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Articles

Columbia Undergraduate Law Review

Challenges to Copyright and User Experience in the Electronic Publishing Industry

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Abstract:

Electronic books (e-books) have grown in prevalence over the last decade, becoming a popular alternative to physical books. However, digital piracy and copyright infringement present a substantial threat to the digital publishing industry, leading to the widespread use of digital rights management (DRM) encoding technologies and the criminalization of circumventing these schemas. While DRM technologies are moderately effective in preventing acts of infringement amongst casual consumers, variances in DRM encryption amongst competitors prevents many challenges to the consumer, tethering the purchase to a single companies' device and potentially creating barriers to fair use after the duration of copyright has expired. DRM also threatens the first sale doctrine, allowing the retailer to maintain authority over how the purchase is used beyond the point of transaction. By examining the rights holders' financial incentives and consumer perspective, this article explores the effects of digital rights management, discusses alternatives to traditional DRM schemes, and proposes digital watermarking and secondary digital resale markets solutions that will address threats to fair use and first sale doctrines, respectively, piracy concerns, and ease of consumer use.

Over the past decade, the Internet and other digital technologies have encouraged the publishing industry to transition from traditional paper books to electronic books (e-books). This change is allowing consumers to experience a long-established form of entertainment in a very different way. Since their commercial introduction in the 1990s, e-books have rapidly increased in popularity, superseding the sale of hardcover books on Amazon.com in July of 2010, and outselling paperbacks on the site only six months later.[1] The electronic publishing industry is projected to take in an estimated $4.1 billion in 2014, $495.1 million of which will be profit.[2] From 2009 to 2014, the annual growth of the electronic publishing industry was an impressive 37.0%,[3] and this growth is expected to continue for the next five years. In its Global Entertainment and Media Outlook for Book Publishing, professional services firm PricewaterhouseCoopers anticipates a 17.6% Compounded Annual Growth Rate (CAGR) in the electronic publishing industry through 2019.[4] Revenue is also expected to grow in the electronic publishing industry as consumers continue to transition towards the digital format and realize the advantages that come with e-books, including translation functions, font enlargement, annotation and web-browsing capacities.[5] Consumer interest in e-books will also rise in the coming years because e-books are less expensive than their print counterparts. Although the move to e-books requires the initial upfront cost of an e-reader (typically priced between $100 and $250), the average e-book retails for $7.00 - $8.00, while print hardcover books can cost as much as $26.00 - $28.00.[6]

Despite the new features that e-books may provide the consumer, e-books come with limitations that can prove to be significant. E-books, like other original works that have been expressed in a way that enables their reproduction and communication, are entitled to copyright protection.[7] The purpose of copyright is to "promote the Progress of Science and the useful Arts"[8] by giving the creators of works the right to economically

exploit their creative works, thereby providing creators with an incentive to create further works that will contribute to societal development and progress. Thus, the owner of a copyright retains the exclusive right to reproduce copies, create derivative works, and display works publicly, among other rights.[9] Within the entertainment industry, these rights are fiercely protected, as exercise of these exclusive privileges can be the primary means of income for the rights holder.

The rise of the Internet and file-sharing networks have facilitated digital piracy en masse, in which copyrighted works such as e-books are illegally distributed, preventing the rights holder from profiting from the distribution of his or her creative work. In an effort to dampen the effects of piracy, the retailers of digital goods have developed an encryption software, known as Digital Rights Management (DRM). This technology is intended to protect the industry's bottom line by preventing income loss as a result of copyright infringement, and it indirectly encourages continued innovation by ensuring authors' incomes. However, Digital Rights Management (DRM) software also creates unfortunate effects for the user of the works upon which it is applied. By tethering a work to a single device, DRM can restrict the consumer from utilizing their purchase in ways that will best suit their needs.[10] The terms by which e-books are distributed also present significant threats to a privilege long enjoyed with physical books, the first sale doctrine. This doctrine, which establishes the right of a consumer to resell a purchase on the secondhand market, does not easily translate into the digital landscape, resulting in the possibility that certain digital works only be available to the public at full price rather than at discounted rates.

The continued presence of DRM schemes in e-book technology, and the limits imposed by the lack of a resale market for digital goods, are likely to become more serious issues as consumers transition further from paper books to e-readers, expecting that the rights they are accustomed to will simply carry

over. Part of this frustration originates from the widespread misunderstanding among consumers that digital goods are acquired through permanent sales rather than via licensed transactions. Additionally, certain accepted practices in the world of physical works simply do not apply in the digital age. In the print publishing industry, books come in a variety of formats (e.g. hardcover, paperback, box sets) at different prices. Consumers can purchase books at any retailer regardless of purchase history, and those who cannot afford retail prices can find works in secondhand markets, or can borrow them within their social networks. The use of DRM disrupts the application of many of these practices in the digital world, preventing the price-shopping that print consumers enjoy, prohibiting the sharing of digital works, and limiting the possibility of a secondhand market.

Despite intentions to promote societal progress and creativity by ensuring authors' incomes, the limitations imposed by DRM software raise the concern that a transition to consuming solely digital goods will result in a marked decrease in the accessibility and affordability of works. In turn, this could result in the isolation of certain groups from the enjoyment of entertainment goods and cultural works. A look at the current debate over whether to keep DRM in e-books, and the relevancy of the first sale doctrine in this industry, indicates that decisions on policy and marketplace practices must be made in the future. Ideally, solutions to these issues will extend rights and accessibility to the consumer, while also satisfying the copyright holders who create these works.

I. WHAT IS DRM?

Digital Rights Management (DRM) refers to the general concept of using software codes to "lock" downloaded material. DRM codes are written into the software of a downloaded file. Though imperceptible to the user during everyday use, these codes allow the rights holder to control access to the digital content, as

well as determine how the digital content can be used. The specifics of a DRM scheme can vary in strength and complexity, and generally determine whether files can be copied or modified.[11] A DRM scheme can be thought of as a lock-and-key design: the file is locked, and only an authorized device can act as the key that unlocks the material for use. Once the DRM codes are downloaded onto the device, the file becomes tethered to the DRM software, rendering the file inoperable on other devices.

Why use DRM? The digital landscape makes copying materials and sharing them with others far easier to accomplish in a short period of time. By placing encryptions on e-books, publishers seek to prevent the copyright infringement that occurs when works are pirated on peer-to-peer file-sharing networks, websites where individuals can upload files for others on the network to download for their own use.[12] Digital Rights Management software allows the publishing industry to achieve a level of predictability regarding the use of their products, a knowledge that was impossible to obtain with prior forms of physical media.[13] Now, publishers can go beyond simply determining the price of a transaction, but also mandate how a work will be experienced long after a purchase is complete.

Of course, just because the publishing companies intend to control how their users engage with purchased content does not mean that implementing DRM technology is entirely effective. Technologically savvy consumers have found ways to circumvent various types DRM encryption, breaking the locks that tether the file to a single device, and demonstrating that those who are passionate enough about maintaining control over their media libraries will find ways to do so. To prevent this activity and avoid piracy, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA criminalizes the act of circumventing DRM technology, as well as the dissemination of information or software that helps circumvent the encryption, regardless of whether or not the circumvention involves infringing

copyright law. The DMCA further states that no person may distribute content that has been disabled of its DRM protection.[14] Passage of the DMCA has legitimized DRM's role in digital technologies, and has discouraged the widespread breaking of DRM schemes by making the circumvention of the technology a criminal offense.

II. CONSUMER FRUSTRATION WITH DRM AND THREATS TO PRINCIPLES OF COPYRIGHT

Despite DRM's value to authors and publishing companies who seek to make a profit from the sale of e-books, the continued presence of DRM has been a frustration for many consumers. Some of this frustration originates from a lack of understanding of the retailers' terms of agreement. The language used in retailers' interfaces (e.g. buy, purchase, checkout) leads many consumers to the false belief that a sale has taken place. Since the monetary exchange that occurs in a sale often signifies a transfer of ownership in the world of material goods, consumers mistakenly expect to obtain full ownership when purchasing a piece of digital content, and they assume that they can use this content at their own discretion. However, a closer look at the terms of use reveals that their digital goods are not sales, but licensed content, and that the retailers have the authority to restrict the scope of the use of these goods.[15] This distinction may be unimportant if consumers use the product as the publisher and retailer intended, but may become problematic if the consumer attempts to take a "forbidden" action, such as transferring or downloading the file onto another device. When a consumer learns that he or she cannot sell, lend, or rent digital items in the traditional sense, the consumer may falsely believe that he or she has been deprived of a fundamental right by nature of being a property owner. In reality, the consumer never truly owned the good, nor possessed the rights to sell, lend, or rent it in the first place.

One of the most common complaints regarding copyright management technologies in e-books is the resulting lack of compatibility provided to the user. Since DRM tethers the downloaded content to the specific e-reader on which it was purchased, users often become frustrated upon realizing that their library may not be transferable to a new device. This limitation becomes especially relevant in cases where a consumer decides to purchase an e-reader from a different distributor, and consequently seeks to transfer content from, for example, Amazon's Kindle to Barnes and Noble's Nook. This issue can be particularly frustrating in the digital world, since technology constantly evolves at a rapid pace. Digital media that is not transferable becomes worthless as original devices age and become obsolete.[16] To account for technological developments, many retailers allow the transmission of files from their older devices to their newer models. In order to prevent the loss of their e-book libraries, many users feel obligated to purchase subsequent generations of the device in question from the same retailer. A copyright optimist may see this effect as building brand loyalty, but given the circumstances, this phenomenon can also be considered a form of brand entrapment, since purchasing an e-reader from a rival company usually requires starting one's e-book collection from scratch. The consumer is prevented from participating in a completely open market in which products are evaluated based on current standards rather than past purchasing decisions.

Some retailers have responded to this complaint by releasing software applications that enable the reading of e-books on non-e-reader devices (e.g. reading an Amazon's Kindle e-book on a personal computer).[17] While this does provide the Kindle owner an alternative location to purchase and read e-books, it does not create the open market that a consumer may want, as the user is still constricted to purchasing content through the Amazon.com digital store. If one desires access to multiple online retailers, one may elect to download software applications that are compatible to

each of the various retailers' stores, but this option is only best suited for the consumer who wants to read these books exclusively on a personal computer. This effort to engage in a more open marketplace will prove to be problematic when attempts are made to transfer these e-books from the computer onto an e-reader, as these devices are programmed to only accept and display the files that share its corresponding DRM scheme. Because competing retailers each encode their products with different DRM software, this means that the consumer will be able to download from his or her computer only those e-books purchased by the retailer who manufactures and distributes that e-reader, which could amount to only a small portion of his or her e-book library.

Other applications, such as Calibre, have been released, claiming to have the capacity to convert nearly any e-book format into another format. However, upon testing, former New York Times columnist David Pogue revealed that Calibre does not convert copyrighted books. Given that copyright's current duration is the life of the author plus seventy years,[18] this limitation dramatically reduces the number of books that can possibly be converted, thus diminishing the application's effectiveness in relieving the incompatible formatting problem. Pogue explains this finding, stating that Calibre rules out "the books that people want to read these days… books by people who are still alive."[19] Using Calibre to convert books that already have expired copyright terms is unnecessary, because these works have entered the public domain and are freely accessible for public consumption. Most works in the public domain are widely available on the Internet in PDF or other file formats that any e-reader can display.

From the perspective of opponents to DRM, one of the major detractors to having the software on e-books is its potential role in limiting the accessibility to works that fall into the public domain. Although copyright terms expire, allowing works to fall into the public domain and be used freely, protective software like DRM does not have an assigned term upon which it will expire.[20]

What will become of the works that are currently protected by DRM when they fall into the public domain? Publishers may elect to release DRM-free versions of these works upon the expiration of their copyright, but this does not address the e-book files that had been downloaded prior to copyright expiration and are now entitled to the freedoms provided by the public domain. Many users will not elect to re-purchase an e-book that has now entered the public domain, especially because the file will appear identical to their original purchase. Unless the work's DRM scheme expires upon the expiration of the work's copyright, publishers will have the opportunity to control the dissemination of e-books to which they are no longer entitled control.

DRM also presents concerns for the concept of fair use. The fair use doctrine offers some provisions for the acceptable use of copyrighted works without granted permission of the copyright holder, under the argument that there are select circumstances in which a particular use of a copyrighted work for the public good outweighs the personal and/or financial interest of the copyright holder. Specifically, the doctrine permits use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching… scholarship, or research."[21] DRM effectively interferes with the fair use doctrine, as it prevents a person from accessing, reproducing or manipulating copies of the work, regardless of circumstance (including those that are approved in the statutory provisions for fair use).

While section 1201(c) of the DMCA states that the anti-circumvention provisions are not meant to impact potential defenses to copyright infringement such as fair use,[22] some scholars have argued otherwise. Circumventing the encryption without legal permission is a violation of the DMCA, potentially creating a situation in which a normally justifiable use of copyrighted works under fair use is suppressed because it will result in violation of another law.[23] It also creates a dichotomy in which an action may be acceptable and legal when adapted from a

print format, but legally questionable if adapted from an electronic e-book interface (there is no risk of violating the DMCA with print formats because the law applies to the circumvention of DRM, which does not exist in print). As e-books gain popularity and prevalence, the presence of DRM technology may deter people who would have otherwise used the privileges of the fair use doctrine to create a derivative work or educational materials that could have been to society's benefit.

III. FUTURE RECOMMENDATIONS

Given the enormous benefit that DRM provides authors and publishers and the limitations it forces onto consumers, what is the best route for DRM in the future? The movement against the presence of DRM in digital musical downloads has already been won. Arguing that DRM was ultimately too ineffective in preventing piracy and too easily decoded to justify the inconvenience shouldered by consumers, Steve Jobs urged the major record labels to renegotiate contracts with iTunes for DRM-free downloads.[24] In 2009, iTunes, the United States' largest online retainer of music, succeeded in dropping DRM from its music downloads, a move that was widely lauded by music users.[25] Over the past few years, smaller publishing houses have begun a similar transition, dropping DRM from their e-books.[26]

Some scholars have proposed that DRM does not have to be removed entirely, but that greater interoperability must be achieved so that both publishers and consumers can be satisfied. Adobe's ePub is a program that acts as a universal base, which can be read by all e-readers. Because publishers want to be able to brand and protect their content, the ePub format allows the layering of proprietary DRM software over its base. This layer of DRM is typically what prevents an e-book from one retailer from being used on a competing retailer's device. However, interoperability could be increased if the retailers include software in their e-readers that can decode the DRM of other distributors, so

long as the e-book files also utilize the ePub base. This would allow the consumer to effectively read e-books purchased from various retailers on their e-reader device.[27]

But would the retailers benefit financially from this move? At first glance, making their devices open to reading rival retailers' e-book formats appears to be a bad business decision. If the consumer has the option of comparing prices and purchasing e-books elsewhere, there is the risk that the consumer will buy the retailer's device and then make all subsequent purchases elsewhere. To address this concern, some suggest that the retailers could charge a fee for these conversion services, in a strategy quite similar to Apple's fee-based service of upgrading consumers' previously purchased music into iTunes Plus DRM-free formats.[28] Consumers would pay for the ability to experience their purchases on whichever device they choose, satisfying a major user complaint about DRM technology. Retailers would still be satisfied because the DRM protections remain intact, discouraging the spread of piracy.

An interoperability scheme like this one is designed to create a more competitive e-book market as well, allowing smaller retailers to enter the market without being completely suppressed by the major companies. Instead of having to create an e-reader device and garner enough users to make a profit, smaller retailers could distribute books that can be read on competitors' devices, such as the Amazon Kindle. However, the success of this model would be dependent on the conversion prices set to make a "foreign" e-book compatible on a reader. The system falls apart if the cost of conversion becomes too expensive (e.g. a $5.00 conversion fee to read a $10.00 book from a small retailer on the Kindle, versus simply paying $12.00 from the Amazon store). In this case, consumers will resort to making all of their purchases on the native site, negating the desired impacts of this model.

Another more effective alternative to the presence of DRM is to unlock the books for use on various formats, but to include

other identifying information in the e-book code to prevent piracy. Known as digital watermarking or social DRM, this technique involves inserting pieces of data into the downloaded file. The publisher can then identify the original purchaser of the file should it be found on pirating networks.[29] The technology has been used on Harry Potter books downloaded through the website Pottermore,[30] and by Benetech, a company that distributes books for people with disabilities.[31] The theory behind the strategy is that if one is more likely to be discovered, one is less likely to commit a crime or wrongdoing. An IP address, the string of numbers that identifies a particular computer in a network, appears on peer-to-peer networks, but often these numerical strings seem anonymous enough to users to justify piracy. However, these users may be less likely to continue if their full names and other identifying information are embedded in the file, particularly because this information would provide publishers and anti-piracy enforcement agencies an avenue to pursue when seeking legal remedies for these crimes.

From the publisher's perspective, the greatest shortcoming of digital watermarking is that it will likely best address major file-sharing networks, but will not be very effective in policing small-scale file-sharing that happens within communities of friends, the mainstream users whose sales publishers depend upon.[32] However, it is important to consider that currently the vast majority of copyright infringement lawsuits against individual offenders are often from large-scale sharing, not single instances of sharing. Benetech has reported having successfully prevented piracy based on the company's experiences with digital watermarking thus far. Of the 1.3 million e-books downloaded annually with social DRM, the company only sees about ten instances of unauthorized copies on the Internet each year.[33] Perhaps the name "social DRM" is appropriate because it can encourage a social exchange of cultural works through casual lending of e-books amongst communities of friends. This would increase access to e-books for those who

ordinarily would not be able to afford them, providing a social good. While some may argue that this casual sharing would negatively impact sales, one must recall that the same sharing is a culturally accepted practice with physical books. Social DRM has become a promising strategy to implement, as it prevents the large-scale piracy that publishers fear while allowing consumers greater freedom in how they experience their downloaded goods.

IV. THE FIRST SALE DOCTRINE

As long as the e-book industry distributes digital goods with DRM, retailers and publishers will have influence over how these downloads are experienced. When considering this influence, it is important to address another significant threat to consumer's abilities to use their purchases as they wish: the question of whether the first sale doctrine is relevant in the digital age.

The first sale doctrine first originated from the 1908 Supreme Court decision in *Bobbs-Merrill Company v. Straus*, which states that a publisher's exclusive right of distribution only applies to the first sale of copies of the work, and that publishers cannot limit further resale of these materials as long as they had been legitimately purchased.[34] This decision later became incorporated into the Copyright Act of 1976, stating that the owner of a copy "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."[35] Since its creation, the first sale doctrine has been a valuable addition to copyright law because it has increased the overall affordability of goods by creating the possibility of a secondary sale market for those who cannot afford the initial market price. Additionally, the first sale doctrine has increased the availability of works, ensuring that works will be accessible and preserved over time, even if the copyright owner no longer produces them.[36]

Because the first sale doctrine has become an established aspect in the distribution of entertainment goods, it must be considered as society makes the transition toward a digital market.

The doctrine itself makes no distinction between digital and non-digital goods.[37] Many proponents of a digital first doctrine argue that this is because there is no real difference between physical and digital entertainment goods, suggesting that they are purchased for the same purpose and consumed in similar ways. However, digital goods differ significantly from physical goods in respect to their production and distribution. While copies of physical goods can only be produced and introduced to the market by the original publisher, technology affords nearly any consumer the ability to reproduce a digital good without any cost. Digital goods can be copied infinitely and transmitted with perfect fidelity.[38] This raises the possibility that the "reselling" of a previously purchased digital good is really the unauthorized distribution of copies of that good, otherwise known as copyright infringement.

V: Concerns over Digital Application of the First Sale Doctrine

Concerns over the applicability and future of the first sale doctrine were raised as early as 2001. A report by the US Copyright Office reveals concerns that "if the practice of tethering [DRM] were to become widespread, it could have serious consequences for the operation of the first sale doctrine."[39] The US Copyright Office discussed a potential idea for facilitating a digital first sale doctrine, suggesting the prospect of a "forward and delete" system, in which consumers who wish to re-sell their digital products would have to download a technical mechanism that would ensure that the copy was deleted from the consumer's hard-drive in order to complete and validate the sale.[40] In modern terms, this would likely require that the consumer upload the electronic file to a third-party web server that would execute the sale and deliver the electronic good to the buying party upon confirmation that the file has been deleted from the seller's device. However, in an age of removable drives and cloud storage, remote storage would likely enable a seller to circumvent this detection by retaining a copy, albeit illegally. Despite concerns about the potential loss of the first sale doctrine, the Copyright Office

ultimately did not recommend taking legislative steps to specifically accommodate or outlaw the first sale doctrine in a digital world, instead instituting a "wait and see" approach.[41]

While this may have been deemed an acceptable decision in 2001, it seems that the time is approaching to make more definitive determinations regarding the relevancy of the first sale doctrine in the digital age. In 2008, the 9th circuit ruled in *Vernor v. Autodesk, Inc.* that software could not be resold because it was licensed property, which the first sale doctrine does not address.[42] More recently, Judge Richard J. Sullivan determined that the company Redigi cannot resell downloaded music files, as it creates a reproduction of the original file, which is transferred to the buyer's computer.[43] This creation of an unauthorized reproduction constitutes as copyright infringement, violating the right of reproduction reserved exclusively for rights holders under the Copyright Act of 1976.[44]

From these decisions, it seems that the first sale doctrine cannot be legally applied to the resale of e-books. This implication stems principally from the concept that a sale has never in fact taken place, but rather that e-books are distributed through licensing agreements. E-books are bought through licenses with the retailer for personal, non-commercial use, and these agreements typically prohibit the sale or reassignment of the rights to another party within their terms and conditions. These licenses allow the copyright holder to exert control over the work for much longer than was ever possible with physical copies.[45]

In the sale of physical media, the distributor loses control of the entity and its subsequent use the minute the transaction is complete, but DRM software allows the distributor to dictate how the electronic good is used for the an indeterminate period of time (presumably as long as the media players to which the e-book is tethered are functional and commonly in use). The only way to avoid implicating the reproduction right in the transaction would be to physically exchange the entire device (and thus entire e-book

library) rather than the single file. In this case, the sale is no longer a digital sale at all, but a physical exchange, and thus would not qualify as a valid exercise of the digital first sale doctrine. Even if a system were established that would facilitate the transfer of the file, circumventing copyright infringement by not making an unauthorized reproduction, the presence of DRM encryption would deny the recipient access to the file when attempting to open it on a new device.[46]

Assuming that these obstacles did not exist and the first sale doctrine was made legally and digitally feasible, would a digital resale market function economically? To the proponents of a digital first sale doctrine, it is essential to establish a secondhand market to prevent copyright owners from forcing consumers to purchase only new copies for whatever high price they choose.[47] However, opponents to a digital first sale doctrine tell a different story. The first sale doctrine functions in the physical market because the new copies are inherently worth more than used copies that have experienced wear. In a digital market, this deterioration of the good does not occur, and thus the new and used copies are identical. If digital resale were to mimic the traditional market, prices would likely decrease with each subsequent transaction, until ultimately a consumer could purchase a perfect digital copy of an e-book for a dramatically lower price.[48] Who would reasonably want to pay full price for a new copy when the same thing can be obtained for far less after it had been bought and resold a few times? In this scenario, consumers would depend on the resale market to circulate goods and a minimal number of copies would be sold in the original market. Because the copyright holder would not be entitled to a portion of these secondhand sales, authors' and publishers' incomes would suffer with the lack of sales upon the initial release of the work. Without the promise of sales in the primary marketplace, the copyright owners would likely not have financial incentive to continue the arduous process of creating new works.

V. FUTURE OF FIRST SALE DOCTRINE IN THE DIGITAL AGE

How do we go about resolving this debate as we move into the future? One of the most reliable ways to resolve debates regarding copyright law is to create legislation that amends the current Copyright Act. One such example is the "Benefit Authors without Limiting Advancement or Net Consumer Experience (BALANCE) Act of 2003," introduced by Congressional Representative Zoe Lofgren. This bill built upon the "forward and delete system" first proposed by the US Copyright Office, proposing to amend Title 17 so that the owner of a digital work can legally transmit it to another party, as long as the original format is subsequently deleted.[49] Permitting the work to be sold "by means of a transmission to a single recipient" would address the exact circumstances in which reproduction of a copyrighted digital work can legally occur, and mechanisms to detect the deletion of the original format would ensure that the exchanges governed by the first sale doctrine would operate as they do in the physical world.[50] However, this legislation never left its congressional subcommittee and does not appear likely to be revived in the near future.[51] The Library Associations has also proposed amending current legislation, suggesting that Section 109(a) of the US Copyright Act of 1976 should include the "owner of any right of access" to engage in the first sale doctrine, thus explicitly including people who have licensed digital goods.[52] However, while this change in definition would resolve the debate as to whether or not the first sale doctrine applies to the digital world, it would not address the problems that could emerge in the establishment of a digital resale market, especially with the continued presence of DRM controlling the goods that would be exchanged.

Retailers have also gotten involved in the debate by proposing the creation of a resale market for their customers. Both Apple and Amazon have filed patents within the last two years for

technology that would create an electronic marketplace for previously purchased goods moderated by the retailers. Apple's patent suggests that the concerns over resale prices could be controlled by imposing a minimum resale price dependent upon how long the work has been available and how many times that particular copy has been resold.[53] While these marketplaces may resolve some of the consumers' complaints, allowing a retailer control the secondhand market ultimately would not extend the first sale doctrine into the digital world. If anything, it further expands the influence of the copyright holders, as the publisher can determine pricing and receives a portion of transaction. These are privileges that the copyright holder would normally not be entitled to under the first sale doctrine in the exchange of goods in the physical world, and thus cannot be considered a true resolution to the diminishing power of the first sale doctrine. Alternative resale markets that do not involve the retailer's and copyright holder's influence would be preferable, provided that they can succeed in drawing Apple and Amazon's loyal customer base to an independent platform. Still, this puts a great deal of legal responsibility on the third party managing the resale market, who must ensure that goods are truly exchanged rather than shared. Otherwise, these markets risk facilitating digital piracy and being held liable for copyright infringement.

Because of the various issues that arise in permitting a digital first sale doctrine to exist and function in the open market, it has been proposed that the concept should be abandoned in the digital world and relegated to apply solely to physical goods. Proponents of the first sale doctrine argue that its elimination would threaten the social benefits it offers, such as greater accessibility and affordability for those who cannot purchase the good at its original retail price. However, this need not be the case if variable licensing systems are introduced, in which various versions of a particular good are introduced in scaled prices.

Accepting digital goods as licensed rather than sold items may disqualify the first sale doctrine in the digital landscape, but it does not necessarily eliminate the benefits that the first sale doctrine typically provides. Digital formats automatically increase accessibility and affordability as compared to tangible goods by the sheer fact that they can be downloaded from anywhere with Internet access, and cost far less to produce and virtually nothing to distribute. Still, even greater accessibility and affordability for these goods can be provided through the introduction of a variable pricing scheme for the licensed goods. Copyright holders can designate different prices for certain degrees of access and use of the digital work.[54] For example, consumers can pay full price for the traditional download with a license that does not expire, or can elect to pay a discounted rate for access that is limited in duration. Another option would be for consumers to pay a slightly more expensive price to access a download that offers certain bonus features or additional content, akin to a deluxe edition in the music world.

Variable pricing of licensed goods would be beneficial for both parties involved in these transactions: copyright holders and consumers. Copyright holders would be satisfied because they would retain control of distribution. The exact duration of these variable licenses, how many options are available, and the prices at which they are set can be determined by the copyright holders and can vary with the demand of the specific work in the marketplace. Price variation would benefit the consumer as well. Certain markets cannot afford to download digital goods at full retail price, leaving consumers with the options of either being barred from access or turning to piracy to gain access to goods. Product differentiation would increase legal access to goods by offering affordable alternatives to full price. Additionally, consumers would benefit from the ability to choose options that best suit their needs, whether they are limited-duration rentals or long-term use.

The format of e-books and other digital goods make this option highly feasible to implement. Creating variable pricing packages for physical books can be expensive for publishers who have to produce large quantities in order to reach a cost-effective yield, but creating alternate versions of a digital good does not carry the same burden. Digital goods do not require additional materials to be made and can be reproduced without cost, meaning that there is no required overhead or supply that must be distributed in order to make the project worthwhile. It is even possible that, instead of creating a limited number of options for consumers to choose from, publishers and retailers can create more flexible licenses.[55] Consumers can then pick and choose the features and license duration that they prefer, and pay a price that corresponds to the conditions they have selected. The ability to customize a digital download will offer consumers even greater flexibility than they enjoy with physical goods. Although variable licensing is not a comprehensive replacement for the first sale doctrine—as it does not allow consumers to dispose of their downloaded digital goods as they wish—it does offer an alternative that still satisfies the first sale's primary social benefits of increased affordability and accessibility.

VI. Conclusion

Overall, the e-book industry has done much to change the nature of how consumers experience books, allowing them to collect vast libraries in a convenient and portable manner. Yet at the same time, this technology has also given the copyright holders and retailers in the electronic publishing industry a great deal of power, often at the expense of the consumer. It may be somewhat acceptable to believe that consumers should sacrifice certain privileges typically offered by physical books in order to experience more advanced technology, but this logic will not remain valid as the digital marketplace increasingly becomes the dominant mode of enjoying entertainment goods.

Ultimately, changes must be made so that consumers and publishers can both comfortably engage in the digital marketplace. First and foremost, it is essential that consumers are better educated on the nature of the goods they are acquiring. Many consumers falsely believe that the transaction that transpires when acquiring a digital work is the same as the one that occurs with a physical work, but consumers must come to understand that digital works are licensed rather than acquired by sales.

This false assumption is made by consumers in part because the digital goods are labeled with the same names as the physical items: an e-book is still categorized as a book, even though it bears little resemblance to a traditional book and is better described as an electronic file that can be downloaded and read on an electronic screen. Retailers employ the label "e-books" to appeal to consumers and easily describe the service that the files perform in a way that is easily understandable; however, using this term also limits the development of novel features. As the industry matures, e-books gain features that further distinguish them from traditional books, and e-readers are gaining capabilities that far surpass their initial purpose — the mechanism by which to read electronic books. It is no wonder that Amazon's Kindle is referred to as an "electronic reader" in its first generation user's guide,[56] but currently advertisers the most recent Kindle as a "tablet" that is capable of web-browsing and other activities that make it appear to function more as a computer than as a mechanism by which to consume books.[57]

Consumer confusion is further increased by the misleading practices of e-book retailers, whose behavior leads consumers to the false impression that they have purchased a digital good rather than licensed its use. Retailers use terminology that is strongly associated with sales, even referring to the transaction as a "purchase" on their websites, and often obscure the actual terms of the license in agreements that can be difficult for consumers to locate and to understand. By using more clear phrasing on their

webpages and by prominently displaying in plain English the core terms and conditions associated with the digital good, consumers will be better informed in regards to what they are acquiring when engaging in a transaction, as well as the rights they are entitled to as a result of this transaction.

Beyond educating consumers about digital goods and the rights permitted through their license, the primary copyright issues facing digital publishing today, digital rights management (DRM) and the first sale doctrine can be addressed through the implementation of new technologies and new strategies. Proposals like social DRM can serve as an effective replacement for more restrictive encryption technologies by offering users greater freedom in using digital goods while still protecting against copyright infringement and piracy. The implementation of a variable pricing structure could prove to be a satisfying alternative to the problematic application of the first sale doctrine to the digital world while still promoting affordability and accessibility to these goods. With some refinement, these solutions can foster the industry, allowing for publishers to distribute their content with reasonable returns and for consumers to appreciate and respect creative goods in the best way possible.

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McCullen v. Coakley: Picketing at Abortion Clinics Does *McCullen v. Coakley* go too far?

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Abstract:

Eleanor McCullen, Jean Blackburn Zarrella, Gregory A. Smith, Carmel Farrell, and Eric Cadin (petitioners) regularly engage in pro-life counseling outside reproductive health care facilities (RHCFs), defined by the state as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed."[i] They sued in district courts in 2008, challenging the constitutionality of a recently ratified Massachusetts statute that they asserted limits their right to speech and free expression of these views, Mass. Gen. Laws. ch. 266, 120E1/2 (Act). Act establishes that "No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility.[ii]" However, Act does not apply to "persons entering or leaving such facility," "employees or agents of such facility acting within the scope of their employment," and "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility. " The petitioners sue Attorney General Martha Coakley (respondent), for her central and primary role in enforcement, on the grounds that their First Amendment guarantees of free speech are unduly burdened. They are legally prevented from delivering their message, peaceful or not, to patients entering and exiting the facility.

This paper will first recount the historical origins of Act to explain the motivations and justifications for enacting this legislation. Second, this essay will determine whether fixed buffer zones that limit free speech enjoy First Amendment protection by examining whether this law is viewpoint-based or viewpoint-neutral. In order to assess viewpoint neutrality, this paper will assess the application of the law, the justifications as distinct from the content of the law, and the law's motivations. This essay will argue that the law is not viewpoint-neutral and that there are no compelling interests for justifying this infringement on the rights of free speech. It will offer another theoretical model for assessing the legality of Act, but even then the law cannot be constitutionally justified. Finally, this essay will consider this case with reference to Hill v. Colorado (Hill), the apparent precedent and inspiration for McCullen v. Coakley (McCullen). This paper will argue that outcome of Hill, whether agreeable or not, does not protect Act and that Act pushes the boundaries of what the Supreme Court deemed acceptable in 2000.

McCullen v. Coakley was decided on June 16, 2014 after six months of deliberation. The Supreme Court unanimously ruled in favor of the petitioners, maintaining that the Massachusetts's Reproductive Health Care Facility Act (Act), which established a 35-foot buffer zone around reproductive health care clinics, violated the First Amendment. Justice Roberts delivered the opinion of the Court. Justice Scalia and Justice Alito concurred in judgment but disagreed with the Court's rationale, delivering two separate opinions.

Justice Kennedy assess the constitutionality of the Act by applying the framework that "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information." Justice Kennedy argues that the regulated speech is content neutral even if it "may disproportionately affect speech on certain topics." He does not consider the exemption to agents of reproductive health clinics who act within the "scope of their employment" to compromise viewpoint neutrality because there is no suggestion that the clinics authorize their employees to speak about abortion.

Having argued that the statute is content and viewpoint neutral, the Court proceeds to examine whether it is narrowly tailored such that it does not "burden speech more than necessary to further the government's legitimate interest." The Court concludes that the law is not sufficiently tailored to serve the government's interest of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Justice Kennedy offers alternative legislation that Massachusetts could have enacted to satisfy these public safety concerns with minimal burden to First Amendment rights citing the Freedom of Access to Clinic Entrances Act of 1994 or N.Y.C.

Admin Code §8-803(a)(3)(2014) as examples. Furthermore, the Court suggests that the 35-foot buffer zone at every clinic in the State might be unwarranted because concerns to public safety are only present once a week at one clinic. The Court concludes that the limitations to free speech are unjustified by government interests and therefore, the Act substantially burdens First Amendment rights.

Justice Scalia disagreed with the Court's opinion arguing that the statute is content and viewpoint based and fails strict scrutiny because it only applies to abortion clinics, targeting abortion related speech and exempts abortion-clinic employees or agents, discriminating on the basis of viewpoint. Justice Scalia goes even further to suggest that *Hill v. Colorado* should be overruled, arguing that "protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks."

Justice Alito's opinion, most closely follows the argument presented in this paper, suggesting that the speech being suppressed is content neutral but not viewpoint neutral. Beyond Justice Scalia's brief commentary on *Hill* both Kennedy and Alito offer little opinion on the case.

I. HISTORY OF THE INTENT AND ENFORCEMENT OF THE ACT

The State of Massachusetts first established laws implementing a version of a buffer zone, following Hill vs. Colorado in 2000. In Hill, the court held that eight foot floating buffer zones that followed patients, entering or exiting within a 100 foot parameter of any healthcare facility, were constitutional. This meant that every person needed permission to approach within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign, or engaging in oral protest, education, or counseling."[iii] The Supreme Court voted 6 to 3, with the majority ruling that: unwilling listeners have the right to be left

alone, this regulation was "narrowly tailored," the "regulation is a content-neutral restriction," and the state has an interest in "protecting access and privacy" for people in "particularly vulnerable, physical, and emotional" conditions.[iv,v]

At the same time, Massachusetts was faced with elevated levels of violence and aggression, particularly around abortion clinics. The First Circuit notes "by the late 1990s, Massachusetts had experienced repeated incidences of violence and aggressive behavior outside RHCFs,"[vi] including a shooting that resulted in the death of two and the injury of many more in 1994. Beyond the threat of violence, the presence of counselors and protesters presented a public safety concern because at times there could be at least 40 people in front of an abortion clinic obstructing sidewalk and street traffic.[vii] Massachusetts's legislature enacted the earliest version of Act in 2000 to address public safety concerns. In its initial form, Act mandated a six-foot floating buffer zone around any person or vehicle within an 18-foot radius of the entrance or door to the reproductive health clinic. No one could pass the six-foot buffer zone for the purpose of "passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person in the public way or sidewalk."[viii] However, like the current version of the law, it exempted bystanders and agents of the RCHF, if they were acting within the scope of employment.

Passage of Act did not temper the levels of intimidation, congestion, and harassment because it was difficult to enforce. The police claimed that they were unable to approximate six feet and that the scope of the law was vague. Can eye contact be considered consent? Or, if patients react to protesters, whether negatively or positively, is this an expression of consent?[ix] Thus the law was revised to prohibit almost anyone from crossing a larger 35-foot buffer zone at a reproductive health clinic facility.

II. IS ACT VIEWPOINT-NEUTRAL?

The fixed buffer is a limitation on free speech, because it limits what can be said and where; in order to determine whether it can be justified under the First Amendment, one has to determine whether it is viewpoint-neutral or viewpoint-based. Then, the abridgment of speech must be balanced against state interest. As Justice Elena Kagan explained, the goal of the viewpoint distinction is "to identify a set of improper motives, which themselves may give rise to untoward consequences."[x] When the law is found to be viewpoint–based, the government has to prove that the legislation is narrowly tailored to serve a compelling state interest.[xi] This framework acts as a restriction on government discrimination among ideas or viewpoints. In order to determine whether this legislation is viewpoint-neutral, there are three factors to examine: the application, the justification, and the motivations. This is a tripartite paradigm borrowed from Mark Rienzi, who represented the plaintiffs, in his article "Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content Neutrality." Rienzi's essay is deployed for its comprehensive analysis, its firm rooting in past cases, as well as its emphasis on neutral application.

Before this paper proceeds with applying the three-pronged viewpoint-neutral test, it is necessary to distinguish viewpoint-neutral framework from content-neutral paradigms. Even though the courts have distinguished between speech restrictions that affect certain viewpoints and limitations that discriminate between the content of speech, given the substantial overlap and blurry boundaries between both paradigms, legal scholarship has used the terms interchangeably. McCullen pertains to a law that discriminates against viewpoint, but in order to preempt any confusion that might arise from a disconnect between the way the paradigms are defined in the court and in scholarship, this essay will use the terms interchangeably.

To qualify as viewpoint-neutral, the law has to be impartial in its application, which means that "the law must apply equally to speech regardless of its message."[xii] This does not appear to be the case in the *McCullen v. Coakley* circumstances. The application of the law in its discrimination between pedestrians, clients, and the workers, seems to be directed at limiting political speech. First, the statute distinguishes between protestors and other people passing through. The law permits uninvolved people crossing the buffer zone to reach destinations besides the abortion clinic. This exemption suggests that a person who stops to ask for directions or deliver a social nicety such as "good morning" could be reasonably assured that he/she will not be fined or imprisoned.[xiii] However, others who stop, whether to offer an opinion or a word of encouragement, would be punished under this law.

Second, in exempting clinic workers from the scope of the law, the statute discriminates between pro-choice and pro-life speech. Justice Alito outlines a hypothetical situation to demonstrate the bias of this law.

> A woman is approaching the door of the clinic, and she enters the zone. Two other women approach her. One is an employee of the facility says, 'good morning, this a safe facility.' The other one who's not employee says, 'good morning, this is not a safe facility.' Now under this statute, the first one has not committed a crime; the second one has committed a crime.[xiv]

By making ambiguous what it means for employees of the RHCF to act within the scope of their employment, the law makes it easier to burden anti-abortion speech in favor of pro-abortion speech.

Furthermore, this law appears to exempt fellow patients, who stall in the buffer zone to talk to one another, from prosecution. Can a woman on her way to a reproductive health care facility stop at the door of the clinic to encourage a fellow patient?

Can that uncertain woman express her doubts to someone who appears to be confidently entering the abortion clinic? Would they be punished? Would someone leaving the abortion clinic be allowed to stop and speak about their experience or share their thoughts? It appears that their speech is protected under the first exemption of the law because they can enter and leave, crossing the buffer zone at free will.

The second prong in determining whether a law is viewpoint-neutral or viewpoint-biased is justification. "The justification analysis asks whether it is something about the content of the speech itself that raises the government's interest or makes the government think the interest needs protecting in the particular context at issue."[xv] This means that if the State can provide justifications for Act without referencing the specific content of the law then it can support the claim that the legislation is viewpoint neutral.

The primary reason the defendants cite for establishing the buffer zone is "to protect public safety and patient access."[xvi] This is made clear from the very first lines of their brief and subsequent arguments in their defense. Witnesses testify that "protesters rarely barred access to clinics by physically blocking doors and driveways, or screamed from close range" in spite of Act's floating buffer zone 2000 precedent[xvii]; rather, patients reported "feeling too intimidated by the pacing protesters to enter the property, and turning back."[xviii] Beyond access, there is a public safety risk. On Saturdays, certain clinics see over 40 protesters that spill over on to the road causing traffic and sidewalk congestion.[xix] Regardless of the persuasiveness of the claim, they satisfy the justification analysis by not referencing the content. So while the law fails the application test, it passes the justification test.

The final prong of Rienzi's argument is the motivation inquiry. Here we must examine whether legislature "acted with the motive of favoring or disfavoring a particular viewpoint."[xx] This is often made clear by a discriminatory remark by public officials or

other authoritative figure, but since it is difficult to determine intent, especially without an obvious statement, this is the easiest prong to satisfy. It is unlikely that a legislature in crafting and enacting the legislation would cite its intent to suppress anti-abortion speech because that would unequivocally burden the freedom of speech. The Massachusetts legislature complies with this requirement partly because it offered as intent the justifications of public safety and access to healthcare facilities listed in the foregoing paragraph. The timing of the statute, following decades of violence, including two deaths in 1994, gives the impression that it was the State's honest and well-intentioned response to a growing problem of violence, intimidation, and obstruction to access of RHCF.[xxi] It seems that the legislature had reasonable motives and made acceptable justifications. The unintentional consequence of law, however, is that it discriminates against different viewpoints, which is enough to color the law viewpoint-based.

III. COMPELLING STATE INTEREST

Having argued that the law is viewpoint-based and that it burdens the First Amendment, can it still be justified if it advances a compelling State interest? In order to examine this question, one has to defer to the justifications outlined in the last section. As Coakley argues, this law addresses critical public safety concerns that other laws have failed to address and it facilitates access to services provided by the health care facilities. Are these interests compelling? And if so, does the law address them?

The first stated interest is to facilitate access for women who seek the services of a reproductive health care facility. *Roe v. Wade* set the precedent that women had the right to control their bodies.[xxii] In order to honor this standard, it is within the State's interest to enable access to facilities, ensuring that women have full agency in their choices and uninhibited access to options. Even though the expressed interest in enabling access to abortion clinics

is a compelling argument in and of itself, it loses some of its force and persuasiveness in the context of *McCullen v. Coakley*. The State already has several alternative mechanisms for reaching the same end. For example, Title 18, U.S.C., Section 248 Freedom of Access to Clinic Entrances (FACE) Act prohibits "the use of force or threat of force or physical obstruction, to intentionally injure, intimidate or interfere with or attempt to injure, intimidate or interfere with any person or any class of persons from obtaining or providing reproductive health services."[xxiii] With reference to physical obstruction and inference, the FACE law makes any effort to hinder abortion a criminal offense. FACE directly addresses the State's concerns about public obstruction, which is the stated purpose of Act. So why then is it necessary to introduce another law that serves the same function but simultaneously seems to burden free speech? This interest alone cannot protect the buffer zone because it is unnecessary given the federal mechanisms already in place.

The second State interest is that of public safety, which overlaps substantially with access to clinics. But Coakley goes further to make the argument that at times one can find up to 40 protesters crowding the small sidewalk of an abortion clinic, spilling over onto the road and obstructing street traffic. What about the times when there are no vehicular or sidewalk traffic? Public safety would be a compelling interest if it reflected the reality of the situation. The "frenetic," "hectic," and "congested," condition that Coakley suggests with over 40 protesters only refers to one clinic in Boston on Saturday mornings.[xxiv] The respondent's investigator observed no such crowds at any other time or place.[xxv] McCullen visited that same clinic during the weekday and found herself to be the sole counselor: "My usual practice is to go the clinic on Tuesday and Wednesday mornings from 7 a.m. to 11 a.m. Sometimes I sidewalk counsel by myself."[xxvi] Similarly, Bashour is often alone in Worcester after 10:00 am on any given day and usually alone on Saturdays.[xxvii] It follows that the interest that the

State uses to justify its standpoint is not grounded in hard empirical truths. The State's concerns are not supported by the realities at the clinics.

An argument could be made that it is easier to establish an absolute barrier than burden law enforcement agencies with determining which counselors are actively intimidating patients or obstructing access to clinics. However, is proposing to regulate five hours of pedestrian traffic on Saturday mornings a convincing argument for a nine hour barrier daily? Is this not more of a burden on the police force? Would they not be better served amplifying their supervision on Saturday mornings? This could address the State's concerns without compromising speech.

Furthermore, it is unclear whether this law serves its purpose in regulating sidewalk traffic. While it does keep protesters off a sidewalk, it simply pushes those people further up the sidewalk. It does nothing to tackle the broader safety concerns of protesters and other citizens. Instead of dispersing protesters among a larger area of space, they are pushed outside into the cramped corners of the street.[xxviii] If anything, this creates congestion on another part of the sidewalk and presents an equal danger to the protestors, crossing pedestrians, and traffic. Even if one could make the weak argument that public safety concerns caused by the congestion of protesters were a valid concern, they would be unable to make the argument that this law was capable of addressing them. It seems that the law gives rise to the very concerns that it hopes to tackle.

After having determined that this law is not viewpoint-neutral, and there are no compelling interests that justify the burden on free speech, it is reasonable to suggest that this law is unconstitutional and to expect that the Court will be overturning the law.

IV. ALTERNATIVE FRAMEWORKS TO ASSESS CONSTITUTIONALITY OF ACT

There are alternative frameworks that we can use to assess the constitutionality of Act. The lower courts propose that time, place, and manner regulations such as those established through Act are permissible if "they are justified without reference to the content of that regulated speech," "are narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information."[xxix] However, even by using this framework, it is difficult to argue that Act can be considered constitutional.

This essay previously conceded that justifications, such as to enable access and ensure public safety, do not reference the content of the speech. However, these justifications were not compelling in *McCullen v. Coakley* and neither were they fully addressed by Act. In some instances there was previously existing legislation that worked towards the same ends but without the burden on free speech. Even if we were to argue that these justifications are persuasive, this Massachusetts law is not narrowly tailored to address those interests in a way that limits the burden on speech. In fact, because it limits itself to reproductive health care centers and exempts health care agents from the scope, it appears to differentiate against certain viewpoints and it is not certain that this discrimination is necessary in addressing their motives.

For the most part, the theoretical model of the lower courts substantially overlaps with the viewpoint neutrality and the compelling state interest tests that were previously outlined. Unlike the first paradigm, the second model does not permit us to examine the application of the law, which is essential to determining constitutionality of the law. But the framework outlined by lower courts and applied in other cases is significant because it argues that restrictions on speech can be justified where there are "ample alternate channels for communication."[xxx] This is a reasonable

revision of above framework that does not consider that burden on the first amendment caused by speech restriction can be diminished where there are other ways for a message to be publically expressed.

Certain advocates of Act argue there are plenty of opportunities for communication to occur outside of the buffer zone before the patient enters the abortion clinic. Even while they're in the buffer zone, they're able see signs and can technically hear shouted protests.[xxxi] The collecting crowd can still reach the patients. They argue that pamphleteering and quiet counseling are not imperative to the exchange and communication of ideas protected by the first amendment since it already occurs in different forms. This reasoning allows for the State to justify the infringement on free speech induced by the buffer zone as negligible.

But even with these alternative ways to deliver speech, the restriction on free speech within 35 feet of a RHCF is not reconcilable with the spirit of the constitution, which is based on the dialectical assumption "that the freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth."[xxxii] This law favors those who are willing to stand outside the buffer zone and bellow their message at the top of the lungs, but punishes those who want to engage in peaceful and thoughtful conversation to arrive at the "truth" whether that might be to have an abortion or not.

Furthermore, it eliminates from the public forum the sidewalk, which has traditionally been the focal point of public discourse and an "iconic image"[xxxiii] of our "profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[xxxiv] This law pushes citizens of the sidewalk and places them into less visible neighborhood corners. This is not only inconsistent with the American ethos but also with court decisions that sidewalks in front of schools, courts, and even funerals should be held open for dialogue.

It also appears those few seconds mean a lot more for the women than it does for the people who support this law. As Nona Ellington testifies, "[if someone had] approached to help me and give me valuable information as I was walking into the abortion clinic, I probably would not have an abortion and suffered the horrible consequences for rest of my life."[xxxv] Nona is one of twelve who testified to the "life time of regret"[xxxvi] they face now and maintain that this could have been avoided had someone approached them as they were entering the clinic. Of the twelve women who write their accounts, four explicitly say they "would have ignored people yelling at me from a distance and would have only felt more shame."[xxxvii] These statements attest to the importance of the speech delivered face-to-face within 35 feet of the abortion clinic that is restricted by the law and maintains that there is no equivalent substitution.

V. RESPONDENT'S DEFENSE

The State still maintains that this law is neutral and that there are compelling justifications for maintaining the law.

Attorney General Coakley counters that the law is not viewpoint-neutral because it discriminates against anti-abortion viewpoints in its application. She asserts that the law can be interpreted in a manner that renders it neutral. She cites the letter she distributed on January 25, 2008 to law enforcement agencies, clarifying the coverage of the law as an example. Her interpretation made the law marginally more neutral in its application. She writes:

> The first exemption – for person entering or leaving the clinic – only allows people to cross through the buffer zone on their way to or from the abortion clinic. It does not permit companions of clinic patients, or other people not within the scope of the second or third exemptions, to stand or remain in the buffer zone, whether to smoke, talk with others,

> or for any other purpose.
>
> The second exemption – for employees or agents of the clinic acting within the scope of their employment – allows clinic personnel to assist in protecting patients and ensuring their safe access to clinics, but does not allow them to express their views about abortion or to engage in any other partisan speech within the buffer zone.[xxxviii]

Attorney General Coakley addresses the concerns that Act discriminates between civilians, protestors, and clinic workers. While she moves closer to a viewpoint-neutral standard, she does not go far enough in applying all parts of the law equally to all citizens of Massachusetts, particularly in her clarification regarding the second exemption. At the same time, her interpretation of the first exemption appears to be at odds with the actual text of the law. For example, her clarification about what it means for employees to act within the scope of employment is welcome. She clarifies that the expression of a view that supports a position that is partial to either side of the abortion debate goes beyond the scope of their employment. But even then the delineations of the scope remain blurry. Can an educator of Planned Parenthood cross into the buffer zone to say that three out of ten women have an abortion before they are 45? That the mortality rate of women in childbirth is higher than the mortality rate of women who have abortions? Both are technically facts, but are the question is whether they are facts that would push a vacillating woman in favor of an abortion.[xxxix] This appears to be permissible by the law if put forth by an agent of an RHCF, but if a bystander were to say such things, it would result in punishment.

Coakley's first clarification prohibiting anyone, whether companions or unassociated pedestrians, from crossing or idling in the buffer zone is a more neutral application of a flawed law. While this clarification might be well intended, how sustainable is

it when it is unsupported by the text of the law? The actual text stipulates that anyone unconnected with abortion clinic such as a regular passerby can cross the buffer zone. Perhaps if the law is ever reformed in the spirit of viewpoint-neutrality, it will move closer to Coakley's interpretation or otherwise support this with alternative legal backing.

Coakley responds to allegations that the justifications of the law are unpersuasive because they can be addressed by FACE, without a burden on speech. She counters that FACE is ineffective because it only protects against "murder, arson, and chaining to doorways," or the threat of it.[xl] She argues it fails in instances of congestion, sometimes unintentionally, caused by peaceful counseling or protesting. Coakley holds that they have exhausted all their options and still are unable to adequately protect public safety and ensure access to reproductive health care services.[xli]

However, Attorney General's office seems to fundamentally misunderstand this federal law. As stated in the definition sections of the federal statute, "the term 'physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services […] or rendering passage to or from such a facility […] unreasonably difficult or hazardous."[xlii] The federal law addresses the identical circumstances that Act covers. Had Massachusetts examined the legal framework more thoughtfully and analytically, perhaps it would have reached the conclusion that there were already the necessary mechanisms that could ensure access without burdening the First Amendment.

Other states do not seem to share Coakley's criticisms of FACE. In fact, FACE seems to be successful outside of Massachusetts. The Department of Justice has obtained the convictions of 71 individuals in 46 criminal prosecutions between 1994 and 2006 under FACE[xliii] for actions of intimidation and obstruction akin to those that prompted the ratification of the 2007 Act, but the Massachusetts state government cannot even point to

one prosecution for harassment, intimidation, and obstruction in the last 17 years.[xliv] It is notable that no prosecutions have been made under either versions of Act as well.[xlv] This suggests that maybe it is not the law that is ineffective but that the enforcement agencies of Massachusetts are in some capacity incapable of ensuring safety and enabling access to the abortion. Perhaps Massachusetts would be better served focusing their attention on making already existing laws work, instead of developing new and unnecessary laws.

Liberal supporters of this law hold that there are other grounds for protecting this law. They attest to the "the emotional and physical vulnerability of women seeking to avail themselves of abortion services."[xlvi] They argue that demonstrations have "deleterious effects […] on patients and providers alike."[xlvii] The state offers testimonies that confirm this argument. Women reported feeling "intimated,"[xlviii] "terrified,"[xlix] and "afraid."[l] These advocates of the law as verified by testimonies argue that exposure to the protestors inflicts emotional harm and moral distress. Blasi articulates[li] the harm by writing that this is "the kind of distress that all of us commonly experience when we learn that others find our beliefs or actions to be immoral."[lii] Advocates of this law contend that women needed to be protected from this harm.

Is this a compelling reason to restrict speech? While confrontations outside abortion clinics might be traumatic and upsetting for patients, it is not a sufficient basis for the regulation of speech. Blasi writes, "the experience of altering ones ways in response to criticism is seldom pain-free."[liii] Waldron extends this argument by suggesting through the analysis of Mill's harm principle in the context of moral distress that there might also be something to be learned from moral distress. "If nobody is disturbed, distressed, or hurt in this way, that is a sign that ethical confrontation is not taking place, and that in turn, as we have seen, is a sign that the intellectual life and progress of our civilization may be grinding to a halt."[liv] Waldron first argues that the

challenge to ethical ideas allows for the emergence of new and better ideas. Secondly, the "collision of ideas" allows for an understanding of the full significance and meaning of our ideas and the way we hold them.[lv] He even goes so far as to endorse Mill's idea that we should manufacture dissent where it does not exist. Along these lines, there could be an argument to protect controversial speech because it has value in and of itself.

The essay has outlined and deflected several of the defense's strongest arguments that convinced the lower courts to uphold the law. Regardless of the framework used to examine the legality of the law, the conclusion is the same: this burdens the first amendment without compelling justifications. It is reasonable to expect the Supreme Court to overturn this law.

VI. DOES THIS SIGNAL A REVERSE OF *HILL V. COLORADO*?

In ruling the buffer zone unconstitutional, would the Court be reversing the decision of the landmark 2000 case, *Hill v. Colorado*? What is the relationship between *Hill v. Colorado* and *McCullen v. Coakley*? Does Massachusetts go too far? Can the differences between the two be reconciled? It appears that McCullen deviates from the standard set in *Hill v. Colorado*. There are three primary differences between Hill and McCullen that indicate that McCullen strays too far from precedent.

The most fundamental difference between the two cases that determines the nature and character of the law is that they are responding to different problems and interests. The primary interest of the law in question in *Hill v. Colorado* is to protect the privacy of unwilling listeners.[lvi] The priority is to ensure privacy, setting aside their ability to access the clinics and safety for other actions. Protecting privacy and personal space is a compelling interest that has had a long history legal scholarship and case law, which has established that where speech or conduct might be offensive to certain groups of people, they should be given an

opportunity to avert their eyes. The offended persons should not be held a captive audience. [lvii] Whereas McCullen, as described above, is more concerned with safety and access of their patients. It is this difference that explains the other disparities between the two laws.

Another difference between the two cases is that while McCullen's law appears to be limiting the sidewalk counselors' right to speak, Hill's seems to be protecting the right of the listener to avoid unwanted conversation or otherwise intrusive speech. "The statute does not place any limit whatsoever on what may be set or displayed more than eight feet away from the listener and it doesn't place any limit on what may be said if the listener consents to the speaker coming within eight feet of the listener."[lviii] Even at a distance of eight feet, which takes around 4.2 seconds to traverse, "normal conversation levels" at slightly elevated volume levels because of background noise can be expected.[lix] In this way it protects the sidewalk as a focal point of public speech and exchange. At the same time, it does not compromise the protection against intrusive speech.

In contrast, the law in question in *McCullen v. Coakley*, moves one step further in that even welcome speech is made criminal within 35 feet. Furthermore, at 35 feet it is nearly impossible for one to transmit a message without the aid of a bullhorn or other amplifying device. As Justice Scalia argues that "those who would accomplish their moral and religious objectives by peaceful and civil needs, by trying to persuade women of the rightness of their cause will be deterred; and this is not a good thing for democracy."[lx] Even though Scalia presents this argument in his dissent for *Hill v. Colorado*, it is even more applicable to *McCullen v. Coakley*. Scalia is incorrect in suggesting it is "absurd" to have a conversation at an eight-foot remove in the backdrop of traffic.[lxi] At times the speaker might have to project but the conversation can still occur, whether in Times Square or in a bustling shop mall or even at a football game. However, this

same level of conversation is nearly impossible at a 35-foot impasse.

The final difference is that the law of Hill is arguably closer to neutrality standards than Act. Colorado's law applies to all healthcare facilities, including hospitals, clinics, abortions centers, and other locations so it does not discriminate against certain bodies of speech.[lxii] Since McCullen's law applies only to reproductive healthcare facilities, it frustrates partisan abortion speech. This burden on speech regarding abortion becomes pronounced when one considers the exemptions. By exempting employees from the jurisdiction of the law, Act specifically limits anti-abortion speech. Hill does not have restriction on who can say what but he does have limitation on what kind of speech requires permission.

It is possible to argue that Colorado's law distinguishes "a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with [that] person…" from any other speech such as "good morning" or a conversation about the weather. This distinction might be problematic in that it gives voice to other speech at the expense of oral protest or education or counseling on whatever subject matter. But this does not appear to be any different from Act because Act also accommodates people who do not express an interest in engaging in partisan dialogue. "Hello," "Good day," and "lovely weather we're having," is not a criminal offense in McCullen as long as someone unconnected to the reproductive health care facility delivers it. But determining the constitutionality of Colorado's law is not within the scope of this paper. Both laws have constitutionally questionable elements. However, when Coakley makes further exemptions regarding who can say what, this moves the law in question in *McCullen v. Coakley* further away from a viewpoint-neutral benchmark and past the standard outlined in Hill.

Because their justifications are dissimilar, the Colorado version of the law is more compatible with federal legislation

while Massachusetts's law is unnecessay. For example, in Colorado, it becomes clearer when peaceful conversation turns into "persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely to be the savor of intimidation."[lxiii] It becomes evident as patients attempt to move away from their sidewalk counselor and the protestor begins to follow them. This harassment, intimidation, and physical obstruction more neatly moves the law into the jurisdiction of FACE, making the line between peaceful speech and instructive and obstructive speech brighter, where it had been previously blurry in the FACE and Act overlap.

It is not within the scope of this paper to determine the constitutionality of Colorado's law but rather to prove that the McCullen case before the Court is very different from the one decided in 2006. But where there is overlap between the two, it seems that McCullen pushes the boundaries of what was outlined and the standard that was established earlier. It follows that Hill cannot protect this Massachusetts law.

VII. CONCLUSION

So far this paper has undertaken a detailed analysis of the law in question, examining the application, the justifications, and the motivations. It argued that this law was discriminatory in content and viewpoint. It examined several interests outlined by the conservatives, the liberals, and the State, arguing that there were no compelling interests and where there were arguable interests, this Massachusetts law was unnecessary to address them. This paper deemed the statute unconstitutional and expects it to be overturned.

It is impossible to study this law without acknowledgement to *Hill v. Colorado*, which provided the inspiration for legislation enacting buffer zones with a fixed radius or parameter of health care facilities. Hill is very different from McCullen in spirit, in content, and in character. Hill's primary aim is to guarantee the

right against intrusive speech by introducing an element of consent in interactions. Hill's law moves closer to neutrality as it avoids discrimination towards partisan beliefs concerning abortion. It minimizes the burden on free speech with a narrowly tailored solution, an eight-foot barrier that still allows for peaceful dialogue to occur. Even if there might be a few apprehensions regarding the neutrality of the law, it is unquestionable that this law is at the very least more neutral than that of McCullen, which goes too far and appears driven by different motivations. Whether or not Hill is a good decision, the standard outlined in that case cannot protect Act.

Whatever the outcome of the case, this will be a landmark case for free speech, determining the extent to which speech can be regulated.

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[i] Mass. Gen. Laws. ch. 266, 120E1/2 (2007).
[ii] *Id.*
[iii] *Hill v. Colorado,* 530 U.S. 703, 703 (2000).
[iv] *Id.*
[v] *Id.* at 729.
[vi] *McGuire I*, 260 F.3d at 38.
[vii] *Id.* at App. B.
[viii] Mass. Gen. Laws. ch. 266, § 120E1/2 (2000).
[ix] Martha Coakley Written Testimony at 4-6, Ex. D to Marignetti Aff. (Trial Ex. 24) [61-65].
[x] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,* 63 U. Chicago L. Rev. 413, 451 (1996).
[xi] Mark Rienzi and Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content Neutrality*, 82 Fordham L. Rev 1187 (2013).
[xii] *Id.* at 1194.
[xiii] *McCullen v. Coakley*, Oral Argument, The Oyez Project, U.S 10 (2014) http://www.oyez.org/cases/2010-2019/2013/2013_12_1168.

[xiv] *Id.* at 16.
[xv] *See* Rienzi, *supra* note 10, at 1194.
[xvi] *McCullen v. Coakley,* Brief in Opposition, The SCOTUS Blog, U.S. p.i [2014] www.scotusblog.com/case-files/cases/mccullen-v.-coakley.
[xvii] Gail Kaplan Oral Testimony, Hear Transcript at 50 (Trial Ex. 26) [64-63].
[xviii] Melissa Conroy Written Testimony, Ex. B to Martignetti Aff. (Trial Ex.24) [61-3].
[xix] Liz McMahon Written Testimony at 1, Ex. F to Martignetti Aff. (Trial Ex. 24) [61-67].
[xx] *See* Rienzi, *supra* note 10, at 1194.
[xxi] *See* McGuire I, *supra* note 5.
[xxii] *Roe v. Wade*, 410 U.S. 113 (1973).
[xxiii] Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248 (1994).
[xxiv] *See* McCullen *supra* note, at 22-23.
[xxv] *McCullen v. Coakley*, Reply Brief for Petitioners, The SCOTUS Blog, U.S. 6 [2014] www.scotusblog.com/case-files/cases/mccullen-v.-coakley.
[xxvi] *Id.* at 7
[xxvii] *Id.*
[xxviii] *Id.* at 6.
[xxix] *See* McGuire I, *supra* note 5, at 43.
[xxx] *Id.*
[xxxi] *McCullen v. Coakley*, Respondent's Brief on Merits, The SCOTUS Blog, U.S. 49-50 [2014] www.scotusblog.com/case-files/cases/mccullen-v.-coakley.
[xxxii] *Whitney v. California,* 274 U. S. 357 (1927).
[xxxiii] *McCullen v. Coakley*, Brief Amicus Curiae of the National Hispanic Christian Leadership Conference, The SCOTUS Blog, U.S. 7 [2014] www.scotusblog.com/case-files/cases/mccullen-v.-coakley.

[xxxiv] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
[xxxv] *McCullen v. Coakley*, Amicae Curiae Brief of 12 Women who Attest to the Importance of Free Speech in their Abortion Decisions. The SCOTUS Blog, U.S. 2 [2014] www.scotusblog.com/case-files/cases/mccullen-v.-coakley.
[xxxvi] *Id.*
[xxxvii] *Id.*
[xxxviii] 2008 Guidance Letter at 1-2 (Trial Ex. 26)
[xxxix] Planned Parenthood, Facts about Abortion, available at http://www.plannedparenthood.org/health-topics/abortion-4260.asp.
[xl] *See* FACE, *supra* note 22.
[xli] See McCullen v. Coakley, *supra* note 30 at 41.
[xlii] *See* FACE, *supra* note 22.
[xliii] National Abortion Federation, Abortion Facts: Freedom of Access to Clinic Entrances (FACE) Act, available at www.prochoice.org/about_abortion/facts/face_act.html.
[xliv] See McCullen v. Coakley, *supra* note 12 at 2.
[xlv] Emily, Bazelon, *You Do Not Have the Right to be Left Alone*, Slate (2014) http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/abortion_clinic_buffer_zones_at_the_supreme_court_why_the_anti_abortion.html.
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[xlvii] *Id.*
[xlviii] Melissa Conroy Written Testimony, Ex. B to Martignetti Aff. (Trial Ex. 24) [61-3].
[xlix] *See* Gail Kaplan Oral Testimony, *supra* note 16.
[l] Liz McMahon Oral Testimony, Hearing Transcript at 51 (Trial Ex. 26) [63-64]
[li] *Id.*

[lii] Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers,* 535 Capital University L. Rev. 556 [2011].
[liii] *Id.*
[liv] Jeremy Waldron, *Mill and the Value of Moral Distress,* 35 Political Studies 410, 417 [1987].
[lv] *Id.*
[lvi] *Hill v. Colorado,* 530 U.S. 703, 712 (2000).
[lvii] *Snyder v. Phelps,* 562 U.S. 13 [2011].
[lviii] *See Hill v. Colorado, supra* note 55 at 726.
[lix] *Id.*
[lx] *Id*. at 763.
[lxi] *Id*. at 156.
[lxii] Colo. Rev. Stat. § 18–9–122(3) (1999).
[lxiii] *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 204 (1921).

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Extradition Treaties as a Prism through which to Analyze the Shortcomings of Realism

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Abstract:
There is much debate within the political science realm as to which international relations theory best encapsulates states' motives and explains why they interact the way they do. This paper weighs two of the main theories, constructivism and realism, and frames them in a new way. The theories are analyzed using the prism of extradition treaties — treaties signed between states to return a criminal who has fled from one territory to the other. These treaties are significant in that they convey the regularized and multilateral interactions between states and represent an important form of diplomacy that does not garner the same level of attention as other vehicles of international relations. Specifically, because the United States has more than 100 bilateral and multilateral extradition treaties currently in effect with other countries, extradition treaties comprise a sizeable component of American foreign relations. To this extent, extradition is an apt prism through which to compare international relations theories. Both realism and constructivism can explain why the United States would sign these treaties; however, this paper will argue that constructivism — particularly, the convergence of norms — provides a much better and more complete explanation for this phenomenon. The analysis looks at a variety of cases of countries with which the United States has signed extradition treaties post-Cold War. The countries selected fall along a broad spectrum ranging from established, stable democracies to emerging democracies and non-democratic states.

I. INTRODUCTION

The practice of extradition in international law enables one state to hand over to another state suspected or convicted criminals who have fled to the territory of the former. According to legal scholar Cherif Bassiouni, extradition "is the means by which states cooperate in the prevention, control and suppression of domestic and international criminality."[1] Extradition is based upon bilateral treaty law, the norm of state reciprocity, and does not exist as an obligation upon states in customary law.[2] In accordance with United States federal law, extradition can only be granted or requested on the basis of a treaty. Currently, the United States has over 150 extradition treaties in force.[3]

This research paper will broaden the analysis of extradition treaties, looking at them as a diplomatic procedure through which international relations theory can be studied. To do this, it is necessary to analyze extradition beyond its narrow legal definition and demonstrate its salience as a tool of statecraft. Unlike other legal mechanisms, the process of extradition involves a significant amount of negotiations between states, bilateral or multilateral treaties, and reciprocity. Even after extradition treaties are signed, the process of extradition is regularized through constant interaction and dialogue between states, going through a variety of diplomatic and political channels. Extradition treaties are a key example of how in the modern world, professional diplomats are no longer the only, or even the main, actors in the conduct of foreign relations. Essentially, the diplomatic guild has lost its monopoly over negotiation.[4]

Outside the auspices of the State Department, officials from other domestic agencies such as the Department of Justice are also just as likely to be involved in major or minor negotiating roles in present-day diplomacy.[5] While the process of negotiating and crafting extradition treaties is a multilateral process that is completed across different government agencies, the Office of International Affairs at the U.S. Department of Justice, alongside their foreign counterparts, carries out the regulation and enforcement of such treaties. The resulting necessity of updating

treaties is a major undertaking, leading to an almost constant process of negotiating new treaties or renegotiating supplementary ones. Therefore, state practice relying on bilateral or multilateral extradition treaties is subject to a myriad of foreign policy problems including state succession, the effects of war and the severance of diplomatic relations.[6] To this extent, extradition represents an important mechanism of diplomatic relations within the larger foreign policy realm. Extradition treaties are significant in that they convey a subtle form of diplomacy — multilateral interaction between states across different legal systems — that often goes unnoticed in the greater study of international relations.

Furthermore, a key question to understand is why states expend the time, energy and resources to create these treaties. This paper will look at a wide array of extradition treaties established between the United States and other countries as case studies. This analysis will reveal the strong normative undercurrent that shapes the signing of these treaties. Although realism accounts for certain factors, it fails to capture other things such as shared and collective norms in affecting diplomatic relations. To that extent, a constructivist normative approach is the most compelling explanation as to why extradition treaties are established and allows us to understand the various elements at play in bilateral and multilateral extradition treaties. The extradition treaties used as case studies support the claim that states are likely to sign extradition treaties with states that share similar norms and values.

The majority of countries with which the United States has a treaty are western states; to that end, the countries with which the United States does not have a treaty are predominantly in Africa, Asia, the Middle East and the former Soviet Union. However, this research paper will look at a variety of countries, from all regions of the world, with the common core of having extradition treaties with the United States. Furthermore, the cases chosen and analyzed are contemporary extradition treaties that have all been signed and put into effect post-Cold War. These cases are chosen because they best reflect an up-to-date foreign policy character of the United States and are an accurate depiction of the modern-day geopolitical

landscape. This paper looks at treaties that the United States signs with both established and stable democratic governments as well as emerging and non-democracies as well.

To better understand the spectrum of countries with which the United States has extradition treaties, the case studies in this paper will be structured into three different sections that will provide a broad array of understanding to address the reason as to why states sign extradition treaties with one another. The first section will look at the realist and constructivist interpretations of the United States forming extradition treaties with countries transitioning towards democracy. The emerging democratic countries discussed in this section are South Africa, Slovenia and Tunisia. The second section will apply both realist and constructivist theory to analyze the signing of a multilateral treaty between the European Union and the United States. Finally, the third section will use both realist and constructivist analysis to gain understanding of the seemingly outlier case of the extradition treaty with Zimbabwe. The analysis of case studies will create a dialogue between realist and constructivist theory: how each would be explained from a realist perspective, and consequently, how constructivism provides a more complete understanding for why they are signed.

II. UNDERSTANDING THE MAIN INTERNATIONAL RELATIONS THEORIES

Extradition is a compelling prism through which international relations theory can be analyzed. The two main theories that will be examined through the prism of extradition treaties are realism and constructivism. Realist international relations theory offers some insights into why states sign extradition treaties, but it cannot explain everything, especially in anomalous cases. The main theoretical proposition of realism is that state behavior is driven by attaining and maximizing power.[7] Realist scholars contend that treaties are created and signed as a result of power-maximization and the seeking of national security or tangible material gains. Examples of material gains would

include increased trade, military sales or entering into alliances. On the other side, realists would argue that smaller countries use extradition treaties as a means to achieve stronger relations with a powerful state, thereby making the smaller country more powerful. To this extent, the realist interpretation of extradition treaties is that they are signed by states as a way to maximize their respective power base and to maintain or increase their share of world power. In addition, from a realist perspective, states would not be bound by such treaties if they compromised their position against other states and reduced their share of world power.[8] To that end, realists contend that the United States' signing of extradition treaties would be contingent upon the ability to maintain or maximize power through tangible material gains, via economic or security advantages, from the other state.

While realism argues that extradition treaties are signed for states to achieve power via material gains, constructivism takes a markedly different approach. A key component of constructivist ideology is the notion that international politics is shaped not by maximizing power, but rather collective values, culture, and social identities.[9] The main theoretical proposition of constructivism that will be emphasized and expanded upon in this paper is that state behavior – specifically in regards to signing extradition treaties – is based upon collective norms. Constructivist scholars define norms as collective expectations about proper behavior for a given [state] identity.[10] Furthermore, in international relations, models of "responsible" or "civilized states are enacted and validated by upholding specific norms."[11] Therefore, states' adherence to particular norms determines the countries with which the United States is willing to cooperate; specifically, the United States will arguably only cooperate or sign treaties with states that possess norms such as human rights or democracy. In the context of this paper, collective norms refer to the shared values between states. Constructivism argues that norms and culture affect how other parties are seen and their willingness to interact.[12] Unlike realism's preoccupation with material gains, constructivism focuses on the role of ideas in shaping the international system[13]. Consequently,

the case studies analyzed in this paper put forth the constructivist interpretation that states with similar norms and ideological foundations are more likely to sign extradition treaties with each other.

In the context of this argument, liberalism also supports the claim that collective norms are what drive the signing of extradition treaties. Specifically, the liberalist democratic peace theory can be reconstructed and reapplied to study extradition treaties. The democratic peace theory contends that democratic countries do not go to war with each other. For this paper, this theory is reconstructed to argue that democratic countries are more likely to sign extradition treaties with other democratic countries. This supports the idea that countries with extradition treaties have a convergence of norms; particularly, in regards to this theory, they both share democratic values and ideology. The idea of democracy as a point of norm convergence is demonstrated by three case studies of emerging democratic countries that have recently signed extradition treaties with the United States. Furthermore, this idea is also applicable to the multilateral treaty between the European Union and United States; in this respect, using the lens of democratic norms theory, a treaty with the European Union is most easily explained. On the spectrum of countries with which the United States has extradition treaties, E.U.-member states have the most stable and longstanding democratic regimes and institutions.

III. AMERICAN EXTRADITION TREATIES WITH STATES TRANSITIONING TO DEMOCRACY

This paper will begin by looking at three case studies that are all examples of extradition treaties being signed between the United States and countries that have made the transition to democracy within the last twenty years. The case studies of extradition treaties signed between the United States and Slovenia, South Africa and Tunisia, respectively, demonstrate the strong normative undercurrent that affects the signing of extradition treaties. These three examples reflect the convergence of norms, specifically regarding democracy, in countries that sign extradition

treaties with each other, as well as an effort on the part of the United States to tie them into the democratic community of nations. Slovenia was first recognized as a sovereign and democratic state in 1992 after the fall of the former Yugoslavia, and the U.S.-Slovenia Extradition Treaty was signed in 2005, coming into full effect in 2010. After the first free and democratic elections in South Africa post-apartheid in 1994, the United States signed an extradition treaty with South Africa in 1999, coming into full effect in 2001. While the U.S. does not officially have an extradition treaty with Tunisia, it was announced in 2011 after the Arab Spring that the two states are currently in treaty negotiations.[14] However, it is necessary to clarify that the states analyzed in this paper fall along a continuum of democracy: while many of the countries differ in the longstanding stability of their governments and institutions, what they share is that they are all clearly moving in the direction of democratic statehood.

Under apartheid, South Africa became increasingly isolated internationally. This is demonstrated primarily by the United Nations' passing of Resolution 1761, which condemned the state's apartheid policies and asked that member states both break off diplomatic relations with South Africa and cease trade with South Africa.[15] This is best demonstrated by the American divestment campaign that was formally enacted by Congress as the Comprehensive Anti-Apartheid Act of 1986. This legislation imposed heavy sanctions on South Africa and the sanctions were not completely lifted until after the fall of apartheid in 1993.[16] It was also not until after the fall of apartheid that an extradition treaty was signed between the United States and South Africa. The treaty was signed less than ten years after the fall of apartheid and the first democratic elections in South Africa's history. Since the abolition of apartheid and 1994 democratic elections, the countries have enjoyed a solid bilateral relationship.[17] From a realist perspective, the extradition treaty was signed with South Africa in order to achieve material gains, whether economic or otherwise. In addition, a realist may contend that South Africa abandoned apartheid as a way to ameliorate the negative material effects of

heavy sanctions imposed from countries worldwide, including the United States. Therefore, one could conclude that South Africa abolished apartheid and signed the extradition treaty to avoid further economic antagonism by other countries, especially the United States. However, while trade revenue between the two states increased significantly after the fall of the apartheid and the ending of sanctions in the early 1990s, there is no statistical evidence that trade increased after the extradition treaty was signed. If anything, trade dropped significantly between 1998 and 1999 and did not recover until 2005.[18] By these indicators, there were no financial benefits to the extradition treaty.

Viewed through the constructivist prism, this treaty can be explained by several factors. To begin with, the extradition treaty with South Africa was the marking of a new era of the United States engaging with democracies in sub-Saharan Africa. Sub-Saharan Africa is a region in which the majority of governmental regimes are authoritarian with high levels of corruption. The extradition treaty signifies a level of openness and dialogue between two regions of the world that ideologically are considered very different; however, South Africa's democratic elections in 1994 marked a new era for diplomacy between the two states.

To another extent, constructivism also emphasizes the role of individuals – in particular, leaders – in shaping international relations as opposed to institutions or material interests. Bill Clinton was a key factor in engaging South Africa during his presidency. It was Bill Clinton's 1998 tour of sub-Saharan Africa that initiated the modern era of formal presidential visits to the region and meeting with African heads of state. Before him, only Jimmy Carter had visited Liberia once in 1978 and George H.W. Bush called on U.S. military personnel and aid workers in Somalia in 1992.[19] Since the Clinton administration, both George W. Bush and Barack Obama have made several formal state trips to Africa. During his 1998 tour, Clinton met with former South African president and humanitarian Nelson Mandela, pledging American aid and support to help South Africa transition out of apartheid-era institutions and politics.[20] On this visit, Clinton addressed South

Africa's parliament saying, "We seek to be your partners and true friends in the work that lies ahead."[21] It is worth noting that this revolutionary visit and engagement with South Africa by an American president took place only a year before the extradition treaty between the two states was signed.

As with the case of South Africa, although Slovenia was part of the former Yugoslavia, its extradition treaty with the United States demonstrates its alignment with westernized democratic norms and as a valued ally of the United States. At the treaty signing ceremony between then-Secretary of State Hillary Clinton and Slovenian Foreign Minister Samuel Zbogar, Secretary Clinton emphasized that "as democratic countries, [Slovenia and the U.S.] are working to stand up for responsible governance and human rights."[22] Clinton made mention of Slovenia's membership in NATO and the potential for trading opportunities, as well. The superficial appearance is that realism accounts for those factors in states signing treaties with each other.

From Slovenia's point of view, a realist argument could be made as well. Arguably, Slovenia aligned with westernized democratic norms to become an ally of the United States, because capitalism had proved itself to offer more material benefits than communism. As a result the United States economy was stronger than those of communist countries. Therefore, the United States was more powerful, and Slovenia would benefit economically by allying with the United States.

And yet, the U.S. has hardly any investment in Slovenia nor does Slovenia have any desirable resources to the U.S. While there was a spike in U.S.-Slovenian trade between 2010 and 2011, this bounce was not sustained and trade dropped by over half during the following two years.[23] In this regard, the U.S.-Slovenia Extradition Treaty has not resulted in any tangible material gains for either state to maximize power and therefore, realist analysis cannot accurately account for the creation of this treaty.

Instead, a more complete understanding of the U.S.-Slovenia Extradition Treaty can be reached through a normative approach. Based on Secretary Clinton's rhetoric, the treaty can be a

move on the part of the United States to lock Slovenia into the community of western democratic nations and to solidify the democratic norms of Slovenia. Furthermore, the U.S. has demonstrated significant involvement in Slovenia regarding the building of democratic institutions. Specifically, the U.S. Support for Eastern European Democracy (SEED) Act was intended to promote free market transitions in the former authoritarian countries of Central and Eastern Europe. Slovenia was first of transitioning countries to "graduate" from this program, and in addition, received a significant amount of U.S. assistance to achieve democratic institutions and a market economy in the 1990s and early 2000s.[24] Despite the realist explanation, Slovenia's transition to capitalism and a free market system demonstrate the adaptation of American and westernized norms in regards to economic relations. Therefore, the United States' prolonged investment in ensuring a democratic Slovenia offers ample evidence to support the constructivist interpretation of extradition treaties. To another extent, beginning in 1997, the United States started engaging Slovenia in its Fulbright Program through the State Department for students to travel between the U.S. and Slovenia for educational and cultural exchanges. The United States' desire to sign such a treaty with Slovenia is better explained by a vested interest in ensuring that Slovenia's norms are on par with those of the United States. Constructivism emphasizes that Slovenia and the United States' convergence of norms plays an integral role in shaping their interaction with each other.

Most recently, the United States began negotiations with Tunisia regarding the development of a mutual legal assistance treaty and extradition treaty in post-Arab Spring 2011 after the ouster of authoritarian leader Zine el Abidine Ben-Ali. In statements released by the State Department, Secretary Clinton said, "to demonstrate our mutual commitment to Tunisia's construction of a new society governed by the rule of law and respect for human rights, the Governments intend to conclude negotiations before the end of the current year for a foreign assistance program to support the development of more

transparent, responsive, and accountable criminal justice institutions.…The events between December 2010 and January 2011 have given the US-Tunisia relationship an even greater impetus." [25] Clinton implies that bilateral legal treaties with the United States further incentivize Tunisia's successful transition to democracy and represent a concrete way to convey the shifting of norms. Unlike the cases of Slovenia and South Africa, the democratic government and institutions in Tunisia were not firmly established and were still very nascent.

However, if the United States' initiation to engage in treaty negotiations with Tunisia was driven by material interests, one would expect to see increases in trade, cooperation in security measures amongst other tangible gains. To that extent, trade with Tunisia in 2013 compared to 2011 has increased significantly.[26] Thus, this phenomenon could be explained by realism. And yet, while realism would account for the increase in trade between the two countries, norms theory accounts for this shift in a more compelling way. Rather, the U.S. signing a treaty with Tunisia was costless and does not fundamentally affect material gains in drastic ways. While trade did increase significantly between the two countries, Tunisia does not possess any resources or material items that the United States would seek. Rather, the economic development and increase in trade falls under the promotion of American values and norms. In American values, materialism and capitalism are implicit as well as cultural values. Realism can account for this, but normative theory does so in a greater way.

Constructivism holistically accounts for recent American relations with Tunisia. More strikingly, Secretary Clinton's statements demonstrate a level of open dialogue, exchanges, willingness to promote democratic ideals and free and fair elections. In addition, the democratically elected Prime Minister of Tunisia Mehdi Jomaa traveled to Washington D.C. in early April 2014 to meet with President Obama. Their meeting emphasized shared values and interests in the region and the ratification of the Tunisian constitution in January 2014 that codified equality of men and women. By all indicators, the evidence in the case of Tunisia

falls most consistent with constructivism. Shared democratic norms after the Arab Spring was the entry point through which the United States could engage Tunisia in dialogue. Moreover, the U.S. also has pledged $350 million since the 2011 revolution to support Tunisia's transition to democracy. These monies are not intended to support economic relations between the two nations nor does the United States seek to profit financially from its "investment" in Tunisia's nascent democracy. This pledge could be interpreted in a drastically different way if Tunisia were a country like Saudi Arabia or Kuwait, both of which possess vast oil resources. However, there has been no expressed interest for the United States to use Tunisia as a state for investment or resources. Furthermore, the United States stands to gain by increasing its influence regarding democratic norms in the largely hostile and non-democratic Arab World. Establishing treaty relations with Tunisia is a step towards that goal.

While trade is certainly a bonus of Tunisia's shift towards democratic norms, the United State's dialogue and action up until this point has focused primarily on supporting a stable democracy in a volatile region prone to authoritarian regimes. This presents many parallels to Bill Clinton's engagement with South Africa: signing extradition treaties with emerging democracies in largely non-democratic regions is a mechanism for the United States to spread democratic values. There is significantly greater evidence and investment on part of the United States in assuring democratic norms in Tunisia rather than the seeking of material gains. Consequently, constructivism provides a greater understanding for the dialogue and actions taken between the two states since 2011. The cases of South Africa, Slovenia and Tunisia demonstrate that there is a greater likelihood that democratic countries will establish extradition treaties with other democracies.

IV. REALIST AND CONSTRUCTIVIST THEORIES APPLIED TO THE MULTILATERAL EXTRADITION TREATY BETWEEN THE EUROPEAN UNION AND THE UNITED STATES

From the spectrum of countries chosen as case studies, it is easiest to explain the 2003 multilateral extradition treaty between the European Union and the United States using both realist and constructivist theories. From a realist perspective, signing the extradition treaty could be interpreted using the security or trade alliances between the U.S. and the E.U. From a trading perspective, the total U.S. investment in the E.U. is three times higher than all of Asia, and total E.U. investment in the U.S. is around eight times the E.U. investment in China and India together.[27] In addition, ongoing negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the two entities demonstrate the economic gains that can potentially result from certain alliances. From a security standpoint, the U.S. and the E.U. are linked in terms of foreign policy and military alliances through their involvement in NATO. Similarly, from a constructivist perspective, the United States and Western Europe share many norms and values in regards to democracy, trade and other ideological foundations. The treaty was signed in 2003, but fully entered into force in 2010.[28]

From a realist perspective, a state would sign extradition treaties if beneficial in its power-maximization. Implicit in this realist interpretation is the emphasis on the way in which the greater power would gain advantages in a treaty. If this realist analysis were true, then the United States would arguably always benefit from the treaties into which it enters, because it is the more powerful state. However, the concessions of the United States in this 2003 multilateral extradition treaty with the European Union seem to undercut the power-maximizing ethos of realist analysis. The concessions made on the part of the United States come from the divergent norms regarding the use of the death penalty.

The death penalty is a source of controversy regarding human rights law. As such, states require the alignment of human-rights norms in order for extradition policy to be successful. If states do not trust other states to try individuals in a just and humane manner, they will most likely not sign treaties. Despite convergent human-rights norms between the United States and the

European Union, there was a marked divergence on the question of the death penalty. While the United States still practices the death penalty, Europe has abolished the death penalty and the U.N. Commission on Human Rights has declared a moratorium on all executions.[29] This divergence had been an issue in previous extraditions from Europe to the United States. Extradition could potentially be invalidated if it involved extradition to a state that may torture or inhumanely treat the person concerned, which would, for example, violate the European Convention on Human Rights. This issue first gained attention in the Soering Case from the early 1980s. Despite a bilateral extradition treaty, the United Kingdom was not willing to extradite Jens Soering if he faced the death penalty in the United States.[30] Soering, a German national, was indicted for the murder of his American girlfriend's parents. After fleeing to the United Kingdom, Soering appealed his extradition on the grounds that potentially facing the death penalty in the United States violated European norms of human rights. Soering was eventually extradited back to the United States on the grounds that the death penalty would not be a possibility for his sentencing.

However, the United States' extradition treaty with the European Union is a significant step to remedy divergent norms regarding the death penalty. Furthermore, treaty allows the E.U. to stipulate that death penalty will not be imposed in certain extradition cases and that either party can extradite for crimes punishable by at least a year in prison but excluding the death penalty. The E.U. treaty conveys that a number of nations have abolished or abandoned capital punishment as a sentencing alternative and as a result, several of these states have preserved the right to deny extradition in capital cases either absolutely or in absence of assurances that the fugitive will not be executed if surrendered.[31] Though almost all other extradition treaties are silent on this ground, the E.U.-U.S. treaty says that some states may also demand assurances that the fugitive will not be sentenced to life in prison, or even that the sentence imposed will not exceed a specified term of years.[32]

A realist interpretation would argue that this treaty would be a tool to tighten U.S.-E.U. relations and a way for the U.S. to increase its influence in the region. Yet, if that were the case, the U.S. would be placing exacting demands on the E.U. On the contrary, the U.S. is making a concession to accommodate European norms and is not exerting its influence. Thus, realism cannot accurately account for the United States' decision to sign this treaty with the European Union. This action undercuts realist theory; realism intuitively emphasizes that the United States as the heavyweight would get its way in treaty negotiations.

Instead, constructivism better accounts for this situation. The treaty was signed in 2003, shortly after the United States' invasion of Iraq. Consequently, European approval rating of the United States was at an all-time low and many European countries perceived the United States' foreign policy character under the Bush administration to be pariah-like. According to a study conducted by the Pew Research Center's Global Attitudes Project, favorable views of the United States from countries in the E.U. dropped drastically over 2003. Favorable views of U.S. in Britain dropped from 70% to 58% between 2003 and 2004, down from 83% in 2000. This paralleled public opinion in France: favorable views of the U.S. dropped from 42% to 37% between 2003 and 2004, down from 62% in 2000. Germany's favorable views of the U.S. dropped from 45% to 38% between 2003 and 2004, down from 78% in 2000. Finally, Spain's favorable views dropped from 50% in 2000 to 38% in 2003.[33]

Consequently, this concession on the part of the United States is better understood in a broader relational dynamic. For the United States, signing this treaty was relatively costless and little emphasis was placed on it in the larger scope of the Bush administration's foreign-policy agenda. Instead, this costless concession can be seen as an attempt to diminish negative responses in regards to other American foreign policies. Through a constructivist lens, this 2003 multilateral treaty was a move to safeguard the relationship between the United States and the European Union and achieve good will as opposed to material

gains. While the United States appeared weaker by conceding its norms, the treaty strengthened relations and placed greater confidence from the E.U. in the American legal system. To this extent, the European Union's perceptions of the United States and its foreign policy influenced this decision. With the European Union's approval ratings of the United States at an all-time low, the concession in the extradition treaty was a costless bargaining tactic on the part of the Americans to maintain strong relationships with the E.U.

V. USING CONSTRUCTIVISM TO UNDERSTAND AN OUTLIER CASE

The above cases of South Africa, Slovenia, Tunisia and the European Union lend themselves to both realist and constructivist interpretations. Ultimately, these cases better support the constructivist analysis that states sign extradition treaties with states that share their norms and values. However, on the surface, this argument does not seem to hold true for the case of the 1997 extradition treaty between the United States and Zimbabwe. While an extradition treaty with Zimbabwe – similar to the case of South Africa – is an anomaly when compared to the fact that the majority of U.S. extradition treaties are made with Western countries, the key difference is that the South African treaty was signed after the country demonstrated a symbolic shift towards democracy. By contrast, Zimbabwe is an authoritarian government under the dictatorship of Robert Mugabe. The country has high levels of corruption and a history of human rights violations. The extradition treaty between the United States and Zimbabwe was signed under President Bill Clinton in 1997 and put into full effect in 2000. This treaty was signed in the midst of heavy sanctions imposed during the Clinton administration in addition to condemnations of the corrupt Zimbabwean authoritarian government under Mugabe and its human rights abuses. Such drastic measures that impeded U.S. relations with Zimbabwe are not the conditions under which a treaty would be signed. This case appears to contradict the trend of norm convergence in other extradition treaties; thus, it is unclear as

to why the U.S. would want to undertake a treaty agreement with Zimbabwe.

And yet, while constructivists will argue that states sign extradition treaties with countries with similar norms, it also can account for why states might sign treaties with seemingly outlier countries with starkly different norms. Another constructivist and normative approach could argue that the United States' treaty with Zimbabwe is a way to encourage the shifting or adaptation of Zimbabwean norms and that the U.S. is using a treaty to influence their norms. The signing of an extradition treaty with Zimbabwe is perhaps a preliminary step for the U.S. to keep its hand and some element of authority in Zimbabwe, but in an indirect and backwards way to influence norms. Furthermore, while no causal relationship can be directly posited, since this treaty has been enacted, Zimbabwe has arguably adapted its norms. Mugabe has agreed to a power-sharing agreement with political rival Morgan Tsvangirai from Movement for Democratic Change (MDC) party.[34] Tsvangirai traveled to Washington D.C. and met with President Barack Obama in 2009. At this meeting, Obama has expressed his support for MDC and called for Mugabe's continued cooperation with MDC in order for sanctions to be lifted.[35] At this meeting, Obama stated, "We want to do everything we can to encourage the kinds of improvement not only on human rights and rule of law, freedom of the press and democracy that is so necessary, but also on the economic front." In the same statement, Obama announced the American government's commitment of $73 million in aid to Zimbabwe, that would not be going to the government directly due to concerns "about consolidating democracy, human rights, and rule of law."[36] The move towards a power-sharing government in Zimbabwe and the consequent pledge of aid from the U.S. government demonstrates shifting relations than when the treaty was signed. While it is not necessarily a causal relationship, there is clearly a temporal correlation that U.S.-Zimbabwean relations have improved since the signing of the extradition treaty and that Zimbabwe has shown signs of adapting westernized, democratic norms.

In this case, it is difficult to use a realist lens to understand the establishment of an extradition treaty between the United States and Zimbabwe. There are no economic or material benefits to having a treaty with Zimbabwe, especially if economic sanctions imposed by the United States are still in place. Furthermore, unlike other countries in the region, Zimbabwe does not possess diamonds or other natural resources that would make it favorable for the U.S. to engage with it. In addition, Zimbabwe does not possess the military capacity or strategic geopolitical location that would incentivize the United States to enter into a military alliance with the country. While the case of Zimbabwe is an outlier, norms still play a role in helping to understand the trend. Despite the country's drastically divergent norms, normative analysis better explains this phenomenon than realists. An extradition treaty with Zimbabwe is a costless move on the part of the United States to encourage and influence Zimbabwe's shift towards democracy while not contradicting its other foreign policy measures, such as the imposed sanctions.

VI. UNDERSTANDING THE EXCEPTIONS IN EXTRADITION

And yet, a key reason why extradition treaties are overlooked from being considered a tool of foreign policy and diplomacy is the large margin for exceptions. Many scholars in international law argue that extradition norms are state-centric and state sovereignty allows refusal of extradition.[37] To that end, just because there are treaties in place does not mean that states abide by them. Extradition still seems to be treated by a majority of states as a domestic matter and ultimately, each individual state possesses veto power.[38] This wide leeway for vetoing extraditions is a reminder of the anarchical system of international law; despite the amount of extradition treaties in place, there is no reigning authority that can ensure that they are enforced. This arbitrary ability to veto extraditions has been employed by both the United States as well as other countries. Specifically, France's refusal to extradite filmmaker Roman Polanski to face criminal charges in the United States and the United State's refusal to extradite

Amanda Knox to Italy to be retried for murder convey the lack of enforceability in extradition treaties. These exceptions in particular are important to consider specifically because they were between the United States and western European countries with which the United States has very strong relations and solid extradition treaties in place. If there is technically the possibility for so many exceptions and loopholes, how can we ensure that extradition remains a stable and effective tool of foreign policy?

Nevertheless, despite this risk, states still spend resources, time, energy and countless negotiations in a very multilateral way to craft extradition treaties. Despite incidents of extradition requests being overridden, states continue to engage other states in crafting extradition treaties. The effort put into treaties alone automatically defines them as important. Even if they can essentially be construed as meaningless and overridden by individual states that refuse to extradite an individual, the fact that they exist is very significant. States engaging in these treaties are expending a significant amount of resources for no clear material gains – no direct economic or military benefits are gained from signing extradition treaties. Bureaucratically, extradition and mutual legal assistance treaties are very dense, complicated and multilateral. Crafting them requires a lot of resources and to this point, there is considerable cost associated with developing them.

VII. CONCLUSION

The creation of extradition treaties is a significant multilateral investment made between states, requiring the use of various diplomatic and political channels. To confine extradition to a purely legal definition is inaccurate; instead, extradition is an important tool of foreign policy and diplomacy. This paper has looked at a broad spectrum of extradition treaties signed between the United States and other countries since the end of Cold War in attempts to answer the question as to why states expend the time, energy and resources into creating these treaties. The international relations theories of realism and constructivism both offer insight as to why states would engage in such treaties; and yet, the prism

of extradition demonstrates the limitations of realism. Ultimately, realism is not sufficient to grasp extradition as a whole, and the constructivist argument is significantly stronger. In particular, constructivism's element of norms theory provides the most compelling analysis of extradition treaties: the United States partakes in extradition treaties even when no material gains or interests are at play. Rather, these studies of extradition treaties allow us to greater understand the significant role that norms play in interstate cooperation on legal, political and diplomatic matters.

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Scrutinizing Scrutiny: The Enduring Importance of *U.S. v. Carolene Products*

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Abstract:
At the beginning of the 20th century, with the case of Lochner v. New York (1905), the Supreme Court formally recognized that the United States Constitution, through its due process clause, protected additional rights and liberties beyond the explicit freedoms mentioned in the Bill of Rights. Among these, according to the Court, were economic liberties such as the right to contract labor. However, more than three decades later, the case of U.S. v. Carolene Products Co. (1938) held that economic liberties were less fundamental than civil liberties, and thus not as stringently protected under due process. This paper seeks to defend the Carolene reasoning against what I see as possible new attacks from the right. As libertarians have become more influential in conservative politics, recent cases have shown a disturbing resemblance to Lochner. Using extensive case law, as well as quotations from conservative academics and other sources, I construct a case that lays out the principal reasons for which economic liberties are less fundamental than civil liberties. I then outline the ways this reasoning is threatened by the modern court, and conclude by urging a reaffirmation of our legal commitment to legislative deference in the economic arena, and vigilance in the civil one.

On April 7th, 1905, the Supreme Court permanently changed the way we think about the Constitution, and specifically the Fourteenth Amendment. Indeed, *Lochner v. New York* (198 U.S. 45, 1905) ushered in a new era of jurisprudence that relied heavily on novel legal concepts. *Lochner* famously held that the Fourteenth (and Fifth) Amendments' guarantees that "No state shall… deprive any person of life, liberty, or property, without due process of law," were *substantive* in nature. According to the Court's new doctrine, rather than simply forcing states to abide by the legal protocol that governments themselves had created, "due process" actually entailed certain guarantees of substantive liberty so fundamental as to be considered nearly inviolable. The lone exception concerned cases in which the state had an interest so compelling that it outweighed individual concerns for liberty. Since then, major decisions advancing reproductive and same-sex rights, privacy, rights of criminal defendants, and other civil liberties have found protections rooted in the concept that, as Justice Kennedy espouses, "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[1]

The concept of substantive liberty as a judicial principle is a convincing one. The Framers of the Constitution--and of the Fourteenth Amendment--were concerned with protecting both individual liberty and human dignity of citizens of the United States. They felt it unnecessary to enumerate every individual right enjoyed by citizens of their constitutional republic, but "insisted that government existed to protect preexisting liberties and was not free to alter those rights and liberties as officials saw fit."[2] As such, court doctrine that focuses on using the due process clause to protect personal liberties has a coherent and logical constitutional basis. It is one of the fundamental purposes of a republican government to protect personal liberty. The problem, however, lies in the kinds of liberties that *Lochner* chose to protect.

Lochner dealt with a New York maximum hours law that prevented bakers from working more than ten hours per day, and

six days per week. The Court found that the right to freely contract labor was protected by the due process clause, and that laws which interfered with that contracting process unconstitutionally violated employers' economic liberty, unless they were narrowly tailored to achieve a compelling state interest.[3] In essence, *Lochner* held that economic liberties were just as fundamental as personal liberties, and subject to the same strenuous protection by the courts.

Though the *Lochner* rationale set off several decades of cases adhering to concepts of economic due process (a time period which has come to be known appropriately as the "Lochner Era"), the Supreme Court ultimately decided in *United States v. Carolene Products Co.* (304 U.S. 144, 1938) that subjecting alleged economic liberties violations to the same standard of review as cases of personal liberty was an error in constitutional logic.

The *Carolene Products* case consisted of a challenge by the Carolene Products company to a 1923 federal law prohibiting the interstate shipment of "filled milk"—a cream-like substance consisting of skim milk mixed with fats or oils other than milk fat—on the grounds that the "stripping of essential healthful elements" from milk created potential health hazards to the public.[4] However, the evidence that filled milk actually posed a serious health threat to the people who consumed it—beyond simply the fact that it was not as healthy as unadulterated cow's milk—was suspect.

Under *Lochner* rationale, since economic rights were deemed fundamental, the government could not restrict the rights of filled milk producers by prohibiting the sale of their product in interstate commerce without strong justification. Congress would have to provide highly compelling evidence that filled milk posed a threat to public health--evidence they probably did not have. But in an 8-1 decision, the Supreme Court abandoned this strict standard, "provid[ing] complete deference to the decision making of the legislature and abstain[ing] from reviewing data in support of the decision."[5] This rationale, however, applied specifically to cases of economic liberty claims; when dealing with questions of

personal liberty, the Court maintained *Lochner* levels of scrutiny and arguably heightened the standards of review for government actions that restrict personal liberties.

Carolene proposed different levels of judicial scrutiny, holding that laws which regulate natural economic processes should not be subject to such exacting standards of review as laws which burden personal liberties. The case (and subsequent jurisprudence) suggested that certain kinds of laws merited stricter scrutiny from the Courts; such laws may only survive "only if they are narrowly tailored to further compelling government interests."[6] But the justices did not consider laws regulating economic actors and channels part of the body of cases which merited such heightened scrutiny, ruling that the Constitution did not intend for the courts to second-guess the economic decisions of elected representatives. Thus, in *Carolene* and in decades of subsequent jurisprudence, the Court charted a new doctrinal path for due process interpretation that held cases of economic rights to a lower standard of review than cases concerning civil liberties.

Yet, recent political and constitutional developments threaten a return to *Lochner* constitutional logic. Several recent cases surrounding economic regulation possess "a disquieting resemblance to [the] long-overruled decisions" of the Lochner Era.[7] Additionally, the American political climate, especially on the right, has adopted a distinctly libertarian stance overwhelmingly hostile to economic regulation. The perfect storm of the revival of constitutional and political libertarianism threatens to create a climate of hostility toward *Carolene* precedent.

This paper will identify the main types of laws that the Court has subjected to more exhaustive scrutiny, justify why economic liberties do not belong to such categories, and explain the disturbing trend lines that have threatened to backtrack upon years of precedent in order to uphold flawed conceptions of fundamental economic liberty. Additionally, this paper will contextualize the current political developments which may foreshadow the return of libertarian ideology as a powerful political and constitutional force.

Ultimately, the goal of this piece is to reaffirm the core commitment to upholding *Carolene* precedent to guarantee the government's ability to manage a healthy, functioning economy.

I. THE TEXTUAL ARGUMENT

The Framers of the Constitution indicated that the specific liberties outlined in the Bill of Rights were not to be the only freedoms and liberties possessed by citizens of the new United States. Indeed, those such as Alexander Hamilton opposed the inclusion of a bill of rights for fear that it could be used to argue that the Constitution would protect only those rights expressly granted on paper.[8] But the Court enters murky judicial waters every time it tries to expressly define the abstract concept of non-enumerated fundamental rights. Thus, in *Lochner* and other cases of the period, the Court developed a doctrine holding that every time the government regulates (and thereby in some way restricts) life, liberty, or property—whether personal liberty or economic liberty—it must meet certain standards of reasonableness and state interest to prove that its actions are constitutionally consistent. During the Lochner Era, the understanding of the Court was that economic rights should be subject to the same judicial scrutiny as personal liberties. But the primary holding of *Carolene* and subsequent cases limited the scope of cases which are eligible for such stringent review.[9] Specifically, it held that laws designed as an exercise of an explicit or implicit Congressional or state power should be subject only to "rational basis review": so long as a law has a "rational relation" to a constitutional objective, it should pass constitutional muster.[10]

It is a core judicial assumption that laws which purport to be within the scope of traditional governmental powers must be considered constitutional until proven otherwise; that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[11] But *Carolene* makes clear that "[t]here may be a narrower scope of operation of the presumption of constitutionality when legislation appears on its face to be

within a specific prohibition of the Constitution."[12] The opinion cites the guarantees in the Bill of Rights as examples of such "specific prohibitions," but the Court has since found that exacting judicial scrutiny should not be construed simply to protect explicit constitutional protections: heightened scrutiny may also apply to implicit principles of liberty, privacy, and other fundamental concepts.[13] Proponents of *Lochner* reasoning argue that if the Court can find implicit concepts of personal liberty in the Constitution, should implicit concepts of economic liberty not be given the same level of constitutional protection?

The reason for the difference in levels of scrutiny lies in Article I, Section 8 of the United States Constitution. Therein lie the powers expressly granted to the Congress of the United States, and among those powers is the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause, which James Madison called "an addition which few oppose, and from which no apprehensions are entertained,"[14] gives Congress explicit power to supervise and regulate economic activity. The Framers felt that giving Congress the express power to regulate commerce was crucial, especially given that one of the primary failures of the Articles of Confederation had been the government's powerlessness to oversee economic activity and development. Madison viewed the clause as an "advantage" to the new government, to enable the "pushing of commerce ad libitum."[15] The reason this is so important is that it makes explicitly clear that regulating commerce is a legitimate goal of democratic governance, and that the ability of Congress to exercise its expressly granted powers is plenary and absolute. Thus, any regulations which have a reasonable relation to regulation of interstate commerce must be held constitutional. As Chief Justice John Marshall once wrote, "any means which tended themselves directly to the execution of the Constitutional powers of the Government, were in themselves Constitutional."[16] Further, regulating commerce is not the only way in which governments are

explicitly allowed to curb economic liberties. Even property rights are not expressly absolute: the Fifth Amendment clearly gives governments the power to take private land for public use, provided there is just compensation.[17]

This argument is not confined to the federal government: given the Framers' focus on Congress' ability to regulate the interstate economy, they clearly believed that states had the ability to regulate the economies which existed within their borders. Furthermore, the takings clause never refers solely to the federal government; in common law and constitutional jurisprudence, it is well established that states have eminent domain rights as well. In any case, the Framers of the Constitution understood the necessity of economic regulation—at any level of government—for the development of a powerful, modern, and sustainable economy.

But if not for the shift in judicial thinking precipitated by *Carolene*, some of the regulations that comprise core parts of our economic framework would be constitutionally suspect. Several cases in the *Lochner* era struck down basic regulations many people take for granted today. *Lochner* itself proved that economic rights could be used as a legitimate basis for striking down maximum hours laws, and *Adkins v. Children's Hospital* (261 U.S. 525, 1923) used economic due process reasoning to strike down a minimum wage law. *Carter v. Carter Coal Co.* (298 U.S. 238, 1936) invalidated federal efforts to regulate coal production and pollution; *Hammer v. Dagenhart* (247 U.S. 251, 1918) and *Bailey v. Drexel Furniture Co.* (259 U.S. 20, 1922) struck down child labor laws.

Applying these concepts and standards to later cases could yield disturbing results. In the post-*Carolene* case *United States v. Darby Lumber* (312 U.S. 100, 1941), the Fair Labor Standards Act, which regulated employment conditions and wages, survived a constitutional challenge. In *Williamson v. Lee Optical Co.* (348 U.S. 483, 1955), an optician plaintiff argued unsuccessfully that a law requiring that medical professionals have a license to prescribe lenses was unconstitutionally burdensome. Perhaps most

importantly, in *Heart of Atlanta Motel v. United States* (379 U.S. 241, 1964), the Court discarded the plaintiffs' argument that being forced by the Civil Rights Act to serve African-American customers violated their economic liberties. If not for the tiers of scrutiny developed in *Carolene*, each of these pieces of legislation would be at serious risk. It is hard to conceive of a world in which the government cannot ensure workers' safety, prevent child labor, require licenses for advanced medical operation, or prohibit discrimination on the basis of race in public accommodations. But if *Lochner* were still the law of the land, that world would be ours.

Fortunately, there is no strong case to be made that the liberties the Framers sought to protect from federal intrusion (and the liberties that the Fourteenth Amendment's authors sought to protect from state intrusion) were economic in nature. Congress expressly retains the power to regulate the economy, and states implicitly have that right as well. Yet the government does not have the ability to regulate personal rights and liberties; on the contrary, one of the main goals of the Constitution was to *protect* personal rights and liberties. So while the Founding Fathers clearly had a strong commitment to the protection of liberties, they obviously did not view economic rights within the same scope of protection as personal, civil liberties. Therefore, courts should not scrutinize questions of economic regulation at the level of laws which burden the substantive personal liberty inherent in a liberal republic; rather, they should be scrutinized in terms of their connection with legitimate constitutional objectives—the regulation of interstate commerce at the federal level, and intrastate commerce at the state level. So long as lawmakers can prove that their regulation is rationally connected to their powers of regulating commerce, logic, history, textualism, and precedent[18] dictate that courts should not shield economic processes from regulation and should uphold laws passed by democratic representatives.

II. OTHER REASONS FOR ELEVATED SCRUTINY

The *Carolene* decision does not stipulate that questions of explicit or implicit fundamental liberties are the only kinds of laws which should receive a more exacting standard of review. It also proposes two other kinds of laws which courts should examine closely. The first is "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[19] But since economic regulation is enacted through the normal political process and does not distort or alter the political system, it is not applicable here. Lastly, *Carolene* proposes a higher standard of review for laws which codify "prejudice against discrete and insular minorities" and "which [tend] to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[20] Essentially, *Carolene* argues that policies directed specifically at minorities or underrepresented groups in the traditional political system may be subject to "more searching judicial inquiry."[21] This gave rise to the idea of additional constitutional protection of "suspect" classes[22]: that laws which disadvantaged groups of people who had been historically discriminated against and underrepresented in the political process required more rigorous constitutional justification.

However, economic regulation in no way harms a suspect class of people. In contrast, CEOs, business owners, and businesspeople are well *over*represented in the American polity, and economic interest groups have proven themselves perfectly adept at dismantling economic regulation through the traditional political process. From 2000 to 2014, the US Chamber of Commerce—a prominent business lobbying group—spent over one billion dollars lobbying for business interests and against government regulation.[23] Additionally, the Chamber contributed over $35 million in outside campaign expenditures in the 2012 elections alone, making it "the biggest spender among organizations that were not national party committees."[24]

The Chamber is hardly the only pro-business, anti-regulation lobby. All told, in 2012 business associations spent over $173 million in lobbying,[25] and a staggering $2.7 billion on political campaigns.[26] And as the Supreme Court continues to strike down rules limiting campaign contributions,[27] their influence is only likely to grow. Business and other interest groups already have a disproportionate impact on public policy. According to Professors Martin Gilens and Benjamin Page, "economic elites and organised groups representing business interests have substantial independent impacts on US government policy, while average citizens and mass-based interest groups have little or no independent influence."[28] Thus, there is simply no logical basis on which to decree that business interests constitute a suspect class, and that regulating their economic liberty should therefore be subject to heightened scrutiny.

As a result of all of these factors, *Carolene* economic reasoning has more or less remained Court's binding precedent since the justices first handed down the decision. Today, however, premonitory signals augur the potential return of *Lochner* reasoning.

III. THREATS TO *CAROLENE* IN THE MODERN ERA

There are certainly modern scholars who believe justices should take a more activist role in ferreting out what they see as unnecessarily cumbersome economic regulations. *Lochner* still has plenty of "perfectly respectable present-day defenders,"[29] including Randy Barnett, a law professor at Georgetown who has written extensively in favor of court protections of economic liberties. In his essay "Does the Constitution Protect Economic Liberty?"—he answers his own question in the affirmative—Barnett defines economic liberty as "the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing."[30] Such a definition is consistent with *Lochner* reasoning, which centered upon the economic right to contract labor, and with other economic property rights cases. Barnett's

core argument lies in the Ninth Amendment, which expresses that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[31] Barnett contends that "the evidence shows that this was a reference to natural rights… includ[ing] the rights to acquire, possess, and protect property… [which t]oday, we would characterize… as 'economic.'"[32] Barnett then argues that the Privileges or Immunities Clause of the Fourteenth Amendment,[33] rather than the Due Process Clause, incorporates natural rights protections to the states. Through either method of incorporation, the contention is still the same: that economic liberties deserve protection of the same vigor as personal liberties.

Barnett is hardly the only proponent of economic liberties. Bernard H. Siegan makes much the same natural rights-infused argument in his own work for the libertarian Cato Institute, "Economic Liberties and the Constitution: Protection at the State Level." While Siegan pays more attention to protection of liberties at the state level, his calculus is fundamentally the same. He believes that securing economic property rights was one of the primary goals of the Fourteenth Amendment authors, and that although no rights are utterly inviolable, the authors of the Fourteenth Amendment "likely would have demanded that a very high burden of proof be borne by the government in justifying such a restraint [as economic regulation]."[34] He further argues that *Lochner* was correctly decided because "comprehending contracts of employment… was not antagonistic to the basic rationale of due process nor an unrealistic extension in meaning."[35] He further alleges that "the right of contract" was among "the liberties… required to make [property rights] meaningful."[36] So while the mainstream scholarly consensus has largely accepted *Carolene* as settled law, there remains a cogent libertarian intelligentsia committed to the concept of economic rights.

The desire to return to *Lochner*-era reasoning has reached an unnerving level of legitimacy. In April 2012, two District of Columbia Circuit Court justices wrote a concurring opinion in the

case of *Hettinga v. United States* (677 F.3d 471, D.C. Cir. 2012) averring that "America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s."[37] Justice Janice Rogers Brown, joined by Chief Justice David Sentelle, specifically calls out *Carolene*[38] and inveighs against the end of the *Lochner* era, complaining that the Supreme Court no longer considers economic rights fundamental.[39] Given that the D.C Circuit Court is often considered the "second most important court in the land," and that more Supreme Court justices have come from there than any other circuit court,[40] the fact that *Lochner* reasoning has experienced such a renaissance as to be invoked by two respected justices in a consequential court decision indicates a level of licit support for the concept of economic due process not seen in decades.

The reinvigorated case for economic liberties is as visible in the political realm as it is in the judicial sphere. For years after *Carolene*, substantive due process cases neatly pitted conservatives against liberals. Liberals believed due process had a "substantive dimension"[41] that protected fundamental liberties, while conservatives believed it to be largely procedural and believed states in particular had broad police powers to regulate public morals and safety, even at the expense of liberty. However, the conservative movement is changing. Religious conservatives who argue against substantive due process in cases of reproductive and same-sex rights are dying out. Now more than ever, the intellective and political anchors of American conservatism have begun to adopt an increasingly libertarian bent. For example, libertarian-leaning Senator Rand Paul is as of 2014 viewed as a frontrunner for the Republican nomination in 2016, while his classically liberalistic father could never get a substantial foothold in the party outside of his own Congressional district. It is hard to believe that

the party whose last President supported anti-sodomy laws,[42] and whose last administration was the defendant in *Hamdi v. Rumsfeld*, (542 U.S. 507, 2004),[43] may nominate a man who filibustered on the Senate floor for hours to protest the constitutionality of a Democratic president's drone program.[44] More than a century after substantive due process was codified into law with *Lochner*, an increasingly powerful libertarian strand of conservatism has begun to accept the doctrine of substantive liberty that liberals have been pushing for years.

The issue, however, is that as conservatives become more socially liberal, they become even more economically libertarian. This explains why the highly conservative Heritage Foundation, the original conceptualizers of a crucial part of the Patient Protection and Affordable Care Act of 2010 which compels individuals to purchase health insurance, found themselves accusing the law of "infring[ing] upon Americans' basic constitutional rights."[45] Again, we see the idea of fundamental economic liberties crop up again; as the libertarian strand of conservatism grows more and more powerful, *Carolene* is increasingly threatened.

IV. MODERN CONSTITUTIONAL LAW

The urgency of affirming this belief in modern constitutional proceedings is largely the result of an unsettling series of cases which seem to implicitly hold economic regulation to a higher standard of review than is warranted. In *Kelo v. New London* (545 U.S. 469, 2005), for example, the Court's conservatives nearly advanced an extremely narrow and strict interpretation of the Fifth Amendment's eminent domain clause. In the case, the city of New London, Connecticut had enacted a comprehensive economic redevelopment plan, a part of which involved taking private property (with compensation) and transferring it to private ownership, in this case the Pfizer Corporation. Pfizer had promised to build a factory on the land, and New London argued that the significant public economic

benefits Pfizer provided through employment, tax revenue, and other monetary stimulus justified the taking of private property "for public use." In previous takings cases, the Court had applied minimal scrutiny in evaluating whether takings policies were reasonably related to a public benefit from the use of the property. As the majority opinion notes, the "Court long ago rejected any literal requirement that condemned property be put into use for the general public."[46] Appropriately, Justice Stevens writes that "[w]ithout exception, our cases have defined that concept [of condemned property serving a public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[47] Thus, *Kelo* did not create a new policy of court scrutiny of takings clause cases; rather, it was highly consistent with precedent and with principles of legislative deference. As has been established, since the taking of private property involves an explicitly granted constitutional power and does not infringe upon fundamental personal liberties, it should only be subject to minimal scrutiny. Indeed, soon after the decision, property rights groups began a highly successful legislative campaign which caused forty-four states to amend their eminent domain laws.[48] This again supports the notion advanced in *Carolene* that economic rights obtained through the normal political process (due to the business and property rights lobbies' significant political power) require less strenuous judicial protection than other rights.

Distressingly, four conservative justices disagreed. Justice O'Connor for the dissent applied an exacting form of scrutiny which did not give the state government the deference required in economic law cases. Rather than examining whether there is a reasonable, rational basis for viewing economic development as a legitimate public goal and purpose, O'Connor writes a *reductio ad absurdum* argument accusing the majority of enabling "[a]ny private property [to] now be taken for the benefit of another private party."[49] O'Connor ignores that rational basis review is still a legitimate constitutional test: if a legislature awarded private property to a private company in exchange for, say, campaign

contributions or other favorable publicity, then the taking would clearly not be rationally related to a public goal, and would thus be unconstitutional. O'Connor mischaracterizes the ruling on the tenuous basis that economic property rights are so fundamental that the only way in which a state may interfere with them is if the property will be explicitly open for "public use." Such a narrow interpretation violates the principles of legislative deference in economic matters and rational basis review.

The second disconcerting misapplication of rational basis review to economic cases comes in the form of *National Federation of Independent Businesses v. Sebelius*, (567 U.S. __, 2012). The case in question concerned the Affordable Care Act, specifically the Act's stipulation that anyone who did not purchase health insurance (with exceptions) would have to pay a tax penalty that came to be known as the "individual mandate." Chief Justice John Roberts wrote the opinion of the Court. He upheld the regulation under Congressional taxing powers because, technically, the government did not make it illegal to not buy health insurance, and he found the penalty for not purchasing health insurance low enough that it did not constitute de facto statutory coercion. Importantly, however, he refused to find the legislation constitutional under Congress' power to regulate interstate commerce. Though the Chief Justice never explicitly mentions the level of scrutiny he applies to the law, it is clear that he subjects it to more rigorous review than the rational basis test demands.

Minimal scrutiny has several implications. First, the individual mandate must be presumed to be constitutional. In order to overturn it, the plaintiffs in the case must prove beyond a reasonable doubt that compelling the purchase of a good exceeds Congress' expressly granted ability to "regulate" commerce. Second, the defendants' only burden of justification must be to demonstrate that the compelling of commerce is rationally related to the explicit constitutional goal of economic regulation. Third, the law must not be arbitrary in nature, or targeted specifically at a certain group due to moral or professional animus. Given these

three criteria, the individual mandate should have clearly passed rational basis review; that it did not suggests that the Chief Justice (and, indeed, the other four conservatives who agreed with him) employed an unnecessarily demanding construction of scrutiny.

As the Court has correctly held in the past, "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[50] And given that the Court has held that the commerce power "is plenary, and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it,'"[51] Commerce Clause jurisprudence should start with the goal of the regulation—to ensure that people who need healthcare have the insurance necessary to pay for it—and, provided that the means of the law are rationally related to the legitimate end, the law should pass constitutional muster. Certainly, the goal of the mandate constituted a legitimate federal interest, given that "precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm."[52] So unless one can argue that Congress has no rational basis for compelling the purchase of health insurance, or that the legislation infringes upon a fundamental right, the individual mandate is manifestly constitutional.

Roberts nevertheless rules the mandate impermissible under any reasonable construction of the Commerce Clause. Seemingly contradicting his own entreaties that if stuck "between two possible interpretations… one of which would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act,"[53] he discards Justice Ginsburg's perfectly reasonable claim that "to regulate" can mean "to require action" on the basis that it may not have been the particular and specific meaning that the Framers had in mind.[54] Throughout the opinion, Roberts seems to be of two minds: one believes that "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation… of the Constitution";[55] but one ignores Justice Ginsburg's reasonable

constructions of the law in favor of an interpretation which forces the law to meet an unnecessarily "heavy burden of justification."[56] Justice Ginsburg proposes several rational justifications for enactment under the Commerce Clause. Primarily, she argues that since everyone is involved in the healthcare market at some point, requiring the purchase of health insurance simply regulates the manner in which they participate in the market.[57] Additionally, she produces evidence that the definition of regulate can include the ability to compel.[58] Lastly, she reminds her audience that court precedent has long recognized Congress' broad prerogative to use the Commerce Clause to take actions in furtherance of the general welfare, as determined by the people's elected representatives.[59] But the Chief Justice ignores these rational bases, instead using an implicitly higher level of scrutiny to "strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever-developing modern economy."[60] Clearly, there is an undercurrent of economic due process reasoning in Roberts' opinion. While he never claims the existence of an economic right to not be forced to purchase a good, he finds no reasonable grounds in the Commerce Clause for the individual mandate, and only upholds the law because purchasing health insurance is not actually *illegal*, and the tax itself isnot fully coercive.

Certainly, neither the dissent in *Kelo* nor the opinion of the Court in *Sebelius* ever mention economic due process; Justices O'Connor and Roberts are too savvy to openly undermine years of established precedent.[61] But in both cases, there is clearly more than just rational basis review occurring. Both justices deliberately ignore rational constructions of the statutes in question that could justify their constitutionality in favor of far stricter burdens of proof which seem wholly unwarranted. Though the essential holding of *Carolene* remains intact, cases like these impute a worrisome trend.

V. CONCLUSION

It is overly sensationalist and dramatic to say that *Carolene* reasoning is under an existential attack. Nevertheless, it is crucial now to reaffirm its central holding, because external factors in the United States are not in its favor. As this paper has shown, support for economic due process is far from a thing of the past. Modern-day academics and public intellectuals, political actors, and even justices on some of the most important courts in the nation have expressed sympathy for *Lochner* reasoning and hostility to *Carolene* precedent. It would be foolish to ignore these potential harbingers of an economic liberty-centered intellectual rejuvenation.

The Court has set appropriate precedent: economic rights are not as fundamental as personal liberties, and should not be subject to the same rigorous standards of review. Historical, logical, and textual evidence supports this claim. Yet a new, invigorated libertarian ideology threatens to challenge it, and many of the conservative justices on the current Court have implicitly shown their willingness to jump on board. As a result, the Court must reaffirm its core commitment to *Carolene* and subsequent cases as binding precedent. It is important to continue to articulate and justify the path the Court long ago chose, for without active and robust defense, new conservative forces may try to cut it off.

[1] *Lawrence v. Texas*, 539 U.S. 558 (2003), Opinion of the Court, Section II Para. 6.
[2] Howard Gillman, Mark A. Graber, and Keith E. Whittington, *American Constitutionalism: Combined Volumes I and II* (Oxford: Oxford University Press, 2013), Vol. II p. 28.
[3] Though technically legal terms such as "narrowly tailored" and "compelling state interest" were used in tiers of scrutiny developed well after *Lochner*, Justice Peckham (the author of the 5-4 majority opinion) nonetheless used the same type of reasoning here, without explicitly categorizing degrees of scrutiny or of state interest.
[4] "United States v. Carolene Products Co.," Casebriefs.com, accessed October 24, 2014, from http://www.casebriefs.com/blog/law/constitutional-law/constitutional-law-keyed-to-chemerinsky/economic-liberties/united-states-v-carolene-products-co/.
[5] "United States v. Carolene Products Co.," Casebriefs.com.
[6] *Grutter v. Bollinger*, 539 U.S. 306 (2003), Opinion of the Court, Section II, Subsection B, Para. 2.
[7] *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___ (2012), Justice Ginsburg dissent, Section IV, Para. 1.
[8] Alexander Hamilton, "Federalist No. 84," *McLean's Edition, New York*, July 16, 1788. Retrieved May 8, 2014, from http://thomas.loc.gov/home/histdox/fed_84.html.
[9] See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), which first codified the rational basis standard for economic regulation.
[10] *Williamson v. Lee Optical Co.*, Opinion of the Court, Para. 13.
[11] *NFIB v. Sebelius*, Opinion of the Court, Sec. III, Subsection B, Para. 6. Quoting *Hooper v. California*, 155 U.S. 648 (1895), 657.
[12] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Opinion of the Court, Footnote 4.
[13] See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003);

United States v. Windsor, 570 U.S. 12 (2013), etc. It should be noted that in many of these cases, the Court did not explicitly state that it was using heightened scrutiny in order to evaluate the constitutionality of the laws in question. However, in each case the Court found either an implicit constitutional guarantee of privacy, or a substantive dimension to the due process clauses of the Fifth and Fourteenth Amendments, as well as the Equal Protection Clause of the Fourteenth and the implicit principles of equality contained in the Fifth, which could not be restricted solely on the basis of the state claiming a rational interest in maintaining public morality and welfare. Thus, the cases were clearly given a more exacting standard of review, even if this was not explicitly acknowledged by the authors of the opinions.

[14] James Madison, "The Federalist No. 45," *Independent Journal*, January 26, 1788. Retrieved May 8, 2014, from http://www.constitution.org/fed/federa45.htm.

[15] "Madison Debates – May 29," Avalon Project at Yale Law School, accessed March 5, 2014, http://avalon.law.yale.edu/18th_century/debates_529.asp.

[16] *MucCulloch v. Maryland*, 17 U.S. 316 (1819), Opinion of the Court, page 16.

[17] U.S. Const. Amend. V, final clause: "nor shall private property be taken for public use, without just compensation."

[18] In addition to *Williamson* and *Carolene*, see John Marshall's early logical arguments which bear a significant resemblance to rational basis review in cases such as *McCulloch* and *Gibbons v. Ogden*, 22 U.S. 1 (1824). After *Carolene*, the Court began becoming even more willing to find rational connections between Congressional regulation and interstate commerce, going so far as to even allow Congress to regulate wholly intrastate activities provided they were related to broader interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Gonzalez v. Raich*, 545 U.S. 1 (2005).

[19] *United States v. Carolene Products Co.*, (1938), Footnote Four, Para. 2.
[20] *Carolene*, Footnote Four, Para. 3.
[21] *Carolene*, Footnote Four, Para. 3.
[22] The idea of suspect classifications was formally recognized in cases such as *Korematsu v. United States*, 323 U.S. 214 (1944); the irony is not lost on constitutional scholars that cases which constituted some of the most severe governmental abrogation of personal liberty also instituted some of the strictest standards of review for the protection of civil liberties.
[23] "US Chamber of Commerce Lobbying Expenditures," OpenSecrets.org. Retrieved May 8, 2014, from http://www.opensecrets.org/lobby/clientsum.php?id=D000019798.
[24] "US Chamber of Commerce Outside Spending Summary 2012," OpenSecrets.org. Retrieved May 8, 2014, from http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=US+Chamber+of+Commerce.
[25] "Business Associations 2012 Lobbying Report," OpenSecrets.org. Retrieved May 8, 2014, from http://www.opensecrets.org/lobby/indusclient.php?id=N00&year=2012.
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[27] See: *Citizens United v. Federal Election Commission*, 558 U.S. __ (2010); *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014).
[28] Martin Gilens and Benjamin I. Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics* (Fall 2014): Abstract, Para. 3.
[29] Richard A. Posner, "Foreword: A Political Court," 119 Harvard Law Review 32 (2005): p. 53.
[30] Randy Barnett, "Does the Constitution Protect Economic Liberty?" *Harvard Journal of Law & Public Policy* 35 (2012): p.

5. Retrieved May 8, 2014, from http://scholarship.law.georgetown.edu/facpub/821.

[31] U.S. Const. Amend. IX.

[32] Barnett, "Does the Constitution Protect Economic Liberty?" pp. 5-7.

[33] The Privileges or Immunities Clause reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Many scholars, backed by historical evidence, believe that it (rather than the Due Process Clause) was intended to shield liberty protections from state rescission.

[34] Bernard H. Siegan, "Economic Liberties and the Constitution: Protection at the State Level," *Cato Journal* (1985): p. 702. Retrieved May 8, 2014, from http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1985/1/cj4n3-2.pdf.

[35] Siegan, "Economic Liberties and the Constitution," p. 702.

[36] Siegan, "Economic Liberties and the Constitution," p. 690.

[37] *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012), Justice Janice Rogers Brown concurrence, Para. 2.

[38] *Hettinga*, Brown concurrence, Para. 3.

[39] *Hettinga*, Brown concurrence, Para. 5-7.

[40] "Why the D.C. Circuit Matters," Legal Progress, Center for American Progress, accessed October 24, 2014 from http://cdn.americanprogress.org/wp-content/uploads/2013/03/Why-the-D.C.-Circuit-Matters1.pdf.

[41] *Lawrence v. Texas*, Opinion of the Court.

[42] Governor George W. Bush threatened to veto attempts to repeal his state's anti-sodomy law that was at the heart of *Lawrence v. Texas* (2003). Source: Tom Head, "Sodomy Laws," *About.com Civil Liberties*. Retrieved May 8, 2014 from http://civilliberty.about.com/od/gendersexuality/ig/Lesbian-and-Gay-Rights-101/Sodomy-Laws.htm.

[43] This was an important civil liberties case concerning rights of defendants who were suspected of being terrorists. For further

reading, see the full case at http://www.law.cornell.edu/supct/html/03-6696.ZS.html.
[44] Sadia Ahsanuddin, "Rand Paul filibusters the domestic drone," *Al Jazeera*. Last updated March 12, 2013; retrieved May 8, 2014, from http://www.aljazeera.com/indepth/opinion/2013/03/201339114442314519.html.
[45] "The Heritage Foundation Flip Flop on Obamacare," *The Thom Hartmann Program*. Retrieved May 8, 2014, from http://www.thomhartmann.com/blog/2011/11/transcript-thom-hartmann-big-picture-proof-heritage-foundation-flip-flop-obamacare-3-oc.
[46] *Kelo v. City of New London*, 545 U.S. 469 (2005), p. 479 (Opinion of the Court, Section III, Para. 3).
[47] *Kelo*, p. 479 (Opinion of the Court, Section III, Para. 3).
[48] "Legislative Center," Castle Coalition. Retrieved May 8, 2014 from http://www.castlecoalition.org/index.php?option=com_content&task=view&id=34&Itemid=119.
[49] *Kelo*, O'Connor Dissenting Opinion, Section II, Para. 18.
[50] *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), Opinion of the Court, Para. 14.
[51] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), p. 38.
[52] *NFIB v. Sebelius*, Ginsburg dissent, Section I Para. 2.
[53] *NFIB v. Sebelius*, Opinion of the Court, Section I, Subsection B, Para. 3. Quoting *Blodgett v. Holden*, 275 U.S. 142 (1927), 148.
[54] *NFIB v. Sebelius*, Opinion of the Court, Footnote 4.
[55] *NFIB v. Sebelius*, Opinion of the Court, Section I, Subsection B, Para. 3. Quoting *Parsons v. Bedford*, 3 Pet. 433 (1830), 448-449.
[56] Affordable Care Act Oral Arguments Transcript, p. 11, Justice Kennedy speaking. Retrieved from http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.
[57] *NFIB v. Sebelius*, Ginsburg dissent, Section I.

[58] *NFIB v. Sebelius*, Ginsburg dissent, Section I(D)(1)(b), Para. 2.
[59] *NFIB v. Sebelius*, Ginsburg dissent, Section I, Para. 2.
[60] *NFIB v. Sebelius*, Ginsburg dissent, Section IV, Para. 2.
[61] Though, it could certainly be argued that Justice O'Connor spent several years herself subtly undermining other *Carolene* precedent: she quietly reworked *Carolene*'s concepts of suspect classes into her own concepts of "suspect classifications." In cases like *Grutter v. Bollinger* (539 U.S. 306, 2003), she held that race was always a suspect classification to be held to strict scrutiny, even if it disadvantaged white people—a class that would never have been considered suspect under *Carolene* reasoning.

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