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Featured Article:

The Natural Resources of the Arctic and International Law:  
How the International System Manages Arctic Resources  
By James Marshall







**THE COLUMBIA UNDERGRADUATE LAW REVIEW**  
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## MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

- i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.
- ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.
- iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history and political science will also be considered.
- iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

## SUBMISSIONS

The submission of articles must adhere to the following guidelines:

- i) All work must be original.
- ii) We will consider submissions of any length. Quantity is never a substitute for quality.
- iii) All work must include a title and author biography (including name, college, year of graduation, and major.)
- iv) We accept articles on a continuing basis.

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Dear Reader,

On behalf of the executive and editorial boards, I am proud to present the Spring 2013 issue of the Columbia Undergraduate Law Review. This semester we received an unprecedented number of submissions from around the country. Despite the difficulty in choosing only four papers out of all the high-quality submissions, we have decided to publish the following papers.

The featured article of this issue is James Marshall's "The Natural Resources of the Arctic and International Law: How the International System Manages Arctic Resources." His examination of the current legal regime managing the natural resources of the Arctic Commons and the effects of global climate change is an insightful commentary on environmental law. We felt it is well worth the read given today's political climate.

Alice Xie's "The Aggrandizement of Corporate Personhood: A Living Originalist Interpretation of Contemporary Corporate Rights Jurisprudence" presents a superb analysis of corporate rights and originalism. Well written and well argued, Xie's piece required the least amount of editing on our part.

"A Man's Gun is His Castle?: Reexamining the Implications of Incorporating the Second Amendment," written by Colin Christensen, examines the concept of the Castle Doctrine, the common law theory that each individual is entitled to use force to defend one's self and one's home, in light of the rulings in *DC v Heller* (2008) and *McDonald v Chicago* (2010).

Lastly, Tanner C. Johnson argues that that a juror's tendency to convict is increased by a favorable attitude toward the death penalty in his paper, "The Biasing Effect of Death Qualification: How Juror Attitudes Toward Capital Punishment Affect Conviction and Trial Proceedings."

With each publication the Columbia Undergraduate Law Review strives to stimulate intellectual debate and scholarly research at Columbia University and at other undergraduate institutions around the country. This semester, in hopes of further achieving this goal, we have also launched our online journal where you can find shorter legal articles on our website. We hope that you enjoy reading the selected submissions and our online articles.

Sincerely,

Varun Char

Editor-in-Chief





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**STUDENT ARTICLES**

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# **The Natural Resources of the Arctic and International Law: How the International System Manages Arctic Resources**

*James Marshall  
Georgetown University.*

**Abstract:**

*In this paper I examine the current legal regime for managing the natural resources of the Arctic Commons in light of the fact that global climate change is making those resources more exploitable. The melting of the Arctic ice caps opens up a host of commons and collective actions issues across multiple international legal issues, including sovereignty determination and collective action on environmental care. To make the matter more complex, the melting of the Arctic is itself caused by the collective action issue of the release of greenhouse gases into the commons. However, this study focuses primarily on the issues surrounding sovereignty claims over areas which until now had widely been regarded as a commons. Because of the weak international regime and the risks of unilateral attempts, I find that regional solutions will most likely be the norm in the coming future.*

The Arctic Circle is warming at twice the global rate, with alarming consequences for the Arctic glaciers.<sup>1</sup> This is producing a host of environmental risks; thawing Arctic permafrost could release vast quantities of carbon dioxide and methane into the atmosphere, thereby accelerating the current rate of warming without additional human activity. Also, whereas it was previously predicted that sea levels would rise by 59 cm during this century, this is now considered an underestimation as glaciers melt more rapidly.<sup>2</sup> Although many have raised the Arctic's environmental crisis as both a global and regional collective action dilemma, the allure of the region's natural resources remains appealing, particularly for the five Arctic coastal nations. As the Arctic glaciers recede, an increasing amount of the Arctic's natural resources are becoming accessible to human exploitation. In 2008, the U.S. Geological Survey estimated that the Arctic is home to approximately 13 percent of the world's undiscovered oil, 30 percent of its undiscovered natural gas, and 20 percent of its undiscovered natural gas liquids.<sup>3</sup> Ironically, human carbon-producing activity is warming the Arctic, in turn rendering more fossil fuels available for extraction. Increased access to Arctic resources has created a unique commons dilemma. In *The Tragedy of the Commons*, Garrett Hardin first introduced the concept that there is a strong incentive to exploit common goods unilaterally even when such exploitation destroys the commons. Under current international law, which is "poorly suited to governing a complex, crowded, changeable world," individual actors have the incentive to unilaterally deplete common goods because unilateral restraint will not prevent others from exploiting it.<sup>4</sup> Yet the Arctic commons dilemma is unique in that now states are claiming legal right to resources that in the past have been considered a commons. The nations bordering the Arctic – the United States, Russia, Canada, Norway, and Denmark – are using the receding glaciers as an opportunity to claim sovereignty over the expanding Arctic Ocean.<sup>5</sup> Meanwhile, other actors such as China and the European Union are also attempting to exploit and/or maintain the Arctic environment. How has the international legal system managed the evolving Arctic commons?

While international law of the sea will continue to be the foundation for managing the Arctic commons, the dominant regime for its management will be mostly regional and bilateral. This paper will demonstrate the rise of such regional and bilateral frameworks as well as other alternative avenues for the international legal system in five parts: the first section will outline the political dynamics of the relevant actors and their individual interests in the Arctic; the second, third, and fourth sections will examine unilateral, international, and regional attempts at managing the Arctic commons, respectively; finally, the fifth section will evaluate the effectiveness of the current legal regime.

## **1. An Introduction to the Arctic Commons**

### **1.1 The Political Dynamics of the Arctic Commons**

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is the international legal foundation for most competing Arctic sovereignty claims. The Convention, which recognizes ocean waters within 12 nautical miles of a nation's coast as within its sovereign territory, also grants states Exclusive Economic Zones, in which they have exclusive economic rights extending 200 nautical miles beyond their respective coasts.<sup>6</sup> The treaty allows states to extend their Exclusive Economic Zones up to 350 nautical miles from their coasts if they can prove that their continental shelf extends to that distance. All of the Arctic coastal states have ratified UNCLOS except for the United States, which instead has opted to recognize the treaty's provisions as customary law for reasons explained below. Although UNCLOS was not constructed with the melting of the Arctic in mind, the five Arctic coastal states (the A5) are using its principles as the legal foundation for their sovereignty claims. If the UN Commission on the Limits of the Continental Shelf (CLCS) legitimizes these claims, then almost all of the Arctic commons would fall under the sovereignty of one of the regional states with little open ocean remaining.<sup>7</sup>

#### **1.1.A The Relevant Actors in the Arctic**

The United States possesses approximately one thousand miles of Arctic coast and is the only Arctic nation to have not ratified UNCLOS.<sup>8</sup> Without recognizing the treaty, the United States has a less reliable foundation for exercising legal sovereignty over the now available Arctic resources. Additionally, not ratifying UNCLOS has meant that the United States is not a member of the United Nations Commission on the Limits of the Continental Shelf (CLCS), which is the sole international legal body authorized to legitimize a nation's claim to a continental shelf extending up to 350 nautical miles.<sup>9</sup> For the United States, the relevant area which could be claimed pending CLCS approval is "probably more than 1.5 times the size of Texas."<sup>10</sup>

The potential for exploiting the Arctic's natural resources, however, might incentivize Washington to finally ratify the Convention. The Arctic's untapped energy resources represent enormous potential profits for U.S. energy companies investing in Arctic exploration. Although the U.S. Geological Survey is still exploring the region, the Alaskan Arctic coast appears to hold at least 27 billion barrels of oil.<sup>11</sup> Furthermore, the United States' prior rationale for not ratifying the Convention in 1982 may no longer apply. The original objections of the Reagan administration were that the Convention's seabed mining regime, which mandated controversial technology transfers, would unjustifiably hurt U.S. interests. The economically rational choice for the United States was to reject the treaty, since research at the time showed that "recovery of only 1 percent of deep-sea nodules would satisfy world demand for nickel, copper, cobalt, and manganese for fifty years."<sup>12</sup> However, these early predictions did not occur,

largely because cheaper sources or alternatives for these metals were discovered.<sup>13</sup> Furthermore, the objectionable provisions regarding technology transfers were adjusted in negotiations in 1994.<sup>14</sup> Yet despite the widespread support for ratification from the Obama administration, the U.S. military establishment, and business interests,<sup>15</sup> the United States has still not signed the Convention because of domestic political opposition to subjecting U.S. sovereignty to an international body.<sup>16</sup>

Russia is staking its claim to the newly available Arctic resources more quickly and aggressively than any other Arctic nation has, both in terms of development and territory claimed. Gazprom, Moscow's state-controlled oil company, is developing about 113 trillion cubic feet of gas in the Barents Sea.<sup>17</sup> Beyond the Barents, Moscow has claimed territory which "could contain as much as 586 billion barrels of oil," which is about double the size of Saudi Arabia's current proven oil reserves. Russia first submitted these claims in 2001 to the CLCS.<sup>18</sup> The area under consideration amounts to 460 thousand square miles or about half the Arctic Ocean, including the North Pole. The Commission, nevertheless, asked for more information, and the United States, along with independent observers, has challenged subsequent claims.

While Russian claims overlap with those of the United States in several places, one particular area has been the Navarin Basin in the Bering Sea.<sup>19</sup> In addition to being rich in oil, the Navarin Basin is also essential to both Russian and U.S. fishing industries; the basin currently yields "nearly 50 percent of the U.S. seafood catch and nearly one-third of Russia's seafood catch," amounts which are estimated to increase as the Arctic ice continues to recede. Although Moscow failed to meet the 2009 deadline for resubmitting its claim to the Commission, it is nevertheless pursuing several military measures to bolster its claims. This only adds to the pressure on the regional and international community to find the appropriate legal mechanisms for dealing with the newly accessible Arctic waters and seabed.

Canada, the third nation with territorial claims to the Arctic, is also actively pursuing its own self-interest. In summer 2007, the extent of polar ice during summer fell to about half of its 1960s average, leaving a sea-lane through Canada's 36,000-island Arctic Archipelago ice-free for the first time on record.<sup>20</sup> Although this is opening up what Canada claims is its internal Northwest Passage, the receding polar caps are also opening up waters beyond the nation's traditional borders. As of 2009, Canada committed \$40 million to scientific research projects to support its Arctic claims.<sup>21</sup> This research could prove fruitful, since Canada is facing competing claims from Denmark, the United States, and Russia. Canada and Denmark both claim possession of Hans Island, situated in the resource-rich waters in the Nares Strait, between Canada and Greenland.<sup>22</sup> Pending further surveying, a mid-ocean overlap between Canadian, Russian, and Danish claims also needs to be determined.<sup>23</sup>

Canadian relations with the United States have also been affected by divergent claims over a portion of the Beaufort Sea. The disputed seabed there is known to hold oil and gas comparable to Prudhoe Bay, Alaska, the largest oil field in North America.<sup>24</sup> Both sides have based their claims on tenuous legal arguments. Canada, which inherited Britain's rights to the territory in 1880, asserts that the United States, which purchased Alaska from Russia in 1867, is beholden to a Russo-British border agreement signed in 1825. Ottawa's claims are based on following the meridian line of that agreement north into the Arctic Ocean, and has supported its argument by noting that the 1825 border agreement was signed in reference to maritime influence. However, the United States has countered that when the agreement was signed, there was no concept of 200-nautical-mile exclusive economic zones, which were first established by UNCLOS, and that no one in 1825 would have "envisaged the existence of sovereign rights beyond 3 nautical miles from shore." The United States, on the other hand, cannot base its case on the UN Convention on the Law of the Sea, but must instead rely on customary law to prove its case.

Norway, an Arctic coastal state by virtue of its possession of the island of Svalbard, has focused on resolving its territorial issues with Russia in the Barents Sea and establishing the extent of its own continental shelf. Svalbard, although not known to be situated near large deposits of energy resources, is of interest to Norway primarily because of the fishing rights that come within the Exclusive Economic Zone around the island – a legal claim which Russia challenges to some degree.<sup>25</sup> Regarding the Barents Sea, the Norwegian government estimates that about 30 percent of all "undiscovered and potential Norwegian resources" lie in the Barents Sea, which is critical for the Norwegian energy industry in the near term because "oil from the Norwegian continental shelf in the Norwegian sea is expected to decline rapidly" unless companies are authorized to exploit new areas.<sup>26</sup>

Denmark, the fifth Arctic coastal state, is a relevant actor in the delineation of the Arctic commons because of its sovereignty over Greenland. The Danish government is hoping to exploit these resources in the near future, but must first establish the extent of its continental shelf, settle its findings with its Arctic neighbors, and consider the interests of native peoples living in Greenland. In its recent "Strategy for the Arctic 2011-2020," the Danish government estimated that there are "31 billion barrels of oil and gas off the coast of Northeast Greenland and 17 billion barrels of oil and gas in areas west of Greenland and east of Canada," however these fields are still far from the production phase.<sup>27</sup> Denmark also seeks to leverage its position in Greenland to exploit newly available mineral deposits; these include zinc, copper, nickel, gold, diamonds and platinum group metals, as well as rare earth elements needed for high-end technology. As mentioned previously, much of this development will have to wait until current territorial disputes are settled, particularly the issue of

Hans Island with Canada, as well as the issue of overlapping continental shelf claims in the Arctic with Canada and Russia.

### **1.1.B The Political Interests and Dynamics in the Arctic Commons**

As previously mentioned, a large driver for the political interests of the Arctic coastal states is economic exploitation of the region. A large portion of the world's undiscovered fossil fuels and minerals remains buried under the Arctic seabed, and only now have warming weather conditions and new technologies made those resources accessible. Although many legal issues still need to be resolved, drilling has already begun in some places. In April 2012, ExxonMobil signed a deal with Russia's Rosneft to invest about \$500 billion in developing offshore reserves, including in Russia's Arctic Kara sea.<sup>28</sup> Although parts of the Barents Sea remain under negotiation, Gazprom is investing \$20 billion in extracting 3.8 trillion cubic meters on Russia's side, while Norway is already producing within its own waters. Additionally, ExxonMobil and BP are beginning to explore the Canadian side of the Beaufort Sea.<sup>29</sup> However, these projects are within waters clearly under one or the other nation's established sovereignty; we have yet to witness large-scale exploitation of newly-accessible and freshly-delineated Arctic territory.

While there are exceptions, relations among the five Arctic coastal states have highlighted the power of international legal sovereignty, defined by Stephen Krasner as the "practices associated with mutual recognition, usually between territorial entities that have formal juridical independence."<sup>30</sup> This can be seen in the logic followed by energy companies in the region; a U.S. company would hesitate to invest in Arctic exploration of a territory claimed by both the United States and Russia because of a potential challenge from Russia, but not from the United Nations. In fact, calls for an international consortium to govern the Arctic have largely been ignored by the five adjacent states. Although a few decades ago one could have classified the Arctic as belonging to an international commons, today the five coastal states are pursuing bilateral or regional forums to resolve disputes. Examples of this include the United States-Canadian dialog over the Beaufort Sea dispute or Russian-Norwegian negotiations regarding the Barents Sea. While issues such as Russia's claim to half of the Arctic have been brought before an international body, none of these nations have yet used an international forum to resolve their disputes. In fact, the Ilullisat Initiative of 2008, in which the Danish government invited the four other adjacent nations' governments to a conference on the Arctic, indicates that the regional players would probably prefer to settle the issue amongst themselves.

While the delineation of the Arctic commons has so far moved slowly and peacefully, there have also been military developments underscoring how fragile the region could become without a solid legal framework. This can be observed particularly between Canada and Russia, Shortly after Russia planted



its flag on the seabed of the North Pole in 2008, Moscow “ordered strategic bomber flights over the Arctic Ocean for the first time since the Cold War,” which led Canadian Prime Minister Stephen Harper to announce funding for new “Arctic naval patrol vessels, a new deep-water port, and a cold-weather training center along the Northwest Passage.”<sup>31</sup> In 2011, Canada conducted its largest military exercise in the region with a total 1,200 troops.<sup>32</sup> Denmark has also added to the tense security environment by establishing its first Arctic joint-military command in northern Greenland.<sup>33</sup> Although the prospects for bilateral diplomacy and the Ilullisat Initiative remain high, these military developments are a reminder of how the political dynamics of the region could devolve.

## **2. Unilateral Attempts to Maintain/Exploit the Arctic Commons**

### **2.1 A Race to the Finish?**

To what extent can states’ behavior in the Arctic be described as a self-interested land grab for precious resources? On the surface, the rush for Arctic resources would seem to be completely anarchic, a situation that is “especially dangerous because there are currently no overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes.”<sup>34</sup> Russia’s decision to lay claim to over half of the Arctic by planting its flag on the North Pole in 2007 seems to fit this model. In response, Canada has announced plans for more navy patrols and a military training camp in the far north.<sup>35</sup> Denmark has also positioned itself to defend its Arctic interests; the Danish government’s 2011-2020 Arctic Strategy calls for the establishment of an Arctic Response Force “to strengthen the armed forces’ enforcement of sovereignty and surveillance, for instance through military exercises.”<sup>36</sup> The Strategy also envisions using its military’s Arctic capabilities being “deployed in other situations such as in assistance to the Greenlandic society.” The Norwegian military has responded to the new Arctic security environment by making some of the largest defense procurements in its history, focusing particularly on high-end technology which could perform under harsh conditions. Suspicions about the intent of these defense technology purchases have been confirmed by Norway’s decision in 2006 to begin military exercises in its northern region.<sup>37</sup>

Of all the A5 nations positioning themselves to defend Arctic claims, the United States is probably the least prepared. According to one former Lieutenant Commander of the U.S. Coast Guard, the United States “has forfeited its ability to assert sovereignty in the Arctic by allowing its icebreaker fleet to atrophy.”<sup>38</sup> Despite funding a naval force as large as the next seventeen in the world combined, the United States has maintained “just one seaworthy oceangoing icebreaker—a vessel that was built more than a decade ago and that is not optimally configured for Arctic missions.” Russia, on the other hand, has a fleet of eighteen icebreakers.

However, there is evidence to suggest that states, including Russia, are not pursuing entirely unilateralist approaches to the Arctic. Thus far all of the A5 states have based their claims either under UNCLOS or, in the case of the United States, customary law of the sea. In fact, Russia was the first country to make a submission to the CLCS despite some unilateral saber-rattling measures such as the flag-planting incident. One candid remark on the potential for an Arctic arms race came from a Canadian general at a 2009 defense summit, in which he assessed that “there is no conventional military threat to the Arctic.” Noting the Arctic’s harsh environment, the general proposed that “if someone were to invade the Canadian Arctic, my first task would be to rescue them.”<sup>39</sup> Therefore, it is worth examining the relevant international regime as well as its implications for regional and bilateral efforts at managing the Arctic commons.

### **3. International Attempts**

Due to its ability to confer international legal sovereignty, the international community has an important role to play in the Arctic Commons dilemma. According to Krasner, sovereignty exists in four forms: international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. International legal sovereignty refers to the practice of states mutually recognizing each other. Westphalian sovereignty – which along with international legal sovereignty involves issues of authority and legitimacy, not control – refers to the exclusion of external actors from a state’s given territory. Interdependence sovereignty refers to the ability that states have to regulate activity between their borders and is concerned with control but not authority. Finally, domestic sovereignty – which involves both authority and control – refers to the organization of authority within a state and the ability of the government to exercise control within its borders. Although Krasner bemoans the repeated violation of international legal sovereignty as “organized hypocrisy,” it has already become a highly prized form of international recognition in the Arctic commons.<sup>40</sup>

International legal sovereignty is the most applicable concept when examining the commons of Arctic resources. The states which have signed UNCLOS – and therefore have their extended exclusive economic zones internationally recognized – have begun exploring the Arctic and exploiting resources. Norway and Russia are already extracting oil and natural gas, and Canada has declared the Northwest Passage an internal waterway. The United States, by contrast, has not signed UNCLOS and therefore does not have its extended exclusive economic zone internationally recognized. Consequently, American energy companies have been less eager to invest in projects to which their legal right might be challenged by an external actor. Therefore, while some states can exclude external actors from the Arctic Commons, the private sector has deemed international legal sovereignty more valuable than issues of mere

control. The importance of international legal sovereignty has provided a role for the international community.

### **3.1 The United Nations Commission on the Limits of the Continental Shelf (CLCS)**

Much of the international community's direct involvement has been through the CLCS. Established by UNCLOS, the CLCS is the sole international legal body authorized to legitimize a nation's claim to an extended continental shelf, thereby expanding its 200 nautical mile Exclusive Economic Zone up to 350 nautical miles.<sup>41</sup> All of the A5 nations are CLCS members, except the United States, who refuses to ratify UNCLOS. Until now, the CLCS has played a passive role in arbitrating between the A5 signatories of UNCLOS (Russia, Canada, Norway, and Denmark). As previously noted, the CLCS rejected Russia's 2001 application that claimed approximately half of the Arctic, citing an absence of sufficient information.<sup>42</sup> The Commission has also given Canada until 2013 and Denmark until 2014 to submit their respective continental shelf claims. A CLCS recommendation regarding Norway's 2006 application is still pending.<sup>43</sup> In none of these cases, though, has the CLCS taken an active approach to settling the regime for the Arctic commons since it is "clear that the workings of the Commission are to be non-adversarial."<sup>44</sup> However, there is potential for the Commission to actively secure the authority of the UNCLOS regime and influence the behavior of the A5 in the Arctic.

Contrary to expectations, the CLCS may develop more influence than it currently exercises. It can do so by bringing the United States formally into the UNCLOS regime, thereby shaping its preferences in negotiations and solidifying the role of the UN over any other regional arrangements. If it were to do so, though, the CLCS would first need to become more autonomous while maintaining its own resources. The model for this development of an international organization would be the autonomous and sustained role that Interpol has gained for itself. As Michael Barnett and Liv Coleman reveal in their study of Interpol, international organizations face a trade-off between acquiring resources necessary to their own survival and maintaining their own autonomy.<sup>45</sup> Barnett and Coleman define autonomy as organizations' ability "to control the conditions of their work," thereby allowing such organizations to "shield themselves from external pressures or threats."<sup>46</sup> In order to maximize both goals, international organizations can follow one of six strategies: acquiescence, compromise, avoidance, defiance, manipulation, and strategic social construction. Interpol presents us with one successful case of an international organization that has accomplished both goals by pursuing multiple strategies over time.

Although it may not be immediately apparent, the logic of CLCS and Interpol are rather similar. Interpol's classification as both one of the many "functionally oriented service organizations that promote cooperation on a

technical issue area” and as one that “handles sensitive security matters of tremendous concern to sovereignty-sensitive states” makes it a relevant model for a host of other international organizations, including CLCS.<sup>47</sup> In fact, the CLCS is a technical-service organization in its provision of expert judgment on geological surveys of continental shelves; although it has no law enforcement role such as Interpol’s, CLCS also handles sovereignty-sensitive matters in its legitimization of sovereignty claims to massive, resource-rich territory. In sum, CLCS is a “unique body constrained to speak a technical and scientific language yet involved in a process where the language that matters is that of politics.”<sup>48</sup>

Barnett and Coleman’s model of strategic choices – acquiescence, compromise, avoidance, defiance, manipulation, and strategic social construction – could provide a path for CLCS. The CLCS already has an autonomous foundation from which to build thanks to the fact that it is comprised of individuals, rather than states or individuals representing states.<sup>49</sup> Therefore, examining the role of CLCS should be concerned with how far this group of individuals is willing to push its own autonomy, rather than as a grouping of states seeking workable solutions. In order to predict which end of the spectrum would offer a more successful strategy for CLCS, we must examine three factors: a) the importance of CLCS’ resources to its survival, b) the extent to which outsiders control CLCS’ resources, and c) the extent to which CLCS can find alternative resources.<sup>50</sup>

Although the Commission members are considered autonomous figures, under the current arrangement it is the responsibility of the state nominating someone to the commission to “defray the expenses” of that member.<sup>51</sup> While some have acknowledged that this creates perceptual problems regarding the Commission’s objectivity, it remains unclear whether this financial structure is actually restricting the Commission’s decisions. However, it can be inferred from the statements of Commission members that this financial dependence on individual states limits the organization; on several past occasions, the Chair of the Commission has found it highly necessary to stress that the organization is an “ ‘autonomous body’ apart from the state parties of the LOS Convention;” other Commission members have also publicly emphasized that the Commission is comprised of individuals while conversely advocating for alternative resources.<sup>52</sup> Although resources are highly important to the CLCS and the extent of outside control could be significant (Barnett and Coleman’s first two criteria), the United Nations can in this case function as alternative resource (the third criteria). This would make the CLCS’ financial independence similar to that of the International Criminal Court. However, it remains to be seen whether or not the Commission - which the above statements imply has an interest in being autonomous - can actually achieve this financial restructuring.

A more autonomous CLCS would be able to make the international regime for the Arctic commons more influential by increasing its appeal. International organizations not only have the ability to change user preferences

once they are engaged in negotiations, but can also increase preferences for appropriate international forums in the first place. Jose Alvarez argues that international organizations provide specialized expertise on such varied topics as public international law, international economic law, and even aviation law.<sup>53</sup> Since expert treaty making bodies “generally adhere to carefully delineated, predictable procedures,” they can provide a useful good (e.g. unbiased information) to users. Furthermore, states wish to “secure the advantages of an organizational setting, and even when key players do not, there may be considerable political pressure brought to bear to secure the endorsement of the organizational body whose established competence appears most directly relevant.” Therefore, by maximizing political pressure to work with international bodies and by providing expertise, international organizations can shape user preferences for collective action solutions. Although it has several steps to take before being perceived as a truly independent actor, the CLCS may have the ability under such circumstances to politically influence both a U.S. ratification of UNCLOS and A5 behavior in the Arctic.

### **3.2 Other Implications of UNCLOS: International Support for a Regional Regime**

Beyond the establishment of the CLCS, the Convention also has ramifications for the Arctic legal regime because of its recognition of environmental norms regarding the law of the sea. These norms, it should be noted, did not develop slowly with evolution of customary practices prior to 1982; instead, similar to many recent normative changes, the environmental norms within UNCLOS were “precipitated by new treaties”<sup>54</sup> such as the 1972/96 London Dumping Convention and the 1973/8 MARPOL Convention.<sup>55</sup> UNCLOS justifies its support for marine environmental protection by citing previous treaties and the “consensus expressed by states in negotiating the environmental provisions” of the Convention.<sup>56</sup> The significance for the political dynamics of the Arctic is that the United States recognizes customary law, even though it has not ratified UNCLOS. Since the “normative system of international law defines the acceptable standards for behavior in the international system,” the legal source of UNCLOS will still have a “compliance pull” on all A5 members to maintain the Arctic environment.<sup>57</sup>

In drawing on customary law as a legal source for environmental protection, UNCLOS not only codifies environmental responsibility but also allows a great degree of flexibility for regional regimes to manage enclosed or semi-enclosed seas. Following the precedent set by regional regimes in the North Sea and other regions, UNCLOS allows for states bordering enclosed or semi-enclosed seas to arrange regional solutions “concluded in furtherance of the general principles and objectives of the Convention.”<sup>58</sup> The Convention’s definition of an enclosed or semi-enclosed area could easily describe the Arctic: “a gulf, basin or sea surrounded by two or more states and connected to another

sea or the ocean by a narrow inlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of the two or more coastal states.”<sup>59</sup> Therefore, UNCLOS has both established a “compliance pull” on environmental standards through customary law, but has also delegated the details to the A5.

The Convention also established the International Tribunal for the Law of the Sea (ITLOS) whose advisory jurisdictions include ruling on seabed disputes through its Seabed Disputes Chamber. Yet it is unlikely that this will be a successful international attempt at managing Arctic resources since UNCLOS governs only “the seabed beyond national jurisdiction;”<sup>60</sup> even though UNCLOS was drafted without the receding Arctic glaciers specifically in mind, its EEZ provisions nevertheless grant the A5 “sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the water superjacent to the seabed and its subsoil.”<sup>61</sup> Therefore, the Seabed Disputes Chamber is unlikely to influence the management of the Arctic seabed if regional actors can attain CLCS recognition of their continental shelf claims, thereby transferring “the common heritage of mankind” to a single state.<sup>62</sup>

### **3.3 Non-Arctic Actors**

Other international actors are also trying to influence the Arctic management regime, particularly the European Union. In 2008, the EU Parliament passed a resolution on Arctic governance in response to both Russia’s 2007 flag-planting move and the A5’s forming of a regional grouping called the Ilulissat Initiative (see 4.2). The EU’s resolution challenges both the unilateral and regional attempts of the A5 and calls for the strengthening of the CLCS on the grounds that the Arctic was “never expected to become a navigable waterway or an area of commercial exploitation.”<sup>63</sup> By making this argument, the EU is suggesting that the letter of the law of the UNCLOS regime should not give legal authority to the division of the Arctic commons because UNCLOS was signed with no such intentions toward the region. It also calls attention to the environmental risks, noting that maritime traffic in the region “does not enjoy anywhere near the level of minimum international safety rules that prevail in other international waters, in terms of either protection of human life or protection of the environment.” Rather than attempting to join existing regional frameworks or resolve the issue multilaterally, the EU is actually encouraging CLCS autonomy; the EU Parliament’s resolution urges the CLCS to “ensure, as soon as possible, that appropriate amendments are made to the International Maritime Organization (IMO) regulations.” In what would be a major step for CLCS autonomy, the EU envisions the Commission “opening international negotiations” on adopting an international treaty for the protection of the Arctic.

China has also taken an economic and ostensibly environmental interest in the Arctic; however, its interest is mostly in the use of the increasingly passable Arctic waters as a transit route, which would shorten distances to foreign markets and reduce transit costs for China's export industry. In 2008, China has sent its single icebreaker on at least three Arctic expeditions.<sup>64</sup> It has also successfully gained observer status on the Arctic Council and plans to install a long-term deep-sea monitoring system in the Arctic to measure marine changes and the impacts of global warming for China's climate. China has not yet joined the EU in calling for an expanded role for the CLCS, potentially because of complicated maritime boundary disputes in the Pacific Ocean with its smaller neighbors.

#### **4. Regional Attempts**

##### **4.1 The Arctic Council**

For reasons explained in 4.2, the Arctic Council – composed of the A5, Sweden, Finland, Iceland, and six indigenous peoples organizations – has proven to be a relatively weak regional organization for managing sovereignty over the Arctic commons. However, it has played an informative role in attempts at environmental preservation. The Council's annual Arctic Climate Impact Assessments (ACIAs) report ice melting at exponential rates and widespread ecosystem shifts for both land and sea wildlife.<sup>65</sup> The Council has also focused its efforts on monitoring pollutants in the Arctic. For example, the Council's recent "Mercury in the Arctic" report goes beyond the effects of global warming and examines the rising rates of mercury in the Arctic, in addition to its impact on indigenous populations in the region whose staple diet consists of marine mammals and fish. In addition to a few vague policy recommendations in the research commissioned by the Council, its activities have mostly consisted of calls by the Council's Chair for reducing global emissions. A concerted policy effort by the member states has yet to transpire.<sup>66</sup>

Although the Arctic Council has published important scientific studies and guidelines, many feel it suffers from structural issues, including its soft law status, lack of a secretariat, and ad hoc funding especially.<sup>67</sup> For example, the Reduction of Mercury Releases project was able to secure funding for the first two of its phases (assessment and selection of pilot site), but not the third phase (implementation).<sup>68</sup> The major structural problem stems from the fact that funding for the Arctic Council is not only voluntary, but states can actually select which projects or working groups they wish to pay for.<sup>69</sup> With regards to the Reduction of Mercury Release project, the only Arctic Council states to provide funding were Russia, Norway, and Denmark.<sup>70</sup> Yet in addition to these structural restraints, the Arctic Council is also competing for influence with the A5's Ilulissat Initiative.

#### **4.2 The Arctic 5 and the Ilulissat Initiative**

In addition to their participation in the Arctic Council, the five littoral states – the United States, Russia, Canada, Norway, and Denmark – have begun cooperation under a more formal framework. The Ilulissat Initiative, started in 2008 in Ilulissat, Greenland, has come to somewhat supplant the Arctic Council, which includes members who do not have continental shelf claims. The conference's founding declaration, in addition to statements made by A5 leaders during 2008, have widely been interpreted as "asserting a predominant role [for the A5] in addressing both territorial issues and also issues related to resource development in the Arctic Ocean."<sup>71</sup> Although the declaration does pay some attention to environmental protection, it is clear that the main role of the Ilulissat Initiative will be to work on sovereignty issues that the Arctic Council is too weak to address.

Much of the Ilulissat's effectiveness in broaching sovereignty claims multilaterally stems from its small-group dynamic and property rights theory. Whereas the Arctic Council has fourteen members in addition to international observers with different levels of interest, the Ilulissat grouping is limited to five states with a high level of interest in a specific issue. In *The Logic of Collective Action: Public Goods and the Theory of Groups*, economist Mancur Olson proposes that property rights – in this case the territorial claims of states recognized in international legal sovereignty – can in some cases incentivize collective action. After noting that members of organizations have both common and individual interests, Olson argues that individuals in large groups have an incentive to free ride, since the lone individual's nonparticipation will have little noticeable effect.<sup>72</sup> This free rider dilemma can be applied to the Arctic Council's system of voluntary payment; if a state notices that other states are unwilling to finance the third stage of the Reduction of Mercury Releases project, then why should it bear the burden of providing a public good? Olson proposes a few ways in which large organizations can cope with this dilemma, one of them being through property. Since large organizations such as the state cannot "support themselves without providing some sanction, or some distinction from the public good itself," they can provide non-collective goods.<sup>73</sup> For example, the government can provide electricity while excluding those who do not participate in paying. In the case of the A5, the non-collective good provided to one of the members would be sovereignty recognized by the only other four states with credible challenges. This is the ultimate incentive for the Ilulissat Initiative.

#### **5. Evaluating the Effectiveness of the Regime for Arctic Resources**

Although a dominant regime for managing the Arctic's resources has yet to arise, there are several paths which the involved actors could follow.



## **5.1 Potential Paths**

Some international actors have looked to the 1991 Madrid Protocol for guidance on strengthening the international regime for the Arctic. In calling on the CLCS to encourage the development of more specific environmental regulations for the Arctic, the European Parliament signified the Madrid Protocol as a useful model.<sup>74</sup> Building on the 1959 Antarctic Treaty, the Protocol designated the region as a “natural reserve,” thus having it function as an international park.<sup>75</sup> Unlike the Arctic, the Antarctic is governed by a treaty whose underlying goal is the maintenance of “a neutral area with no single country having sovereignty.”<sup>76</sup> However, the strong economic incentive for the A5 in exploiting the Arctic’s rich energy resources strongly suggests that their self interests will prevent a similar regime being established.

A less ambitious path than the Madrid Protocol would be maximizing the effect of existing environmental law governing the Arctic. Non-interested parties such as environmental groups or other non-Arctic states could use provisions of UNCLOS to demand environmental safeguards from the A5 states. According to Article 56 of the Convention, once states have established an Exclusive Economic Zone they are still responsible for “the protection and preservation of the marine environment”<sup>77</sup> in the context of “conforming to and giving effect to generally accepted international rules and standards’ for the prevention, reduction, and control of vessel-source pollution.”<sup>78</sup> By citing already existing marine law, UNCLOS is clearly extending into EEZs the authority of MARPOL, the 1973 International Convention for the Prevention of Pollution From Ships. In fact, all of the A5 states have signed and ratified MARPOL, making the United States responsible marine preservation as well.<sup>79</sup> Therefore, Arctic states must enforce existing international standards on the increased shipping in their own EEZs, without the authority to apply national standards.

As previously noted, a more autonomous CLCS could provide another path for a dominant management regime, especially since the A5 needs the CLCS for approving their continental shelf claims. The opportunity for the CLCS to maximize political pressure on the United States lies in whether or not it can convince U.S. energy companies that Washington should ratify UNCLOS. Some have predicted that the extractable oil in the Beaufort Sea alone, which is currently disputed with Canada, will incentivize companies to “demand legal certainty.”<sup>80</sup> For example, ExxonMobil has already signed deals with Russia’s state-run Rosneft to explore oil drilling in Russia’s Kara Sea.<sup>81</sup> This suggests that ExxonMobil and similar American energy companies would have an interest in pursuing resources under U.S. sovereignty. In fact, it is puzzling that this has not already been enough of an incentive to overcome domestic political opposition. As U.S. Secretary of State Hillary Clinton has stated before Congress, U.S. energy companies “need the maximum level of international legal certainty before they will or could make the substantial investments.”<sup>82</sup> In

order to encourage the United States to ratify UNCLOS and pave the way for a collective action solution, the CLCS can exercise political pressure in the form of expert criticism (see 3.1). This critique of U.S. policy by an unbiased and expert organization would mobilize U.S. domestic energy firms. If it were to have a stake in the UNCLOS arbitration dispute, the United States would probably modify its preferences in order to satisfy norms recognized by the CLCS, such as Article IV of MARPOL (see 3.2). Until the CLCS does so, it will remain a passive arbitrating body between only four of the A5 nations.

## **5.2 The Trend Toward Regional Solutions**

As indicated in the analysis of the A5's Ilulissat Initiative (4.2), there are strong incentives for the five Arctic littoral states to cooperate regionally. Firstly, the sovereignty disputes are essentially bilateral between A5 states; by including international bodies and non-regional actors (all of whom have their own incentives and might shape A5 domestic preferences in unexpected ways), the A5 would certainly make these issues much more complex than individual bilateral agreements.

Secondly, there are areas for future bilateral cooperation between the United States and Russia. Both states would benefit from clearly defined maritime boundaries in the Arctic and the opening of possibilities for joint projects with other nations. For example, although U.S. energy companies often provide the technology and expertise when drilling for natural gas and oil in mainland Russia, in the Arctic Russia may be the one with more to offer; as of late 2011, "the U.S. lacks the icebreakers and other equipment needed"<sup>83</sup> to continue projects off of its own Alaskan coast, whereas Russia has a fleet of eighteen icebreakers<sup>84</sup> but lacks sorely needed foreign investment and new technology.

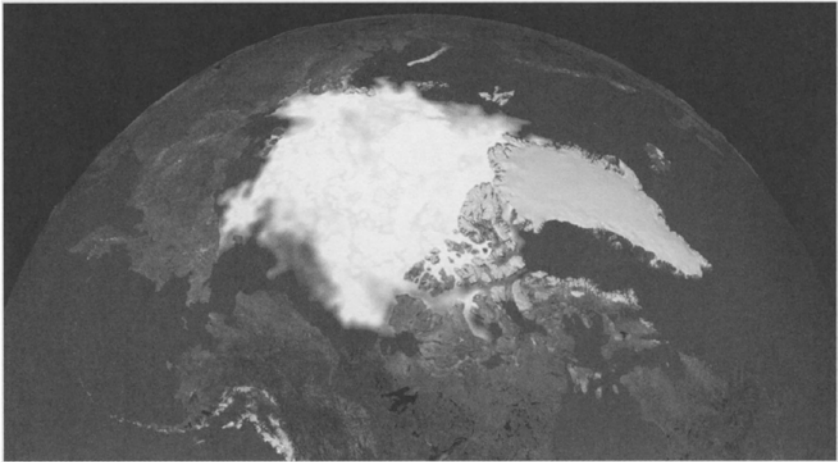
## **6. Conclusion**

The melting of the Arctic ice caps opens up a host of commons and collective action dilemmas across multiple international legal issues, including sovereignty determination and collective action on environmental care. To make the matter more complex, the melting of the Arctic is itself caused by the collective action issue of the release of greenhouse gases into the commons. However, this study focuses primarily on the issues surrounding sovereignty claims over areas which until now had widely been regarded as a commons. Although the international law of the sea will continue to be the foundation for managing the Arctic Commons, the dominant regime for its management will be mostly regional and bilateral. The A5's efforts through the Ilulissat Initiative have already provided strong evidence of such regional cooperation, and bilateral efforts such as the ongoing U.S.- Canadian dialog over the Beaufort Sea dispute and Russian-Norwegian negotiations regarding the Barents Sea cast further doubt on the prospects for a stronger role for international institutions.

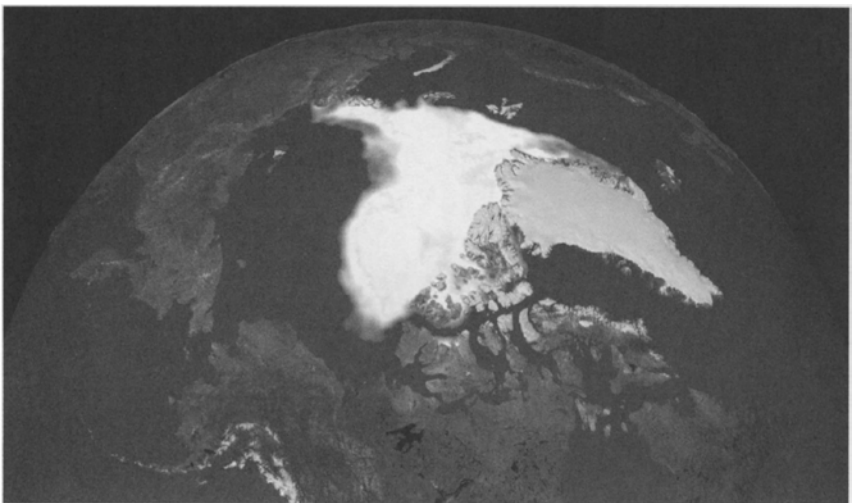
Because of the weaknesses of the international regime and the risks of unilateral attempts, these regional and bilateral solutions will most likely be the norm in the coming future.

**Appendix A**<sup>85</sup>

The Arctic Ice Cap, September 2001

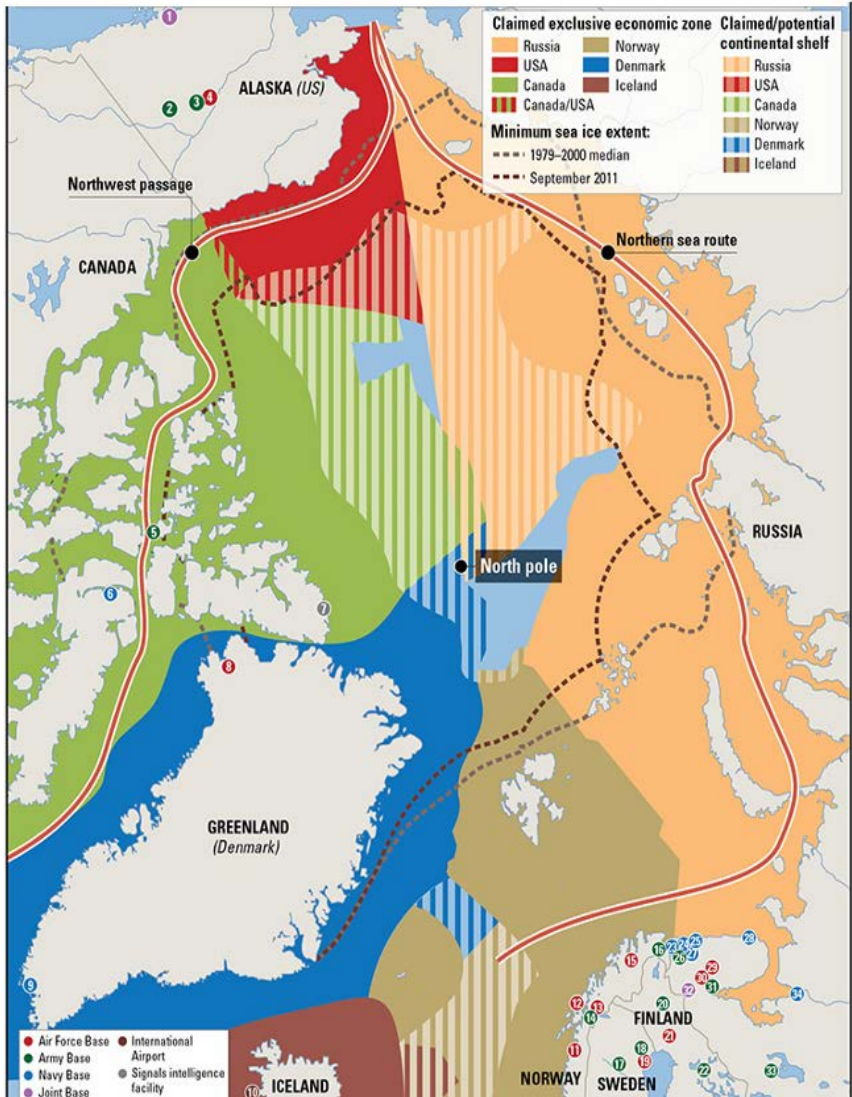


The Arctic Ice Cap, September 2007



Appendix B<sup>86</sup>

Overlapping Continental Shelf Claims



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<sup>1</sup> See Appendix A

<sup>2</sup> "The Melting North." *Economist*. 16 June 2012, online at <http://www.economist.com/node/21556798>. (visited October 8, 2012).

<sup>3</sup> United States. Department of the Interior. *90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic*. 2008. online at <http://www.usgs.gov/newsroom/article.asp?ID=1980>. (visited October 8, 2012).

<sup>4</sup> Garrett Hardin, "The Tragedy of the Commons," *Science* (1968): 1245.

<sup>5</sup> See Appendix A

<sup>6</sup> United Nations. *United Nations Convention on the Law of the Sea*. 1982, online at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). (December 1, 2012).

<sup>7</sup> See Appendix B

<sup>8</sup> Borgerson, Scott G., "The Great Game Moves North," *Foreign Affairs* (2009), online at <http://www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>9</sup> McDorman, Ted L., "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The," *International Journal of Marine & Coastal Law*, 17 (2002): 301.

<sup>10</sup> U.S. Department of State, Office of the Spokesperson, "Secretary of State Hillary Rodham Clinton Before the Senate Foreign Relations Committee On the Law of the Sea Convention."

<sup>11</sup> Borgerson, Scott G., "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>12</sup> George Galdorisi, and Kevin Vienna, *Beyond the Law of the Sea: New Directions for U.S. Oceans Policy*, (Westport: Praeger Publishers, 1997), 48.

<sup>13</sup> *id* at 76

<sup>14</sup> *id* at 64-65

<sup>15</sup> U.S. Department of State, "Obama Administration Urges Senate to Approve Oceans Treaty." online at <http://iipdigital.usembassy.gov/st/english/article/2012/05/201205236216.html>. (visited October 8, 2012).

<sup>16</sup> Wong, Kristina, and Sean Lengell. "DeMint: Law of the Sea Treaty now dead." *Washington Times*. online at <http://www.washingtontimes.com/news/2012/jul/16/demint-says-law-sea-treaty-now-dead/?page=all>. (visited December 1, 2012).

<sup>17</sup> Borgerson, Scott G., "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic>

meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show. (visited October 8, 2012).

<sup>18</sup> Cohen, Ariel, *Russia in the Arctic: Challenges to U.S. Energy and Geopolitics in the High North*, (Ed. Stephen J. Blank. Carlisle: Strategic Studies Institute, U.S. Army War College, 2011), 15.

<sup>19</sup> Paul Pedrozo, *Encroachment on Navigational Freedoms, International Law and Military Operations*, Michael D. Carsten, 2008) (Vol. 84, U.S. Naval War College International Law Studies).

<sup>20</sup> "The Melting North." *Economist*. 16 June 2012, online at <http://www.economist.com/node/21556798>. (visited October 8, 2012).

<sup>21</sup> Borgerson, Scott G., "The Great Game Moves North," *Foreign Affairs* (2009), online at <http://www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>22</sup> Borgerson, Scott G., "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>23</sup> *id* at 93

<sup>24</sup> Byers, Michael, *Who Owns The Arctic?*, (Vancouver: Douglas & McIntyre, 2010), 98-100.

<sup>25</sup> Jensen, Oystein, and Svein Rottem. "The Politics of Security and International Law in Norway." *Polar Record*. 46. (2010): 78, online at <http://www.fni.no/doc&pdf/OYJ-SVR-PR-2010.pdf>. (visited October 8, 2012).

<sup>26</sup> *id* at 79

<sup>27</sup> Kingdom of Denmark, "Strategy for the Arctic 2011– 2020." 2011. <http://uk.nanoq.gl/~media/29cf0c2543b344ed901646a228c5bee8.ash&xgt>.

<sup>28</sup> "The Melting North." *Economist*. 16 June 2012, online at <http://www.economist.com/node/21556798>. (visited October 8, 2012).

<sup>29</sup> Byers, Michael, *Who Owns The Arctic?*, (Vancouver: Douglas & McIntyre, 2010), 98-100.

<sup>30</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton: Princeton University Press, 1999), 3.

<sup>31</sup> Borgerson, Scott G., "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>32</sup> "Too much to fight over." *Economist*, 2012 16, June. online at <http://www.economist.com/node/21556797>. (visited December 1, 2012).

<sup>33</sup> "Denmark Plans Forces for Arctic," *BBC*, July 16, 2009, online at <http://news.bbc.co.uk/2/hi/europe/8154181.stm>. (visited October 8, 2012).

<sup>34</sup> Borgerson, Scott G., "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>35</sup> "Canadians Prepared to Fight for Arctic: Survey," *AFP* [Ottawa] 25 Jan 2011, online at [http://www.spacedaily.com/reports/Canadians\\_prepared\\_to\\_fight\\_for\\_Arctic\\_survey\\_999.html](http://www.spacedaily.com/reports/Canadians_prepared_to_fight_for_Arctic_survey_999.html). (visited December 1, 2012).

<sup>36</sup> Kingdom of Denmark, "Strategy for the Arctic 2011–2020." online at <http://uk.nanoq.gl/~media/29cf0c2543b344ed901646a228c5bee8.ash&xgt>. (visited October 8, 2012).

<sup>36</sup> "The Melting North." *Economist*. 16 June 2012, online at <http://www.economist.com/node/21556798>. (visited October 8, 2012).

<sup>37</sup> Huebert, Robert Neil. Canadian Defence and Foreign Affairs Institute, "The newly emerging Arctic security environment."

<sup>38</sup> *id at 64*

<sup>39</sup> "Canadians prepared to fight for Arctic: survey." *AFP* [Ottawa] 25 Jan 2011, online at [http://www.spacedaily.com/reports/Canadians\\_prepared\\_to\\_fight\\_for\\_Arctic\\_survey\\_999.html](http://www.spacedaily.com/reports/Canadians_prepared_to_fight_for_Arctic_survey_999.html). (visited December 1, 2012)

<sup>40</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton: Princeton University Press, 1999), 9.

<sup>41</sup> United Nations. *United Nations Convention on the Law of the Sea*. 1982, online at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) (visited October 8, 2012)

<sup>42</sup> Ariel Cohen, *Russia in the Arctic: Challenges to U.S. Energy and Geopolitics in the High North*, (Ed. Stephen J. Blank. Carlisle: Strategic Studies Institute, U.S. Army War College, 2011), 15.

<sup>43</sup> Ingenfeld, Eva. "Arctic." *Arctic*. 63.2 (2010): 257.

<sup>44</sup> McDorman, Ted L. "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The." *Int'l J. Marine & Coastal L.* 17 (2002): 311.

<sup>45</sup> Michael Barnett, and Liv Coleman, "Designing police: Interpol and the study of change in international organizations," *International Studies Quarterly*, 49, no. 4 (2005): 593.

<sup>46</sup> *id at 598*.

<sup>47</sup> *id at 596*.

- <sup>48</sup> McDorman, Ted L. "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The." *Int'l J. Marine & Coastal L.* 17 (2002): 312.
- <sup>49</sup> McDorman, Ted L. "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The." *Int'l J. Marine & Coastal L.* 17 (2002): 311.
- <sup>50</sup> Michael Barnett, and Liv Coleman, "Designing police: Interpol and the study of change in international organizations," *International Studies Quarterly*, 49, no. 4 (2005): 600.
- <sup>51</sup> McDorman, Ted L. "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The." *Int'l J. Marine & Coastal L.* 17 (2002): 312.
- <sup>52</sup> *id* at 311-312.
- <sup>53</sup> Alvarez, Jose, "The New Treaty Makers," *Boston College International and Comparative Law Review*, 25, no. 2 (2002): 221.
- <sup>54</sup> Charlotte Ku, and Paul Diehl, *International Law: Classic and Contemporary Readings*, (Boulder, CO: Lynne Rienner Pub, 2008), 13.
- <sup>55</sup> Birnie, Patricia W, and Alan E. Boyle. *International Law and the Environment*. Oxford: Clarendon Press, 1992. 387.
- <sup>56</sup> *id* at 387
- <sup>57</sup> Ku and Diehl 14.
- <sup>58</sup> Birnie and Boyle 391
- <sup>59</sup> *id* at 391
- <sup>60</sup> Freestone, David. "Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area." *American Society of International Law*. 15. no. 7 (2011). online at <http://www.asil.org/insights110309.cfm>. (visited December 1, 2012).
- <sup>61</sup> Birnie, Patricia W, and Alan E. Boyle. *International Law and the Environment*. Oxford: Clarendon Press, 1992. 716-17
- <sup>62</sup> Freestone, David. "Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area." *American Society of International Law*. 15. no. 7 (2011). online at <http://www.asil.org/insights110309.cfm>. (visited December 1, 2012).
- <sup>63</sup> European Union, European Parliament, "European Parliament Resolution of 9 October 2008 on Arctic Governance," online at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>.



<<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>>. (visited December 3, 2012).

<sup>64</sup> Borgerson, Scott G., "The Great Game Moves North," *Foreign Affairs* (2009), online at <http://www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>65</sup> Arctic Monitoring and Assessment Program (AMAP), "Arctic Pollution 2011," online at <http://www.arctic-council.org/index.php/en/environment-a-climate/environmental-protection/277-mercury-in-the-arctic>. (visited October 8, 2012).

<sup>66</sup> Bildt, Carl. The Arctic Council, "STATEMENT TO UNFCCC COP XVII." Last modified 2011, online at [http://www.arcticcouncil.org/images/attachments/extra\\_information/arctic\\_council\\_statement\\_to\\_the\\_cop\\_xvii.pdf](http://www.arcticcouncil.org/images/attachments/extra_information/arctic_council_statement_to_the_cop_xvii.pdf). (visited January 15, 2013).

<sup>67</sup> Koivurova, Timo. "The actions of the Arctic states respecting the continental shelf: a reflective essay." *Ocean Development & International Law*. 42. no. 3 (2011): 211-226.

<sup>68</sup> Timo Koivurova, and David VanderZwaag, "The Arctic Council at 10 years: retrospect and prospects," *University of British Columbia law review*, 40, no. 1 (2007): 152.

<sup>69</sup> Evan T. Bloom, "Establishment of the Arctic Council," *American Journal of International Law* (1999): 718.

<sup>70</sup> Arctic Contaminants Action Program to Eliminate Pollution of the Arctic, "PROGRESS REPORT TO SENIOR ARCTIC OFFICIALS." Last modified 2008, online at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http://www.arcticcouncil.org/index.php/en/about/documents/category/71-acap-reports-to-saos?download=279:acap-report-to-saos-2008november&ei=LOY8UdqPFei40AG5oICIDg&usq=AFQjCNFDp9wi6NGNi6zLL4jTQuKAd74Pw&bvm=bv.43287494,d.dmg&cad=rjt>. (visited March 9, 2013).

<sup>71</sup> Aspen Dialogue and Commission on Arctic Climate Change, "The Ilulissat Declaration: Background and Implications for Arctic Governance," 2008, online at <http://arcticgovernance.custompublish.com/the-ilulissat-declaration-background-and-implications-for-arctic-governance.4626039-137746.html>. (visited December 1, 2012).

<sup>72</sup> Olson Mancur, *The Logic of Collective Action: Public Goods and the Theory of Groups*, (Cambridge: Harvard University Press, 1965), 8.

<sup>73</sup>*id* at 12

<sup>74</sup> European Union, European Parliament, "European Parliament Resolution of 9 October 2008 on Arctic Governance," online at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>. (visited October 8, 2012).

<sup>75</sup> Lennon, Erika, "A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic," *Sustainable Development Law & Policy*, 8, no. 3 (2008), 32.

<sup>76</sup> *id at* 32

<sup>77</sup> United Nations. *United Nations Convention on the Law of the Sea*. 1982. Article 56.1.b

<sup>78</sup> Birnie, Patricia W, and Alan E. Boyle. *International Law and the Environment*. Oxford: Clarendon Press, 1992. 419.

<sup>79</sup> Copeland, Claudia. Congressional Research Service, "Ship Pollution: Background, Laws and Regulations, and Key Issues," 2008, online at <http://www.earthforum.com/NLE/CRSreports/08Jun/RL32450.pdf>. (visited December 1, 2012).

<sup>80</sup> Byers, Michaels, *Who Owns The Arctic?*, (Vancouver: Douglas & McIntyre, 2010), 102.

<sup>81</sup> Helman, Christopher. "In Russian Oil Deal, Norway's Statoil Follows Exxon's Lead On 'Hostage Taking'." *Forbes*, May 2012, online at <http://www.forbes.com/sites/christopherhelman/2012/05/07/in-russian-oil-deal-norways-statoil-follows-exxons-lead-on-hostage-taking>. (visited October 8, 2012)

<sup>82</sup> Clinton, Hillary. United States. Department of State. "Obama Administration Urges Senate to Approve Ocean Treaty," online at <http://iipdigital.usembassy.gov/st/english/article/2012/05/201205236216.html>. (visited October 8, 2012)

<sup>83</sup> Harsem, Øistein, Arne Eide, and Knut Heen. "Factors influencing future oil and gas prospects in the Arctic." *Energy Policy*. 39.12 (2011): 8037–8045, online at <http://www.sciencedirect.com.proxy.library.georgetown.edu/science/article/pii/S0301421511007476>. (visited October 8, 2012).

<sup>84</sup> Borgerson, Scott G., "The Great Game Moves North," *Foreign Affairs* (2009), online at <http://www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

<sup>85</sup> *id at*

<sup>86</sup> The International Institute For Strategic Studies, "Map: Overlapping Sovereignty Claims in the Arctic," online at <http://www.iiss.org/publications/military-balance/the-military-balance-2012/press-statement/overlapping-sovereignty-claims-in-the-arctic/>. (visited February 22, 2013)

**Works Cited**

- Alvarez, Jose. "The New Treaty Makers." *Boston College International and Comparative Law Review*. 25. no. 2 (2002): 213-234.
- Arctic Contaminants Action Program to Eliminate Pollution of the Arctic, "PROGRESS REPORT TO SENIOR ARCTIC OFFICIALS." Last modified 2008, online at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDAQFjAA&url=http://www.arcticcouncil.org/index.php/en/about/documents/category/71-acap-reports-to-saos?download=279:acap-report-to-saos-2008november&ei=LOY8UdqPFei40AG5oICIDg&usg=AFQjCNFDp9wi6NGNi6zIL4jTQuKAd74Pw&bvm=bv.43287494,d.dmg&cad=rjt>. (visited March 9, 2013).
- Arctic Monitoring and Assessment Program (AMAP), "Arctic Pollution 2011," online at <http://www.arctic-council.org/index.php/en/environment-and-climate/environmental-protection/277-mercury-in-the-arctic>. (visited October 8, 2012).
- Aspen Dialogue and Commission on Arctic Climate Change, "The Ilulissat Declaration: Background and Implications for Arctic Governance," 2008, online at <http://arcticgovernance.custompublish.com/the-ilulissat-declaration-background-and-implications-for-arctic-governance.4626039-137746.html>. (visited December 1, 2012).
- Barnett, Michael, and Liv Coleman. "Designing police: Interpol and the study of change in international organizations." *International Studies Quarterly*. 49. no. 4 (2005): 593-620.
- Bildt, Carl. The Arctic Council, "STATEMENT TO UNFCCC COP XVII." Last modified 2011, online at [http://www.arcticcouncil.org/images/attachments/extra\\_information/arctic\\_council\\_statement\\_to\\_the\\_cop\\_xvii.pdf](http://www.arcticcouncil.org/images/attachments/extra_information/arctic_council_statement_to_the_cop_xvii.pdf). (visited January 15, 2013).
- Bloom, Evan T. "Establishment of the Arctic Council." *American Journal of International Law*. (1999): 712-722.
- Borgerson, Scott G. "The Great Game Moves North," *Foreign Affairs* (2009), online at <http://www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).
- Borgerson, Scott G. "Arctic Meltdown," *Foreign Affairs* (2008), online at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown?page=show/www.foreignaffairs.com/articles/64905/scott-g-borgerson/the-great-game-moves-north?page=show>. (visited October 8, 2012).

- Byers, Michael. *Who Owns The Arctic?* Vancouver: Douglas & McIntyre, 2010.
- "Canadians Prepared to Fight for Arctic: Survey," *AFP* [Ottawa] 25 Jan 2011, online at [http://www.spacedaily.com/reports/Canadians\\_prepared\\_to\\_fight\\_for\\_Arctic\\_survey\\_999.html](http://www.spacedaily.com/reports/Canadians_prepared_to_fight_for_Arctic_survey_999.html). (visited December 1, 2012).
- Clinton, Hillary. U.S. Department of State, "Obama Administration Urges Senate to Approve Oceans Treaty," online at <http://iipdigital.usembassy.gov/st/english/article/2012/05/201205236216.html>. (visited October 8, 2012).
- Cohen, Ariel. *Russia in the Arctic: Challenges to U.S. Energy and Geopolitics in the High North*. Ed. Stephen J. Blank. Carlisle: Strategic Studies Institute, U.S. Army War College, 2011.
- Copeland, Claudia. Congressional Research Service, "Ship Pollution: Background, Laws and Regulations, and Key Issues," 2008, online at <http://www.earthforum.com/NLE/CRSreports/08Jun/RL32450.pdf>. (visited December 1, 2012).
- "Denmark Plans Forces for Arctic," *BBC*, July 16, 2009, online at <http://news.bbc.co.uk/2/hi/europe/8154181.stm>. (visited October 8, 2012).
- European Union, European Parliament, "European Parliament Resolution of 9 October 2008 on Arctic Governance," online at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>. <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0474>>. (visited December 3, 2012).
- Freestone, David. "Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area." *American Society of International Law*. 15. no. 7 (2011). Online at <http://www.asil.org/insights110309.cfm>. (visited December 1, 2012).
- Galdorisi, George, and Kevin Vienna. *Beyond the Law of the Sea: New Directions for U.S. Oceans Policy*. Westport: Praeger Publishers, 1997.
- Hardin, Garrett. "The Tragedy of the Commons." *Science*. (1968): 1243-1248.
- Helman, Christopher. "In Russian Oil Deal, Norway's Statoil Follows Exxon's Lead On 'Hostage Taking'." *Forbes*, May 2012. Online at <http://www.forbes.com/sites/christopherhelman/2012/05/07/in-russian-oil-deal-norways-statoil-follows-exxons-lead-on-hostage-taking>. (visited December 1, 2012).
- Huebert, Robert Neil. Canadian Defence and Foreign Affairs Institute, "The newly emerging Arctic Security Environment."

- Kingdom of Denmark, "Strategy for the Arctic 2011– 2020." 2011. Online at <http://uk.nanoq.gl/~media/29cf0c2543b344ed901646a228c5bee8.ash&xgt>. (visited October 8, 2012).
- Koivurova, Timo. "The actions of the Arctic states respecting the continental shelf: a reflective essay." *Ocean Development & International Law*. 42. no. 3 (2011): 211-226.
- Koivurova, Timo, and David VanderZwaag. "The Arctic Council at 10 years: Retrospect and Prospects." *University of British Columbia Law Review*. 40. no. 1 (2007): 121-194.
- Krasner, Stephen. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.
- Ku, Charlotte, and Paul Diehl. *International Law: Classic and Contemporary Readings*. Boulder, CO: Lynne Rienner Pub, 2008.
- Lennon, Erika. "A Tale of Two Poles: A Comparative Look at the Legal Regimes in the Arctic and the Antarctic." *Sustainable Development Law & Policy*. 8. no. 3 (2008).
- McDorman, Ted L. "Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World, The." *International Journal of Marine & Coastal Law*. 17. (2002): 301-324.
- Mancur, Olson. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge: Harvard University Press, 1965.
- Paul Pedrozo, Encroachment on Navigational Freedoms, International Law and Military Operations, Michael D. Carsten, 2008) (Vol. 84, U.S. Naval War College International Law Studies).
- "Too much to fight over." *Economist*, 2012 16, June. Online at <http://www.economist.com/node/21556797>. (visited December 1, 2012).
- The International Institute For Strategic Studies, "Map: Overlapping Sovereignty Claims in the Arctic." Online at <http://www.iiss.org/publications/military-balance/the-military-balance-2012/press-statement/overlapping-sovereignty-claims-in-the-arctic/>. (visited February 22, 2013)
- United Nations. *United Nations Convention on the Law of the Sea*. 1982.
- U.S. Department of State, "Obama Administration Urges Senate to Approve Oceans Treaty." Online at <http://iipdigital.usembassy.gov/st/english/article/2012/05/201205236216.html>. (visited October 8, 2012).

U.S. Department of State, Office of the Spokesperson, "Secretary of State Hillary Rodham Clinton Before the Senate Foreign Relations Committee On the Law of the Sea Convention."

Wong, Kristina, and Sean Lenggell. "DeMint: Law of the Sea Treaty now dead." *Washington Times*, July 16, 2012. Online at <http://www.washingtontimes.com/news/2012/jul/16/demint-says-law-sea-treaty-now-dead/?page=all>. (visited December 1, 2012).

## **The Aggrandizement of Corporate Personhood: a living originalist interpretation of contemporary corporate rights jurisprudence**

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### **Abstract:**

*What implications does the recent Supreme Court ruling on Citizens United v. Federal Election Commission have for the constitutional rights of corporations? In overturning two recent precedents on corporate political speech, Citizens United clearly departs from stare decisis. Yet a living originalist theory of interpretation demonstrates that the decision marks a much more fundamental break with historical Court jurisprudence by extending the right to speech to corporations. This paper demonstrates why a living originalist approach is necessary to analyze the nebulous concept of corporate rights, how it gave rise to the legal construction of corporate personhood since the founding era, and finally, how the majority opinion of Citizens United represents an unconstitutional expansion of corporate personhood.*

At the end of his ninety-page dissent to *Citizens United v. Federal Election Commission*, Justice Stevens quotes from a dissent to a precedent cited in the opinion of the Court: “the majority... ‘elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.’”<sup>1</sup> The precedent, *First National Bank of Boston v. Bellotti*, was the first in U.S. history to recognize corporate political speech rights only about three decades earlier. The fierce public controversy which followed *Citizens United* echoed this sentiment, with the *New York Times* proclaiming, “the Supreme Court has thrust politics back to the robber-baron era of the 19<sup>th</sup> century.”<sup>2</sup> Since then, legal scholars have castigated in turns the Court’s “stunningly incorrect” treatment of precedent and ideological motivations.<sup>3</sup>

As the latest Court ruling on corporate rights, *Citizens United* raises difficult questions. How have historical cases on corporations impacted contemporary corporate speech rights? How does the constitutionality of corporate actions today compare with that of the past? The outpouring of scholarly responses to the ruling has left few stones unturned: it has been analyzed and compared with precedents from a multitude of angles ranging from its treatment of shareholder interests to its interpretation of corruption. Yet there remains a pronounced absence of a guiding framework that explains why certain criteria or certain methods of interpretation ought to be adopted rather than others. And while a wide variety of tests have been offered to assess the Court approach to corporate rights overall, there has been little comparison among them.<sup>4</sup> Even theories of corporate personhood, perhaps the most commonly proposed analytical framework, are applied in too many different ways to provide much clarity.<sup>5</sup> Most essentially, the discussion lacks an agreed-upon starting point of constitutional interpretation. As a result, many pieces argue past one another. One cannot see the forest for the trees.

This paper holds that it is necessary to view corporate rights through the lens of living originalism. This theory of constitutional interpretation in turn produces the corporate personhood theory of adjudication, which has been consistent enough to anchor Court adjudication throughout history and flexible enough to adapt to a changing economic landscape. In the context of *Citizens United*, the most recent Court ruling on corporate rights, living originalism demonstrates that the recognition of First Amendment protections for corporations represents an unconstitutional expansion of corporate personhood.

As a case examination of living originalism, this paper consists of three parts: theoretical discussion, historical analysis, and legal argument. After an overview of contemporary corporate rights adjudication, I will critique theories of interpretation which have been previously offered to evaluate corporate rights and explain why living originalism succeeds where they have failed. Next, I



examine how living originalism has constructed the legal theory of corporate personhood to guide Court jurisprudence on corporate rights throughout U.S. history. Finally, I discuss the implications of living originalism for the *Citizens United* ruling as representative of the current status of corporate rights.

## **I. Background**

At its core, *Citizens United* turned on the validity of Section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), a recent piece of campaign finance reform legislation. Section 441b, which was amended by Section 203, prohibited corporations from spending general treasury funds to finance “electioneering communications,” which entailed “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office” made within either sixty days before a general election or thirty days before a primary election to the office sought by the candidate.<sup>6</sup> *Citizens United*, a nonprofit corporation, sought to broadcast a documentary film criticizing then-Senator Hillary Clinton around the time of the 2008 Democratic presidential primary elections. It sued the Federal Elections Commission on the grounds that Section 203 did not apply to its release of the film, titled *Hillary: The Movie*. After a D.C. district court ruling in favor of the defendant, the case reached the Court on appeal, and was reversed in a 5-4 decision which struck down the BCRA restrictions on independent political expenditures as a ban on corporate speech and a violation of the First Amendment.

The ruling followed over a century of campaign finance reform efforts in Congress and nearly forty years of their judicial review. The defining pieces of legislation, and those that received the most judicial attention, were the 1925 Federal Corrupt Practices Act (FCPA) and the 1971 Federal Election Campaign Act (FECA). FCPA introduced disclosure requirements and expenditure limits on corporate giving to federal elections as an amendment to the earlier Tillman Act of 1907. FECA, in part a response to perceived inadequacies of FCPA to address rising campaign costs, prevented direct corporate spending from general treasury funds on certain electoral activities, but allowed for indirect expenditures through political action committees (PACs). Following the political financing abuse uncovered during the Watergate scandal, Congress amended FECA to set more stringent campaign spending limits and individual contribution limits in 1974. BCRA further sought to amend FECA loopholes through which corporations could circumvent expenditure limits through the use of soft money.

Court evaluations of corporate speech began much later, starting with the Burger Court in the late 1970s. Four cases in particular have since served as guideposts for the academic debate on corporate speech, as well as the *Citizens United* majority opinion: *Buckley v. Valeo* (1976), *Bellotti* (1978), *Austin v. Michigan Chamber of Commerce* (1990), and *McConnell v. Federal Election*

*Commission* (2003). *Buckley* marked the beginning of judicial review of campaign finance, striking down FECA limits on direct campaign expenditures by groups and individuals but upholding corporate and union expenditure bans. *Bellotti* was the first decision to explicitly extend political speech protections to corporations, building on *Buckley's* vigorous endorsement of First Amendment rights to reject a Massachusetts statute limiting corporate spending in the case of a voter referendum. A decade later, the Rehnquist Court qualified this extension of corporate speech protections in *Austin* and *McConnell*, upholding corporate spending limits in candidate elections and the BCRA soft-money prohibition, respectively. Both justified this partial retreat from *Bellotti* with the strong government interest of preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”<sup>7</sup>

## **II. Theoretical Discussion: towards a theory of constitutional interpretation for corporate rights**

### **a. Alternate theories of interpretation**

To clear the ground, I will first establish that theories of constitutional interpretation which have been previously employed, either explicitly or implicitly, are inadequate to assessing corporate rights cases, and particularly *Citizens United* as a case on corporate speech.<sup>1</sup> Most arguments that have been applied to *Citizens United* are rooted in constructionism, originalism, or living constitutionalism. Assuming that a theory of interpretation should aim to accurately construe the meaning of the constitution—whatever that may be—each theory is simply insufficient. The information each alone provides on the rights and legal status of corporations is either too vague, too limited, or too conflicted to offer much in the way of instruction.

A strict constructionist approach, or one that focuses primarily on the text of the Constitution, is most obviously untenable. Neither the Constitution nor the Bill of Rights mentions corporations. Some scholars have pointed out the distinction between the reference to “speech” as opposed to “speaker” in the First Amendment as evidence of its equal application to all types of speakers, corporations as well as individuals. Indeed, this logic underlies much of the discussion of the First Amendment in the *Citizens United* opinion.<sup>8</sup> Nonetheless, even the concurring opinion of Justice Scalia points out that “all the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears.”<sup>9</sup> It is impossible to conclude purely from the

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<sup>1</sup> Though *Citizens United* has often been critiqued for offending principles of *stare decisis* and judicial restraint, for the purposes of examining the basic constitutionality of corporate rights I will not review supplementary principles of adjudication.

text to what extent free speech rights apply to corporations as distinct legal entities any more than we can conclude how much they apply to a polar bear.

Originalist interpretation, by contrast, hardly suffers from a paucity of information but yields abundant, diverse, and indeterminate results. In his *Citizens United* dissent, Justice Stevens casts doubt on the Court's ability to determine the Framers' views on the First Amendment as applied to corporations.<sup>10</sup> But although founding-era discussion of corporate speech rights in particular is virtually nonexistent, historical records reveal extensive debate among the Framers and the wider public on the rights of corporations overall. The Framers frequently grappled with how to limit the political influence of powerful interest groups without overextending the powers of the federal government. Citing the corporate tendency towards rent-seeking and disproportionate aggregations of wealth, Madison recognized the need to protect the democratic process against corruptive influences.<sup>11</sup> Speaking on the incorporation of the Bank of the United States, he noted with caution "the great and extensive influence that incorporated societies had on public affairs in Europe."<sup>12</sup> Yet he also affirmed that factionalism ought not to be allayed by Congressional regulation but by institutional balancing mechanisms. Other Framers differed pointedly in their visions of the corporation in American society. The incorporation of the Bank of the United States, for instance, was led by Hamilton and fiercely opposed by Jefferson, who hoped to "crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength."<sup>13</sup> There was no clear consensus among the Founders as a group as to how much control government might exercise over corporations. At the 1787 Constitutional Convention, for instance, proposals of a congressional power to grant charters of incorporation were introduced, heavily debated, and eventually defeated.<sup>14</sup>

With regard to the original public meaning of corporate rights, political debate around the time of ratification reflects a similar division. In an examination of corporation controversies in the late 18<sup>th</sup> century, Ian Speir notes the variety of decisions reached by state legislative bodies as to how much constitutional power they possessed in granting, revoking, and amending charters of incorporation. The same concerns of the Framers guided debates on corporations for decades: their unique advantages in accumulating wealth, property, and power; the danger of their private interests overwhelming the public interest; and the potential for corruption in their relation with government officials, for instance.<sup>15</sup> Speir concludes: "the challenge presented by the corporation was one of power. At issue—and the source of disagreement—was how to properly limit power and to allocate it between its private (corporate) and public (legislative) domains."<sup>16</sup> Though the same values and principles were at play in each case, the conclusions drawn invariably fluctuated.

Though there are no known cases on corporate speech from the 18<sup>th</sup> century, one of the earliest free speech controversies, regarding associations, is illuminating. In 1794, a Federalist attempt to censor Democratic and Republican societies rested on the claim that “groups with an undue and distortionary influence on political processes were, as groups, not protected or only narrowly protected by the First Amendment.”<sup>17</sup> In response, Madison and other members of the House of Representatives asserted that the Constitution prohibited Congress from legislating to abridge the freedom of speech.<sup>18</sup> Though the Democratic and Republican societies were certainly not the legal equivalent of corporations, the debate nonetheless sheds light on how the founding generation may have evaluated the political speech of corporations as potential “groups with an undue and distortionary influence on political processes.”

The few attempts to resolve this founding-era divide on corporate rights are unconvincing. Speir concludes that institutional mechanisms built into the constitution, not congressional regulation, were intended to protect against the dangers of corporate power and, by extension, corporate speech.<sup>19</sup> On the other hand, Adam Winkler argues that since states held considerable control over corporations at the time, corporations were “unlikely holders of so-called rights against the government.”<sup>20</sup> Yet the fierce debate inspired by congressional powers over the very existence of corporations—incorporation—indicate a deep-seated division over their constitutional rights. To forcibly extract a final conclusion from such sharp discord would be simplistic and misleading. The defensive nature of the concurring and dissenting opinions of *Citizens United* is revealing: Justices Scalia and Stevens each focus on the others’ inability to prove original understandings of corporate speech rights.<sup>21</sup> The problem is that when the Framers’ generation was itself so conflicted on the issue, we are left with no “default” base conception of corporate speech, and neither side can be assigned the burden of proof.

The third avenue of interpretation, living constitutionalism, views the Constitution as a document that adapts to changing circumstances over time, particularly in response to social and political mobilization. Justice Stevens alludes to this reasoning in his *Citizens United* dissent: “our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today.”<sup>22</sup> He continues: “the American people...have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense.”<sup>23</sup> The most vehement detractors of *Citizens United* in the press and legal scholarship also accuse the Court of turning a blind eye to the toxic influence of wealthy interest groups.<sup>24</sup> The meaning of the constitution, in this view, supplants outdated beliefs of the Framers with a modern understanding of urgent socioeconomic realities and the “common sense” of the American people.

The fault of this admittedly popular angle of criticism is its dismissal of the information conveyed by originalist interpretations. Though ratification-era corporations certainly differ profoundly from their contemporary counterparts, the political and legal concerns they inspired remain highly relevant today. The core issues of the aforementioned debate of 1794 on censoring Democratic and Republican societies, for instance, are identical to those of *Citizens United*: the need to limit the distorting influence of wealthy interest groups on the political process, and the need to limit congressional powers. These issues are not contingent on particular corporate models or economic concerns of a given historical period; they are timeless. As such, they reveal important truths on the principles underpinning corporate rights. A living constitutionalist approach may help apply such principles to a modern context, but it is entirely unjustified in replacing the crucial analytical anchor of original understandings.

Regardless of how one construes the meaning of the Constitution, neither the text, nor original understandings, nor modern sociopolitical values yields a sufficiently concrete and substantive interpretive foundation for corporate speech rights. The document itself never refers to corporations. Original understandings reveal a sharply divided founding generation on the extent of government authority in regulating corporations. And an overemphasis on contemporary social values robs the Court of a guiding framework.

#### **b. A living originalist interpretation**

Living originalism is exceptionally well-suited for interpreting corporate rights by definition. As this theory establishes a framework of originalist principles that may be flexibly applied in future generations, it lends itself directly to two key attributes of the corporation as a legal concept: its abstract original and textual meaning, and its significant evolution throughout U.S. history.<sup>2</sup>

The concept of living originalism was introduced last year in an eponymous book by legal scholar Jack Balkin. Based on a general idea of “framework originalism” in which the Constitution creates “an initial framework for governance that sets politics in motion,” it looks to successive generations to implement this framework in accordance with the country’s evolving sociopolitical values.<sup>25</sup> This theory of interpretation is premised on a method of “text and principle” which holds that the meaning of the Constitution is based on the original text and principles, but that its future construction will differ based

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<sup>2</sup> Because the Court has only recently introduced the notion of corporate speech rights, a narrow examination of corporate First Amendment rights alone will not yield much in terms of original understandings and historical evolution. As will be shown, an analysis of the broader topic of corporate rights yields much more fruit.

on context.<sup>26</sup> Balkin argues that the text is often so general and abstract as to indicate the Founders' intentions to impart firm general principles to posterity rather than their own specific beliefs. In this way, constitutional provisions could be applied in accordance with the changing sociopolitical landscape of the U.S.<sup>27</sup> Follow-up analyses of living originalism have similarly emphasized the argument that the ambiguity of founding-era views and the text necessitates a degree of construction based on present-day circumstances.<sup>28</sup>

The living originalist interpretation of congressional regulation of commerce provides a compelling analogy for its application to corporate rights. In both *Living Originalism* and *Commerce*, a separate examination of the topic, Balkin justifies how the Commerce Clause has evolved from how it was originally understood in the 18<sup>th</sup> century to its expansive meaning in the modern regulatory state. He argues that the text and original understanding of the Constitution communicates the structural principle that Congress is authorized to regulate activities producing spillover effects between states. It does not, by contrast, demand continued adherence to conceptions of 18<sup>th</sup>-century business and economic activity. Importantly, this more abstract view of the Commerce Clause takes into consideration contextual changes such as new technologies and economic developments; new types of spillover effects; and new mechanisms of regulation. Thus, the Commerce Clause evolves alongside the "rise of a modern integrated economy and society" and "justifies the constitutionality of federal regulation of labor law, consumer protection law, environmental law, and antidiscrimination law."<sup>29</sup>

Likewise, the text and founding-era debates of corporate rights also convey an abstract structural principle: that Congress possesses the authority to regulate corporations for the purposes of protecting the public interest. This principle rests on founding-era observations of the legal and economic advantages of the corporate entity, as well as their potentially disproportionate political influence; it also notes the limits on federal power, and the dangers of political corruption. That the founders themselves did not agree on how to weigh these concerns, and that numerous cases from the founding generation frequently came to different conclusions on the proper reach of congressional regulation speaks to the vital role of contextual application. The importance of future understandings of corporations takes on even more importance than in the case of regulating commerce, for the latter is at least anchored in the explicit text of the Commerce Clause.

Furthermore, just as the evolution of the American economy has transformed interstate commerce, so too has it transformed the capabilities, needs, and interests of corporations over the past two centuries. Structurally, corporations today are wholly different legal, political, and economic creatures compared to their 18<sup>th</sup>-century forebears. Collectively, their impact on and relationship with society, while not immediately quantifiable, has burgeoned and

evolved. This is to say nothing of historic developments like industrialization, the Great Depression, and globalization which have successively reshaped the face of the economy. While it is true that many elements of U.S. society change to some extent over time, such fundamental differences between corporations then and now noticeably exceed, say, the differences between federal elections in Washington's time and federal elections now. Thus, any constitutional interpretation of corporate rights must be able to account for stark contextual differences.

Living originalism neatly reconciles the respective drawbacks of a purely constructionist, originalist, or living constitutionalist approach. It pairs the stability and consistency provided by the first two with the flexibility of the third. It grounds judicial thought in the vocabulary and criteria laid out in the original understanding, then adapts it to a contemporary understanding of corporations and socioeconomic realities. It is, in other words, the only theory of interpretation that can paint a full and accurate constitutional picture of corporate rights.

### **III. Historical Analysis: the evolving corporate “person” as a theory of adjudication**

To bridge the gap between a grand doctrine of interpretation such as living originalism and its relevance to individual Court cases, it is useful to analyze how it has shaped past jurisprudence. Perhaps inevitably, the case history on corporate rights falls into a living originalist approach as Courts continuously adapted the structural principle of congressional regulation of corporations to profound changes in the economic landscape. As corporations evolved over time, so did the legal protections they were accorded from the Bill of Rights. As the Bill of Rights directly pertains to natural persons only, the successive recognition of these limited protections conferred a legally constructed “personhood” on corporations. Over time, this contextual waxing and waning of recognized corporate rights alternately extended and curtailed congressional regulation. Judicial review of this corporate-government relationship, as manifested in the robust or feeble application of corporate personhood theory, may be distilled along three periods: the founding era, the Progressive era, and the New Deal era.

Founding-era economic circumstances and legal thought persisted from the late 18<sup>th</sup> century up until the mid-19<sup>th</sup> century, such that corporations enjoyed few, if any, protections under the constitution. The corporation was a comparatively feeble economic actor, dependent on government endorsement for its very existence and purpose. At this incipient stage of development, individuals and small firms represented the largest business enterprises, and productive property remained widely distributed.<sup>30</sup> The total number of corporations nationwide summed to a meager three hundred, and of these only a

small minority actually engaged in general commerce.<sup>31</sup> As they had since ratification, state legislatures not only retained the authority to grant charters of incorporation, but could also subject corporations to various limitations regarding their number of shareholders, capitalization, life term, and defining purpose.<sup>32</sup> Common practice held that a corporate charter was a special privilege to be awarded primarily for enterprises benefiting the public good, for instance constructing a bridge or providing public transportation.<sup>33</sup> The infantile nature of corporations at this early stage and founding-era suspicions of corporate power led the Court and the legal community to view corporations as largely beholden to the state, with little claim to independent rights against congressional action. As Chief Justice Marshall pronounced in the famous *Trustees of Dartmouth College v. Woodward* ruling, the corporation was “an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>34</sup>

A shift in this thinking began in the mid-19<sup>th</sup> century, as structural innovations in the corporation sparked considerations of increasing their legal independence. As the economy continued to expand, states increasingly eliminated the requirement for legislative approval before incorporation, and the once-selective practice of granting charters was steadily phased into an administrative formality.<sup>35</sup> Though corporations remained subject to state regulation, new business concerns of protecting shareholder property, contract interests, and long-term private investment augmented their *de facto* and legal independence. Even as early as 1819, *Dartmouth* had tempered its restrictive portrayal of corporate legal rights by acknowledging that corporations were entitled to a degree of protection under the Contracts Clause.<sup>36</sup> As the Court cautiously recognized additional contractual and property rights against government incursion, the legal community also began theorizing on the legal “personality” of the corporation.<sup>37</sup>

By the turn of the century, as burgeoning industrialization swept across the American economy, corporations had taken on new form and function. Fears that the continued practice of selectively state-granted charters during such rapid growth would lead to government corruption and favoritism gave rise to a “free incorporation” movement.<sup>38</sup> After general incorporation statutes freed corporations from regular government supervision and their perpetual existence was legalized, they skyrocketed in number and size.<sup>39</sup> Structurally, shareholders were demoted to the role of passive investors while corporate ownership diversified and dispersed.<sup>40</sup> The giant management corporation of the modern era was born as professional, salaried management took over the former functions of state law, accelerated by the formation of the national stock market.<sup>41</sup>

In response to these developments, the Progressive era Court pushed earlier speculations on the corporate “personality” to their logical conclusion: the new paradigm of corporate personhood. The corporate “person” was



consolidated as a legal concept in the unprecedented extension of Fourteenth Amendment protections to corporations. First, the infamous *Santa Clara County v. South Pacific Railroad Company* ruling of 1886 held that corporations had the same rights as natural persons under the Fourteenth Amendment for literally no apparent reason. Almost in passing, Chief Justice Waite assumed Fourteenth Amendment protections for the corporations involved during oral argument.<sup>42</sup> This equation of corporations to people in terms of the equal protection clause was thereafter entrenched despite its complete lack of mention in the actual ruling, its utter lack of any legal explanation or argument, and the contrary ruling of every court which had previously considered the issue.<sup>43</sup> Indeed, it was cited and expanded on as a precedent to include due process protections only two years later in *Minneapolis and St. Louis Railroad v. Beckwith* and *Pembina Mining Co. v. Pennsylvania*, neither of which explained the actual basis of corporate Fourteenth Amendment rights, either.<sup>44</sup> The landmark *Lochner v. New York* decision followed not long after, decisively extending Fourteenth Amendment substantive due process protections to invalidate federal and state statutes on working conditions. Altogether, the Court employed this new legal reasoning to invalidate some two hundred economic regulations during the Progressive era, most featuring corporate challenges to state statutes under the substantive due process doctrine.<sup>45</sup>

The shift in the Court's conception of corporate rights beginning with *Santa Clara* was clearly not motivated by a sudden intellectual revelation into the true meaning of the constitutional text, nor was it derived from the much more restrictive 18<sup>th</sup>-century legal and political conceptions of the corporation. Yet neither was the corporate person conclusion a renunciation of history and text, as Justices Douglas and Black argued in their dissents of the period.<sup>46</sup> The structural principles governing each decision remained unchanged. The Court still struggled to balance founding-era suspicions of special interest groups, factionalism, and corporate power against those of political corruption and bloated government. Its critics continued to warn against the political dangers of the steady accumulation of wealth in the hands of a small elite. The key difference between the Progressive-era and founding-era Courts was context. Borne by the tide of rapid industrialization, corporations engaged in newly independent and sophisticated economic activities which necessitated legal recognition and, arguably, protection. The previously strict application of the structural principle of congressional regulation was no longer sustainable in an era when the relationship between state and commerce had so acutely changed.

The third period of judicial review during the New Deal era qualified the expansive Progressive-era legal recognition accorded to corporations in recognition of mounting sociopolitical ills. When President Roosevelt declared that "our industrial combinations ha[ve] become great uncontrolled and irresponsible units of power within the State," contrasting it with the

Jeffersonian agrarianism of the founding era, he unknowingly appealed to the two interpretative reference points before the Court: the need for state regulation of these “industrial combinations,” and the adaptation of this principle to their activities in modern times.<sup>47</sup> As legal scholars turned their attention to how the government might defend the citizenry against predatory and self-interested corporations, the concept of corporate personhood lost its luster.<sup>48</sup>

After a period of obstructing economic reform by way of the due process clause, the Court finally abandoned the Fourteenth Amendment doctrine of substantive due process in recognition of the sociopolitical problems introduced by industrialization, thereby significantly diminishing corporate personhood. The legacy of *Lochner* ended with *West Coast Hotel Co. v. Parrish* in 1937, in which Court adopted a newly expansive view of the state power to regulate economic activities. The logic of subsequent decisions shifted focus from demarcating the reach of corporate personhood to that of federal regulation.<sup>49</sup> Debate on how the Bill of Rights might apply to corporations faded into the background. Before the Court, even corporations chose a defensive line of argument in seeking to limit government regulation rather than asserting positive rights as they had in the Progressive Era. In 1950, the majority opinion of *United States v. Morton Salt Co.* asserted:

Corporations can claim no equality with individuals in the enjoyment of the right to privacy. They are endowed with public attributes... The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.<sup>50</sup>

This explicit distinction between corporate and individual rights draws a sharp contrast with the equal extension of the Fourteenth Amendment to corporations and natural persons in *Santa Clara*. The notion of government “favors,” too, recalls the supervisory, almost patronizing, relationship between state and corporation in the founding era.

Whether the Court was entirely correct in the precise degree to which it altered its application of the original structural principle in each era is subject to debate. Key decisions such as *Lochner* certainly remain highly controversial. But it is sufficient for our understanding of the value of living originalism with regard to corporate rights to note that some level of adjustment to the new problems raised in the Progressive era and New Deal era was called for; that the central principle of Congressional regulation remained a constant base of judicial logic; and this guiding logic manifested itself through the legal vehicle of corporate personhood theory.

Identifying the particular relationship between corporate personhood theory and living originalism in this context has a threefold significance for our

understanding of corporate rights. First, it makes sense of an otherwise convoluted record of corporate rights adjudication. Various analyses have been proposed by which to assess judicial review of corporate rights. Larry E. Ribstein takes note of the “corporate person” theory, the “contract” theory, and the “unconstitutional conditions” theory; Jeffrey Newsteruk proposes a “tripartite structure” of person, property, and organization; and Elizabeth Pollman emphasizes the contract view, the aggregate theory, and the concession theory.<sup>51</sup> Living originalist analysis summarizes judicial review of corporate rights through a single (though varyingly applied) theory of adjudication: corporate personhood. And while judicial review of corporations has often been critiqued for its inconsistency and lack of firm grounding in the constitution, living originalism demonstrates that it does in fact adhere to a core constitutional framework and that a degree of inconsistency in its findings is not only inevitable but necessary.

Relatedly, living originalism demonstrates that the notion of corporate personhood cannot itself be the starting point of legal analysis, and cannot supplant a theory of constitutional interpretation in assessing corporate rights. Nonetheless, it is rarely examined within the context of a larger theory of constitutional interpretation, and instead often presented as the independent, primary means of understanding corporations as legal entities. As a mere description of the legal status of corporations under the constitution, it cannot explain what this legal status is based on, or when it may change. That depends on living originalist determinations.

Finally, a living originalist approach sheds light on the nature of the corporate “person.” The corporation is not a “natural” entity, as some have argued, as it does not inherently and directly possess constitutional rights by its very nature, but under certain circumstances may fall under their protections based on similarities between its legal identity and that of natural persons. The notion of personhood is a super-constitutional, technical construction which facilitates this conferral of rights. On the other hand, it is also not a legal “fiction,” as some detractors deem it, as it derives its legitimacy and value from the original meaning of the constitution.

#### **IV. Legal Applications: the death of living originalism in contemporary corporate speech jurisprudence**

##### **a. The *Citizens United* ruling**

The cardinal error of the *Citizens United* decision is its base assumption that corporations are legally equivalent to natural persons with regard to First Amendment protections. As living originalism shows, the corporate person may at times take on similar constitutional treatment as natural persons based on the circumstances. This distinction is crucial, as the majority opinion is entirely premised on the assumption that the First Amendment extends to corporations.

The assumption of constitutional corporate speech rights justifies the application of strict scrutiny, which requires the government to demonstrate both that there is a “compelling interest” for Section 441b and that it is “narrowly tailored to achieve that interest.”<sup>52</sup> It makes relevant the forceful claims that the statute constitutes an “outright ban on speech” and that “premised on mistrust of government power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”<sup>53</sup>

The Court basis its analysis of First Amendment protections for corporations on the precedents of *Buckley*, the first Court case to invalidate a piece of campaign finance reform legislation on free speech grounds; and *Bellotti*, the first Court case to recognize corporate speech rights. Neither can justify *Citizens United*. The opinion of the Court relies on *Buckley*’s finding that differences in wealth cannot justify government incursions on the First Amendment. Yet Section 441b, as an instance of congressional regulation of corporations, does not aim to remedy wealth inequities among individuals but the distinct economic and political advantages corporations possess as legal entities. The vast logical gap between *Buckley*’s restrictions on individual expenditures and the corporate restrictions in *Citizens United* is that the First Amendment must first be shown to extend to corporate personhood. Thus, analyses which frame *Citizens United* as a case which is fundamentally about wealth are misplaced.<sup>54</sup> It is fundamentally about the unique constitutional role which the corporate “person” occupies.

*Bellotti* itself erred in expanding the legal notion of the corporate person without any contextual justification. In his concurring opinion, Chief Justice Roberts notes *Bellotti*’s rejection of the idea that “speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.”<sup>55</sup> However, the Bill of Rights and thus the First Amendment explicitly refers only to individuals; it is the responsibility of the Court to justify their further and indirect application to another individual-like entity. The only legitimate rationale for *Bellotti* would have been a manifest change in the nature of corporations or corporate speech compelling parallel adjustments in constitutional law. However, that the Court neglected to review any of the campaign finance legislation which had targeted corporate spending on elections for nearly half a century until *Bellotti* suggests an ideological rather than a contextual motivation. If anything, a change in Court adjudication should have further restricted corporate personhood, given the steady growth of the economic and political clout of corporations since the 1907 Tillman Act and the political financing scandal of Watergate which occurred only several years before *Bellotti*. Thus, much like *Citizens United*, *Bellotti* was heavily rebuked at the time of the ruling as a return to pre-New Deal thinking.<sup>56</sup>

The Court suggests that a cap on expenditures constitutes a recent and especially severe instance of corporate speech regulation, for instance compared

to contribution limits or disclaimer and disclosure requirements, to justify a targeted extension of First Amendment protections.<sup>57</sup> Yet this is an impracticably exacting treatment of corporate personhood. Constitutional rights protections do not exist on a narrow case-by-case basis. As in the past, changes in the application of the Bill of Rights to corporations derive from essential changes in the nature of corporations or their operating environment, not provisional changes in individual statutes. Such reasoning in earlier periods would have produced such ludicrous results as invoking the Fourteenth Amendment in *Lochner* based on the particular qualities of the baking industry or whether the statute in question set a limit on working hours or minimum wage. The majority opinion itself proclaims, “We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned.”<sup>58</sup> Either corporations enjoy First Amendment protections or they do not. This does not turn on the minutia of whether the type of speech is a political contribution or a political expenditure.

Because this unwarranted expansion of corporate personhood calls for strict scrutiny, the compelling government interests for Section 441b—antidistortion, anticorruption, and shareholder protection—are wrongly construed in a roundabout and constrictive way. The first two interests in particular represent the very foundation of living originalism’s original structural principle of Congressional regulation. The Court description of the antidistortion interest, which fights “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form,” quite plausibly could have been taken from an 18<sup>th</sup>-century debate on incorporation.<sup>59</sup> As such, the antidistortion and anticorruption interests determine the extension of rights protections rather than vice versa. They should be a foundational rather than a supplementary argument against corporate speech rights. The dissent in *Citizens United* touches on this reasoning when it observes: “corporate electioneering is not only more likely to impair compelling governmental interests, but . . . restrictions on that electioneering are less likely to encroach upon First Amendment freedoms.” Yet it fails to take the next logical step of contesting strict scrutiny, instead taking on the excess burden of arguing that these interests do meet the high standards set by the majority opinion.

Without living originalism and corporate personhood theory, much of current debate on *Citizens United* engages the arguments of the Court on its own terms when the terms are in fact the source of error. Criticism of the Court’s judicial activism in upending *stare decisis* is irrelevant, as former cases are all based on the unconstitutional expansion of corporate personhood under *Bellotti*. Comparing the arguments from original understandings by Justices Scalia and Thomas misses the mark, as they represent the same two sides of the centuries-old debate on corporations and Congressional regulation which depends on context for final resolution. And vigorous attempts to reconcile *Bellotti* with

*Austin* and *McConnell*, which the Court struck down in *Citizens United*, are also misguided. Even Justice Stevens insists in his dissent:

*Austin* and *McConnell*, then, sit perfectly well with *Bellotti*. ...The difference is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda.<sup>60</sup>

Such arguments are flawed on two counts. First, as previously discussed, corporate personhood theory does not consider such precise conditionalities as whether the election is a referendum, a state election, or a federal election; whether there is a “PAC option”; and what “class” of corporations is involved. Second, this line of argument neglects the unconstitutionality of *Bellotti* to begin with, choosing instead to circumvent its extension of First Amendment rights with a dense thicket of tests and exemptions. Unfortunately, such complications only distract from the basic unconstitutionality of corporate speech protections. It is little wonder that corporate speech jurisprudence has been called a “patternless mosaic” of “off-on switches.”<sup>61</sup>

## **V. Conclusion**

While *Citizens United* may not be a return to the “robber-baron era of the 19<sup>th</sup> century,” it does represent an important step backwards for corporate rights jurisprudence. Since the unprecedented expansion of corporate personhood under *Bellotti*, the Court has lost sight of the core structural principle of state regulation of the corporation. Isolated efforts to undermine *Bellotti*’s impact in subsequent cases have only sustained and complicated a fundamentally flawed judicial record. In the brief history of corporate speech, the latest *Citizens United* ruling adopts perhaps the most generous view of corporate personhood yet in its assertion of the equal application of First Amendment rights to corporations and natural persons.

If the Court is to remain true to the meaning of the Constitution, a return to a more circumscribed view of corporate personhood is called for. Admittedly, this paper presents a purely theoretical argument as to constitutional meaning, and there are certainly practical concerns to overturning three decades of precedent to be considered. But such leaps have been made before, not least with the rejection of *Austin* and *McConnell* in *Citizens United*, and the shift away from decades of adhering to the *Lochner* precedent. And while it technically did not break with precedent, *Bellotti* itself constituted a pointed shift away from over two centuries of legal tradition in which corporations had never possessed rights of free speech. Perhaps, as with the New Deal era, it will take many more years of increasing corporate influence on the political process, and

of social and political debate, before the Court recognizes the need to adapt. Yet such a repeat of history's mistakes would be unfortunate. The contemporary generation possesses a wisdom and experience their predecessors did not: two centuries' worth of corporate rights jurisprudence under the guidance of living originalism. It must now use it to restore corporate personhood to its proper place in the Constitution.

<sup>1</sup> *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (Stevens, J., dissenting in part, concurring in part).

<sup>2</sup> “The Court’s Blow to Democracy,” *New York Times*, Jan. 21, 2010; Jan Witold Baran, “Stampede Toward Democracy,” *New York Times*, Jan. 25, 2010.

<sup>3</sup> Michael S. Kang, “The End of Campaign Finance Law,” *Virginia Law Review* 98, no. 1 (March 2012); Randall P. Bezanson, “No Middle Ground? Reflections on the Citizens United Decision,” *Iowa Law Review* 96 (2010-2011); Geoffrey R. Stone, “Citizens United and Conservative Judicial Activism,” *University of Illinois Law Review* (2012).

<sup>4</sup> Just a few works which offer sharply different frameworks of legal analysis for various cases include: J. Skelly Wright, “Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?,” *Columbia Law Review* 82 (1982); “Political Speech, Inc: The Bellotti Decision and Corporate Political Spending,” *Suffolk University Law Review* 13 (1979).

<sup>5</sup> Examples include Susanna Kim Ripken, “Corporate First Amendment Rights After Citizens United: an Analysis of the Popular Movement to End the Constitutional Personhood of Corporations,” *University of Pennsylvania Journal of Business Law* 14 (2011-2012); Jess M. Krannich, “The Corporate Person: a New Analytical Approach to a Flawed Method of Constitutional Interpretation,” *Loyola University Chicago Law Journal* 37 (2005-2006); Elizabeth Pollman “Reconceiving Corporate Personhood,” *Utah Law Review* (2011).

<sup>6</sup> Bipartisan Campaign Reform Act, H.R. 2356, 107th Cong. (2002).

<sup>7</sup> Richard L. Hasen, “Citizens United and the Illusion of Coherence,” *Michigan Law Review* 109 (2010-2011).

<sup>8</sup> *Citizens United*, 130 S. Ct. 876.

<sup>9</sup> *id* (Scalia, J., concurring).

<sup>10</sup> *id* (Stevens, J., dissenting in part, concurring in part) (“The truth is we cannot be certain how a law such as BCRA §203 meshes with the original meaning of the First Amendment. ... The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right...”).

<sup>11</sup> “Political Speech, Inc: The Bellotti Decision and Corporate Political Spending,” *Suffolk University Law Review* 13 (1979) (Quoting *The Federalist* No. 10 (James Madison) at 63-68 (E. Bourne ed. 1937)).

<sup>12</sup> Ian Speir, “Corporations, the Original Understanding, and the Problem of Power,” *Georgetown Journal of Law & Public Policy* 10 (2012) (quoting *Legislative and Documentary History of the Bank of the United States* 82 (M. St. Claire Clark & D. A. Hall eds., Wash., D.C., Gales & Seaton 1832)).

<sup>13</sup> Dale Rubin, “Corporate Personhood: How the Courts have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for



Individuals,” *Quinnipiac Law Review* 28 (2009-2010) (Letter from Thomas Jefferson to Dr. George Logan (Nov. 12, 1816)).

<sup>14</sup> Speir, 147.

<sup>15</sup> id at 115.

<sup>16</sup> id at 147.

<sup>17</sup> id at 169.

<sup>18</sup> id at 120.

<sup>19</sup> Id at 121.

<sup>20</sup> Adam Winkler, “Corporate Personhood and the Rights of Corporate Speech,” *Seattle University Law Review* 30 (2006-2007).

<sup>21</sup> *Citizens United*, 130 S. Ct. 876.

<sup>22</sup> id (Stevens, J., dissenting in part, concurring in part).

<sup>23</sup> id (Stevens, J., dissenting in part, concurring in part).

<sup>24</sup> Kang, 37.

<sup>25</sup> Jack M. Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011). See also Jack M. Balkin, “Framework Originalism and the Living Constitution,” *Northwestern University Law Review* 103 (2009).

<sup>26</sup> id

<sup>27</sup> David A. J. Richards, “Living Originalism by Jack M. Balkin,” *American Political Thought* 1 (Fall 2012).

<sup>28</sup> Randy E. Barnett, “Interpretation and Construction,” *Harvard Journal of Law and Public Policy* 34 (2010); Kermit Roosevelt III, Interpretation and Construction: Originalism and its Discontents,” *Harvard Journal of Law and Public Policy* 34 (2011).

<sup>29</sup> Jack M. Balkin, “Commerce,” *Michigan Law Review* 109 (2010-2011).

<sup>30</sup> “The Corporation and the Constitution: Economic Due Process and Corporate Speech,” *Yale Law Journal* 90 (1980-1981).

<sup>31</sup> Elizabeth Pollman, “Reconceiving Corporate Personhood,” *Utah Law Review* (2011).

<sup>32</sup> id at 1634.

<sup>33</sup> id

<sup>34</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

<sup>35</sup> Pollman, 1640.

<sup>36</sup> id at 1636.

<sup>37</sup> Rubin, 539.

<sup>38</sup> Pollman, 1640.

<sup>39</sup> Mary Lyn Stoll, “Corporate Rights to Free Speech?,” *Journal of Business Ethics* 58 (2005).

<sup>40</sup> “The Corporation and the Constitution: Economic Due Process and Corporate Speech,” 1845.

<sup>41</sup> Winkler, 865.

<sup>42</sup> Rubin, 555 (Chief Justice Waite stated: “The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution...applies to these corporations. We are all of the opinion that it does.”).

<sup>43</sup> *id* at 556.

<sup>44</sup> Pollman, 1647.

<sup>45</sup> Out of three hundred cases asserting 14<sup>th</sup> amendment protections from 1868 until 1900, two hundred and eighty-eight were filed by corporations, and twelve by black plaintiffs. Dale F. Rubin, “Citizens United v. Federal Election Commission: Corporate Personhood v. the Regulatory State,” *Administrative & Regulatory Law News* 35 (2009-2010).

<sup>46</sup> Pollman, 1655.

<sup>47</sup> William E. Forbath, “The New Deal Constitution in Exile,” *Duke Law Journal* 51 (2001-2002).

<sup>48</sup> Rubin, 535.

<sup>49</sup> Carl J. Mayer, “Personalizing the Impersonal: Corporations and the Bill of Rights,” *Hastings Law Journal* 41 (1989-1990).

<sup>50</sup> Rubin, 11.

<sup>51</sup> Larry E. Ribstein, “The Constitutional Conception of the Corporation,” *Supreme Court Economic Review* 4 (1994); Jeffrey Newsteruk, “Persons, Property, and the Corporation: a Proposal for a New Paradigm,” *DePaul Law Review* 39 (1989-1990); Pollman, 1629.

<sup>52</sup> *Citizens United*, 130 S. Ct. 876.

<sup>53</sup> *id*

<sup>54</sup> Michael C. Dorf, “The Marginality of Citizens United,” *Cornell Journal of Law & Public Policy* 20 (2010-2011). (Referring to Richard A. Briffault, “Corporations, Corruption, and Complexity: Campaign Finance After Citizens United,” *Cornell Journal of Law & Public Policy* 20 (2011) (“to focus on corporations as such misses the real story, which is the effect that large concentrations of wealth can have on politics—whether in the hands of corporations, other artificial entities, or natural persons”.)

<sup>55</sup> *id* (Roberts, J., concurring).

<sup>56</sup> “The Corporation and the Constitution: Economic Due Process and Corporate Speech,” 1834; “Political Speech, Inc: The Bellotti Decision and Corporate Political Spending,” 1023.

<sup>57</sup> *Citizens United*, 130 S. Ct. 876 (“At least since the latter part of the 19<sup>th</sup> century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in §304 of the Labor Management Relations Act. In passing this Act Congress overrode

the veto of President Truman, who warned that the expenditure ban was a ‘dangerous intrusion on free speech.’”)

<sup>58</sup> id

<sup>59</sup> id

<sup>60</sup> id (Stevens, J., concurring in part and dissenting in part).

<sup>61</sup> Daneil Hays Lowenstein, “Patternless Mosaic: Campaign Finance and the First Amendment after Austin,” *Capital University Law Review* 21 (1992).

### **Works Cited**

Bipartisan Campaign Reform Act, H.R. 2356, 107th Cong. (2002).

*Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

*Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

“The Court’s Blow to Democracy.” *New York Times*, Jan. 21, 2010.

Balkin, Jack M. *Living Originalism* (Cambridge, MA: Harvard University Press, 2011).

Baran, Jan Witold. “Stampede Toward Democracy.” *New York Times*, Jan. 25, 2010.

“Political Speech, Inc: The Bellotti Decision and Corporate Political Spending.” *Suffolk University Law Review* 13 (1979).

“The Corporation and the Constitution: Economic Due Process and Corporate Speech.” *Yale Law Journal* 90 (1980-1981).

Forbath, William E. “The New Deal Constitution in Exile.” *Duke Law Journal* 51 (2001-2002).

Balkin, Jack M. “Commerce.” *Michigan Law Review* 109 (2010-2011).

Barnett, Randy E. “Interpretation and Construction.” *Harvard Journal of Law & Public Policy* 34 (2010).

Bezanson, Randall P. “No Middle Ground? Reflections on the Citizens United Decision.” *Iowa Law Review* 96 (2010-2011).

Dorf, Michael C. “The Marginality of Citizens United.” *Cornell Journal of Law & Public Policy* 20 (2010-2011).

Hasen, Richard L. “Citizens United and the Illusion of Coherence.” *Michigan Law Review* 109 (2010-2011).

Kang, Michael S. “The End of Campaign Finance Law.” *Virginia Law Review* 98 (2012).

Lowenstein, Daneil Hays. “Patternless Mosaic: Campaign Finance and the First Amendment after Austin.” *Capital University Law Review* 21 (1992).

Pollman, Elizabeth. “Reconceiving Corporate Personhood.” *Utah Law Review* (2011).

Mayer, Carl J. “Personalizing the Impersonal: Corporations and the Bill of Rights.” *Hastings Law Journal* 41 (1989-1990).

- Newsteruk, Jeffrey. "Persons, Property, and the Corporation: a Proposal for a New Paradigm." *DePaul Law Review* 39 (1989-1990).
- Ribstein, Larry E. "The Constitutional Conception of the Corporation." *Supreme Court Economic Review* 4 (1994).
- Richards, David A. J. "Living Originalism by Jack M. Balkin." *American Political Thought* 1 (Fall 2012).
- Roosevelt III, Kermit. "Interpretation and Construction: Originalism and its Discontents." *Harvard Journal of Law & Public Policy* 34 (2011).
- Rubin, Dale F. "Citizens United v. Federal Election Commission: Corporate Personhood v. the Regulatory State." *Administrative & Regulatory Law News* 35 (2009-2010).
- Rubin, Dale. "Corporate Personhood: How the Courts have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals." *Quinnipiac Law Review* 28 (2009-2010).
- Speir, Ian. "Corporations, the Original Understanding, and the Problem of Power." *Georgetown Journal of Law & Public Policy* 4 (2012).
- Stoll, Mary Lyn. "Corporate Rights to Free Speech?" *Journal of Business Ethics* 58 (2005).
- Stone, Geoffrey R. "Citizens United and Conservative Judicial Activism." *University of Illinois Law Review* (2012).
- Weissman, Robert. "Let the People Speak: the Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment." *Temple Law Review* 83 (2010-2011).
- Winkler, Adam. "Corporate Personhood and the Rights of Corporate Speech." *Seattle University Law Review* 30 (2006-2007).

## **A Man's Gun is His Castle?: Reexamining the Implications of Incorporating the Second Amendment**

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### **Abstract:**

*The Castle Doctrine is a combination of two common law theories: each individual is entitled by natural right to use force to defend (a) one's self and (b) one's home. Together, these principles, each recognized as a defense against prosecution for the use of force by English common law, allow for a home dweller to use deadly force upon a home intruder and abrogate the home dweller's duty to retreat. The Castle Doctrine is not necessarily recognized by all U.S. states, and is only a guaranteed right in those states that have codified the Castle Doctrine in statutory law. I argue that the authority of the Castle Doctrine as an exonerative defense for the use of deadly force upon a home intruder in the United States has become substantially enhanced in the wake of the Supreme Court's rulings in *DC v Heller* (544 US 570 (2008)) and *McDonald v Chicago* (561 US 3025 (2010)). In a strict legal sense, these cases applied the Second Amendment's protection of gun ownership to the individual states; but the reasoning the Court employed suggests much more. Here, I argue that the Court's incorporation of *Heller's* reading of the 2nd Amendment to the individual states through the 14th amendment's Due Process Clause has created an opening for a federalized Castle Doctrine defense in states that have not previously recognized any such doctrine. I explore the reasoning of the majority in both *Heller* and *McDonald* to explain (a) how the right to keep and bear arms is judicially constructed, and thus how (b) the purposes for which one may bear arms under the 2nd Amendment establishes a line of reasoning along which the 2nd Amendment's scope and application may be expanded to justify the use of deadly force with a firearm.*

## I. Introduction

The recent decisions of *District of Columbia v Heller*<sup>1</sup> and *McDonald v City of Chicago*<sup>2</sup> have established that the Second Amendment right to keep and bear arms exists for the individual purpose of self-defense, and consequentially, have given rise to the reasonable expectation that gun control issues that have remained relatively dormant in recent political debate will increasingly accommodate the pro-gun agenda. The purpose of this paper is to explore how far these expectations can be met with respect to the justified use of self-defense with a firearm. Because the Court relies overwhelmingly upon the understanding of self-defense in the common law tradition, it has left open a doorway through which statutes conventionally associated with common law<sup>3</sup> might now be understood as having constitutional authority. I will apply inferential analysis to *Heller*'s judicial construction of the Second Amendment and will argue that the reasoning employed by the majority in *Heller* and embraced by the majority in *McDonald* suggests that a fundamental kinship exists between the Second Amendment and the so-called Castle Doctrine. This kinship could be used to establish a constitutional linkage between statutorily-defined justifiable uses of self-defense within one's home and the Second Amendment, so long as the self-defense is carried out with a firearm.

The practical implications of the holdings in both *Heller* and *McDonald* have been widely discussed within both the academic and political spheres. If nothing else, *Heller* and *McDonald* reinvigorated the contemporary political discourse over the legitimacy, desirability, and importance of personal firearms for purposes of self-defense. In raising these questions, *Heller* and *McDonald* also ignited a scholastic debate over the legal background of the Second Amendment and the presumed foundation of the Court's construction of a constitutional right guaranteeing self-defense. This scholastic discourse has focused largely on areas such as the implications of *Heller* and *McDonald* on legal provisions concerning concealed-carry rights,<sup>4</sup> the relationship between citizenship rights and the Second Amendment,<sup>5</sup> and the ramifications that incorporating the Second Amendment may have upon the individual states and future constitutional development.<sup>6</sup> The definitive commonality inherent within the post *Heller-McDonald* Second Amendment discourse is the Court's association between the common law conception of the use of force and the Second Amendment. This association leads some to argue that *Heller* effectively constitutionalized a general right to self-defense.<sup>7</sup> However, the philosophical underpinnings of *Heller*'s construction of the Second Amendment suggest that it codifies a specific theory of self-defense, namely the Castle Doctrine. The Castle Doctrine is the combination of two distinctive common law theories: defense of habitation and self-defense.<sup>8</sup> Together, these theories provide that each individual is entitled by natural right to use force to protect (a) one's self and (b) one's home. These principles, each recognized by English common law as a defense against prosecution for the use of force, allow for a home dweller to

use deadly force upon a home intruder and abrogate the home dweller's duty to retreat.<sup>9</sup>

Here, I consider the specificity of this theory of self-defense seriously and reexamine the Second Amendment with an acute focus on the relationship between the underlying moral and philosophical principles of the decision in *Heller* and those of the Castle Doctrine as understood in English common law. I will show that the line of reasoning opened in *Heller* to explain the constitutional purposes of the right to gun ownership indicates a trajectory for the Second Amendment which may cause state courts that fail to recognize a Castle Doctrine defense to run afoul of federally protected constitutional principles.

This paper proceeds in four parts. Part II discusses the moral and philosophical foundations of the Castle Doctrine, particularly with respect to the concepts of the duty to retreat and necessity and proportionality, as understood by the English common law.

Part III address the judicial interpretations of the Second Amendment in *Heller* and *McDonald*, and specifically how the Court's reasoning embraces an association between self-defense and gun ownership. It argues that the theoretical underpinnings of and justification for the Second Amendment mirror those of the Castle Doctrine, thus establishing a fundamental kinship between the two.

Part IV outlines the potential trajectory of incorporation of the Second Amendment. It relies on examples from accepted constitutional law, namely the incorporation of the First and Fourth Amendments, to demonstrate that the incorporation of constitutional amendments begins with the literal application of the law and evolves to provide protections for broader rights that reflect the law's supposed purposes. Part IV then returns to the Castle Doctrine, examining the ways in which it has expanded within statutory law in state legislatures throughout the United States. I use the fundamental kinship between the Castle Doctrine and the Second Amendment discussed in Part III to argue that the demonstrated expansion of the Castle Doctrine suggests a logical path for the future of the Second Amendment jurisprudence and legal innovations to come. Finally, this paper confronts the expansion of statutorily defined justifiable uses of self-defense and the political architecture currently in place through which the kinship between the Castle Doctrine and the Second Amendment established in *Heller* may become legally recognized. While this paper does not argue that the creation of this kinship was an intention of the majority in *Heller* or *McDonald*, it argues and concludes that holding that the Castle Doctrine is contained within the Second Amendment has the potential to create a constitutional shelter for the use of a firearm under circumstances not initially intended by the Court.

## II. Common Law Foundations of the Castle Doctrine

While the Court dedicates the largest portion of its discussion in *Heller* to the Second Amendment's prefatory clause, this paper deals chiefly with the practical implications of a constitutional protection predicated upon a purported fundamental right to the use of force. A justification for the prefatory clause of the Second Amendment carries with it little in the form of practical implications.

The historical legitimacy and logical consistency of the Court's analysis of the concept of a militia has little bearing upon the individual use of force within the home. As such, the philosophical discussion of the Anglo-American concept of militia does little more than mask the central component of the Second Amendment right established in *Heller*.

By logical necessity, the challenge to Washington, DC's handgun ban presented in *Heller* is a question of utility. The mere fact that the Court places at the heart of the Second Amendment a protection of the individual right to self-defense within the home allows for the reasonable conclusion that the discussion over whether one may lawfully possess a firearm unaffiliated with service in the state militia is judicial dicta. In other words, the question presented in *Heller* necessarily required a justification for "why" more so than it did "if." If the Second Amendment provides a protection for individual citizens to own firearms free from service in a state militia is not a simple matter of yes or no; a complete assessment of the constitutional question presented in *Heller* required the Court also to justify *why*. Here, it is the Court's answer to *why* the Second Amendment protects the individual's right to own firearms free from service in the militia that is of principle concern. Therefore, the context of the decision in *Heller* considered here accepts the Court's answer to *if* in order to provide a more focused examination of the implications of the Court's answer to *why*.

Although the Castle Doctrine fuses the common law protections of defense of habitation and self-defense together, providing that each individual is entitled by natural right to use force to protect (a) one's self and (b) one's home, the combined rationale and effect of these two common law theories, which together constitute the Castle Doctrine,<sup>10</sup> have inherent and distinctive differences. The defense of habitation is rooted in the idea that one's home is one's castle that one holds most sacred, and that the individual is therefore entitled by natural right to protect it.<sup>11</sup> This defense extends to the use of deadly force, so long as deadly force is used to prevent the commission of a felony within one's personal dwelling.<sup>12</sup> That force must be used to prevent the commission of a violent felony is not necessarily required; however, a forcible felon must be present, and the right does not extend to mere trespass.<sup>13</sup> The common law theory of self-defense, on the other hand, provides that one may meet force with force, so long as one has retreated until one can no longer, or if one has no other available means of immediate resolution. Thus, defense of habitation is a right of property, whereas self-defense is a right of body. Through the integration of these two theories, the Castle Doctrine serves as a legal



protection for the use of force in defense of both body and property within the confines of the home.

### **A. The Duty to Retreat**

Although English common law required individuals to retreat before acting in self-defense, this was seldom required within the walls of the home.<sup>14</sup> Here, both the defense of habitation and self-defense rely upon an absolute distinction between public and private areas. Since, by logical necessity, the defense of habitation functions to allow an inhabitant to use deadly force to prevent the commission of a felony within one's own home, it would be impractical for the inhabitant to be required to flee.<sup>15</sup> Such a requirement would be counterproductive to the right, and consequently, render it meaningless. The privacy of one's personal dwelling offered a similar immunity from the duty to retreat for the justified use of self-defense under English common law. Because, as William Blackstone writes, "the law of England has so particular and tender a regard to the immunity of a man's house, that it considers it his castle, and will never suffer it to be violated with impunity,"<sup>16</sup> the duty to retreat is abrogated within the walls of the home. Thus, the use of self-defense, even to the extent of deadly force, against home intruders, without an obligation to retreat, was permitted and justified under the English common law within the walls of home.

The Castle Doctrine sits at the intersection of these two defenses.<sup>17</sup> By its strict language and historical meaning, the defense of habitation abrogates the duty to retreat within the home. With the combination of the defense of habitation and the right to deadly force as a means of self-defense within the home, the Castle Doctrine removes the prerequisite that an individual must retreat from his assailant before resorting to deadly force under the belief that occupying one's home is, essentially, equivalent to the Blackstonian requirement of "retreating to the wall."<sup>18</sup>

### **B. Necessity and Proportionality**

The general privilege of self-defense as a justification for the use of deadly force under the English common law is limited by the doctrine of necessity.<sup>19</sup> Following the rationale of the duty to retreat, this limitation of the right to self-defense requires that deadly force be used only in times of absolute necessity, such as when one's back is to the wall. However, both the doctrines of defense of habitation and self-defense accept the confines of one's dwelling as the general exception to this rule. When occupying the confines of one's home, one is considered to have already retreated "to the wall,"<sup>20</sup> and therefore necessity of self-defense within the walls of one's home is presumed.<sup>21</sup>

However, the defense of habitation and self-defense rely on distinctly disparate concepts of proportionality. Self-defense is based on one's right to protect oneself from the threat of physical violence: meeting force with force. Defense of habitation, on the other hand, is rooted in the natural right for one to

defend one's home against violation and intrusion.<sup>22</sup> While self-defense can be seen as a proportional response—if one reasonably believes there is an immediate threat to grievous bodily injury, one may be justified in using deadly force to defend against such threat—the defense of habitation can be understood as an exception to the requirement of proportionality. Instead of meeting force with force, the defense of habitation is, essentially, meeting a perceived felonious act, regardless of actual threat of death or grievous injury, with deadly force; “thus, apparently, the harm inflicted may be disproportional to the harm threatened.”<sup>23</sup> Therefore, the Castle Doctrine's combination of self-defense with the defense of habitation blurs the requirement of proportionality, providing a justification for the use of deadly force for home dwellers protecting (a) themselves from physical violence, and (b) their proprietary interests.

### **III. *Heller* and the Castle Doctrine**

*District of Columbia v Heller* marks the first case in nearly seventy years in which the Court directly examined the central meaning of the Second Amendment and the constitutional guarantees it protects.<sup>24</sup> The case challenged the District of Columbia's prohibition on privately owned handguns. Under the handgun ban, DC residents were required to obtain a special license from the chief of police in order to possess a handgun, and all privately owned firearms were required to be kept unloaded, disassembled, or trigger-locked.<sup>25</sup> After being denied a license to keep a handgun in his home for the purpose of self-defense, Dick Heller, a DC resident and security guard, challenged this law on the grounds that the licensing and trigger-lock requirements violated the Second Amendment.<sup>26</sup> In resolving this dispute the Court was obliged to answer: (a) whether the DC handgun ban was a legitimate form of gun regulation under the Second Amendment, and (b) whether the Second Amendment guarantees an individual right to gun ownership.

By positing at the heart of the Second Amendment the right to self-defense within the home, *Heller* relied upon basic tenets of American law most commonly found within codified self-defense statutes—in particular state statutes creating a Castle Doctrine defense—in order to recognize[?] a lawful purpose for an individual citizen to possess a firearm. The majority opinion, authored by Justice Antonin Scalia, is broken into four parts. Part I is primarily judicial dicta, discussing only the facts of the case before the Court. Part II addresses, with little bearing on the outcome of the case, the historical relationship between the prefatory and operative clauses of the Second Amendment.<sup>27</sup> Part III explains the historical exceptions to the types of arms that may be lawfully possessed and the persons who could possess them. It is not until Part IV that the majority opinion addresses the law at issue, the District of Columbia's handgun ban, and justifies *why* the Second Amendment protects the individual right to possess a firearm. To this point the Court held:

The inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for *defense of self, family, and property* is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of *one’s home* and family,” would fail constitutional muster.<sup>28</sup>

The Court’s pointed explanation for *why* the Second Amendment protects the individual right to keep and bear arms unaffiliated with service in the militia emphatically relies on the same set of rationales that underpin the Castle Doctrine. Most explicitly, as the Court establishes early in the opinion<sup>29</sup> and again in Part IV, is “the inherent right of self-defense,” particularly, “for protection of one’s home.” This language suggests that the right to gun ownership is protected in order to satisfy (a) one’s personal safety, and (b) the successful protection of one’s proprietary interests.

These protections are rooted in distinctly disparate theories. First, the common law theory of self-defense provides, and always has provided, that one has the justified right to use deadly force in the face of clear and present danger.<sup>30</sup> Although this right has been limited by the doctrine of necessity and the duty to retreat, the English common law accepted a man’s home as an area of unique vulnerability, and consequently abrogated these limitations within the walls of the home. The reason for the exception to these limitations differs between the doctrine of self-defense and the defense of habitation. English common law considered a man occupying his home as having already retreated “to the wall”: that is, to an area of privacy not within the public domain. By having already retreated as far as the law could reasonably expect, necessity, therefore, is presumed to justify self-defense within the walls of the home. Thus, in the face of threats of grievous bodily injury or death from intruders, self-defense, to the extent of deadly force, was considered justified if the victim was assailed within the walls of his own home.

Not unlike the Castle Doctrine itself, *Heller* blurs the distinctions between these two rationales. Simply construing the Second Amendment to provide an individual right to gun ownership for the purposes of self-defense in the home would not be beyond the scope of the doctrine of self-defense. However, construing the Second Amendment to provide an individual right to gun ownership for purposes of self-defense and “for protection *of* one’s home,”<sup>31</sup> links self-defense and defense of habitation together. The right to use force for the protection of one’s home indubitably establishes an underlying right to protect one’s proprietary interests. The distinction between “of” and “in” is of utmost importance due to the implication that either use has upon the moral and philosophical underpinnings of the Second Amendment. “In” the home has moral and philosophical underpinnings rooted in the concepts that one may

respond to imminent danger with force, and that he who occupies his home has retreated from public society and therefore has the privilege of non-retreat. “Of” the home has its moral and philosophical underpinnings in the concept that one may use force to protect from unlawful activity that may affect one’s property.

Thus, *Heller*’s construction of the Second Amendment creates a constitutional right to possess a firearm for the purposes of defending both one’s body and one’s proprietary interests.

### **A. Necessity and Proportionality in *Heller***

Although it may be enough to conclude that necessity is presumed in *Heller*’s reading of the Second Amendment due to the majority’s reliance upon the rationales of the doctrines of self-defense and defense of habitation, the Court goes further and suggests that the Second Amendment provides for “immediate self-defense.”<sup>32</sup> Here, immediacy and necessity should be treated as equivalents. Certainly, if one is guaranteed the right to possess a firearm for immediate self-defense, the defense is presumed to be necessary. Moreover, the Court’s use of “immediate self-defense” is in the context of DC’s ban on operable handguns within the home, which further reinforces the notion that the use of force within the home is unrestricted by the doctrine of necessity under the Second Amendment.

The concept of proportionality under *Heller*’s interpretation of the Second Amendment further exacerbates the disproportionate use of force in the Castle Doctrine. The doctrines of self-defense and defense of habitation, either separately or combined as the Castle Doctrine, provide for the use of deadly force under a specific set of circumstances. Obviously, because these common law theories provide protections for the use of deadly force, they also protect the use of lesser force under the same circumstances. *Heller*, however, ties these common law theories directly to the use of a firearm. Firearms have been generally accepted as a tool primarily intended for deadly force, and several state constitutions define deadly force to include the firing of a firearm towards another person.<sup>33</sup> If *Heller*’s justification for individual gun ownership under the Second Amendment is grounded in the rationales of self-defense and defense of habitation, then it also implicitly transforms the proportionality requirements of these protections. Consequently, according to the *Heller* majority, all force used in the name of self-defense within one’s home or in the defense of one’s home is not only protected by the Second Amendment, but in particular, deadly force is protected by the Second Amendment due to the fundamental purpose of firearms as a tool of self-defense. Thus, because the majority in *Heller* bases the right to own a handgun on the idea that guns are the “quintessential self-defense weapon,”<sup>34</sup> the fact that guns are primarily implements of deadly force is fundamental to *Heller*’s reading of the Second Amendment.

## **B. Second Amendment and Castle Doctrine Kinship**

It is axiomatic that “A constitutional right implies the ability to have and effectuate that right.”<sup>35</sup> Inherent within the right to possess tools of deadly force to protect one’s self and one’s home is the right to use deadly force in order to effectuate that right. Moreover logic dictates that no right can be granted by the Constitution for an unlawful or unjustifiable purpose. Thus, by the Supreme Court granting the right to firearm possession for self-defense within the home and for defense of the home, the right to use a firearm to pursue such defenses is necessarily justified.

The Court’s construction of the Second Amendment in *Heller* has a moral and philosophical foundation fundamentally identical to that of the common law understanding and lawful intentions of the Castle Doctrine. The depth of this common identity creates a fundamental kinship between the Second Amendment and the Castle Doctrine. The linkage that the majority in *Heller* creates becomes increasingly clear from the evidence Justice Scalia provides in order to reconstruct the Second Amendment’s meaning. “There is more evidence in the majority opinion establishing the existence of a common law right of self-defense than there is demonstrating that such a right was constitutionalized by the Second Amendment’s eighteenth-century ratifiers.”<sup>36</sup> Because the right to armed self-defense posited in *Heller* stands on fundamental common law ideas, namely defense of self and defense of dwelling,<sup>37</sup> the Court not only created a powerful association between the Second Amendment and English common law, but also suggested an inherent sameness between the two by employing language identical in rationale and effect to these specific common law theories.

This specificity raises particularly dubious consequences. Whether one accepts *Heller* as good, bad, or somewhere in between, the constitutional freedom it provides creates a set of peculiar problems to understanding self-defense. The right to self-defense is, and always has been, a right guaranteed to any citizen in the face of present danger.<sup>38</sup> To this point many scholars cite Justice Oliver Wendell Holmes’ oft-quoted declaration that “detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>39</sup> [Legal qualifiers such as a specific tool of force not sure exactly what this means] have not limited this right. However, by codifying the right to self-defense within the vice of the Second Amendment, *Heller* establishes a unique set of qualifiers that, while they may not necessarily limit the right to self-defense, place those brandishing a firearm under a constitutional shelter not enjoyed by those without a firearm.

There is no question that the Constitution and the freedoms it provides are the supreme law of the land. As such, rights granted by the Constitution to individual citizens are the most secure legal shelter within the American scheme of ordered liberty. With *Heller*’s transmogrification of a common law principle into a constitutional guarantee, self-defense, so long as it is pursued with a

firearm, carries constitutional gravity, whereas self-defense pursued with any other implement of force is not. In establishing this constitutional guarantee, *Heller* disproportionately disadvantages those who do not possess a firearm. Thus, at a fundamental level, the *Heller* court established a disproportional application of the common law within our constitutional democracy.

The disproportionate effect *Heller* creates, by prescribing a specific tool of force the Constitution now guarantees may be used for self-defense, is further exacerbated by the core value with which the Court reads the Second Amendment. *Heller* declares that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>40</sup> In so holding, the Court constricts the application of its decision to the home. However, *Heller*’s holding can be seen to rely so fundamentally on theories associated with English common law that it creates a right not to any self-defense, but to a specific theory of self-defense, namely the Castle Doctrine. Together, the use of common law evidence and the specific application of and justification for *Heller*’s reading of the Second Amendment create an indubitable kinship between the authority of the Castle Doctrine and the right to possess firearms under the Second Amendment. Because the majority in *Heller* constitutionalizes the common law understanding of the Castle Doctrine defense within Second Amendment doctrine, this kinship has the potential to allow Castle Doctrine statutes within individual states to gain constitutional authority through the Second Amendment. As such, *Heller* creates the possibility of a constitutionally recognized Castle Doctrine defense predicated on the use of a firearm.

#### **IV. *McDonald* and the Trajectory of Incorporation**

While *Heller* posits a Second Amendment right that veers away from any affiliation with service in state militias, its sister case, *McDonald v Chicago*, extends and fortifies the reach of *Heller*’s “central component”<sup>41</sup> of an individual right to armed self-defense. Because of DC’s unique status as a federal enclave, the central holding in *Heller* was only applicable to the federal government. Not unlike the DC handgun ban, a Chicago ordinance “effectively bann[ed] handgun possession by all private citizens.”<sup>42</sup> In light of *Heller*’s strict language, gun proponents in Illinois challenged Chicago’s similar handgun ban, arguing that the law left Chicago residents “vulnerable to criminals”<sup>43</sup> and that it violated the Second and Fourteenth Amendments. The dispute presented in *McDonald* thus questioned whether *Heller*’s reading of the Second Amendment applied equally to the states.

Relying on the Second Amendment protection recognized in *Heller*, the *McDonald* court determined that the individual right to armed self-defense, particularly within the home, is a fundamental characteristic of our scheme of ordered liberty and therefore applies equally to both the federal and state governments through the Due Process Clause of the Fourteenth Amendment.<sup>44</sup>

Although *Heller*'s reading of the "core" purpose of the Second Amendment constitutes an aggressive departure from the Court's previous treatment of the right, *McDonald*'s incorporation of this right against the individual states is particularly unorthodox. When considering the incorporation of individual rights, there are several important qualifications one must keep in mind: What legislative barriers, if any, does the purported fundamentality of the individual right to self-defense create for our scheme of ordered liberty? How wide, if at all, is the range of state action that will be struck down? How might this right come to be seen in the future? In answering these questions, one should keep in mind that the history of incorporation tends to turn only one way: when a right is incorporated into constitutional doctrine, it is seldom scaled back, and more likely continues to expand.

The tendency for incorporated rights to function like a ratchet—turning in only one direction that has any meaningful effect—is a familiar principle of constitutional interpretation. The propensity for constitutional protections to expand after incorporation can be seen to begin with the literal application of a law and evolve to provide protections of the broader rights that reflect the law's supposed purpose.

Consider, for example, the historical trajectory of the incorporation of the First and Fourth Amendments. In the Court's 1925 ruling in *Gitlow v New York*, the First Amendment's guarantee of free speech and freedom of the press gained recognition as "fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states."<sup>45</sup> Here, the First Amendment began as a fundamental guarantee of free political speech. This protection was later expanded to include "symbolic acts," which were held "akin to pure speech,"<sup>46</sup> as well as both emotive and cognitive expression.<sup>47</sup> The establishment of a First Amendment protection for speech as conduct provided a constitutional harbor for a wide range of actions, including displaying a red flag in protest,<sup>48</sup> union picketing,<sup>49</sup> and burning flags in public protest.<sup>50</sup> While considering conduct, as speech Justice William Brennan famously opined, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>51</sup> This "bedrock principle" became the judicially recognized underpinning for the First Amendment, reading beyond the Amendment's literal meaning and bringing many new ideas into its sphere.

The First Amendment came to include not only individual political expression, but also both commercial and, most recently, corporate expression. In consecutive cases in 1976<sup>52</sup> and 1977,<sup>53</sup> the Court initiated the idea that "speech does not lose its First Amendment protection because money is spent to project it."<sup>54</sup> Ultimately, the First Amendment has evolved to become the guardian for corporate expression under *Citizens United v Federal Election*

*Commission*, which fundamentally redefined campaign finance laws, allowing ideas to “compete in th[e] marketplace without government interference.”<sup>55</sup>

The protection from unreasonable search and seizure guaranteed by the Fourth Amendment followed a similar expansion. This protection was first incorporated in 1949, when the Court held in *Wolf v Colorado* that the security of one’s privacy is “implicit in the concept of ordered liberty, and as such enforceable against the states.”<sup>56</sup> Initially, the expectation of privacy was limited to the walls of the home or office. This conception later changed in the Court’s ruling in *Hoffa v US*, which held, “what the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile.”<sup>57</sup> The Court’s ruling in *Hoffa* not only extended the areas in which the Fourth Amendment applies, but also widened the Amendment’s scope to include “oral statements,” creating a protection for things that are “not tangibles.”<sup>58</sup> Most recently, the Fourth Amendment has been held to bar the unwarranted recording of oral statements,<sup>59</sup> the unwarranted search of a traveler’s personal luggage,<sup>60</sup> and evidence obtained by “sense-enhancing technology,”<sup>61</sup> thus further stratifying the legal distinction between public and private spaces.

## V. The Potential Trajectory of the Second Amendment

Here, my argument departs from the current Second Amendment discourse and focuses on the implications of the Court’s line of reasoning for *why* one may possess a firearm, rather than *if* they may. The *Heller* court’s reading of the Second Amendment is necessarily limited by the scope of the law under review, which explicitly placed limitations upon the private possession of firearms within one’s home. However, the current Second Amendment battle confronts not only if one may *keep* arms, but if they may also *bear* arms. Together, *Heller* and *McDonald* provide a sweeping categorical answer to the former, and although the majority in both cases fails to provide any standard of review for the future of Second Amendment doctrine, these two cases offer little indication that the future of the Second Amendment will be determined by anything other than a categorical application of the right.<sup>62</sup> Despite the fact that *Heller* has led some to argue that the core value of the Second Amendment has been left unclear,<sup>63</sup> if one accepts the majority’s explicit, albeit at times contradictory, language in *Heller* and *McDonald*, the potential trajectory of the Second Amendment may be predicted to include consequences not intended by the *Heller* and *McDonald* courts. That is, *Heller* and *McDonald* embrace above all else a “basic”<sup>64</sup> and “inherent”<sup>65</sup> right to armed self-defense as the “central component of the Second Amendment.”<sup>66</sup> Thus, the future of Second Amendment doctrine, whatever that may be, will likely rest within a vice of categorical reasoning predicated on a right to armed self-defense.



*Heller* hardly represents the first time that the Supreme Court has incorporated a constitutional right against the states. Therefore, it is unlikely that the Second Amendment will prove dissimilar from other protections contained within the Bill of Rights that have also been incorporated. Although I do not explore the development of categorical reasoning within the constitutional evolution of the First and Fourth Amendments, if one keeps in mind the historical evolution of the First and Fourth Amendments more generally, one must consider seriously how the Second Amendment's right to armed individual self-defense might come to look. In this general regard, *Heller's* right to individual self-defense with a firearm, particularly within the home, might ultimately follow the same pathway as the Castle Doctrine. Remembering the fundamental kinship between *Heller's* reading of the Second Amendment and the common law theory of the Castle Doctrine discussed in Part III, a logical trajectory for *why* the Second Amendment protects an individual right to self-defense is one that mirrors the expansion of the Castle Doctrine within the statutory codes of the individual states.

In order to provide a brief but meaningful example with which this phenomenon may be illustrated, I turn here to recent legislative developments in Texas. In 2007, the Texas Legislature overwhelmingly passed an amendment to the Texas Penal Code, which, in both rationale and effect, grants the privilege of non-retreat to areas outside the confines of one's private dwelling if an actor (a) has a lawful right to be in a given location, (b) did not provoke the attack against which he is using self-defense, and (c) was not engaged in criminal activity at the time of the confrontation.<sup>67</sup> The 2007 amendment also prescribes the circumstances under which the use of deadly force in an act of self-defense is justified, establishing the following lawful uses of deadly force:

to protect the actor against the other's use or attempted use of unlawful deadly force; or

to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.<sup>68</sup>

With the addition of these amendments, the Texas Penal Code now also includes a subset of circumstances under which using force in self-defense is presumed to be reasonable.<sup>69</sup> Among others, this includes if the actor:

(1) knew or had reason to believe that the person against whom deadly force was used:

(a) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment...<sup>70</sup>

The expansion of the circumstances and areas in which the use of deadly force is justified within the Texas Penal Code stands on common law terrain similar to that of the Castle Doctrine. The Castle Doctrine relies on a distinction between areas that are public and those that are private; these

amendments appear to maintain a similar distinction by referring to one's personal vehicle and place of business. By abrogating the duty to retreat from these areas, these amendments suggest an implicit understanding that one's vehicle and place of business are areas of acute vulnerability. As such, these amendments are connected to the common law conception that one has reasonably "retreated to the wall" in primarily private areas, which, in this case, extend beyond the walls of the home to include one's vehicle and place of business.

Furthermore, not unlike the Castle Doctrine, the circumstances under which one may use deadly force resemble a right to both bodily integrity as well as a right of property. These rights are indubitably clear, as stated in the above section (B): "to prevent...murder...or robbery," in particular. Certainly, an individual who takes action to prevent a murder is acting in self-defense or acting to preserve bodily integrity, whereas one who acts to prevent a robbery is acting to protect proprietary interests. More important, however, are the areas in which deadly force is presumed to be reasonable, outlined in the above subset (1)(a). This subset codifies not only the traditional understanding of the Castle Doctrine as a protection reserved to the confines of the home, but also expands the protection of the Castle Doctrine to one's vehicle and place of business or employment. Within these areas, the duty to retreat is not only abrogated, but a presumption of reasonableness creates an inherent assumption of necessity. Furthermore, by specifically codifying a right to *deadly* force, a presumption of proportionality exists for uses of deadly force within these areas.

Recalling, in particular, the fundamental kinship between *Heller's* explanation for *why* the Second Amendment exists as an individual right and the Castle Doctrine, the expansion of the Castle Doctrine exemplified by the 2007 amendments of the Texas Penal Code may be particularly insightful for the potential future of Second Amendment doctrine. *Heller's* reading of the Second Amendment relies on a historically accepted distinction between public and private areas. By logical necessity, this same distinction rests at the very core of the Castle Doctrine. However, as the Texas Penal Code demonstrates, this distinction may be blurred, and private areas may be held to expand beyond the walls of the home. As such, *Heller's* categorical answer to *why* the Second Amendment is an individual right may logically expand to include areas such as one's vehicle or place of business, thus emboldening both the rights of body and of property posited by the *Heller* court. Whether *Heller's* construction of the Second Amendment creates a right to armed self-defense outside of the home has yet to be addressed by the Supreme Court. However, it is clear that the underlying common law tenants of, and categorical basis for, *Heller's* individual right to self-defense render the task of operationalizing *Heller's* reading of the Second Amendment beyond the walls of the home particularly problematic.

Because the majority's reasoning in *Heller* and *McDonald* relies on theories traditionally understood as the common law rights of self-defense and

defense of habitation, the future standard of review for Second Amendment jurisprudence may very well be one that recognizes, and perhaps even highlights, an association between an individual's bodily integrity and proprietary interests.

## **VI. Conclusion**

This paper has explored a potential trajectory of Second Amendment doctrine from constitutional recognition of a right to gun ownership to constitutionally justified uses of deadly force. The most immediate and particularly concerning implication of *Heller's* reading of the Second Amendment and *McDonald's* incorporation of the same is the potential for a constitutionalized Castle Doctrine defense that would be judicially recognized in states that have not previously recognized any form of the Castle Doctrine.

The connection that the Court's reasoning draws between the Second Amendment and the Castle Doctrine has remained dormant thus far. However, given the current power enjoyed by political pro-gun organizations like the National Rifle Association, which have a refined and successful agenda for expanding legally justified uses of deadly force in state laws,<sup>71</sup> this potential development of the constitutional linkage created in *Heller* may very well come to fruition. Ultimately, if the states cannot ban gun ownership because *Heller* constitutionalized the major theoretical underpinnings of the Castle Doctrine through the Second Amendment, then a state court that fails to recognize a Castle Doctrine defense presented by a defendant who used a firearm in defense of his "hearth and home" may run afoul of federally protected constitutional principles.

Beyond this potential development, this potential trajectory of Second Amendment jurisprudence raises several other problematic questions that must be addressed. Remembering that *Heller's* construction of the Second Amendment recognizes a right to defend both oneself and one's property at a fundamental level without explicitly suggesting that a threat of physical violence must be present to invoke the Second Amendment to defend the latter, could an actor invoke the protection of the Second Amendment if he shoots someone who tries to steal his wallet, or any other such personal property, in a public space? Will a constitutionally recognized right to firearm possession in public that is predicated on a right to individual self-defense indirectly incentivize actors to stand their ground in cases of public confrontation? What will become of the concepts of necessity and proportionality if the Second Amendment fundamentally protects the right to brandish, and thus theoretically use in self-defense, a tool of deadly force, particularly in public?

These, among others, are questions that must be considered as we wait to see how the Court will apply *Heller's* line of reasoning in future Second Amendment jurisprudence.

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<sup>1</sup> *District of Columbia v Heller*, 544 US 570 (2008).

<sup>2</sup> *McDonald v City of Chicago*, 561 US 3025 (2010).

<sup>3</sup> Reva B. Siegel, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. V. Heller: Heller & Originalism's Dead Hand - In Theory and Practice*, 56 UCLA L. Rev. 1399 (2009).

<sup>4</sup> See, for example, Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585 (2012).

<sup>5</sup> See, for example, Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 NYU L. Rev. 1521 (2010).

<sup>6</sup> See, Joseph Blocher, *Rights To and Not To*, 100 Cal. L. Rev. 761 (2012); see also, Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (2011).

<sup>7</sup> Siegel, *supra*, and Gulasekaram, *supra*.

<sup>8</sup> Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq. L. Rev. 653, 665 (2003).

<sup>9</sup> Benjamin Levin, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 Harv. J. on Legis. 523, 536 (2010).

<sup>10</sup> *id* at 530

<sup>11</sup> Carpenter, *supra*; see also *State v Carothers*, 594 NW2d 897, 900 (Minn. 1999) (citing *State v Touri*, 112 NW 422, 424 (1907)).

<sup>12</sup> *id*

<sup>13</sup> Sarah Pohlman, *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 St. Louis L. J. 857, 859 (2012).

<sup>14</sup> Lydia Zbrzezni, *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 Fl. Coastal L. Rev. 231, 235 (2012).

<sup>15</sup> *State v Blue*, 565 SE2d 133, 138 (NC 2002) (citing *State v Miller*, 148 SE2d 279, 281 (NC 1966)).

<sup>16</sup> William Blackstone, 4 *Commentaries On the Laws of England* 223 (1822) (Wayne Morrison ed., Cavendish Publishing 2001).

<sup>17</sup> Carpenter, *supra*, at 665.

<sup>18</sup> Pohlman, *supra*, at 860.

<sup>19</sup> Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 Rutgers J. of L. & Pub. Pol'y 504, 505 (2007).

<sup>20</sup> Pohlman, *supra*, at 860.

<sup>21</sup> Catalfamo, *supra*, at 530.

<sup>22</sup> Carpenter, *supra*.

<sup>23</sup> Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. Ill. L. Rev. 1, 9 (1999).

<sup>24</sup> Greenhouse, Linda, “Justices to Decide on Right to Keep Handgun,” *The New York Times*.

<http://www.nytimes.com/2007/11/21/us/21scotus.html?pagewanted=all> (accessed January 11, 2013).

<sup>25</sup> *Heller*, *supra*, at 575.

<sup>26</sup> *id*; Barnes, Robert, “Justices To Rule On D.C. Gun Ban,” *The Washington Post*.

[http://www.washingtonpost.com/wpdyn/content/article/2007/11/20/AR2007112000893\\_2.html#trove-tab-2](http://www.washingtonpost.com/wpdyn/content/article/2007/11/20/AR2007112000893_2.html#trove-tab-2) (accessed October 11, 2012).

<sup>27</sup> Again, the purpose of this paper is not to explore the legitimacy of the relationship between the prefatory and operative clauses of the Second Amendment, the goal is to explore the implications of *why* the Court suggests this relationship exists.

<sup>28</sup> *Heller*, *supra*, at 628-629. Emphasis added.

<sup>29</sup> *id* at 592

<sup>30</sup> *Beard v United States*, 158 US 550, 559 (1895).

<sup>31</sup> *Heller*, *supra*, at 628-629. Emphasis added.

<sup>32</sup> *id* at 635

<sup>33</sup> Consider, for example, Florida’s legal definition of deadly force under Chapter 776, section 6 of Florida Statutes: “(1) The term ‘deadly force’ means force that is likely to cause death or great bodily harm and includes, but is not limited to: (a) the firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm...”

<sup>34</sup> *Heller*, *supra*, at 629.

<sup>35</sup> David I. Caplan & Sue Wimmershoff-Caplan, *Armed Standoff: The Impasse in gun Legislation and Litigation: Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments – and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073, 1105 (2005).

<sup>36</sup> Siegel, *supra*, at 1415.

<sup>37</sup> Carpenter, *supra*.

<sup>38</sup> Beale, Jr., Joseph H., *Retreat from Murderous Assault*, 16 Harv. L. Rev. 567, 577 (1903).

<sup>39</sup> *Brown v United States*, 256 U.S. 335, 343 (1921).

<sup>40</sup> *Heller*, *supra*, at 635.

<sup>41</sup> *id* at 599

<sup>42</sup> *McDonald*, *supra*, at 3026.

<sup>43</sup> *id*

<sup>44</sup> *id*

<sup>45</sup> *Gitlow v New York*, 268 US 652, 666 (1925).

<sup>46</sup> *Tinker v Des Moines*, 393 US 503, 505 (1969).

<sup>47</sup> *Cohen v California*, 403 US 15 (1971).

<sup>48</sup> *Stromberg v California*, 283 US 359 (1931).

<sup>49</sup> *Thornhill v Alabama*, 310 US 88 (1940).

<sup>50</sup> *Texas v Johnson*, 491 US 397 (1989).

<sup>51</sup> *id*; see also, *RAV v City of St. Paul*, 505 US 377 (1992).

<sup>52</sup> *Virginia State Pharmacy Board v Virginia Citizens Consumer Council*, 425 US 748 (1976).

<sup>53</sup> *Bates v State Bar of Arizona*, 433 US 350 (1977).

<sup>54</sup> *Virginia State Pharmacy Board*, *supra*, at 761.

<sup>55</sup> *Citizens United v Federal Election Commission*, 558 US 310, 354 (2010) (citing *New York State Bd. of Elections v Lopez Torres*, 552 US 196, 208 (2008)).

<sup>56</sup> *Wolf v Colorado*, 338 US 25, 27 (1949).

<sup>57</sup> *Hoffa v United States*, 385 US 293, 301 (1966); see also *United States v Jeffers*, 342 US 48 (1951); *Silverman v United States*, 365 US 505 (1961).

<sup>58</sup> *id*

<sup>59</sup> *Katz v United States*, 389 US 347 (1967).

<sup>60</sup> *Bond v United States*, 529 US 334 (2000); see also, *United States v Place*, 462 US 696 (1983).

<sup>61</sup> *Kyllo v United States*, 533 US 27, 34 (2001).

<sup>62</sup> As Joseph Blocher correctly identifies, this idea is perhaps best evidenced by Scalia's response to Justice Breyer's dissenting opinion that argued for a balancing, instead of a categorical, approach to reading the Second Amendment: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Heller*, *supra*, at 635.

<sup>63</sup> Blocher, Joseph, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U L. Rev. 375 (2009).

<sup>64</sup> *McDonald*, *supra*, at 3036.

<sup>65</sup> *Heller*, *supra*, at 628.

<sup>66</sup> *id* at 599

<sup>67</sup> Neyland, J.P., *A Man's Car is His Castle: The Expansion of Texas' "Castle Doctrine" Eliminating the Duty to Retreat in Areas Outside the Home*, 60 Baylor L. Rev. 719, 729-730 (2008).

<sup>68</sup> Tex. Pen. Code Ann. Sec. 9.32(c) (Vernon Supp. 2007).

<sup>69</sup> Neyland, *supra*, at 731.

<sup>70</sup> Tex. Pen. Code Ann. Sec. 9.31 (providing that the use of deadly force is statutorily justified under certain circumstances and statutorily not justified under others).

<sup>71</sup> Goode, Erica, “N.R.A. Campaign Leads to Expanded Self-Defense Laws - NYTimes.com.” *The New York Times*.  
[http://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html?pagewanted=all&\\_r=0://](http://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html?pagewanted=all&_r=0://). Accessed November 23, 2012.

### Works Cited

- Barnes, Robert. “Justices To Rule On D.C. Gun Ban.” *The Washington Post*.  
[http://www.washingtonpost.com/wpdyn/content/article/2007/11/20/AR2007112000893\\_2.html#trove-tab-2](http://www.washingtonpost.com/wpdyn/content/article/2007/11/20/AR2007112000893_2.html#trove-tab-2). Accessed October 11, 2012.
- Bates v State Bar of Arizona*, 433 US 350 (1977).
- Beale, Jr., Joseph H. *Retreat from Murderous Assault*, 16 Harv. L. Rev. 567 (1903).
- Beard v United States*, 158 US 550 (1895).
- Blackstone, William. *Commentaries On the Laws of England*. Wayne Morrison, Ed. London: Cavendish Publishing, 2001.
- Blocher, Joseph. *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 NYU L. Rev. 375 (2009).
- Blocher, Joseph. *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (2011).
- Blocher, Joseph. *Rights To and Not To*, 100 Cal. L. Rev. 761 (2012).
- Brown v United States*, 256 US 335 (1921).
- Caplan, David I. and Sue Wimmershoff-Caplan. *Armed Standoff: The Impasse in gun Legislation and Litigation: Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments – and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073 (2005).
- Carpenter, Catherine L. *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 Marq. L. Rev. 653 (2003).
- Catalfamo, Christine. *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 Rutgers J. of L. & Pub. Pol’y 504 (2007).
- Citizens United v Federal Election Commission*, 558 US 310 (2010).
- Cohen v California*, 403 US 15 (1971).
- District of Columbia v Heller*, 544 US 570 (2008).
- Gitlow v New York*, 268 US 652 (1925).
- Goode, Erica. “N.R.A. Campaign Leads to Expanded Self-Defense Laws - NYTimes.com.” *The New York Times*.  
[http://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html?pagewanted=all&\\_r=0://](http://www.nytimes.com/2012/04/13/us/nra-campaign-leads-to-expanded-self-defense-laws.html?pagewanted=all&_r=0://). Accessed November 23, 2012.

- Green, Stuart P. "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles," 1999 *U. of Ill. L. Rev.* 1 (1999).
- Greenhouse, Linda. "Justices to Decide on Right to Keep Handgun." *The New York Times*.  
<http://www.nytimes.com/2007/11/21/us/21scotus.html?pagewanted=all>  
. Accessed January 11, 2013.
- Gulasekaram, Pratheepan. "*The People*" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 *NYU L. Rev.* 1521 (2010).
- Hoffa v United States*, 385 US 293 (1966).
- Katz v United States*, 389 US 347 (1967).
- Kyllo v United States*, 533 US 27 (2001).
- Levin, Benjamin. *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 *Harv. J. on Legis.* 523 (2010).
- McDonald v City of Chicago*, 561 US 3025 (2010).
- Neyland, J.P. *A Man's Car is His Castle: The Expansion of Texas' "Castle Doctrine" Eliminating the Duty to Retreat in Areas Outside the Home*, 60 *Baylor L. Rev.* 719 (2008).
- O'Shea, Michael P. *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 *Am. U. L. Rev.* 585 (2012).
- Pohlman, Sarah. *Shooting from the Hip: Missouri's New Approach to Defense of Habitation*, 56 *St. Louis L. J.* 857 (2012).
- RAV v City of St. Paul*, 505 US 377 (1992).
- Siegel, Reva B. *Symposium: The Second Amendment and the Right to Bear Arms After D.C. V. Heller: Heller & Originalism's Dead Hand - In Theory and Practice*, 56 *UCLA L. Rev.* 1399 (2009).
- Silverman v United States*, 365 US 505 (1961).
- State v Blue*, 565 SE2d 133 (NC 2002).
- State v Carothers*, 594 NW2d 897 (Minn. 1999).
- Stromberg v California*, 283 US 359 (1931).
- Tex. Pen. Code Ann. Sec. 9.32(c) (Vernon Supp. 2007).
- Texas v Johnson*, 491 US 397 (1989).
- Thornhill v Alabama*, 310 US 88 (1940).
- Tinker v Des Moines*, 393 US 503 (1969).
- United States v Jeffers*, 342 US 48 (1951).
- United States v Place*, 462 US 696 (1983).
- Virginia State Pharmacy Board v Virginia Citizens Consumer Council*, 425 US 748 (1976).
- Wolf v Colorado*, 338 US 25 (1949).



Zbrzezni, Lydia. *Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-Defense*, 13 Fl. Coastal L. Rev. 231 (2012).

## **The Biasing Effect of Death Qualification: How Juror Attitudes Toward Capital Punishment Affect Conviction and Trial Proceedings**

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**Abstract:**

*This paper investigates how juror attitudes toward capital punishment combined with the post-Witherspoon voir dire death qualification process biases trial outcomes in favor of conviction. Research indicates that favorable attitudes toward the death penalty are associated with a greater tendency to convict, conviction on a lower threshold of guilt, pro-prosecution evaluation of evidence, and punishment decisions that are biased against the defendant. Since the process of death qualification filters the venire to persons willing to impose the death penalty, it produces a jury that is not representative, but that is partial toward conviction and death sentences. Moreover, this paper suggests the importance of psychological research in evaluating the American legal system. Precipitating legal policy changes to recover impartiality in trial proceedings and to mitigate individual biases that are brought onto the jury will require empirical evidence from further research aimed at testing actual jurors, analyzing direct measures of attitudes, and assessing the effects of individual attitudes on final jury verdicts.*

Capital punishment within the United States legal system has undergone significant transformations since its beginnings in the eighteenth century. As the only legal punishment mechanism with an irrevocable outcome, the death penalty has undergone intensive scrutiny, abolitionist backlash, and modifications aimed at improving its fairness and constitutionality. From the apex of the abolitionist movement and the period of death penalty reform came the influential *Witherspoon v. Illinois*, 391 U.S. 510 (1968) decision. The Supreme Court voted in a 6-3 decision to reverse William C. Witherspoon's capital punishment sentence and redefined the voir dire process of death qualification during jury selection. After an Illinois state jury judged Witherspoon guilty of murder and sentenced him to death, petitioner Witherspoon challenged his death sentence on the grounds that the Illinois statute for death qualification was unconstitutional and violated the Sixth Amendment's right to an impartial and cross-sectional jury.

At Witherspoon's trial, the prosecutor eliminated approximately half of the prospective jurors by implementing the state statute, which permitted the dismissal of any venirepersons who voiced general objection or "conscientious scruples against capital punishment."<sup>1</sup> Petitioner Witherspoon cited scientific evidence of death-qualified jurors' bias toward the prosecution in order to argue that a jury determined by this overreaching process of death qualification was necessarily biased in favor of conviction. He claimed that such death-qualified jurors are more likely to ignore the presumption of the defendant's innocence, favor the prosecution, and determine guilt over innocence. The court, however, dismissed this evidence for being "too tentative and fragmentary."<sup>2</sup>

In the process of jury selection, the prosecutor has the legal right to challenge for cause venirepersons whose attitudes or beliefs would disallow them from acting impartially during the trial. Furthermore, in capital cases, the state has the right to dismiss potential jurors who state that they could never sentence somebody to death or that they could never consider the imposition of the death penalty. However, Witherspoon argued that the State of Illinois exceeded these rights by allowing the prosecution to not only dismiss venirepersons who were 'excludable' on the grounds of the prosecutor's and state's aforementioned rights, but also any potential jurors who expressed general reservations about capital punishment.

In the Supreme Court decision, Mr. Justice Stewart wrote the majority opinion and claimed that by condoning unlimited challenge for jurors on the basis of the Illinois state statute the State had induced partiality into Witherspoon's trial and entrusted an unconstitutional "hanging jury" that was "uncommonly willing to condemn a man to die."<sup>3</sup> As this case was the first time the Supreme Court investigated the jury selection process for capital cases, the Supreme Court's decision redefined the standard of the voir dire process of death qualification from all jurors who held anti-death penalty attitudes, to only the extreme opponents of the death penalty that would never impose the death

penalty, regardless of the evidence. While the *Witherspoon* decision reduced the probable biasing effect of death qualification by limiting the number of potentially excludable jurors, it still condoned the filtering process. The law, therefore, arguably still facilitates a jury biased toward guilt. Not only did this Supreme Court decision gain practical significance by reversing *Witherspoon*'s death sentence and restricting the death qualification process, but it also stimulated a closer examination of the jury-selection process of death qualification in capital cases.

Capital punishment in the United States justice system has been the topic of heated cross-disciplinary debate and controversy since the founding of the country. When considering the more intricate trial proceedings involved in the judicial system of capital punishment, issues and concerns regarding its morality and constitutionality arise. Psychology and legal experts Haney and Wiener argue that empirically based social scientific research is crucial for studying the controversial facets of the death penalty.<sup>4</sup> Through psychological theories, research methods, and data, researchers can probe the effects of certain procedures involved in capital punishment cases. In doing so, legal experts and social psychologists can work in tandem to assess the degree of fairness, quality of justice, and level of constitutionality educed by each process within the capital punishment system.

In particular, Haney and Wiener state that social scientific data facilitates a more in-depth examination of legal processes such as the biasing effects of the process of death qualification and the relationship between juror's death penalty attitudes and their decision to convict.<sup>5</sup> By examining the seminal psychological studies conducted on capital sentencing juries and analyzing the existing psychological research through a legal lens, this paper aims to expose the influence of juror's attitudes toward the death penalty on capital cases. This survey of the relevant studies and the related psychological theories implicated in the process of death qualification will illuminate new directions for further psychological research on the topic, as well as propose policy recommendations that should be taken up by legislators and applied to relevant judicial proceedings.

The American legal system is predicated on the promise to grant defendants an impartial and representative jury of their peers to decide both their guilt and punishment. Before all trials are heard, the process of *voir dire* occurs, during which attorneys question and challenge the venirepersons—prospective jurors—to identify attitudes that could prove unfavorable for their respective arguments during the trial. However, in addition to this standard process of jury-selection, additional cause challenges are introduced in capital cases that allow attorneys to dismiss perspective jurors based on their strong attitudes about the death penalty.<sup>6</sup> This screening process of death qualification deems as unfit for the jury—and thus disqualifies—those jurors who display a high enough degree of opposition to the death penalty to prevent them from making an impartial

decision.<sup>7</sup> In the *Witherspoon v. Illinois* decision, the Supreme Court approved of death qualification in capital trials, but narrowed “excludable” jurors to only those who displayed unequivocal opposition to the death penalty.<sup>8</sup> After the death qualification jury-selection process eliminates the “excludables,” only “death-qualified” jurors—those who promise to consider all sentencing options including death and life imprisonment—can be placed on the trial jury. By eliminating anti-death penalty juror’s different perspective, it is plausible that a death-qualified jury with jurors who favor the death penalty will be more likely to determine a guilty conviction, and thus sentence the defendant to death.

Although all criminal trials undergo a voir dire jury-selection process, only capital cases include the additional biasing composition and process effects of narrowing potential venirepersons to death-qualified jurors. Since death qualification reduces the representativeness of the capital jury, the fairness of the process, its consequences, and the resulting verdicts have become subject for radical psychological and legal research. Lab and field-based investigations into the behavior of death-qualified juries reveal that the death qualification process has a biasing effect on jurors’ threshold of conviction,<sup>9</sup> interpretation and evaluation of evidence,<sup>10 11</sup> deliberation,<sup>12</sup> and verdict decision-making processes.<sup>13</sup> As a result, jurors who display a partiality for the death penalty are not only prejudiced toward determining guilt in their juror tasks, but are also more likely to implement the death penalty as a result.

### **The Impact of Jurors’ Death Penalty Attitudes on Conviction Tendencies**

The motivating reason behind the process of voir dire stems from the presumption that juror’s attitudes influence their behavior in courtroom trials. In response to the Court’s claim that the empirical data *Witherspoon* cited was “too tentative and fragmentary,” Jurow conducted a study to investigate the effects of a death qualification jury on the guilt determination process.<sup>14</sup> In this study, Jurow addressed the limitations of previous studies that had examined the relationship between attitudes toward capital punishment and the tendency to convict. He recruited participants that better represented the general community, used more realistic and interactive trial simulation stimuli, and applied the legally applicable *Witherspoon* standards of death qualification. Participants first filled out a demographic background questionnaire, a Capital Punishment Attitude Questionnaire (CPAQ), and various other scales to measure related legal attitudes and social value orientation. The CPAQ assessed not only general attitudes toward capital punishment (CPAQ-A), but also the degree to which participants would consider the death penalty if they were serving on a capital jury (CPAQ-B), which made their assessment of death penalty attitudes legally applicable. Next, the participants heard general instructions, viewed the videotape of the simulated cases, marked their ballot, and then assigned penalties for each defendant.

Jurow analyzed CPAQ pro-death penalty and anti-death penalty attitudes in relation to the submitted verdicts and found that only the strongest opponents of capital punishment were more likely to acquit defendants, while participants with both mild and strong support for the death penalty were more conviction prone.<sup>15</sup> These results support the relationship previously proposed by Wilson,<sup>16</sup> Goldberg,<sup>17</sup> and Zeisel<sup>18</sup> that jurors without scruples against capital punishment are more likely to convict on a guilty verdict, even despite the extra *Witherspoon* death qualification restrictions that limit excludable jurors to only those that would never allow the use of the death penalty.

Furthermore, he found that the legally relevant measures of death penalty attitudes (CPAQ-B) achieved operational validity since they correlated with the participant's actual verdict decisions. Subjects who claimed that they would vote for the death penalty if they were sitting on a jury actually applied the death penalty, whereas those who claimed they would not vote for the death penalty as a juror almost never did. These findings support Jurow's initial hypothesis that favorable attitudes toward the death penalty relate to higher propensity to convict.

Lastly, Jurow found that participants with attitudes favoring the death penalty were more likely to demonstrate politically conservative and authoritarian legal positions.<sup>19</sup> Jurow claimed that death penalty attitudes prejudiced associated personality characteristics and beliefs about legal standards involved in the jury process, such as the "presumption of innocence" and proof of guilt "beyond reasonable doubt." Thus, social values related to death penalty attitudes significantly mediate the relationship between an individual's attitudes toward capital punishment and their verdict decision-making processes.

Although this research focused on individual decision-making processes instead of more trial realistic group-decision making processes, and used mock jurors instead of actual jurors, it still produced valuable insight into the relationship between death penalty attitudes and capital punishment verdicts. To improve external validity, further investigation with actual jurors on the relationship between death penalty attitudes and both jury dynamics and group-decision making outcomes proves necessary. However, these results empirically verify that, on the individual level, participants in simulated juror situations who favor the death penalty—*Witherspoon* death-qualified jurors—are biased toward a higher tendency to convict. By eliminating the strongest opponents of the death penalty as a consequence of the *Witherspoon* standards, the process of death qualification removes acquittal prone jurors, which yields a jury biased toward determining the guilt of the defendant.

In an attempt to investigate the mechanisms behind the relationship between attitudes and verdicts, Thompson, Cowan, Ellsworth, and Harrington conducted a two-study lab experiment that examined how juror's attitudes toward the death penalty influence their perception of case evidence, as well as

their proneness to convict in capital cases.<sup>20</sup> The team of researchers first defined death penalty attitudes and closely associated beliefs about criminal justice. Thompson et al. claimed that people who favor the death penalty were more likely to be concerned about crime, to hold favorable views of police officers and the prosecutor, to show less sympathy for the defendant and more suspicion for the defense attorney, and to be more impatient with due process protections. Based on these assumed differences between supporters and opponents of the death penalty, Thompson and his team of researchers hypothesized that jurors who favored the death penalty would (a) interpret the same evidence in a manner that favored the prosecution theory and (b) have a lower threshold for conviction.<sup>21</sup> The researchers predicted that jurors who favor capital punishment would find police and prosecutors evidence as more credible and persuasive, and would also resolve ambiguous evidence in favor of the prosecution. Furthermore, they predicted that jurors who favored the death penalty would be more willing to convict due to their lower criminal trial standard of proof for conviction—"beyond a reasonable doubt."<sup>22</sup>

Using the same standards outlined by *Witherspoon v. Illinois* to compose experimental juries, Thompson et al. divided the participants into an "excludable" group—those that showed enough opposition toward the death penalty to exclude them from the capital jury—and a "death-qualified" group—those with more favorable views of the death penalty that would qualify them to sit on a capital jury. In this study, subjects were shown a videotaped scripted simulation of two conflicting witness testimonies—one from a white police officer and one from a black criminal defendant—and were asked to rate the credibility of the witnesses as well as the plausibility of the facts. While the prosecutor's testimony framed the defendant as the aggressor and denied the use of racial slurs, the defendant's testimony framed the police officer as the aggressor and highlighted the prosecutor's use of verbal racial slurs.

Overall, compared to the "excludables," the death-qualified subjects significantly favored the prosecution in their evaluation of evidence and resolved ambiguous testimony by making it fit the prosecution's story.<sup>23</sup> Thompson et al. ran a correlation and found that the subject's attitudes toward the death penalty significantly predicted their evaluations of evidence.<sup>24</sup> These results indicate that different attitudes toward the death penalty bias jurors' perception of the same evidence so that supporters favor the prosecution and opponents favor the defense. This finding further suggests that juror's differential interpretation of evidence may produce greater conviction-proneness in jurors who favor the death penalty.

Furthermore, Thompson et al. sought to assess the amount of disutility jurors associated with erroneous convictions and erroneous acquittals. The researchers assumed that in a theoretical model of decision-making, a juror's threshold of conviction is directly related to the amount of disutility they attribute to erroneous decisions, which they measured by how much regret the

juror would experience if an innocent defendant were wrongly convicted or if a guilty defendant were wrongly acquitted.<sup>25</sup> Thompson and his team of researchers found that excludable jurors expressed more regret for harsh errors—when the defendant was erroneously convicted of a harsher crime than he committed—compared to death-qualified jurors and that excludables expressed less regret for lenient errors compared to death-qualified participants.<sup>26</sup>

Confirming their hypothesis that excludables would experience more regret for erroneous convictions,<sup>27</sup> these results further suggest that excludable jurors have a higher threshold of conviction. Based on Thompson et al.'s conclusions, since death-qualified subjects are willing to sentence a criminal to death, they believe it is better to convict all guilty defendants at the possible expense of wrongly convicting an innocent person than to erroneously acquit a guilty criminal. Thus, this strong predisposition to convict indicates an increased probability of a death penalty-prone sentence.

Thompson et al.'s findings suggest that death-qualified jurors selected by the process of death qualification are more likely to convict a criminal defendant, to convict on a lesser showing of guilt compared to excludables, and to evaluate trial evidence in favor of the prosecuting team.<sup>28</sup> This research introduces the idea of persuasion as a biasing mechanism in criminal cases. Persuasion techniques act to not only convince someone to take the side of the people they trust and favor, but also to skew the perception and interpretation of evidence so that it fits with the biased script that they have adopted.

The results of Thompson et al.'s studies indicate that juror's attitudes do influence their decision-making processes in trial proceedings, especially attitudes toward the death penalty. However, these results cannot be fully accepted without considering the confounding variables that could contribute variance in the results. The second study rested on the assumption that a juror's threshold of conviction was in fact related to the relative amount of disutility experienced in response to erroneous sentences. The researchers cited that mathematical models had demonstrated that beliefs about erroneous convictions and acquittals could dictate the probability of guilt necessary to convict in order to minimize disutility.<sup>29</sup> Furthermore, it seems rational that someone who is extremely opposed to erroneous convictions will wait until he or she has utmost certainty about guilt—a higher threshold for conviction—while someone else who believes that no guilty criminal shall ever go free will be more prone to convict as a result of a lower threshold. Since logic and math both support the assumption that relative measures of disutility relate to thresholds of reasonable doubt, the results from the second study should hold weight.

Lastly, neither study conducted in this experiment was trial-specific. The questionnaires alluded to general trial events and failed to account for variability between different capital trials. While the results of these studies cannot be applied to specific capital trial proceedings, they elucidate general



relationships and biasing mechanisms between juror's attitudes toward capital punishment and both their interpretation of evidence and willingness to convict, which lays the groundwork for further research.

### **Death Penalty Beliefs Effect Reception of Aggravating and Mitigating Circumstances**

Most states that allow capital punishment use a bifurcated trial, in which the judicial proceedings are divided into a guilt-or-innocence phase and a subsequent penalty phase. During the penalty phase of capital trials, the jury is given the chance to hear evidence about special circumstances that are intended to help the jurors decide on the severity of punishment. Aggravating factors are circumstances that make the penalty of death appropriate, while mitigating factors are circumstances that lessen the appropriate punishment to life imprisonment. In examining the penalty phase, Luginbuhl and Middendorf built on pre-existing evidence that death-qualified juries were more conviction prone by investigating how the partiality of such juries influences the evaluation of aggravating and mitigating circumstances.<sup>30</sup>

Luginbuhl and Middendorf based their predictions on previously proven variance in attitudes, values, and personality characteristics between death-qualified and excludable jurors. They hypothesized that death-qualified juror's and excludable juror's dissimilar attitudes would differentially sensitize them to aggravating and mitigating factors. Death-qualified jurors would find aggravating circumstances more influential, whereas excludable subjects would be more affected by mitigating circumstances.<sup>31</sup> From questionnaires that probed jurors' levels of agreement with real aggravating and mitigating factors used in court, the researchers proved that support for the death penalty was again related to juror's increasing rejection of mitigating circumstances. Furthermore, Luginbuhl and Middendorf demonstrated that under *Witherspoon* criteria, excluded jurors rejected aggravating circumstances significantly more than death-qualified jurors, although the two groups did not differ overall in terms of their acceptance of mitigating circumstances.<sup>32</sup> These results suggest that death-qualified juries stress the importance of the aggravating circumstances, while attenuating the importance of certain mitigating circumstance.

While statistically significant, this research depended on the assumption that death-qualified jurors were differentially persuaded by aggravating circumstances over mitigating circumstances. However, there are factors that might assuage the differences between death-qualified and excludable jurors, such as precise direction from the judge on how jurors should assess the aggravating and mitigating circumstances. In order to substantiate this assumption, further research must be aimed at testing causation, rather than correlation, between death-qualified juror's beliefs and their valuation of aggravating and mitigating factors.

Nonetheless, since Luginbuhl and Middendorf's hypotheses were confirmed, eliminating death-scrupled—excludable—jurors from capital cases would increase the likelihood of conviction due to a weightier consideration of aggravating circumstances. By favoring aggravating circumstances and opposing mitigating circumstances, death-qualified juries are more likely to be pro-death penalty in their evaluation of evidence. These findings agree with the previously cited evidence from Thompson et al.'s 1984 studies that jurors who favor the death penalty are more prone to convict because of their prosecution interpretation of evidence.

In cognitively demanding tasks, such as weighing the importance of aggravating or mitigating circumstances, Fiske and Taylor demonstrate that people organize and mentally process incoming information according to preexisting schemas.<sup>33</sup> Therefore, in death-qualified jurors, pro-death penalty schemas will be primed throughout the trial, making pro-death attitudes, beliefs, and opinions more salient for subsequent evaluation of aggravating and mitigating factors. These schemas re-emerge in the decision-making process of determining the appropriate punishment by facilitating the retrieval of schema-consistent information. Since jurors are left to subjectively weigh the importance of aggravating and mitigating circumstances, a juror oriented to favor the death penalty will more likely emphasize the importance of aggravating circumstances, believe that these aggravating circumstances exist in the case, and thus, determine the death penalty as the most appropriate form of punishment.

This study furthered previous research on the influence of death qualification's biasing effects on capital verdicts by elucidating an added biased receptivity to and evaluation of aggravating and mitigating circumstances in death-qualified versus excludable jurors. This research illustrates that a death-qualified jury deviates from legally presumed neutrality, insinuating that the death qualification process predisposes a jury to be biased against the capital defendant.

### **Death Qualification on Conviction Proneness and the Quality of Deliberation**

Since capital cases diverge from the norm of trying defendants with a wholly representative "mixed" jury and instead restrict capital juries to death-qualified jurors, death-qualified juries are less diverse in their representation of community opinions and arguably more unified in their higher predisposition to presume guilt and convict defendants. In their 1984 study on the relationship between death qualification and the quality of jury deliberation in capital cases, Cowan, Thompson, and Ellsworth focused on the fact that the process of death qualification necessarily eliminates a large degree of different viewpoints.<sup>34</sup> The researchers argued that the omission of diverse positions could eliminate unique insights, interpretations of evidence, and perspectives on the trial.<sup>35</sup> The

homogeneity of beliefs created by death qualification may prejudice juror's perception of the case, reduce the amount of contention in deliberation, and bias deliberation to favor pro-death penalty stances. Therefore, Cowan et al. recruited a group of jury-eligible adults to participate in a simulation study that investigated juror's initial verdict inclination, as well as the quality of deliberation in both "mixed"—juries composed of both death-qualified jurors and *Witherspoon*-excludable jurors—and death-qualified juries.

Cowan et al. found that death-qualified participant jurors were significantly more likely to convict than *Witherspoon*-excludable jurors in pre-deliberation verdicts. Furthermore, the researchers determined that even after exposure to other points of view during the mock deliberation process, juror's initial verdicts persisted and mapped onto their post-deliberation verdicts.<sup>36</sup> For example, excludables who initially voted 'Not Guilty' maintained their stance throughout the deliberation process and contributed this perspective to the jury's final decision. This evidence supports the high correlation Hastie, Penrod, and Pennington found between first-ballot verdicts and final jury verdict sentences.<sup>37</sup> Thus, these findings provide further evidence that pre-deliberation verdicts are a valid measure of conviction proneness and represent predisposed death penalty beliefs that impact the deliberation process.

Furthermore, in their analysis of post-deliberation measures between death-qualified and "mixed" juries, the researchers found that mixed juries expressed more critical evaluations of all witnesses.<sup>38</sup> "Mixed" juries rated police eyewitnesses and forensic pathologists both as less believable and less helpful compared to death-qualified jurors. Since the researchers controlled for pre-deliberation verdicts, the slight variance in isolated post-deliberation measures between death-qualified and mixed jurors illustrated the diversity of opinions in mixed juries, and suggested that mixed juries with more representative opinions provoked more contention and analysis. Therefore, a homogeneous death-qualified jury is more likely to filter out evidence that is inconsistent with both their beliefs and their shared perceptions of evidence.

Moreover, jurors in "mixed" juries showed significantly improved and more accurate memory of evidentiary facts compared to jurors in death-qualified juries.<sup>39</sup> With a wider range of viewpoints, mixed juries are more likely to notice errors of facts and question aspects of the trial to a higher degree. Mixed juries also perceived the case as more challenging compared to death-qualified juries.<sup>40</sup> It follows that diverse juries, therefore, do not become complacent due to their different viewpoints, and as a result, produce a more thought-out, accurate, and impartial final verdict.

Although this study was limited by the fact that juror participants were not actual jurors and were not experiencing the unique pressures of a real trial, the participants who had previously participated on real juries reported that the experimental simulation aroused the same experience as did the actual jury experience.<sup>41</sup> This reported similarity between mock juries and actual juries

quells some skepticism about the reliability and external validity of simulated trials, and provides support for the most conducive and accessible stimuli for jury research. While the effects of the homogenization of death-qualified juries revealed by this study are not fully conclusive, they do insinuate a sacrifice made to jury deliberation when a death-qualified jury is impaneled. Since death qualification inherently restricts the jury's representativeness of the community sample and its diversity of opinions, capital juror's attitudes toward the death penalty become augmented. This induced partiality adversely affects the jury's deliberation—the jurors lower their standard of reasonable doubt, are less critical of testimony, and less thorough in their discussion and evaluation of the case—and the jury as a whole becomes more prone to convict the defendant.

### **Effects of Juror's Attitudes on Pre-deliberation Verdicts**

Investigating the influence of juror's attitudes toward capital punishment on their pre-deliberation verdicts, Moran and Comfort found support for Zeisel's 1968 findings that *real* jurors' attitudes favoring the death penalty index their conviction proneness.<sup>42</sup> Prior to the *Witherspoon* decision, Zeisel advanced research regarding the relationship between death penalty attitudes and conviction proneness by investigating actual jurors who were sitting on felony juries at the time of the study. Zeisel found that, in addition to mock jurors, actual jurors without scruples against capital punishment were more likely to vote on a guilty verdict compared to death-scrupled jurors.<sup>43</sup> In the first direct test of the *Witherspoon* thesis conducted on real jurors since Zeisel's study, Moran and Comfort refined this relationship by investigating the effect of death penalty attitudes on pre-deliberation verdicts.

In the first study of their two-study investigation Moran and Comfort elicited self-report responses on a questionnaire from jurors who had served on felony juries two years prior to filling out the survey. This mailed questionnaire asked about demographics, personality characteristics, and juror behavior—the jury's legal verdict, the juror's pre-deliberation verdict, and subjective evaluation of participation in deliberation and influence on jury's verdict. Moran and Comfort found that juror's attitudes toward capital punishment correlated with personal pre-deliberation verdicts.

In their second study, Moran and Comfort sent out a similar questionnaire that asked about the same measures as the initial questionnaire, however, this survey was sent out ten days after jurors were discharged from their felony juries. In this study, Moran and Comfort found that juror's attitudes toward the death penalty correlated with pre-deliberation verdicts to a more acceptable level of significance.<sup>44</sup> These results enhanced the marginally significant results of the first study with a more significant correlation and validated, with increased confidence, the *Witherspoon* presumption that jurors who favored the death penalty are more likely to favor conviction, prior to deliberation, compared to jurors who opposed the death penalty.

Furthermore, both of the studies conducted in this research revealed that juror's different attitudes toward capital punishment predicted membership in different legally cognizable classes.<sup>45</sup> The jurors who were more likely to favor capital punishment in both studies were male, white, wealthier, politically conservative Republicans, married, and both classically and legally authoritarian. These findings provide convergent validation of Jurow's conclusions that supporters of the death penalty were more legally conservative and authoritarian, as well as more likely to convict.<sup>46</sup> Reciprocally, Jurow's findings help verify that the pro-death penalty jurors involved in Moran and Comfort's study would be more likely to reach a guilty verdict in a real capital trial.

Therefore, by eliminating or restricting the presence of legally cognizable classes in capital cases, the resulting impaneled juror will neither be representative nor impartial. Not only does the process of death qualification exclude certain demographic groups from capital juries, but it also creates homogeneity of demographics and attitudes within the impaneled jury—homogeneity that favors capital punishment as well as a lower threshold of conviction, and that presumes guilt over innocence. By using impaneled felony jurors, these conclusions extend Cowan et al.'s previous finding from non-impaneled jurors that restricting capital juries based on their attitudes toward capital punishment exacerbates the overall conviction proneness of individual members of death-qualified juries. Moreover, Moran and Comfort proved that in addition to restricting attitudinal diversity, the process of death qualification further limits demographic diversity and creates a non-representative sample of the community, thus violating the Sixth Amendment.<sup>47</sup> By introducing two types of homogeneity into capital juries, the process of death qualification not only unfairly biases the verdict in favor of conviction, but it also confines significant trial proceedings, such as jury deliberation, to prejudiced pro-capital punishment ideals.

Despite determining a significant relationship between attitudes that favored the death penalty and pre-deliberation verdicts to convict the defendant, the researchers found that attitudes toward capital punishment did not predict legal verdicts in either of the two studies.<sup>48</sup> However, this finding should not undermine the plausible relationship between attitudes toward the death penalty and final verdicts, due to the presence of methodological limitations. Although the researchers were progressive in probing actual jurors, these jurors served on different trials with various outcomes. Since the participant jurors did not serve on the same trial, each of their reported legal verdicts was influenced by dissimilar trial-specific information, jury interactions, and deliberation processes—each of which effect the final verdict. Thus, the relationship between individual attitudes and their related personal pre-deliberation attitudes is more noteworthy than the relationship between attitudes and legal verdict. Moreover, the researchers asserted that pre-deliberation verdicts were more sensitive to

juror's prejudices compared to the final unanimous legal verdict.<sup>49</sup> Therefore, pre-deliberation verdicts should reveal a more direct effect of a juror's bias toward conviction. As found, death-qualified jurors did hold more favorable attitudes toward the death penalty, they were more inclined to convict, and thus, they substantiated the biasing effect that the process of death qualification has on impaneled capital trial juries.

### **Future Direction of Research**

Since the *Witherspoon* decision in 1968, much knowledge has been developed about how juror's attitudes toward capital punishment bias trial proceedings and the sentencing verdict. Nevertheless, there is further research that must be conducted before psychological evidence on this topic can incontestably substantiate legal policy recommendations and sway court decisions.

More research on the effects of juror's attitudes must be conducted using active capital jurors. While experimental conditions can be created to realistically simulate court trials, research participants inherently do not experience the pressures, interactions, and unique challenges faced in trial proceedings. The current problem is that certain legal standards restrict researchers from gaining access to real jurors while they are sitting on juries. The evidence substantiating the relationships between trial proceedings and juror's attitudes and decisions is growing toward a level of empiricism that proves the importance of this research for progressing both the legal and psychological fields. When that level is reached, policymakers might be more willing to condone research during trials, without breaching legal standards of confidentiality and privacy. However, until then, researchers should focus on conducting studies on real jurors immediately after their time on the jury.

Furthermore, follow-up psychological research on this topic should strive to acquire evidence rooted in observation and direct neural measures of attitudes rather than self-report. Future studies should aim to test participant jurors using fMRI brain scanning or Implicit Associations Test (IAT) to reveal more subconscious measures of attitudes. Examining the neural correlates of juror's attitudes toward the death penalty and their decision-making processes would produce more objective proof of the presumed biases evoked by death qualification and capital trial proceedings. Moreover, a comparison between direct brain activation and observational qualitative measures of jurors' behavior on the jury would provide more incontestable and conclusive data.

Lastly, researchers must now focus on the missing effect of individual capital punishment attitudes on group decision-making processes. Investigating the deliberation process of capital juries would also elucidate the undeveloped link between juror's attitudes toward the death penalty and the jury's ultimate punishment decision. In his 1971 study, Jurow noted the incongruity between individual decision-making and group decision-making and the missing effect of

the group deliberation process. Since the final punishment verdict emerges from a group decision, it necessarily depends on group factors. Moreover, in her analysis of the social psychology behind jury deliberation, Kessler cited a study by Kalven that suggested that juries' first ballot vote strongly correlated to the final verdict.<sup>50</sup> While this link between pre- and post-deliberation verdicts is probable, more research must be conducted in order to empirically validate the relationship between juror's individual verdicts and the unified jury's final verdict.

Although legal and psychological research has illuminated many of the complexities in the relationship between juror's attitudes toward capital punishment and their tendency to convict defendants, as noted, there is both need and opportunity for further research in this field. If conducted, these future studies have the potential to transform the existing knowledge on the issue into stimuli for legal policy change. However, irrespective of future findings, the current findings have illuminated numerous psychological theories that can begin to explain how the biasing effect of death qualification occurs.

### **Use of Psychological Research in Legal Policy Reform**

It is clear that changes must be made to the process of jury selection, especially for capital punishment trials. In researching the process effects of death qualification, Allen, Mabry, and McKelton as well as Haney examined the composition and process effects of the death qualification process to determine that this unique process of voir dire elicits pretrial biases and augments the influence of predisposed attitudes toward the death penalty on assessment of guilt and punishment.<sup>51 52</sup> Furthermore, in his book "Death by Design," Haney argues that by forcing jurors to imagine themselves deciding a penalty for the defendant before hearing the case not only implies and predisposes guilt, but also increases each juror's subjective estimate that the alleged events actually occurred.<sup>53</sup> The mere process of death qualification primes the salience of the death penalty, exposes jurors to issues of life and death, desensitizes jurors to conviction and death sentences, and also indoctrinates them—all of which strengthen death-qualified jurors' support for the death penalty and reduce their reluctance to implement death.<sup>54</sup> In addition to the process effects, death qualification's ability to filter out strong anti-death penalty beliefs adds composition biasing effects, which further propagate a jury-decision slanted toward favoring the death penalty.

In addition, as long as legal policymakers continue to believe in the need to filter out jury members who are strongly biased either for or against capital punishment, different tests must be implemented to detect these death penalty attitudes. Instead of using questionnaires and verbal interrogation, private tests of implicit attitudes toward the death penalty and criminal justice might reveal the same pro- or anti-death penalty attitudes without consciously biasing jurors one way or another. Furthermore, in addition to changing the

process by which jurors are excluded or qualified for the jury, overall scrutiny must be heightened throughout the entire trial process to prevent these biases from pervading juror's behaviors and controlling the outcome of the trial.

Moreover, the grounds for exclusion from a capital jury are heavily one-sided. Since 1980, developments have been made to exclude extreme supporters of the death penalty—"automatic death penalty jurors"—through the process of death qualification. However, in practice, the exclusion of ADPs is highly varied in conduct and does not seem to balance out the exclusion of extreme opponents of the death penalty. Either a novel method of neutralizing capital juries—such as including an equal number of outright supporters and opponents of capital punishment on each jury—must be enacted, or the process of jury selection should revert back to its democratic and impartial *pre-voir dire* state. This policy recommendation would require prohibiting the intentional exclusion of jurors and broadening the pool of venirepersons and jury members to be most representative of the community as possible. Thus, the current research on the effect of death qualification and juror's death penalty attitudes on their conviction proneness and penal verdict indicates a need for new legal policies to either eliminate or counterbalance biases toward or against the death penalty among capital juries.

The aforementioned policy change to mitigate the partiality of capital juries by including an equal number of pro-death penalty and anti-death penalty excludables would also require reducing the requirement of a unanimous verdict. Including an equal number of jurors with scruples against the death penalty and jurors who favor the death penalty could result in a more impartial deliberation, a more holistic interpretation of evidence, and a more fair penal decision. In addition, including both extremes of excludables would increase the representativeness of the jury. However, because of conflicting unwavering opinions that would be on such a jury, a unanimous verdict is unlikely to result. While such a jury might be more balanced and representative, the trade-off would be convicting on a split majority decision. Thus, the question legislators must face before enacting this policy recommendation would be determining which solution creates the greater good: an impartial jury or an undivided jury? In this decision, as is the case with most policy recommendations regarding controversial issues, solving one problem opens up other issues. From the current state of legal psychological research, it seems that recovering impartiality in juror's behavior should take precedence, even if this dictates convicting a defendant with a majority verdict, rather than a unanimous one.

Therefore, a balance must be struck between protecting a defendant's right to an impartial and representative jury and preventing biasing effects of juror's attitudes toward the death penalty via legal writs. Psychological research on the relationship between death penalty attitudes, the death qualification process, juror's conviction proneness, and the penalty decision-making process has the potential to generate enough empirical evidence to substantiate legal



reform to the capital trial system. However, until psychologists can more convincingly prove the direct effect and results of death qualification biases, adopting a non-discriminating system might prove to produce the fairest trial outcomes. In order to reach this level of empirical integrity about juror's attitudinal biases and the mechanisms that they both effect and are affected by, further research on this topic must be conducted. Only then will legal policy change to reflect the progressive psychological developments.

Through examining the current research on the biasing effects of juror's attitudes toward capital punishment and the process death qualification on capital punishment verdicts, it is not only evident that juror's attitudes toward the death penalty bias capital trials in a manner that leads to unfair decisions, but also that crucial changes must be made to the legal system for capital punishment cases. The seminal social psychological studies on the topic substantiate the argument that jurors who favor capital punishment are more prone to convict a defendant, interpret evidence in favor of the prosecution, and conduct the deliberation and punishment decision-making processes in a manner that is biased against the defendant.

As the *Witherspoon* decision revealed, arbiters of the law are often reluctant to accept scientific data as reliable proof on the grounds of its tentative significance, even despite its empiricism. However, as psychological data on legal matters becomes more prevalent and meaningful, the legal professionals and policymakers must become less hesitant to accept empirical proof of legally implicated psychological processes. As this paper has demonstrated, cohorts of psychological and legal researchers have already made the initial push to refine the system of capital punishment trials on the grounds of scientific evidence. They have begun to prove the relationship between jurors' attitudes toward the death penalty and their biased behavior while sitting on the jury. Yet, future studies that further investigate the effects of group deliberation, juror's implicit attitudes toward the death penalty, and the link between individual conviction tendencies and the unanimous trial verdict during the penalty phase are needed to answer the *Witherspoon* question once and for all. A conclusive answer would provide the last impetus to accomplish policy reforms within the legal system. With 3,146 inmates awaiting the death penalty as of October 2012<sup>55</sup> and controversy regarding capital punishment continuing to brew, the follow-up psychological research on this issue has never been so warranted.

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<sup>1</sup> Witherspoon v. Illinois, 391 U.S. 510 (1968)

<sup>2</sup> id

<sup>3</sup> id

<sup>4</sup> Craig Haney and Richard Wiener, "Death is Different: An editorial Introduction to the Theme Issue," *Psychology, Public Policy, and Law* 10, no. 4 (2004): 374.

<sup>5</sup> id at 378

<sup>6</sup> Craig Haney, *Death By Design: Capital Punishment as a Social Psychological System* (New York, NY: Oxford University Press, Inc., 2005), 105.

<sup>7</sup> id at 94

<sup>8</sup> id at 104

<sup>9</sup> George L. Jurow, "New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process," *Harvard Law Review* 84, no. 3 (1971).

<sup>10</sup> William Thompson, Claudia Cowan, Phoebe Ellsworth, and Joan Harrington, "Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts," *Law and Human Behavior* 8, no. 1-2 (1984).

<sup>11</sup> James Luginbuhl and Kathi Middendorf, "Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials," *Law and Human Behavior* 12, no. 3 (1988).

<sup>12</sup> Claudia Cowan, William Thompson, and Phoebe Ellsworth, "The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation," *Law and Human Behavior* 8, no. 1-2 (1984).

<sup>13</sup> Gary Moran and John C. Comfort, "Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment," *Journal of Applied Psychology* 71, no. 1 (1986).

<sup>14</sup> Jurow, "New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process."

<sup>15</sup> id at 585

<sup>16</sup> W. C. Wilson, "Belief in Capital Punishment and Jury Performance," Unpublished manuscript, University of Texas, 1964.

<sup>17</sup> Faye Goldberg, "Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law," *Harvard Civil Rights-Civil Liberties Law Review* 5, 53-69 (1970).

<sup>18</sup> Hans Zeisel, "Some Data on Juror Attitudes Towards Capital Punishment," Monograph, Center for Studies in Criminal Justice, University of Chicago Law School (1968).

<sup>19</sup> Jurow, "New Data on the Effect of a "Death Qualified" Jury," 588.

<sup>20</sup> Thompson et al., "Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts," 95-113.

<sup>21</sup> id at 97-98

<sup>22</sup> id

<sup>23</sup> id at 103

<sup>24</sup> id at 104

<sup>25</sup> id at 106

<sup>26</sup> id at 107-108

<sup>27</sup> id at 106-107

<sup>28</sup> id at 109-110

<sup>29</sup> id at 99

<sup>30</sup> Luginbuhl and Middendorf, "Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials," 263-281.

<sup>31</sup> id at 267

<sup>32</sup> id at 273-275

<sup>33</sup> Susan Fiske and Shelley Taylor, *Social Cognition* (Reading, MA: Addison-Wesley), 1984.

<sup>34</sup> Cowan et al., "The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation," 53-79.

<sup>35</sup> id at 54

<sup>36</sup> id at 67-70

<sup>37</sup> Reid Hastie, Steven D. Penrod, and Nancy Pennington, *Inside the Jury* (Cambridge: Harvard University Press), viii, Reprinted 2002 by The Lawbook Exchange, Ltd. (1983).

<sup>38</sup> Cowan et al., "The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation," 73.

<sup>39</sup> id

<sup>40</sup> id

<sup>41</sup> id at 74

<sup>42</sup> Moran and Comfort, "Neither "Tentative" nor "Fragmentary,"" 146-155.

<sup>43</sup> Zeisel, "Some Data on Juror Attitudes Towards Capital Punishment."

<sup>44</sup> id at 151

<sup>45</sup> id

<sup>46</sup> Jurow, "New Data on the Effect of a "Death Qualified" Jury," 588.

<sup>47</sup> Moran and Comfort, "Neither "Tentative" nor "Fragmentary,"" 152-154.

<sup>48</sup> id at 149-152

<sup>49</sup> id

<sup>50</sup> Joan B. Kessler, "The Social Psychology of Jury Deliberations," In R. J. Simon (Ed.), *The Jury System in America: A Critical Overview* (Beverly Hills, CA: Sage Publications, 1975).

<sup>51</sup> Mike Allen, Edward Mabry, and Drue-Marie McKelton, "Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis," *Law and Human Behavior* 22, no. 6 (1998): 715-731.

<sup>52</sup> Craig Haney, "Examining Death Qualification: Further Analysis of the Process Effect," *Law and Human Behavior* 8, no.1-2 (1984b): 136-140.

<sup>53</sup> Haney, *Death By Design*.

<sup>54</sup> id

<sup>55</sup> “Death Row USA: Fall 2012,” NAACP Legal Defense and Educational Fund, Inc., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year>.

### Works Cited

- Allen, Mike, Edward Mabry, and Drue-Marie McKelton. “Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis.” *Law and Human Behavior* 22, no. 6 (1998): 715-731.
- Asch, Solomon E. “Forming Impressions of Personality.” *Journal of Abnormal and Social Psychology* 41, no. 3 (1946): 258-290.  
doi: 10.1037/h0055756.
- Cowan, Claudia, William Thompson, and Phoebe Ellsworth. “The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation.” *Law and Human Behavior* 8, no. 1-2 (1984): 53-79. doi:10.1007/BF01044351.
- Fiske, Susan T. and Shelley Taylor. *Social Cognition*. Reading, MA: Addison-Wesley, 1984.
- Goldberg, Faye. “Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law.” *Harvard Civil Rights-Civil Liberties Law Review* 5 (1970): 53-69.
- Haney, Craig. “On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process.” *Law and Human Behavior* 8, no. 1-2 (1984a): 121-132. doi: 10.1007/BF01044355.
- Haney, Craig. “Examining Death Qualification: Further Analysis of the Process Effect.” *Law and Human Behavior* 8, no. 1-2 (1984b): 133-151.  
doi:10.1007/BF01044356.
- Haney, Craig. *Death By Design: Capital Punishment as a Social Psychological System*. New York, NY: Oxford University Press, Inc., 2005.
- Haney, Craig and Richard Wiener. “Death is Different: An editorial Introduction to the Theme Issue.” *Psychology, Public Policy, and Law* 10, no. 4 (2004): 373-378. doi: 10.1037/1076-8971.10.4.373.
- Hastie, Reid, Steven D. Penrod, and Nancy Pennington. *Inside the Jury*. Cambridge: Harvard University Press, viii. Reprinted 2002 by The Lawbook Exchange, Ltd., 1983.
- Jurow, George L. “New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process.” *Harvard Law Review* 84, no. 3 (1971): 567-611. Retrieved from <http://www.jstor.org/stable/1339553>.

- Kessler, Joan B. "The Social Psychology of Jury Deliberations." In R. J. Simon (Ed.), *The Jury System in America: A Critical Overview*. Beverly Hills, CA: Sage Publications, 1975.
- Luginbuhl, James and Kathi Middendorf. "Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials." *Law and Human Behavior* 12, no. 3 (1988): 263-281. doi: 10.1007/BF01044384.
- Myers, David G. and Helmut Lamm. "The Group Polarization Phenomenon." *Psychological Bulletin* 83, no. 4 (1976): 602-627. doi: 10.1037/0033-2909.83.4.602.
- Moran, Gary and John C. Comfort. "Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment." *Journal of Applied Psychology* 71, no. 1 (1986): 146-155. doi:10.1037/0021-9010.71.1.146.
- NAACP Legal Defense and Educational Fund, Inc., Criminal Justice Project. *Death Row USA: Fall 2012*, (New York: NY, 2012), online at <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year>.
- Nickerson, Raymond S. "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises." *Review of General Psychology* 2, no. 2 (1998): 175-220. doi: 10.1037/1089-2680.2.2.175.
- Thompson, William, Claudia Cowan, Phoebe Ellsworth, and Joan Harrington. "Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts." *Law and Human Behavior* 8, no. 1-2 (1984): 95-113. doi:10.1007/BF01044353.
- Wilson, W. C. "Belief in Capital Punishment and Jury Performance." Unpublished manuscript, University of Texas (1964).
- Witherspoon v. Illinois, 391 U.S. 510 (1968).
- Zeisel, Hans. "Some Data on Juror Attitudes Towards Capital Punishment." Monograph. Center for Studies in Criminal Justice, University of Chicago Law School (1968).









