringe on the proper balance of federalism, although the history of the Court suggests a search for a defined limit on the powers enumerated in the Commerce Clause.)
\end{itemize}
centered on the Commerce Clause are *United States v. Lopez*\(^{51}\) and *San Antonio School District v. Rodriguez*.\(^{52}\) The decisions in these court cases both clearly state that Congress does not have constitutional authority over state education.\(^{53}\) Therefore, this power should be left to the states under Tenth Amendment grounds.\(^{54}\)

In the first case of *US v. Lopez*, Congress sought to extend its authority over certain aspects of education pursuant to the Commerce Clause. At stake was the Gun-Free School Zones Act of 1990\(^{55}\) which prohibited an individual from knowingly possessing a firearm within school zone. In both the majority and minority opinion, the justices clarify that education is not a federal power.\(^{56}\) The federal government was unable to show that the Gun-Free School Zones Act

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51 Lopez, 514 U.S. at 549 (1995). (In 1992 Alfonzo Lopez Jr. was a 12th grade student attending Edison high school in the state of Texas. Lopez brought a loaded revolver with him to school and while at school Lopez was confronted by school authorities. Lopez was then charged with violation of Gun-Free School Act. Lopez appealed the charges brought against him, claiming the ruling exceeded Congress’s power under the Commerce Clause. The Supreme Court upheld the Court of Appeals decision in favor of Lopez.)

52 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1993). (The lawsuit was filed against the school district of San Antonio and surrounding areas, by parents of the Edgewood Concerned Parent Association. The Supreme Court held that a school-financing system based on local property taxes was not an unconstitutional violation of the Fourteenth Amendment’s equal protection clause. The majority opinion stated that the Apellees did not sufficiently prove that education is a fundamental right, that textually existed within the US Constitution, and could thereby through the 14th Amendment to the Constitution, be applied to the several States. The Court also found that the financing system was not subject to strict scrutiny.)

53 Levittown, 439 N.E.2d at 370 (Fuchsberg, J., dissenting) (stating that “primary concern for education was to be that of the States rather than of the Union”).

54 *Id.*


56 *Id.*
was related to commerce, and without such a justification, the Court ruled that the government had exceeded its jurisdiction. This decision is a precedent for limiting government to strictly enumerated powers.

The second influential court case was *San Antonio School District v. Rodriguez.*\(^57\) This court case was centered on the division of financial inequalities within the Texas public school system. The wealthy areas of San Antonio and across Texas were able to provide a better education to their students than poorer areas, such as in Edgewood, an area near San Antonio. The judges in this case found that the appellees did not prove sufficiently that education was a fundamental right. In other words, that the states have jurisdiction over the administration of their own education system, including the associated funding.

These cases show that the Court has historically sided against education as a federal power. Such decisions suggest that the federal government has no power to legislate or impose regulations on the education system of the several states; this also has implications for federal funding. Although the implications of constitutionality of funding will not be fully considered in this paper, it is the author’s opinion that federal funding of education is not a violation of any constitutional power so long as it is not conditional on unjustified federal programs. If funding is constitutional, or allowed under the General Welfare Clause, then all states ought to receive comparable funding.

IV. Eliminating Federal Mandates on Constitutional Grounds:

The important question in these cases is consistently related to federalism. In one such case, *West Virginia v. U.S. Department of Health & Human Services,*\(^58\) the state of West Virginia sued the federal government claiming that the federal Medicaid program, which required states to adopt an estate recovery program to recoup Medicaid expenditures from deceased beneficiaries, violated the


\(^{58}\) West Virginia v. United States Department of Health & Human Services, 289 F.3d 281, 1-2 (4th Cir. 2002).
Tenth Amendment because it was “unduly coercive.”\textsuperscript{59} Although the Fourth Circuit declined to recognize any such federal coercion, it acknowledged that when dealing with federal mandates the coercion theory was valid. In the majority decision the judges stated that, “A law or congressional policy which is unduly coercive may violate the Tenth Amendment if it deprives the State of any reasonable ability to regulate an area that is traditionally left to the State and outside the federal government’s enumerated powers.”\textsuperscript{60} This is a clear statement that the federal government’s powers are bounded. This decision also indicates that the deprivation of state power, whether because of law or otherwise, is a violation of the Tenth Amendment.

A second influential court ruling comes from the state of New York, in the case of \textit{Arlington Central School District Board of Education v. Murphy.}\textsuperscript{61} Theodore and Pearl Murphy were the parents of a special needs child who felt that the public high school of Arlington was unacceptable. Accordingly, they placed him in a private school, but the Arlington Central School District was unwilling to pay the related expenses. The question brought to the Fourth Circuit was whether or not the prevailing party ought to be reimbursed for expert witness fees. The parents claimed that this was implied in the federal Individual with Disabilities Act (IDEA) which stated that the prevailing party would be rewarded “reasonable attorneys’ fees.”\textsuperscript{62} The courts reversed precedent and argued that the federal statute made under the auspices of the spending clause should be interpreted narrowly. This is another example of how the courts recognize that federal power ought to be restricted in cases where mandates are not based in constitutional law.

Several interesting things were considered in \textit{Murphy} which are applicable to the present discussion. The Fourth Circuit in their


\textsuperscript{60} Id.


majority decision state that the conditions for federal funds must be set out “unambiguously.”\textsuperscript{63} In fact, they say that, “Legislation enacted pursuant to the spending power is much in the nature of a contract,” and therefore, to be bound by “federally imposed conditions,” recipients of federal funds must accept them “voluntarily and knowingly.”\textsuperscript{64} The courts here emphasize that federal mandates must be absolutely clear in their language both for the states and the courts who must enforce the agreement. However, although the language of the mandate may be contract-like, the state has little control over the terms of the agreement. Therefore, the only authority under which such a stipulation could be made under is constitutional. If this is not the case, then such an agreement may be excessively and unjustly burdensome to state functions and may be reviewed by the Supreme Court.\textsuperscript{65}

The argument of this paper rests squarely on the back of the previously mentioned majority opinion by Judge Owens who said that “the power to confer or withhold unlimited benefits is the power to coerce or destroy.”\textsuperscript{66} Another notorious Court decision stated something similar, that “the power to tax is the power to destroy.”\textsuperscript{67} Clearly the idea of coercion as a form of enforcement has and continues to have broad application. Previous cases have shown that the federal mandate system, and more specifically the withdrawal of funds as a retributive act, can be excessively burdensome to states and individuals. Such cases have also demonstrated the destructive power of the withholding of federal funds for vital programs such as highway maintenance or school systems. Thus, it is up to the courts to act on precedent and more firmly establish the balance of federalism via creating a definitive threshold of coercive federal mandates.

\textsuperscript{64} Id. at 17.
\textsuperscript{65} Marbury v. Madison 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).
\textsuperscript{66} US v. Butler, 297 U.S. 1, 71 (1936).
\textsuperscript{67} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) Ironically, this case was a ruling made in favor of a federal institution; however, the principle of taxation having destructive power is applicable in this case.
Having established that federal mandates have the potential to be compulsory even to the point of being as powerful as law, they ought to be under the same restrictions as law. In regards to legislative authority, Congress is strictly restrained by the Constitution, including federal amendments. The Tenth Amendment provides a clear division between federal and state jurisdiction; however, federal mandates effectively bypass this separation of powers. Congress’ ability to enforce its will via financial sanctions effectively limits state sovereignty and extends federal oversight. Therefore, both funded and unfunded federal mandates, as acts of Congress, should be strictly limited to only those powers enumerated in the United States Constitution.

V. Conclusion:

The use of federal mandates began with the good intention of administering federal funding for vital state programs such as education, but is now become a means of managing anything considered a national issue. In this article, the authority of congress to distribute federal funding is not in question. Rather, the primary issue is one of federalism. Given that federal funding can in some cases be so great as to be compulsory, and that the removal of this funding as a consequence of non-compliance can devastate state programs which have grown dependent on funding patterns, one is led to conclude that federal mandates have power similar to law. On the other hand, federal mandates are not restrained by constitutional limits as are statutes. As a result, federal mandates given by Congress have the theoretical power to circumvent the institution of federalism by imposing almost any sort of mandate on state governments using financial incentives.

The No Child Left Behind Act is one such case where the federal government mandated an action which as a law would have been outside of constitutional jurisdiction. The subsequent legal action

68 The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report supra note 10 at 3.
69 No Child Left Behind Act 115 § 1425 (2002).
taken by Connecticut and others illustrates that, at least from a state perspective, the withdrawal of federal funding constitutes a destructive and therefore coercive act. It is for this that one must conclude that No Child Left Behind has the force of law. Using the means of federally funded mandates, the federal government has successfully circumvented the Tenth Amendment and is administering a state-level program.\(^70\)

It is apparent that the judicial debate concerning the legitimacy of federal mandates has not gone far enough. The Unfunded Mandate Reform Act stipulated that federal mandates must cover the costs of the programs which they implement;\(^71\) however, it has only been recent Court decisions which have recognized the possibility that federal funding could be coercive. Congress habitually administers programs via funded mandates which are not explicitly defined federal powers and which may or may not be welcome by the states. The cases highlighted in this article show that this has previously been a non-issue because there are very few states who would risk their funding by not accepting government mandates. For those states who have challenged these provisions, there has been only lukewarm success. Thus to preserve the fundamental role of federalism, there needs to be a new discussion in the courts which defines coercive funding and establishes a hard precedent for the use of federal mandates.

In the absence of a definitive threshold that discriminates between coercive and non-coercive federal mandates, the courts ought to recognize that coercive mandates exist. While funding may be provided by the federal government in accordance with the general welfare, there must be recognition that attaching a significant portion of federal funds to a mandate gives that mandate law-like properties. Additionally, taking away even trivial federal funding from states as a penalty creates inequality between communities, which is opposed to the “general” welfare. In short, federal mandates

\(^70\) U.S. Const. amend. X.

cannot be treated as contracts, or if they are, they must be considered as a legislative act. Therefore, it is the author’s recommendation that federally funded mandates should be under the same constitutional restrictions as is federal law. Following such a standard will provide much needed clarity concerning federally mandated action and will reinforce the institution of federalism, especially as it pertains to education.
UNJUSTIFIED PUNISHMENT: JUVENILE CONSENSUAL SEX OFFENDERS AND THE SEX OFFENDER REGISTRY

Tyson Prisbrey

The sexual offender registry that tracks and informs the public of sexual offenders’ residential and other relevant information has recently attracted widespread attention and, in most cases, support. The general purpose of the registry is to protect potential victims by providing the automobile, residential, and personal identification information of dangerous sex offenders living in their area. Studies have shown that the registry can deter non-offenders from committing sexual crimes and reduces the frequency of reported sexual crimes against local victims by keeping local authorities informed on local sex offenders. The problem with the registry is its punishment of those who might not be deserving of such. When offenders are included on the sex offender’s registry, they are publicly labeled as sex offenders by neighbors and others in the community. I argue that not all sexual offenders should be publicly labeled as such. In many cases, the punitive nature of the registry felt by those on the registry and their families is not proportional to their crimes. The main focus of this article is to demonstrate

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1 Tyson is an undergraduate student at BYU studying political science. He plans to attend law school and to pursue a career in law. Special thanks to Katherine Dew Rhodes, Trent Timmons, James Tringham, Brock Laney, and Kurt London for their many hours spent editing and contributing to the paper.


3 See id. at 893.

4 See J.J. Prescott and Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior? 54 J.L. & Econ. 161, 192 (2011). (This study found that the registry could have a positive impact, but that the recidivism rate actually increases due to the registry).
why juvenile consensual sexual offenders (JCSO) should not have to register as sexual offenders.

Consider this 2009 case: a seventeen-year-old boy started dating a fourteen-year-old girl while both were in high school. When the girl became pregnant, a family member decided to take drastic measures and informed the local police that a seventeen-year-old was engaging in sexual acts with their underage daughter. Even though the sexual acts were consensual, the police arrested the young man for statutory rape and he served three months in a prison boot camp for the felony. But his punishment did not stop there. The state required that he register as a sex offender on a publicly available database and update his information every year.\(^5\)

After the young man served his sentence, the young couple got married and started a family. Although the man is now thirty-one years old, he and his family still suffer because of his status as a sex offender. After years of searching, the family finally found a home 1,000 feet away from any area that children frequent, in accordance with the requirements of the state.\(^6\) Because of the registry, the husband is forced to take lower-income employment, which results in financial strain on the family. The father cannot coach his daughter’s soccer team, nor can he pick his children up from school. He cannot participate in church activities that involve children, and he cannot participate in his son’s scouting activities. This family suffers greatly because of the sex offender registration laws. This misery will continue for life unless the family moves to a state that has a limit on the number of years the father must register.\(^7\) To make matters worse, the registry is very difficult to appeal in court. This life of continual embarrassment is all because he engaged in consensual sexual acts with his high school sweetheart.\(^8\)


\(^7\) See O.C.G.A. § 42-1-19 (2010).

\(^8\) See Chen, *supra* note 4, at A16.
As terrible as this sort of life sounds, this is exactly how many who have committed consensual sexual acts as juveniles have to live their lives under the current sexual offender policies in many states. While the registry helps protect the public from dangerous sex offenders, JCSOs who engage in consensual acts with another should not be forced into this public humiliation. The registration process for sexual offenders came into law as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994.\(^9\) Registry laws vary between states, but most states require past offenders to meet annually with local law enforcement to update their residency and occupational information, as well as a description of the car they drive.\(^10\) This information is open to the public, via Internet, in order to provide those living near any sexual offender the information needed to avoid letting their children have contact with those registered. In recent years, this information has become even more accessible; for example, there is now an application for smart phones that will show the picture and the residential location of all sex offenders within a radius of a few miles.\(^11\) The main intent of this easy access to the registry is to protect the public from dangerous sexual offenders.\(^12\)

I argue that JCSOs are not necessarily violent, dangerous criminals. Therefore, they should not have to register and be labeled as sex offenders. There are numerous articles debating the effects and problems of the registry in general. However, this article shows that the registry is unconstitutional when applied to JCSOs. First, a brief history of sex offender registry laws are included and an argument that the registry is a penal act is presented. Upon the premise that the


\(^10\) See id. at § 14071.


registry is a punishment, I then argue that the registry is cruel and unusual punishment when applied only to JCSOs, therefore classifying the registry as unconstitutional. To conclude the article, a proposal is written on how to improve the sex offender registry laws in the country. The purpose of this article is to illustrate the flaws and negative effects the law has on JCSOs, as well as the need for reform.

History of the Sex-Offender Registry

Sex offender registry laws have been in practice in five states since 1986, and almost half of the states had some sort of registry by 1993. At that time, however, most states did not make the information available to the public. In the early 1990s, there were a series of widely known child-abductions and molestations that sparked the creation and modification of sex offender registry laws.

In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was passed to establish guidelines for states to track sex offenders. Named after an eleven-year-old boy who was a victim of a violent sexual crime in 1989, the act requires states to track sexual offenders by implementing a mandatory registration system for sexual offenders upon release.

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from custody. Requirements for the registry differ between states, but every state registry updates the convicted sex-offenders’ address regularly. This was not initially public information when this act was first passed, but became public domain two years later. In 1996 Megan’s Law was added as an amendment to the Jacob Wetterling Act. Named after a New Jersey girl who was a victim of sexual violence, this amendment directed states to allow for the sex offender registry information to be made public.

A decade after the passage of Megan’s Law, the Adam Walsh Child Protection and Safety Act of 2006 was passed. This act, named after a Florida boy who was abducted in a shopping mall and later murdered, is another amendment to the Jacob Wetterling Act. The Adam Walsh Act provides states further guidelines on how to operate the sex offender registry; however, not every state has ratified this federal act. Currently, there are only fifteen states that have ratified this act. The Act classifies convicted sex offenders into a three-tier system: the most serious and dangerous offenders being a tier three classification, and the least dangerous being a tier one. Depending on classification, sexual offenders have different guidelines for their registry and the duration of time for which they must register.

While only a small number of states have ratified the Adam Walsh amendment, some states have made their own changes to the system. Some states have laws, commonly known as Romeo and Juliet Laws, that protect the older participants in consensual sexual relationships as long as they meet some required stipulations (which vary from state to state). This modification to the registry protects the public by providing information on the whereabouts of dangerous sex offenders while helping to protect those on the registry like JCSOs from public scrutiny and further punishment. For example, Florida passed such a law in 2007 that stops the accused from being listed as a sex offender. The younger of the two participants must be between 14 and 17 years of age, a willing participant in the sexual relationship, and no more than four years younger than the offender. It also must be the only violation on the offender’s record. This does not make the intimacy legal; those protected by the Romeo and Juliet law still have to serve the punishment given for statutory rape. However, it does protect the offender from the punishments associated with the sex offender registry. Twenty-four states have ratified these laws, while other states, including the District of Columbia, have no laws protecting JSCOs.

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25 See id. Once those who are protected by the Romeo and Juliet law are released from custody, they are not required to enlist in the sex offender registry.

26 See Close-In-Age Exemptions to the Age of Consent, Age of Consent by State, http://www.age-of-consent.info/?page_id=25 (Jan. 23, 2012). Other acts and laws have been passed concerning the registration, but for the intents and purposes of this article, these are the four pieces of legislation that are discussed.
Registry is a Punishment

The sex offender registry is punitive in nature. The registry further disadvantages and restrains the convicted sex offender after serving his or her time. Because of the stipulations of the law, many aspects of sex offenders’ lives are affected. For example, special limitations are placed on where they can live, and they are restricted from attending any school activities or church functions when there are children present, even if the children are their own. Many report being fired or not being hired because of their sex offender status, regardless of the severity of their crime.  

The Supreme Court, however, does not agree. This was confirmed in the Supreme Court decision of *Smith v. Doe*. John Doe and his son, John Doe II, had been convicted sex-offenders prior to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 being passed. Under this act, all sex offenders convicted before 1994 still had to register as a sexual offender. Doe argued that this violated the *ex post facto* clause because of the retroactive nature of the act. However, the Court disagreed in a 6-3 decision stating that the act did not violate the *ex post facto* clause because the registry is not a punitive act. The Court reasoned that the act was intended to be a non-punitive means of identifying offenders to ensure public safety. They acknowledged that the availability of information about sex offenders may have a “lasting and painful” impact, but argued that these negative consequences are a result of their conviction, not the registration system.  

The two dissenting opinions found the act to be penal. Justice Ginsburg wrote that she would hold the registry as punitive in effect

29 See *id.* at 91.
30 See *id.* at 90.
31 See *id.* at 91.
32 Id. at 101.
because it involves an “affirmative disability or restraint.”

She argued that the registry exposes the offenders to “aggressive public notification of their crimes” and causes “profound humiliation and community-wide ostracism.” As further justification of her opinion, Justice Ginsburg compared the requirements of the registry with those associated with a lifetime parole. She recognized the registry’s civil purpose—to promote public safety—but thought that the registry’s “scope notably exceeds this purpose.” Justice Ginsburg stated that the registry “applies to all convicted sex offenders, without regard to their future dangerousness.” This opinion justifies the need to reform the registry in order to protect JCSOs from the punishment inherent with being on the registry. Justice Ginsburg agreed that the registry is a punishment and that it may be too harsh a punishment for certain sexual offenders. In agreement with Justice Ginsburg, I argue that the registry can be beneficial for promoting public safety, but that its punitive nature makes it too harsh for certain sexual offenders such as JCSOs.

Justice Stevens shared the same opinion as Justice Ginsburg, expressed in his dissent. He wrote of the “severe stigmatizing effect” of the registry. He cited some provisions of the registry in the Alaskan Act that may be too intrusive for some of the offenders on the registry.

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33 Id. at 115 (Ginsburg, J., dissenting). (Justice Ginsburg stated that she realizes that the court has also deemed some laws non-punitive, despite their punitive aspects, she quoted United States v. Urse, 518 U.S. 267, 290, 1996).
34 Id. at 115 (Ginsburg J., dissenting).
35 See id. at 115 (Ginsburg J., dissenting).
36 Id. at 116 (Ginsburg J., dissenting).
37 Id. at 116-17 (Ginsburg J., dissenting).
38 Id. at 111-112 (Steven, J., dissenting).
registry.\textsuperscript{39} Most importantly, Justice Stevens established a definition of what is a punishment. He states that the registry is a punitive action because “the sanctions (1) constitute a severe deprivation of the offender’s liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminal.”\textsuperscript{40} In his opinion, Justice Stevens considers the registry a punishment.

Informing the public of sex offenders in their neighborhood, in accordance with Megan’s Law, is also a punishment. This harms potential relationships that JCSOs could make with those in their communities, which further displaces them from rehabilitation and creates an atmosphere for vigilantism. A study conducted in 2000 among sex offenders in Wisconsin discovered that most sex offenders interviewed were harassed, ostracized, or humiliated on a regular basis, and all of them feared for their safety.\textsuperscript{41} In extreme cases, some of those registered had been physically attacked by members of their communities overly concerned with a sex offender living in their neighborhood.

The punishment associated with registration is cruel to sex offenders, but it is exacerbated by the familial punishment that

\textsuperscript{39} See id. at 111-112 (Steven, J., dissenting). Justice Stevens wrote: “In Alaska, an offender who has served his sentence for a single, nonaggravated crime must provide local law enforcement authorities with extensive personal information, including his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment at least once a year for 15 years. If one has been convicted of an aggravated offense or more than one offense, he must report this same information at least quarterly for life. Moreover, if he moves, he has one working day to provide updated information. Registrants may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities.”

\textsuperscript{40} Id. at 112 (Steven, J., dissenting).

\textsuperscript{41} See Hollida Wakefield, The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?, 1, J. SEX OFFENDER CIV. COMMITMENT: SCI. & L. 141, 143 (2006).
comes with it. This is especially poignant for JCSOs because they are not dangerous citizens and are more likely to have normal sexual and familial relationships. Their innocent family members are punished by the sex offender registration notification process and the humiliation associated with it. A 2009 study found that not only do few family members of registered sex offenders (4% of the population surveyed) find the registration effective in helping the public to protect itself, but most family members are affected adversely by the notification laws, even though they were not the people who committed the crime. The majority of families experienced financial hardships because of sex offender laws, and most respondents were also forced out of their homes. Many had also been threatened or harassed because of their family member’s status as a sex offender. The injustice of this is irrefutable. It is obvious that this form of punishment goes beyond retribution for just the sex offender; their family members often pay a price as well. Families of convicted murderers or other heinous crimes would suffer similarly, but the suffering the sex offenders’ families experience and the magnitude of the family members’ crime is not proportional.

Notification laws become even more worrisome when one considers the effects those laws have on the children of sex offenders. In

42 See Richard Tewksbury, Collateral Consequences of Sex Offender Registration, 21 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 67 (2005).


44 See Jill Levenson et. al., Collateral Damage: Family Members of Registered Sex Offenders, 34 AM. J. CRIM. JUST. 54 (2009).

45 See id at 54. (82% of the respondents said that a financial hardship had been created for their family because the registered sex offenders had such difficulty in finding a job. 53% said that the registered sex offender in their family had been fired because of their sex offender status, which created more financial hardship for their family. 51% said that they had to move from their residence because someone (either a landlord or a neighbor) found out that a sex offender lived there. A shocking 44% of respondents said that they had been threatened or harassed by neighbors after it was discovered a family member was a sex offender).
the same 2009 study, it was obvious that children were affected by stigmatization that occurs because of their parents’ crimes. When one considers that sometimes the children themselves are the victims of these crimes, it seems especially cruel that they are made to suffer. Most of these children have been stigmatized by their parents’ sex offender status, and adults more often than not treat these children differently. The consequences that they experience are not just restricted to actions taken by adults, however; most children of sex offenders are treated differently by other children. The sex offenders’ children should not be ostracized as a result of their parents’ crimes.

The registry further penalizes the sex offender who has served out his or her punishment. The registry disables and restrains the sex offender from progressing to a new and rehabilitated life. He or she is constantly reminded of past mistakes and is ostracized by the community because of the registry.

The Registry Cruel and Unusual Punishment for JCSOs

I have found the registry to be unconstitutional for JCSOs because the registration process is a cruel and unusual punishment, in violation of the Eight Amendment. Because Megan’s Law helps protect the public from violent sex offenders, the registry does fulfill its purpose for dangerous sex offenders. JCSOs were convicted of statutory rape that was consensual, therefore their action could not have been rape; use of force must be present for these actions

46 See id. at 54.
47 See id. at 54. (The study reveals that 71% of the children of registered sex offenders have been stigmatized by their parents’ status, and 63% are treated differently by other adults. The consequences that the children experience are not just restricted to actions by adults, however; 58% of respondents with children said that their child is treated differently by other children at school, and 78% claim that their child’s friendships have been impacted).
48 Id. at 54.
49 See U.S. CONST. amend. VIII.
to be considered rape.\textsuperscript{50} I conclude, then, that JCSOs are not violent offenders and the registry is unconstitutional when applied to them.

The registration process is comparable to a lifetime parole. For example, in the state of Utah, convicted sex offenders have to meet with local law enforcement agencies to update their residential information and vehicle registration, among other things.\textsuperscript{51} The most serious sexual offenders have to meet with authorities every three months. Parole, on the other hand, is no more than an extension of their incarceration; it is granted to those imprisoned that have had good behavior, to serve out the rest of their sentence at home under the supervision of local authorities. Those under parole have to meet with parole officers regularly to prove that they are being rehabilitated and improving their behavior.\textsuperscript{52} In reference to Justice Ginsburg’s dissent, the registry is simply a parole.\textsuperscript{53} Sex offenders who serve their full sentence in custody, upon being released, have to meet with local authorities regularly. There is no functional difference between these meetings and parole. The registry is cruel and unusual punishment because it is excessive in punishment and is not proportional to such a mild offence of having consensual sex with a minor.

The Supreme Court has established that excessive punishment for a crime is considered “cruel and unusual.” In \textit{Coker v. Georgia}, a prisoner who was found guilty of murder, rape, kidnapping, and aggressive assault escaped from prison and again sexually assaulted a woman.\textsuperscript{54} The defendant was convicted of rape and sentenced to death by a jury, which was later held up by the Georgia Supreme Court. The defendant then appealed the decision to the U.S. Supreme Court. In the case addressing the defendants appeal, the decision was overturned by a 7-2 vote with the Court arguing that the punishment of death constituted cruel and unusual punishment. The Court


\textsuperscript{51} \textit{See id. Title 77 Chapter 27, available at http://corrections.utah.gov/services/sonar.html.}


concluded that proportionality of punishment to crime is a part of cruel and unusual punishment:

(a) The Eighth Amendment bars not only those punishments that are “barbaric” but also those that are “excessive” in relation to the crime committed, [and] a punishment is “excessive” and unconstitutional if it ... is grossly out of proportion to the severity of the crime.\(^{55}\)

This case established a precedent of punishing criminals with sentences that are proportional to the crime committed. Even in a dissenting opinion, Chief Justice Burger and Justice Rehnquist also accepted the Eighth Amendment’s concept of proportionality, though they did not believe the death penalty to be a disproportionate punishment to rape.

When applied to other violent sex offenders, the registry is a punishment, but a deserved one. These sex offenders are dangerous to society and exposure to children could be a dangerous temptation and detrimental to their rehabilitation. According to the legislation, the purpose of Megan’s Law is “to protect the public concerning a specific person required to register.”\(^{56}\) Because JCSOs are not violent and did not commit any heinous crime towards a minor, they do not deserve this punishment.

Proposal

There are many issues that arise from the sex offender registry, and many amendments have been passed for the Sexual Offender Act of 1994 aimed at improving its effectiveness. The Adam Walsh Child Protection and Safety act of 2006 is an amendment that some states have ratified that increased the effectiveness of the registry. For non-serious offenders (classified by the act as Tier-1 offenders), the limit to the number of years that a sex offender has to register is 15 years. For more serious crimes, the number of years required to

\(^{55}\) Id. at 592.

register is greater. This and other acts have been ratified to further the effectiveness of a much-supported public service.

However, more needs to be done to ensure that the punishment fits the crime and that the registry serves its purpose. A large part of the purpose behind punishing sex offenders is to help these people move on from their mistakes, and become productive and law-abiding citizens. I propose that the federal government require every state to pass Romeo and Juliet Laws that will protect young, consensually intimate couples. It would be left to the state to decide what ages fall under the Romeo and Juliet Law, but every state should implement these laws. Lastly, if every state were to ratify the Adam Walsh Act, there would at the very least be a limit to the number of years that JCSOs would have to register, thus limiting the long-term effects the registry can have on individuals. The legislation for the registry has good intentions, but it can be detrimental to JCSOs. Continuing to improve the already amended laws will help ensure that the registry fulfills its intended purpose.