COLUMBIA UNDERGRADUATE LAW REVIEW

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ARTICLES

A Reexamination of *Wisconsin v Yoder*: An Untenable Holding in the Modern Era — Halina Bereday

Disparate Impact of Surveillance: The Precarious Condition of the Poor's Right to Privacy — Luke Hinrichs

Tiered Scrutiny and Tiered Wedding Cake: Implications of Non-Identarian Constitutional Protections — Charlotte Karlsen

California v Texas and its Attack on the Affordable Care Act — Aida Shipley

Shallow and Deep Approaches to 'Greening' Property Law — Witter Swanson

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LETTER FROM THE EDITOR-IN-CHIEF

Dear Reader,

As our first fully-virtual semester comes to a close, the Editor-In-Chief is proud to present the Fall 2020 issue of the *Columbia Undergraduate Law Review*. These five articles, selected from a set of more than 70 submissions, showed unique creativity and rigor. They cover topics ranging from the differential right to privacy based on class to the changing meaning of religious freedom in the twenty-first century.

In addition to our print articles, the *Columbia Undergraduate Law Review* initiated new interjournal collaborations to expand the geographical breadth and analytical depth of our content. In October, we began a partnership with the University of Cambridge's *Per Incuriam* to publish a range of intercontinental legal discussions through our roundtable initiative. And in December, we held our first-ever joint launch event with members of the *University of Pennsylvania Law Journal*. We hope to expand these partnerships in the upcoming year and beyond.

We also successfully launched our fellowship program, which allows students to pursue independent legal projects with the support of the *Review*. The program has received overall positive feedback, and we hope to welcome more fellows in January.

Despite our virtual environment, the *Columbia Undergraduate Law Review* has thrived. This year, we published a record-breaking three print issues, including our new summer edition. We expanded our membership to over 100 members, a 40% increase from the previous year. But none of this would have been possible without the incredible tenacity of each and every one of our members in the face of the COVID-19 pandemic.

Without your readership and the incredible work of our Print, Online, and Business teams, this journal would not exist. We hope you enjoy leafing through our Fall 2020 issue, and we look forward to your continued readership of the *Columbia Undergraduate Law Review*.

Sincerely,
Sonia Mahajan
Editor-in-Chief

LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board, I am proud to present the Fall 2020 issue of the *Columbia Undergraduate Law Review*'s print journal. We are excited to publish the following articles, which offer fresh perspectives on familiar legal problems.

In "A Reexamination of *Wisconsin v Yoder*: An Untenable Holding in the Modern Era," Halina Bereday explores the shortcomings of religious liberty in modern society. She argues that changes in factual circumstances since the Supreme Court's ruling in *Wisconsin v Yoder* disadvantages Amish children, and therefore should be reconsidered in modern context.

In his article "Disparate Impact of Surveillance: The Precarious Condition of the Poor's Right to Privacy," Luke Hinrichs investigates the disparities in the protection of privacy rights across socioeconomic class. He finds that low-income individuals experience a disproportionate amount of privacy intrusions, and advocates for equal protection of privacy regardless of economic status.

Charlotte Karlsen, in "Tiered Scrutiny and Tiered Wedding Cake: Implications of Non-Identarian Constitutional Protections," examines two approaches to the scrutiny doctrine—the dignity doctrine and powers review—but finds that both methods are flawed. Analyzing *Masterpiece Cakeshop v Colorado Civil Rights Commission*, she concludes that identity is indispensable in Equal Protection review under the Fourteenth Amendment.

In "*California v Texas* and its Attack on the Affordable Care Act," Aida Shipley reviews the most recent case concerning the Affordable Care Act before the Court. She argues that the individual mandate is constitutional, but—in the event that the Court finds otherwise—also holds that the mandate is severable from the rest of the Act.

Finally, in "Shallow and Deep Approaches to 'Greening' Property Law," Witter Swanson studies the impact of modern property law on climate change. He proposes and evaluates sustainable approaches to liberal property theory to combat environmental degradation.

With each successive publication, the *Columbia Undergraduate Law Review* strives to cultivate debate and discussion of legal issues, especially among undergraduates. We hope that you enjoy reading our print journal.

Sincerely,
Matthew Sidler
Executive Editor, Print

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 submissions 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.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

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A Reexamination of Wisconsin v Yoder: An Untenable Holding in the Modern Era

Halina Bereday | Georgetown University

Edited by John David Cobb, Jessica Cuadro, Gabriel Fernandez, Joyce Liu, Anushka Thorat, Jack Walker

Abstract

This paper considers the 1972 case of *Wisconsin v Yoder*, in which the U.S. Supreme Court considered a free exercise challenge by Amish parents seeking to avoid state compulsory education requirements for their children. Since that time, *Yoder* has endured as the landmark case for religious freedom and parental rights. In 1972, the Court conducted a *Sherbert* test, balancing the Amish communities' burdens against Wisconsin's compelling state interests, finding for the Amish. This paper examines the untenability of this holding in modern society: since 1972, there have been significant changes to factual premises of the case. In addition, *Yoder* hinders participation in economic and social systems and impedes autonomy, which are values the Court has deemed worthy of protection. By taking Amish youth out of school after eighth grade, they are significantly disadvantaged for the rest of their lives and effectively prevented from leaving the Amish faith. With all of this in mind, this paper notes that the time has come to re-examine the holding in *Wisconsin v Yoder*.

I. Introduction

In 1972, the Supreme Court ruled that Wisconsin's compulsory education requirement violated the right of the Amish to exercise their religion as protected by the Free Exercise Clause. Since then, *Wisconsin v Yoder*[1] has endured as a landmark case on religious freedom. In their ruling, the Court used the *Sherbert* test, which weighed the burden on Amish communities (exposing their

children to worldly influences and interference during the critical adolescent period) against Wisconsin's compelling state interests (educating youth and protecting them from child labor) to determine that the law violated the Amish's right to exercise their religion freely. However, since 1972, there have been significant changes to the factual premises of the case. The *Yoder* holding hinders participation in economic and social systems and impedes autonomy, which are values that the Court has deemed worthy of protection. Thus, while the Amish may have sincere religious beliefs and bore significant burdens in the 1970s, the time has come to re-examine the holding in *Wisconsin v Yoder*.

II. Background

Some knowledge of the Amish religion is necessary to understanding *Yoder*. Amish ideologies stem from a literal interpretation of a passage from the Epistle of Paul to the Romans that commands the Amish to "be not conformed to this world."[2] The Amish believe that salvation is achieved through living in a separate church community shielded from worldly influences.[3] Many of their objections to higher education are related to these claims. To the Amish, secondary education and further is an impermissible amount of exposure to worldly influences. However, the Amish do not object to elementary school because they believe that children must learn how to read the Bible, be good farmers, and deal with non-Amish people. Furthermore, early education does not interfere with the critical period during adolescence where commitment to the religion is cultivated.[4]

Still, the Amish believe that the values taught in school, such as self-promotion at the expense of others, are in conflict with their way of life. Specifically, schools teach self-distinction, competitiveness, and science, which contradict the Amish values of community welfare, separation from the world, and the concept

of learning through doing.[5] The Amish also place particular values on the importance of agriculture, especially in adolescence; they believe that manual labor brings them closer to God. During adolescence, Amish youth must stay home in order to develop a positive attitude towards hands-on agricultural work, grow in their faith, and strengthen ties within the Amish community. Adolescents must acquire these positive attitudes and skills to succeed as adult farmers in the Amish community.[6]

Another reason why adolescence is important to Amish culture is the practice of Rumspringa. Rumspringa is a period in which the Amish expose their youth to competing secular ideas, the purpose of which is to make an individual less restless as an adult. When Amish teenagers turn sixteen, for a period of about two years they are allowed to drive cars, play competitive sports, go to parties, drink alcohol, watch movies, and travel to cities.[7] While the retention rate after Rumspringa varies by community, it is generally around 80 to 90 percent. The Amish state that the purpose of Rumspringa is to offer Amish children the opportunity to make an informed decision about whether they want to stay in the religion. However, in reality, this process of Rumspringa is illusory and causes confusion and fear. All their lives, Amish youth have been taught that what they encounter during Rumspringa is bad. Thus, the sudden exposure to sinful experiences has severe repercussions. Amish youth sometimes become alcoholics or drug dealers, or are convicted of driving under the influence.[8] [9] It is interesting that the Amish do not take issue with exposure to worldly influences during Rumspringa especially since they sought exemption from the law because they feared the exposure to worldly influences that their children would encounter in school. Now, the premises and holding of the case will be analyzed.

III. Facts of the Case

In 1971, Wisconsin required mandatory school attendance until age sixteen; at the time, thirty-three states had a similar requirement. After this legislation was enacted, three Old Order Amish parents refused to enroll their children, ages fifteen, fifteen, and fourteen, in the local public high school. A criminal complaint was filed against the parents, and they were prosecuted. The defense argued that the skills necessary for Amish life are best learned through doing rather than in a classroom setting. The prosecution conceded that the Amish parents had exercised their religious liberty in objecting to compulsory education.[10] They also allowed that values taught in high school, such as competition and consumerism, were contrary to Amish values. Despite this, the Amish parents were fined, and the case was appealed to the Supreme Court. The Supreme Court stated that mandatory secondary school would "substantially interfer[e] with the religious development of the Amish child and . . . way of life of the Amish . . . at the crucial adolescent stage."[11] Moreover, it was noted that while education beyond eighth grade was required for a satisfactory life in modern society, the agrarian community of the Amish had different requirements. They maintained that learning by doing through informal vocational training would best prepare their youth for Amish life.[12] Thus, the Supreme Court determined that the State could not compel Amish youth to attend school past eighth grade. However, since *Yoder*, Free Exercise Clause jurisprudence has evolved. Changes in the Amish lifestyle and livelihood warrant the holding of *Yoder* to be reassessed, which requires an understanding of the evidence and arguments that were made at trial and on appeal.

At trial, the State claimed that the mandatory education laws served a few interests. The primary interest was enabling effective participation in the government by educated citizens.[13] The State also argued that individuals who left the Amish community with an

incomplete education would not be equipped to live in modern-day society. The State's third claim was that, without proper education, the Amish could become reliant on social welfare. This would be unfair to the wider public since the Amish did not pay social benefit taxes.[14] Finally, the State argued that it had an interest in fighting "the disease of ignorance." The State utilized the precedent set by *Prince v Massachusetts*[15] to justify some aspects of their argument, in which the Supreme Court held that under the power of *parens patriae*—the power of the state to protect those who cannot protect themselves, such as children—the state could prohibit a mother from employing her child to distribute religious material in public. The State sought the application of the *Prince* holding in this case, and thus, the Wisconsin Supreme Court found the Amish parents liable and issued them a fine, and the case was appealed.

At trial, the Amish called upon an expert witness, Dr. John Hostetler, an Amish scholar and professor at Temple University, who was able to inform the Wisconsin Supreme Court about the Amish community. Hostetler explained that a pillar of the Amish faith is separation from the world, which the Amish see as an ethical obligation necessary for salvation. Hostetler explained that the Amish reject education after eighth grade because those that persecuted the Amish in seventeenth century Europe were intellectuals, and so they believe that substantial knowledge prohibits salvation.[16] He explained the religious duty expected of Amish parents to raise their children in the Amish faith in order to achieve salvation. This includes instilling the values of attachment to agriculture, soil, plants, animals, natural life, and simple relationships to others and the community. Hostetler stated that adolescence has particular importance in the Amish faith because Amish youth receive their adult baptism and take on major responsibilities in the community around age sixteen. Finally, he explained that education up to eighth grade is accepted in Amish life in order to learn basic communication, interpersonal, and social skills.[17]

After citing his knowledge of Amish culture, Hostetler expressed concern over the mandatory attendance law. He noted that once Amish children are exposed to worldly influences, they cannot continue the Amish way of life. He mentioned possible psychological damage that could result from placing children in an unfamiliar environment where they will likely be mocked for their looks and peculiar dress. He believed that if Amish children come into contact with the values taught in high schools, the Amish community would be destroyed due to pressure to conform with the non-Amish ways of their peers.[18]

The second witness that testified at trial was the local sheriff. The sheriff declared that the Amish were the best-behaved people in the county and never committed crimes. They then put the county's Welfare Director on the stand, who declared that none of the Amish were a "public burden" because they were not on welfare. Finally, the Amish argued that the mandatory school requirement is not only irrelevant to Amish life, but makes Amish life impossible.[19] The Amish claimed a right to keep their religion free from entanglement with the State. The Amish argument was strong, but many of the aspects that made it convincing have changed since the decision.

A. The Sherbert Test

The *Sherbert* Test, established in 1963 through *Sherbert v Verner,*[20] allows the Court to examine governmental actions and laws that may substantially burden a religious sect and thus must be justified by a compelling governmental interest. If the government is unable to prove that it has a compelling interest in enforcing a law that burdens an individual with sincere religious objections, or has not enforced such an interest in the least restrictive way, the sect is exempted from complying with the law. For the *Sherbert* test, religious convictions must be sincere, and religious liberty, specifically, must be violated. Next, the defense must show that its

religious liberty was violated by the State, and not another party. Finally, the State must demonstrate that the violation of religious liberty is justified by a compelling State interest and is carried out in the least restrictive manner possible, while the defense attempts to demonstrate that the interest is less compelling than the resulting burdens or could have been conducted in a less restrictive way.

The Court applied the *Sherbert* Test to the facts of *Wisconsin v Yoder.* The Amish's religious convictions were clearly sincere; the Court stated that the case "abundantly supports the claim that the . . . way of life of the Amish is not . . . [a] personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[21] The substantial burden placed upon the Amish parents was that their children were forced to attend worldly high schools in order to meet the mandatory education requirement, where they would be exposed to non-Amish teachings that might threaten the survival of the Amish religion.[22] A second potential burden that the Supreme Court found was that formal high school attendance would interfere with the religious and agricultural training that Amish youth were supposed to receive during those formative adolescent years.[23] The Court examined these burdens and determined that because the mandatory education laws placed the Amish in an environment that might be hostile to their beliefs, the burdens were substantial. In response, critics argue that while it is true that exposing their children to such views would make it more difficult to raise the youth as Amish, it would not make it impossible. Parents could have children work on the farms after school hours and on weekends in order to instill these positive feelings towards farming.[24]

The argument that worldly education is a "burden" treats children as passive actors rather than autonomous beings who can challenge and refute the views of their parents and form their own values. Children will not necessarily accept worldly beliefs just because they are exposed to them. If Amish children were still

exposed to traditional Amish values, perhaps in a family-oriented setting outside of the classroom, children could freely choose to accept Amish principles. Ultimately, because a child is the guardian of their own conscience, it is up to the child to accept and reject various views independent of what they are exposed to by others. Furthermore, it is difficult to contend that exposure to worldly influences will lead to the downfall of the religion because 80 to 90 percent of Amish youth stay in the faith following the two years of Rumspringa. This suggests that there is a possibility that worldly values and Amish culture are compatible, and this might shift the outcome of the burden analysis.

Because the narrow question presented to the Supreme Court concerned solely whether compulsory education substantially burdened the Amish in the manner that was not least restrictive, the only ruling was determining if the Amish were to be exempt from the law. The Supreme Court was therefore legally unable to mandate solutions. However, plenty of compromises were available at the time, such as Amish-only schooling and homeschooling that could have allowed Amish youth to attend school in a way that would not have threatened their religious beliefs. These compromises remain available. As Gage Raley, Professor of Law at Hanyang University, suggests, the Amish could create a vocational school that teaches reading, agriculture, husbandry, and basic math skills, which Amish youth could attend until the age of sixteen.[25] This would allow them to meet the State's requirement, avoid worldly influences, and enable youth who fall away from the community to continue their education. Another alternative is homeschooling. There is already infrastructure to accommodate Amish students through high school. Rod and Staff Books, the leading textbook publisher for Amish schools, carries high school curricula for the Amish that allow students to continue their education through tenth grade. They also have a homeschool curriculum that continues through the end of high school so that Amish youth can receive a diploma. The diploma

and courses offered are accepted by colleges should the youth choose to continue their education.[26] Thus, more than a few remedies exist for the burdens placed on the Amish by the State's education requirement. Next, we will examine the compelling interests of the State in keeping children in school up to age sixteen.

B. Compelling State Interests

The main compelling State interest at play in *Yoder* was to protect children's health and prevent violations of child labor laws. At the time, Amish youth worked on their parents' farms, complying with child labor laws, which merely prevented children under fourteen from working in manufacturing, those under sixteen from operating heavy machinery, and those under eighteen from toiling in dangerous workplaces such as sawmills, but exempted children working on farms with parental supervision.[27] As a result, the State had a less compelling interest in enforcing the mandatory education requirement for Amish youth because they were not in violation of existing child labor laws.[28]

C. The Holding

Because the Court determined that the Amish encountered substantial burdens that outweighed the State's interests in enforcing education, the Supreme Court exempted the Amish from the education mandate. Justices Brennan, Stewart, and White noted that they could not say that the State's requirement of two more years of education outweighed the importance of the survival of the Amish religion; it was a minor amount of schooling at stake, and children who dropped out of the religion could acquire new academic skills later. Justice White concurred that the State did have a legitimate interest in preparing children for the secular lifestyle they later may choose, but noted that two more years would not help to achieve

this.[29] Justice Stewart noted that, from his perspective, the case did not involve the rights of children to attain education because the children never expressed a desire to attend high school against the wishes of their parents.[30]

The Court determined that the state's claim that individuals who left the Amish community without completing their education would not be equipped to live in modern-day society was speculative.[31] Another one of the State of Wisconsin's arguments was that the Amish could become burdens on society without proper education. The Court responded by stating that there was no evidence that members who left the Amish community would be a burden because their practical education equips them with values such as reliability and dedication to work, which would also serve them well in normal society.[32] In essence, the Court believed that the vocational training that Amish teens received on family farms not only prepared them for life in the Amish community, but also in broader society.

Justice Douglas dissented in part, noting that the Court failed to consider the children's perspective. While none of the children expressed desire to attend high school, they were not given an opportunity to choose. Justice Douglas would have had all the children testify regarding their wishes on the matter, writing that "it is the future of the student . . . that is imperiled . . . if a parent keeps his child out of school . . . the child will be forever barred from entry into the new and amazing world."[33] This quote reveals that Justice Douglas recognized that keeping children out of schools after eighth grade would have significant repercussions for the rest of a child's life. Douglas concluded by arguing that if a child "is harnessed to the Amish way of life . . . and if his education is truncated, his entire life may be stunted and deformed."[34] Finally, the Court noted that the holding did not apply to other religious groups and has dismissed similar cases brought about by other religious sects in later jurisprudence, arguing that *Yoder* applies only to the Amish.[35]

Despite the Court's claim that youth could resume their education later if they desired,[36] research shows that resuming education after an interruption is difficult. In Amish culture, at sixteen, an Amish child can make their own decisions. However, by then, they would have fallen behind academically by one or two years. Continuity is another significant factor in education: a Department of Education study of a California high school committed to re-enrolling dropouts showed that only 31 percent of dropouts eventually re-enrolled, and only 18 percent of dropouts graduated.[37] This study and countless others show that consistency is vital to success in education. As with high school dropouts in various situations, the Amish are much less likely to re-enroll and even less likely to graduate from high school, especially in Amish communities that do not have a commitment to re-enrolling.

IV. Changes to the Factual Premises of *Yoder*

Since 1972, there have been significant changes in Amish society that undermine the factual premises and therefore warrant reconsideration of *Yoder*. Originally, the Court held that "the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults."[38] However, the majority of Amish children now work in dangerous conditions and in positions that should be occupied by adults. The Amish's previously agrarian vocational education now takes place primarily in sawmills and factories, and is no longer superior to traditional high school. In addition, the Amish community is no longer isolated, but rather interdependent on the rest of society, as demonstrated by their reliance on welfare and the national economic fluctuations. Therefore, Amish children now need a modern education to succeed.[39] Wisconsin has also raised the minimum age of mandatory education, so there is no longer a minimal difference

between the state's requirements and the eighth-grade education that the Amish accept. Given these factors, the state has an increased interest in enforcing mandatory education for the Amish.

The most important aspects that have changed since the holding of *Yoder* stem from the shift from farms to factories and a subsequent child labor law exemption that Amish were granted in 2004. Both of these factors make the Amish's burdens less significant and the State's interests even more compelling. As a result, it is unlikely that a *Sherbert* test conducted today would indicate that burdens on the Amish outweigh the interests of the state. Originally, a primary reason the Supreme Court allowed the Amish to be exempted was because they were working on farms run by parents that abided by child labor laws. As a result, the state had less of an incentive to enforce the education requirement upon them. Over time, the environment where the Amish community works has transitioned from the family farms to dangerous factories. This is because changes in rural economics have had an impact on the price of land, rendering farming no longer financially viable. As a result, more than two thirds of Amish communities have switched from farming to factory work, and where Amish parents go, the youth follow.[40] The primary reason the Amish had to seek a dangerous alternative livelihood is because of their truncated education. With only an eighth-grade education, professional jobs were not an option, and so the Amish community was limited to manual labor. Since farming has become much less essential in Amish society, this remedies one of the main burdens that the defense initially claimed: high school attendance interfered in the critical period of adolescence where Amish teens were acquiring important farming skills to help them function as adults in the community. Now, the majority of Amish youth work in conditions that violate child labor laws. Thus, if relitigated today, it is unlikely that most Amish communities would pass a *Sherbert* test, as the burden on the Amish is less essential and the state's interests have become

substantially more compelling. What was a significant burden is no longer as important for most Amish communities, and it would be the decision of the lower courts to exempt the Amish youth who engage in farming, if any still exist, from the education requirement.

A focus on risky factory work coupled with loosening restrictions for the Amish concerning child labor threatens the welfare of Amish youth. In the aftermath of the *Yoder* holding, the Department of Labor further relaxed labor restrictions and so the Amish were allowed to perform farm work during what would otherwise be school hours. However, the Department would not permit Amish youth to work in sawmills and woodworking shops. But, when Amish society shifted from farms to factories, they began to lobby for an exemption from child labor restrictions.[41] Union leaders argued against granting an exception because of the dangerous working conditions in sawmills and woodworking facilities. The Department of Labor argued that such places have high accident and fatality rates that would only increase with children working there.[42] Congressmen from districts with Amish communities claimed that the concerns for child safety were overblown, and that children would be supervised by caring adults.

After much controversy, in 2004, the Amish were granted a total exemption from child labor laws and received a law tailored to their needs.[43] The labor law had one stipulation: if the decision of *Yoder* was ever overturned, this child labor law exemption would be discarded as well. However, Amish children are free to work in hazardous industries, at least for now. This alone provides a compelling reason to overturn *Yoder*. Moreover, states have a stronger interest today than they did in 1972 in keeping the Amish in school, as the primary compelling state interest at the time was to keep children out of dangerous labor situations. Amish children are working lengthy hours in workplaces that would be dangerous for anyone, especially children. Current Amish practices exemplify why child labor laws were created in the first place. Thus, if *Yoder*

were reevaluated today, the *Sherbert* test would likely show that the state has a greater interest in compelling Amish youth to stay in school.

Another consequence of the Amish transition to manufacturing jobs is that they are increasingly vulnerable to fluctuations in the economy. The Amish suffered during the 2008 recession, which proves that their community is no longer insulated from economic disasters and their society is not as self-sufficient as it once was. In *Yoder*, the Amish's lack of reliance on welfare was used to justify the fact that they should be exempted from mandatory education statutes, as they were not burdens on society.[44] Now, Amish adults have become increasingly reliant on public assistance, in part due to their lack of education, which prohibits them from getting a stable job. With permission from their bishops, the Amish now file for unemployment and receive state assistance, which rarely happened when the Amish were primarily farmers.[45] If Yoder were relitigated today, the Amish would not be able to use the evidence that they are not reliant on public assistance in order to justify their exemption from the mandatory education requirement. Additionally, because of their general susceptibility to economic fluctuations, the State today would have a more compelling interest in enforcing the mandatory education laws on the Amish so that they can obtain professional jobs in order to support their families in times of economic downturn.

The fourth significant change is that in modern society, the importance of education has increased. The purpose of education is to provide individuals with skills necessary to survive in a modern economy. Technological innovations have altered the workplace and, as a result, jobs require more skills. Individuals who have only obtained an eighth-grade education are at more of a disadvantage now than they were in 1972. Today, Americans must compete for jobs with a vastly higher educated domestic workforce. In 1970, 52 percent of Americans had completed high school and only 11

percent had finished college. By 2007, 84 percent of Americans had graduated from high school and 27 percent had completed college.[46] Today, Amish children are not prepared to be economically productive adults without a high school education.

Finally, across the country, all states have realized the value of education since *Yoder* and have raised the age for compulsory education; Wisconsin's statutes now require education through age eighteen.[47] When the opinion of *Yoder* was issued, the Justices stated that two years more education was a marginal difference for Amish youth. Now, there is a four-year difference between Amish youth and everyone else. It is much harder to argue that a full high school education is only marginally different from an eighth-grade education. As state legislatures have recognized the increasing importance of education, so too should the Amish.

V. The Reliance Interests

As Gage Raley suggests, the reliance interests strengthen the case for reexamining *Yoder*. The reliance interests are a legal standard established as a result of *Planned Parenthood v Casey*.[48] *Casey* was a suit brought against the Pennsylvania legislature for making abortion laws stricter by adding various caveats that minors, married women, and women in general were required to fulfill before they could obtain an abortion. In response, numerous clinics petitioned against these new laws, and the Court established several *stare decisis* considerations, in which they determined how to reexamine prior legal precedent in current litigation. For *Casey,* the Court reexamined *Roe v Wade* to determine if it should be overturned, ultimately retaining the decision.

The several *stare decisis* considerations which the Court outlined were as follows: "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation," "whether

related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," and "whether the rule has proven to be intolerable simply in defying practical workability." In essence, reliance interests ask whether people have come to rely on the stability of an existing legal rule, whether the rule is in line with current jurisprudence, and whether the rule is practically workable. The Court also set a standard for how to determine these notions by examining the following: the extent to which *Roe* altered the way women organized their lives and changed the way women viewed themselves and their place in society; and whether *Roe* enabled female participation in the nation's social and economic spheres which served constitutional values. Upon examination of these aspects, the court determined that *Roe* not only significantly impacted the way women organized their lives but also the way they were both viewed by society and themselves. Furthermore, the Court stated that because for nearly two decades *Roe* enabled participation in systems and fostered constitutional values, it thus should not be overturned. Applying these questions to *Yoder*, has the law developed so much so that *Yoder's* principles and the *Sherbert* test used to justify it are remnants of an abandoned doctrine? Has the holding defied practical workability? Furthermore, is there a justification that the holding should not be overturned because it enables participation in economic and social spheres and promotes constitutional values? Do the Amish significantly rely on *Yoder* in the way that they view themselves and their place in society? These questions must be analyzed to come to the determination if *Yoder* could be abandoned in current times.

To begin, an analysis of more recent cases coupled with the abandonment of the *Sherbert* test demonstrates that the holding in *Yoder* is based on an abandoned doctrine. Today, the courts no longer use the *Sherbert* test to determine religious exemptions. In *Employment Division v Smith,* the Court held that a state does not have to meet strict scrutiny to justify a generally applicable law

with a burden on religious exercise. This new determination set a precedent that was at odds with the *Yoder* holding. As a result, the Supreme Court created a doctrine known as "hybrid rights" to justify *Yoder,* which has since been abandoned.[49] Created by Justice Scalia, hybrid rights entails the notion that when a law burdens more than one constitutional right, a neutral, generally applicable law is barred. Thus, *Yoder* was preserved in light of *Smith* because the case dealt with both the right to the free exercise of religion and the right of Amish parents to direct the upbringing of their children. This principle is inherently at odds with the *Sherbert* test because the *Sherbert* test can only be used to determine if the free exercise right is burdened, not some other kind of right.[50] Thus, if the Amish's right to raise their children and their free exercise right was burdened, the *Sherbert* test would not have been used in the first place and there would have been no case.

Even this hybrid rights justification has largely been abandoned. Legal commentators have condemned hybrid rights for being disingenuous and unworkable, and even Justices and lower courts have stated their opinions: Justice Souter remarked that the hybrid rights exemption would likely swallow the *Smith* rule. The U.S. Court of Appeals for the Sixth Circuit has rejected the hybrid rights theory as "completely illogical." The Second and Third Circuits have avoided dealing with the theory by ignoring it. Even Justice Scalia, who created the doctrine, abandoned it in *Watchtower Bible & Tract Society of New York, Inc. v Village of Stratton* in 2002. Because of the controversy surrounding the justification of *Yoder* in modern times, it is clear that the holding is both practically unworkable and a remnant of an abandoned doctrine.

Next, do the Amish significantly rely on the holding in *Yoder* in establishing how they view themselves? While Amish adults at large may rely on the holding in order to ensure that youth stay in the Amish community, the New Glarus Amish community (which was the residence of the defendants) no longer has a stake in the holding.

This is because shortly after the case was decided, the Wisconsin Amish dispersed due to conflict over whether the suit was the right decision.[51] There is also conflict in existing Amish communities about the value of education, highlighting the fact that the holding may not be critical to the way that the Amish define themselves. Some Amish parents may admit to the increasing importance of education and exposure to different beliefs. For the most part, however, Amish communities continue to object to education after age fourteen; one study in Ohio found no instance of an Amish family that had enrolled children in a full-time public or private school after eighth grade.[52] So, because certain individuals in the Amish community value education more than others, it is unclear whether all Amish rely on the *Yoder* holding to the same extent as they once did. Thus, while the Amish community at large may rely on the holding, the degree of this reliance is uneven.

Next does *Yoder* facilitate participation in social and economic spheres and serve constitutional values? *Yoder* actually hinders participation; the ruling prevents Amish youth from obtaining higher education that would allow them to leave the religion. In *Yoder*, no mention was made of intervening on behalf of the child's well-being. However, the Court failed to consider the value of a teenager's autonomy. Thus, while Amish adults may have a reliance interest in the *Yoder* holding because it prevents members from leaving the faith, Amish young people have an equal interest in protecting their autonomy, which is threatened by *Yoder*. For example, from early childhood, Amish children are made to feel separate and isolated.[53] They are not allowed to use technology and are forced to wear distinctive clothing. The *Yoder* decision demonstrates how Amish parents employ their children's lack of education to emphasize their distinctness. Amish teens know that other American youth attend high school, and they are also aware that they are removed from school at an earlier age so that they will not be prepared for a life in modern society. This reminds Amish youth that, should they

leave the faith, the majority of American adults have a high school diploma, placing them behind both economically and socially. Even Dr. Hostetler admitted that "learning [is] very attractive to the Amish boy or girl . . . [but] such ambitions are blocked."[54] Even some Amish elders contend that curtailing education early serves a purpose because Amish youth have "less ability to make it on the outside" and it "hastens their return to the fold."[55] Thus, the *Yoder* exemption allows Amish parents to further separate their children from modern society and coerces Amish youth into staying in the community; this hinders equal participation in economic and social systems.

Finally, *Yoder* does not serve constitutional values. This is because their exemption to the compulsory education requirement allows the Amish community to prevent youth from leaving; otherwise the Amish may have difficulty retaining young people.[56] The community pressures children to retain membership through guilt and alienation. Furthermore, Amish youth miss out on the autonomy fostered by education, which the Court has previously recognized as worthy of constitutional protection in *Plyler v Doe*.[57] In *Plyler*, the Court acknowledged that children of undocumented immigrants are entitled to Fourteenth Amendment protections and therefore cannot be excluded from education. In its holding, it acknowledged that the "deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement."[58] It is interesting that the Court was willing to acknowledge that children of undocumented immigrants have a right to education, yet still allows U.S. citizens to be deprived of this right. As the Court acknowledged in *Plyler*, children cannot control to whom they are born, and thus should not be penalized. This should include both undocumented immigrants and Amish youth. In turn, the lack of education prevents the Amish from leaving their religion because surviving in modern society without a high school diploma is exponentially harder. *Yoder*

fosters dependency and hinders autonomy, which is at odds with values deemed worthy of constitutional protection. As such, it is unlikely that if reexamined through *stare decisis* today, the Court would find any justification to reaffirm *Yoder* as they did *Roe.*

VI. The Child Rights Perspective

Finally, there are several aspects of children's rights that are worth mentioning. The Amish children have the right to a secondary education, and the State has the power of *parens patriae* to intervene when parents act contrary to a child's best interests. The theory of *parens patriae* stems from the idea that a child is innately vulnerable. When a parent fails in their natural duty to protect a child's healthy development, the State must intervene.[59] For example, in the case of *Kansas v Garber,*[60] the Kansas Supreme Court refused to let the Amish keep their children out of state-accredited schools altogether, stating that religious liberty included "the absolute right to believe but only a limited right to act." The Kansas Supreme Court mentioned that it could not see how the right to religious exercise was infringed upon because Amish beliefs were unaffected; the parent, Leroy Garber, could educate his child on religion however he desired. The Court concluded with the notion that "the question of how long a child should attend school is not a religious one."[61] The fact that the Kansas Supreme Court recognized and protected the Amish children even though the parents claimed religious exemption points to the direction courts should take.

Another similar case is *Prince v Massachusetts*,[62] in which the Court indicated that the parents' right to direct the upbringing of their child, even when linked to a free exercise claim, such as in the case of a mother instructing her child to distribute religious pamphlets, is limited if it will jeopardize the health and safety of the child. In the holding for *Prince*, the Court established that it was concerned with the physical and mental well-being of the child and

that the Court must protect the child from these adverse effects.[63] One would think that because the Court was so thorough about expressing its concerns for the child's mental well-being, it might also be critical of the stunted knowledge and truncated mental well-being of the Amish youth.

It is true that parents have the right to direct the upbringing of their child. However, if parents' means in achieving a religious belief conflict with what is in the child's best interest, it is illegal. Even when parents are acting on a religious belief, society sees a child's well-being as more important; one example is female genital mutilation, which is required by some religions but is against the law.[64] This brings me to the interesting notion coined by philosopher Joel Feinberg that children have a right to an open future; this has no legal standing but is a liberal interpretation of *parens patriae*. The right to an open future discusses the notion that, because children will eventually be adults in society, it is in their best interest to grant them as many opportunities as possible, and this right is violated when a parent irreversibly eliminates certain key options for the child.[65] In the Amish case, because the lack of higher education coerces Amish youth to stay in the community, their parents have violated their right to an open future, because without education, leaving the faith is no longer an option. This idea stems from conventional ethical and philosophical discourse which notes that parents do not have a right to insulate their child from different ways of thinking.[66] Furthermore, because Amish youth have been sheltered from the outside world, when Amish adolescents turn sixteen years old, they are not able to make an autonomous choice to join or leave the community, because they are not properly informed about the alternatives. Thus, advocates of the right to an open future would contend that the best education is one that allows children as many open opportunities as possible so that they can make up their own minds, and would advocate for the holding of *Yoder* to be reexamined on behalf of the children.

In American society, Amish people were greatly admired at the time of *Yoder's* holding, as increasing violence, affluence, corruption, and state power made people yearn for the simplicity, peace, and hope, that the Amish seemed to promote.[67] Despite this yearning for simplicity, a significant shift in the nature of the world warrants *Yoder's* reconsideration. It is extremely unlikely that the Amish could pass a *Sherbert* test today.[68] Even if they could, jurisprudence and Amish society have changed so much that the *Yoder* holding is untenable. The Amish now put their children to work in hazardous factories that are potentially dangerous to their health and well-being in lieu of allowing them a basic education—all in the name of religious freedom. Furthermore, under the reliance interests outlined in *Casey,* it is apparent that *Yoder,* if examined in a *stare decisis* manner today, would not provide the justification to warrant its reaffirmation. Thus, while the chances of *Yoder* being litigated again are low, the stakes are high. Every year *Yoder's* holding remains unchanged, generations of Amish children are stripped of additional years of education, future opportunities, and many of the freedoms guaranteed by the Constitution; this is contrary to the very values Americans pride themselves on, such as a broad view of personal freedom. Therefore, the time is long overdue to reexamine *Yoder.*

[1] *Wisconsin v Yoder*, 406 U.S. 205, 205-248 (1972).
[2] Romans 2:12. In *New International Version*. (2011).
[3] Gage Raley, ""Yoder" Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned." *Virginia Law Review*, 97, (2011): 681-722. https://www.jstor.org/stable/41261528?seq=1#metadata_info_tab_contents
[4] Cheng, David. "Wisconsin v. Yoder: Respecting Children's Rights and Why Yoder Should Be
Overturned," 4, no 1., *Charlotte Law Review,* 45, 45-81 (2013).
[5] Raley, 687.
[6] Ibid, 690.
[7] Cheng, 60.
[8] Ibid, 61.
[9] Stick Figure Productions. "The Devil's Playground," 2002.
[10] *Wisconsin v Yoder*, 209.
[11] Ibid, 218.
[12] Ibid, 211.
[13] *Wisconsin v Yoder*, 213-215.
[14] Ibid, 224.
[15] *Prince v Massachusetts*, 321 U.S. 158, 158-178 (1944).
[16] Ball, William. "Future Shock: The Religious Liberty Horizon." Lecture, Ball & Skelly, Harrisburg, PA, 18.
[17] Ibid.
[18] Ibid, 19.
[19] Ibid*,* 19-20.
[20] *Sherbert v Verner*, 374 U.S. 398, 398-423 (1963).
[21] *Yoder*, 216.
[22] Ibid, 235.
[23] Ibid, 211.
[24] Cheng, 70-73.
[25] Raley, 689.
[26] Ibid.
[27] *Wisconsin v Yoder*, 229.
[28] Ibid.
[29] *Wisconsin v Yoder,* 238-240 (White, B., concurring).
[30] Ibid, 237 (Stewart, P., concurring).
[31] Ibid, 224.
[32] Ibid, 224-225.
[33] *Wisconsin v Yoder,* 245 (Douglas, J., dissenting).

[34] Ibid*,* 246.
[35] When parents have cited *Yoder* to exempt their children from mandatory education laws, lower courts note that the holding only applies to the Amish. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.* (Pentecostal faith) and *State v. Riddle* ("Biblical Christian" sect of Methodism).
[36] *Wisconsin v Yoder*, 240.
[37] Raley, 707.
[38] *Wisconsin v Yoder*, 228.
[39] Raley, 691.
[40] Ibid, 691.
[41] Ibid, 699.
[42] Ibid, 700.
[43] Ibid, 700-701.
[44] *Wisconsin v Yoder*, 222.
[45] Raley, 696.
[46] Ibid, 695-696.
[47] Ibid, 696.
[48] *Planned Parenthood v Casey,* 505 U.S. 833, 833-854 (1992).
[49] *Employment Division v Smith*, 494 U.S. 872, 872-874 (1990).
[50] *Sherbert v Verner*, 398-423.
[51] Mark Walsh. "Supreme Court Lecture Recalls Amish School Case." Education Week - The School Law Blog (2011). https://blogs.edweek.org/edweek/school_law/2011/03/
[52] McConnell, David L. and Charles E. Hurst. "No "Rip Van Winkles" Here: Amish Education since "*Wisconsin v. Yoder*". *Anthropology & Education Quarterly,* 37, no. 3 (2006): 236-254. https://www.jstor.org/stable/3805072
[53] Raley, 708.
[54] Raley, 710.
[55] Raley, 710.
[56] Ibid, 707.
[57] *Plyler v Doe*, 457 U.S. 202, 202-253 (1982).
[58] Ibid.
[59] Cheng, 47.
[60] *Kansas v Garber*, 197 Kan. 567, 567 (Kan 1966).
[61] Ibid.
[62] *Prince v Massachusetts*, 166.
[63] Ibid.

[64] Cheng, 45.
[65] Ibid, 47.
[66] Davis, Denna, "The Child's Right to an Open Future: Yoder and Beyond," 26 Capital University Law Review 93, 93-106 (1997)
[67] Ball, 24-25.
[68] *See supra*, note 20.

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Disparate Impact of Surveillance: The Precarious Condition of the Poor's Right to Privacy

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Abstract

Although the exact definition of privacy remains elusive and amorphous, the sharp inequality in the inflicted harms of privacy intrusion and in privacy protection cuts through the fog of uncertainty. Though surveillance is increasingly pervasive in contemporary society, low-income Americans endure disproportionate levels of privacy vulnerability and intrusions. This inquiry examines the enduring legacy of the discriminatory impairment of impoverished individuals' exercise of their fundamental rights. This article first establishes the difference between soft surveillance and hard surveillance as the foundation for evaluating the dual disparity in the poor's experience of traditional hard intrusions and heightened vulnerability to the expanding imposition of soft intrusions. I then analyze the hegemonic housing exceptionalism in privacy jurisprudence to depict the inefficiencies of traditional doctrines of privacy rights and protections. The ability to purchase the expectation of privacy instills inherent disparities in doctrinal protection. Additional fundamental conceptions of privacy, such as the right to be left alone, prove insufficient for the poor who have an ongoing relationship with the State. The subsequent analysis of the intrusive and criminalized nature of the welfare system depicts the disparate treatment of beneficiaries of government programs. While hard surveillance is primarily monopolized by the State, the big data revolution's disparate amplification of privacy vulnerability exposes the poor to the harmful soft surveillance intrusions of a predatory private sector. With the workplace increasingly surveilled and monitored, the low-income laborer, unable to afford the full luxury of privacy, toils under a continued, surveilled existence.

I. Introduction

A fable teaches that if a frog jumps into a pot of boiling water, it will instinctively jump out. But, if that very same frog were to jump into a pot of tepid water that is slowly brought to a boil, it will not perceive the danger until it is too late. For many scholars who examine privacy in the United States, the water is now perceived to be coming to a boil. But, in reality, the bubbling water of this nation has long been boiling, with its scathing steam now increasingly enveloping those beyond its usual class of victims. The creeping normalization of privacy intrusions has long been standardized for impoverished communities with generations of poor Americans born in inescapably boiling water. The poor and destitute were fixed in these dangerous waters at the inception of this nation.

In Colonial America, most localities employed "overseers of the poor" who tracked and recorded the destitute as the poor "could be jailed, sold at auction, or indentured at the discretion of… individual towns or communities."[1] By the 1800s, poorhouses were the dominant poverty relief policy. The poor were rounded up and housed in tight, dismal dwellings as a designated "keeper" conducted inspections and oversaw their labor.[2] Though anti-poverty policies became more compassionate in the late 1800s with major social reform efforts, "the scientific charity movement relied on 'friendly visitors' to investigate the homes of the poor and exhort them to higher morals."[3] As the New Deal's set of domestic policies responding to the Great Depression constructed the modern welfare state and expanded the federal government's role in the economy and financial well-being of the people, its programs continued this history of surveillance of the "undeserving poor." The contemporary welfare system has maintained the intrusive indignities of the past. In addition, much of the state's surveillance and data-collection today are comparable to the tools and institutions of the political economy of slavery. For example, "Plantation ledger books served as proto-

biometric databases" and "[t]he slave pass, the slave patrol, and the fugitive slave poster—three pillars of information technology in their day—prefigured modern policing, tracking, and photo ID."[4] Though "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society,"[5] such growth and progress has yet to extend to the unchanged existence of a poor class. When Louis D. Brandeis and Samuel D. Warren constructed the initial provenance of privacy as a right protected by common law, their concern did not explicitly extend to the sharecropper or pauper whose existence was under constant surveillance, scrutiny, and intrusion.

Though poor Americans are a diverse group and their experiences are varied, they nevertheless share an economic condition that condemns them to experience privacy differently on a daily basis than do middle and upper-class Americans. For some, privacy is a luxury they cannot afford. For others, privacy cannot even be bought at any price. While many in the US express unease over a perceived loss of privacy, the direct harms to the poor from surveillance and data collection stretch far beyond generalized concerns.

For most Americans, privacy intrusions are felt as a vague sense of being watched or a distant uneasiness over the collection of their data according to Pew research.[6] Data-collection is both felt as inescapable, and yet also relatively unseen and indirect. However, these sentiments only capture the increasingly salient and imposed "soft" invasions of the general public's privacy. Soft surveillance and privacy intrusion involve "less invasive techniques, hidden technologies, and implied consent."[7] Invasiveness in this context refers to the tangible and direct nature of the intrusion. Soft surveillance encompasses the unseen and automated information collection of personal data, facial recognition and CCTV surveillance, and less-coercive means of voluntary compliance. By comparison, "hard" surveillance, primarily monopolized by state

entities and law enforcement, involves intrusions like *Terry* stops, custodial interrogations, urine and blood testing, and overt and coercive surveillance tactics. With advancements in technology and the rise of the information economy, or the development of Shoshana Zuboff's surveillance capitalism,[8] soft intrusions and surveillance are increasingly used in policing practices and prompted as tradeoffs for goods, services, and benefits. Gary T. Marx describes this movement as the "surveillance creep," involving the "displacement of traditional invasive means and the expansion to new areas and users."[9] Even though the imposition of hard forms of surveillance remains unabated, the soft forms are expanding with their harms disproportionately levied on the vulnerable.

Though surveillance is widespread in contemporary society, low-income Americans endure disproportionate levels of hard privacy intrusions while remaining vulnerable to the growing harms of soft privacy intrusions as well. The definition of privacy remains elusive and amorphous for scholars as it is loosely defined as the right to be let alone, the ability to control personal information, a condition of intimate relationships, and an essential component of human dignity, autonomy, personhood, and self-determination. Nonetheless, the sharp inequality in the harms of privacy intrusion cuts through the fog of uncertainty. In this study, I explore the class-based differential in privacy protection through the deleterious effects and inefficacy of housing exceptionalism in privacy rights, the invasiveness of the welfare system, the disparity in economic harms of unregulated big data, and the work environment of low-wage laborers.

II. The Man Without A Castle: Housing Exceptionalism and Privacy of the Unpropertied

The disproportionate protection of residential privacy rights has yielded a disparity in protection across income groups

and environmental contexts that proves unfavorable for low-income communities. The supremacy of the home in the context of privacy jurisprudence and cultural consideration is deeply rooted in Anglo-American tradition. Common law in the United States imported English law's recognition that "the house of every one is to him as his...castle and fortress."[10] Both the Fourth Amendment's protection against unreasonable searches and seizures and the Third Amendment's bar of non-consensual quartering of soldiers in private homes provide the foundation for the idealization of the inviolate home. However, the property-based approach to identifying protected privacy interests has distorted and undermined the broader protection from substantive privacy intrusions. The Supreme Court has held steadfast to the principle that there is an inherent reasonable expectation of privacy within the home.

The Court has defended the home as a sanctimonious site at the "core of the Fourth Amendment."[11] With "physical entry of the home [as] the chief evil against which the wording of the Fourth Amendment is directed,"[12] homes have doctrinally received greater protection than most other contexts of search and seizure. While the fixation on residential search precedents and the home is not the sole reason these contexts receive less protection, home-search cases have provided additional justification for limiting protection outside of the home. In *Dow Chem. Co. v United States* (1986), the Court explicitly allows for aerial search of the property around a business as "this is not an area immediately adjacent to a private home, where privacy expectations are most heightened."[13] Wading through uncharted waters, the Court considered mobile homes in *California v Carney* (1985). With limited prior cases considering the non-traditional home, the Court applied the automobile exception doctrine, in addition to the consideration of mobility, that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[14] Thus, vehicles, in which less

well-off people are much more likely to live, may be searched without the full protection of the Fourth Amendment. The dissenting opinion points out that the majority ruling gives very little consideration to "whether the home is moving or at rest, whether it rests on land or water, the form of the vehicle's attachment to its location, its potential speed of departure, its size and capacity to serve as a domicile, and its method of locomotion."[15]

While *Katz v United States* (1967) was posed to shift jurisprudence away from the property-based approach as the Court asserted the Fourth Amendment "protects people, not places,"[16] the movement towards substantive privacy concerns proved incomplete. Justice John Marshall Harlan formulated two tests: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[17] Subsequent cases, however, showed a persistence of trespass law and property concepts in Fourth Amendment doctrine.[18] For example, in *United States v Jones* (2012), the only opinion carrying a majority was Justice Antonin Scalia's in which he concluded that the police had failed "the common law trespassory test" by sneaking onto the defendant's driveway for access to his car.[19] While *Jones* reinforced the old property-bound conception of privacy, it also provides additional subtle disparate implications as designated private driveways are not often incorporated in urban planning or apartment complexes. In *United States v Karo* (1984), the Court ruled that police needed a warrant to track the location of a beeper in private residences as the home has a presumptive expectation of privacy.[20] A year after the Court instilled the consideration of reasonable expectation of privacy in *Katz*, they clarified the ruling in their *Alderman v United States* (1969) decision, asserting that Katz "was [not] intended to withdraw any of the protection which the Amendment extends to the home."[21] In practice, the *Katz* doctrine functionally meant that privacy primarily follows space rather than citizens.

The housing exceptionalism of privacy protection "define[s] privacy in a way that makes people who are less well-off more likely to experience warrantless, suspicionless government intrusions."[22] The homeless, those without a castle, are afforded very little certainty as to their privacy rights. Courts have ruled that there is no reasonable expectation of privacy afforded to those who live in cardboard boxes[23] or the squatters in abandoned buildings.[24] While homeless campsites and makeshift homes enjoy no reasonable expectation of privacy, case law is contradictory with regard to homeless shelters.[25]

The doctrinal emphasis on the physical home and "sacred spaces"[26] has placed the private versus public discrepancy to the disadvantage of all society, but disproportionately the poor. Since "[l]ow-income individuals spend a greater share of their time in public venues and socialize more frequently in public spaces,"[27] the publicity of the poor casts a limited shield from intrusion. Even though "there are many, many more street encounters than searches of private homes" and that "protecting privacy in the home casts a smaller substantive shadow than protecting privacy in glove compartments or jacket pockets," the home remains the locus of privacy protection as seen even in *Kyllo v United States* (2001).[28]

The poor found little relief from the unequal distribution of privacy protections in the extensions of the "home's 'umbrella' of Fourth Amendment protection"[29] and the principle of reasonable expectation of privacy. These shifts and expansions do not strike at the heart of the Fourth Amendment's anti-egalitarian jurisprudence. The expectation of privacy doctrine proves insufficient as the smallest dilapidation of property makes Fourth Amendment protection as useful as an umbrella with holes in it. Through the property-based approach to privacy protection, one's shield against unlawful intrusion and surveillance is measured by the size of their home and backyard, the material and height of their fences, the thickness of their walls, and the curtains on their windows. Privacy

exists most for those who can afford such accoutrements as a free-standing home, lawn and awning, fence, heavy curtain, and vision- and sound-proof doors and walls. As professor of law and Fourth Amendment legal scholar Ronald J. Bacigal asserts, privacy is most protected for "those wealthy enough to live exclusively in private places."[30]

In densely packed towers, adjoining apartments can be searched even when only one of them is specifically listed in the warrant. In *Maryland v Garrison* (1987), the Court allows for such a search under the loose guideline that the "objective" facts make distinguishing between the two apartments difficult.[31] Under current jurisprudence, privacy is so fickle that the slightest vulnerability proves fatal.

In the current era of smart home technology, the ability to control what surveillance and data-collective services are introduced into one's home is a significant issue for tenants of apartment buildings and residents of public-housing. In July 2018, tenants of Atlantic Plaza Towers, a rent-stabilized apartment building in Brooklyn, filed a formal protest with the city against their landlord's plan to replace key fobs with facial recognition technology.[32] Public and subsidized housing have historically been de facto Fourth Amendment exclusion zones. From the poorhouses of the eighteenth and nineteenth centuries to modern public housing developments, surveillance has been imposed under the guise of crime prevention and moral rehabilitation. In the early 1990s, police in Chicago, Baltimore, and Philadelphia began campaigns of warrantless raids of public housing complexes.[33] In 1994, a federal court deemed the Chicago operation unconstitutional.[34] Committed to the continuation of warrantless searches of the poor, Attorney General Janet Reno and Housing Secretary Henry G. Cisneros constructed what President Clinton called a "constitutionally effective way" of conducting suspicionless sweeps. [35] The Clinton Administration called for more patrols of public common areas and vacant apartments while also

pressuring city officials to add "consent clauses" to public housing leases, which would oblige tenants to permit blanket permission for police to enter their residences without probable cause.[36]

Additionally, while the New York City Police Department (NYPD) was conducting their Stop and Frisk operation in the streets, they were enforcing a "clean halls" program in public housing and low-income apartment buildings. The NYPD routinely patrolled public spaces and stairwells of housing projects and apartment complexes to find and remove nonresidents under threat of a loitering charge.[37] Similarly, in 2017, the Longmont Housing Authority in Colorado invited the use of K9 drug teams for walk-throughs of low-income apartment complexes as "an opportunity for the dogs to train."[38]

With the movement from hard surveillance tactics to soft methods, the issue of facial recognition and surveillance cameras in public housing developments has become increasingly salient. Though legislation was introduced in the House and the Senate — the "No Biometric Barriers to Housing Act" — to ban the use of biometric-based recognition systems in most housing supported by the Department of Housing and Urban Development, there has been no movement on the bills since. While the 1.2 million residents of public housing wait for Congress to act, facial recognition has already been in use for years in a New York City affordable housing complex in the Lower East Side, and many of the surveillance cameras already in place in public housing developments can be used in conjunction with separate facial recognition software.[39] As the middle- and upper-class freely decide whether to install private home security systems and invite data-collectors into their homes through smart technology, for low-income Americans and those who live in high-surveillance, low income housing developments, this choice is often beyond their control. Although some may propose the residents of such high-surveillance communities live there voluntarily, the freedom to choose in this case is the ability to

decide between the infringement of personal liberty and depression of human dignity and the ability to live homeless, a status that inflicts its own intrusions and injuries.

Though the Supreme Court has held that "the Fourth Amendment has drawn a firm line at the entrance to the house,"[40] its protection has stopped at the doorstep of the welfare recipient and the indigent.

III. The Welfare State: Big Brother, Hypocrisy, and Condemnation

The concept of the inviolate home was famously idealized by William Pitt in a speech to the English Parliament in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement![41]

This declaration drowned in the icy waters of the Atlantic, never making it to the teeming shores of America. The nation's housing exceptionalism not only allowed for the forces of the state to intrude through the shaky roof and equated dilapidation with lowered expectation of privacy, but it also permitted agents of the state to conduct suspicionless and warrantless searches of the ruined tenement. While the warrantless physical invasion of the home "by even a fraction of an inch"[42] is constitutionally impermissible, such valued measurements of inches and centimeters bear no meaning for the protection of the poor. Throughout the 1950s and 1960s, state officials conducted suspicionless, warrantless raids in the middle of the night to confirm and investigate welfare eligibility. These

crusades against the poor were dubbed as the midnight welfare raids.

One of the fundamental principles of privacy law, the "right to be let alone,"[43] has proven insufficient for the needs and realities of low-income Americans. Privacy inherently involves consideration of an individual's relationship with the state and with society. The vulnerable economic status of poor citizens dependent on government assistance requires an ongoing and direct relationship with the state that conflicts with the simplistic right to be let alone.

In the American ethos of condemnation and degradation, a deeply problematic conflation of wealth with morality emerges in compliment to a belief system that demands poor beneficiaries of the State give up something in return for government assistance. But as Charles Reich, a late professor at Yale Law School, wrote in 1963, "if the welfare state is to be faithful to American traditions, government must recognize its duty, even as it hands out benefits, to preserve the independence of those it helps."[44] For almost a century, Social Security and welfare have been critical means through which the poor are deprived of their right to privacy.

In *Wyman v James* (1973), the Supreme Court heard the challenge of Barbara James who was approved to receive assistance from New York State's Aid to Families with Dependent Children program (AFDC) after a caseworker visited and searched her apartment.[45] However, James challenged the state's requirement that she receive additional suspicionless caseworker visits in the coming years. Her request was to be treated equally to that of other beneficiaries of government largesse. Her request for equal treatment was denied and with it her request to escape a sub-constitutional class denied as well. The Court held that welfare investigators and social workers may conduct warrantless, suspicionless inspections of benefit recipients' homes for the purpose of detecting welfare fraud. In the ruling, five members of the six-member majority of *Wyman v James* ventured so far past the firm line at the home's entrance[46] that they held such inspections are not even searches at

all with the sixth opinion concluding that even if such inspections are searches, they are reasonable because the evidence obtained is not tied to criminal sanctions. Since the stated purpose of these invasive inspections was the detection of welfare fraud, the opinion that the evidence obtained through such searches is not tethered to consequential criminal charges remains contradictory to reality. The *Wyman* ruling has "enlarged its reach over the last three decades as lower courts have repeatedly invoked its rationale"[47] with the contemporary special-needs doctrine strengthening the justification for the decision.

The *Wyman* Court asserted that home visits fell outside the domain of the Fourth Amendment because of the rehabilitative purpose of the caseworker's visit and the fact that a visit would have occurred only by consent. But, the nature of this consent proves hollow within the coercive nature of the interaction between the individual and State entity. The Court even ruled in *Lynumn v Illinois* (1963) the threat that "state financial aid for her infant children would be cut off…" constitutes a fundamental element of coercion.[48] Despite this ruling, the fundamental element of coercion defines the welfare recipient's association with the State. Their choice is to relinquish fundamental rights or ensure the health and well-being of their children. The mere presence of coercion ought to strike at the heart of the fundamental voluntariness of consent.

Nonetheless, voluntary consent has traditionally served to validate, not eliminate, Fourth Amendment protection. The Court's opinion "trivialized the intrusive and often adversarial nature of the caseworker's presence within the home, and stigmatized poor parents based on archaic stereotypes."[49] In analyzing the reasonableness of the visit, the Court emphasized that criminal sanctions are not imposed upon refusal of entry. And yet, just four years prior, in *Camara v Municipal Court,* the Court ruled that residential health and safety inspections, which can result in civil penalties, require a warrant.[50] *See v City of Seattle* was ruled similarly as it

also discarded the distinction between civil and criminal sanctions in applying Fourth Amendment protection.[51] In Justice Thurgood Marshall's dissent of the *Wyman* ruling, he notes that the home visit is the same type of inspection proscribed by both *Camara* and *See*, "except that the welfare visit is a more severe intrusion upon privacy and family dignity."[52] While the majority asserted that the distinction was in the severity of punishment, Marshall reminds that "there is neither logic in, nor precedent for, the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen."[53] And even if the severity of punishment is relevant, "For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a $100 suspended fine."[54]

After their shallow consideration of voluntary consent, the Court turned to the State's interest in "fiscal integrity" in *Wyman*, recognizing a "paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses."[55] For the poor welfare recipient, the fundamental right to privacy weighs less than the paramount interest of the state and public to know the aid is used properly. But such cold calculus provides a different outcome for the business that receives tax breaks, the corporation that gets bailed out, and the farmer that is subsidized. As Justice William O. Douglas remarked in his dissent, "No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few."[56] To ensure that the decision's implications on fundamental rights remained isolated among the poor, the Court restricted their opinion to those who receive the State's "charitable funds." Under the supreme law of the land, the poor receive special burdens to qualify for the "charity" of State assistance while the wealthy and privileged

remain unencumbered in their reception of subsidies.

Some may argue that, similar to how certain business licenses can be conditioned on lessened Fourth Amendment protection, a welfare recipient's relationship with the State can come with the same condition. But, the home has long been considered more protected than the place of business, and the Court has specifically refused to permit warrantless entries of businesses when governmental agencies are searching for assets in their investigation of tax fraud.[57] The fundamental disparity in protections for those investigated for tax fraud and those inspected for welfare fraud hinges on the poverty of the latter. A warrant, understandably, is required for governmental agencies to seek evidence of tax-related illegalities in both a home and a business. Likewise, an IRS auditor does not make suspicionless home visits, searching through closets, drawers, and medicine cabinets to confirm the number of dependents living there. While the individual that falsely receives tax exemptions, a form of government largesse, continues to enjoy their fundamental protection from suspicionless searches, the recipient of welfare has no recourse as the State freely enters the sanctity of their home. In America, those suspected of tax fraud relinquish no protection, whereas those suspected of welfare fraud, by virtue of their economic stature, are granted no respite.

The Court's effort to frame welfare visits as friendly and non-intrusive obscures the fact that, were the investigator to find discrepancies or misconduct, they would have been required to initiate a criminal investigation that could have resulted in charges of fraud or perjury. In turning to James and her son, the Court insists that the visits are necessary tools to protect indigent children from "exploitation."[58] Discussing James, the Court makes mention of her problematic "attitude" and "belligerency," insisting that this "picture is a sad and unhappy one."[59] Though the subsequent visits that James was challenging did not originate in suspicion of her wrongdoing or abuse, the Court conjured from information not introduced at trial

the specter of the immoral, poor mother who is unfit to care for her children. Implicitly, these suspicionless, warrantless searches become cause-based investigations into the universal risk of misconduct by poor parents.

While federal law places some restrictions and guidelines on states, welfare administration is highly devolved such that states and municipalities have broad discretion in structuring their welfare programs. In *Sanchez v San Diego* (2006), the Ninth Circuit reaffirmed the validity of *Wyman* and upheld the county policy called Project 100%.[60] Under Project 100%, any individual who applies for California's welfare program must consent to an unannounced home visit by a welfare fraud investigator. The investigator is deputized and employed by the local prosecutor's office. The first home visit, occurring before benefits can be issued, consists of an interview and home walk-through. During the walk-through, investigators are permitted to explore the intimacies of any closets, bathroom cabinets, laundry baskets, and trash cans. Applicants are informed that the purpose of the home visit is to verify eligibility and refusal will automatically result in denial of benefits. If fraudulence or discrepancies are discovered, a criminal investigation will ensue.

In order to justify their assertion that welfare recipients have a lower expectation of privacy, the Ninth Circuit court's majority opinion expressly equated the privacy rights of welfare recipients to probationers, concluding that neither group has a reasonable expectation to privacy. The majority's holding that "a person's relationship with the state can reduce [the] expectation of privacy even within the sanctity of the home,"[61] erroneously hinges on *Griffin v Wisconsin* (1987). However, *Griffin* held that a state's probation system had an operational special need that justified a warrantless search of a probationer's home, specifically noting "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty."[62] While poverty has in fact been criminalized and debt may sometimes

feel like shackles, the Circuit court's reliance on *Griffin* implies that association with the welfare system imposes a carceral loss of liberty and reduced expectation of privacy. Less than a year later, the Circuit court denied the appellant's petition for a rehearing en banc. In dissent of the denial, Judge Harry Pregerson writes:

> This case is nothing less than an attack on the poor…. This is especially atrocious in light of the fact that we do not require similar intrusions into the homes and lives of others who receive government entitlements. The government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage pails of real estate developers or radio broadcasters. The overwhelming majority of recipients of government benefits are not the poor, and yet this is the group we require to sacrifice their dignity and their right to privacy.[63]

Welfare recipients have committed no criminal act, yet their liberty is conditional on the basis of their poverty.

The diminished privacy of welfare recipients does not end at the physical intrusion of their home. Extensive and invasive data collection as well as the continued monitoring and reporting requirements exact heavy burdens on the inalienable rights of welfare recipients. A typical applicant for Temporary Assistance for Needy Families (TANF), must initially undergo a multistage, multi-day application process consisting of screening interviews, application interviews, group orientations, and employability assessments.[64] They must answer questions on subjects ranging from their available resources and assets to their psychological state to their intimate relations. For verification, they must provide independent corroboration of their answers. Paternity information

is also required, and in the case of contested paternity, DNA testing and collecting can be required. Once they turn over this personal data, the information is then electronically shared and compared with numerous federal and state databases. Their Social Security number is matched against criminal records, ensuring they do not have outstanding arrest warrants or prior criminal convictions. The financial information they provide is matched against various employment databases, IRS records, and other government agency records. Commercial databases are also included in the cross-referencing. Applicants provide all of this personal information prior to receiving any aid. These very same databases are also plagued with outdated, inaccurate, and incomplete data, resulting in the denial of thousands of people who would otherwise be entitled to benefits. Nonetheless, once this personal data enters the system, it is fed to law enforcement systems and vice-versa in a ceaseless loop of digital records sharing, intertwining the criminal justice system and welfare system. At any time, without probable cause or suspicion, law enforcement officials can demand that welfare and housing officials turn over personal information about benefits recipients.[65] By contrast, state officials cannot conduct similar fishing expeditions into the bank accounts of those individuals with the means to maintain savings.

As part of the screenings, applicants are also fingerprinted and photographed. These again are cross-referenced in databases before being stored. New York City began fingerprinting welfare applicants in 1995 in an effort to root out imagined fraud. Out of the one hundred forty eight thousand recipients fingerprinted, the city found only forty three cases of "double dipping."[66] There is very little data backing the claims of pervasive welfare fraud, even though states continue to presume it is widespread. By comparison, tax fraud and tax evasion, far more likely to be committed by high-income earners, amounts to upwards of $400 billion in lost revenue with some estimates reaching over $700 billion and yet there is no

comparable concern about fraud committed by those with excess.[67]

Once approved, their continued enrollment in the welfare program can be predicated on requirements like immunization. Twenty five states mandate immunization.[68] In addition, as of 2018, a total of twenty nine states permit drug and alcohol monitoring of welfare recipients with thirteen of those requiring the testing as a condition of initial eligibility. As of 2017, fifteen states had passed legislation specifically enabling and encouraging suspicionless, random drug testing of welfare applicants or recipients. And yet, a study by ThinkProgress determined that out of seven states reporting data on welfare drug testing, only one had a positive hit rate above one percent.[69] TANF also permits states to intrude on the reproductive decisional privacy of mothers who receive welfare as fourteen states impose family caps as conditions of eligibility while many jurisdictions condition additional funds on birth control devices like Norplant implants.[70] Welfare recipients know little of the freedom recognized in *Eisenstadt v Baird* (1972), which asserted that "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[71]

After recipients pass through the intrusive gauntlet, most jurisdictions then distribute their benefits electronically through Electronic Benefit Transfer (EBT) cards or Electronic Payment Cards (EPC). While the EBT is government issued, the EPC is a debit card issued and maintained by a third-party private company. Eight states use EPC cards. Meanwhile, caseworkers routinely track the purchase records of the cards, thereby limiting "clients' autonomy, opportunity, and mobility: their ability to meet their needs in their own way."[72]

While home visits are still practiced by welfare programs, soft surveillance has been increasingly incorporated in the monitoring of welfare recipients. The privacy deprivations and humiliations

associated with welfare have been found to discourage many needy women from seeking assistance. Besides criminalizing the poor, welfare surveillance has additional societal consequences as it has also been linked to reductions in democratic participation by welfare recipients. Welfare applicants are subject to physical search, unbounded questioning, a presumption of cheating, and coercive rules that restrict their decisional privacy. Mary, a mother of three in Appalachia, Ohio, describes it as, "You have to watch every step like you are in prison. All the time you are on welfare yeah you are in prison. Someone is watching like a guard."[73] Although participation in government entitlement programs and particular employment is technically voluntary, the alternatives are often dire.

Charles Reich, over a half-century ago, made the argument that the original intent of the Social Security Act as well as the high-minded values of individual liberty and independence need not be discarded:

> To insist that welfare officials obey the Fourth Amendment is no more than to insist that the high aim of the Social Security Act not be forgotten in the day-to-day difficulties of carrying it out; and to make certain that the Act remains what it was, above all, intended to be — a guardian and insurer of the dignity of man.[74]

While hard surveillance in the form of suspicionless, warrantless raids has long been imposed on welfare recipients, innovations in information-sharing and data collection has transformed the invasive nature of the State in the lives of the poor.

IV. Targeting the Poor: Fragile, Rural, and Barely Making It

The big data revolution was presented as a means to solve all societal woes, even inequality and poverty. These prospects remain, but their promises have proven hollow as of yet. Poor Americans have faced heightened risks from big data, or "the collection, aggregation, analysis, and use of mass amounts of digital information gathered and shared about individuals."[75] At the dawn of the Internet and the Big Data era, the impoverished were largely excluded from the resulting advancements and marginalized from online life because of affordability issues and broadband access. Access inequality created a sharp digital divide across income groups. More recently, low-income Americans are now increasingly online as the cost of smartphones has decreased. While the access gap dwindles, problems continue exist in the nature of the access and the digital literacy divide between income groups.

While mobile access has included low-income Americans in the digital experience, this inclusion is rife with vulnerability. Poor Americans are considerably more likely to use mobile phones as their primary means to access social media and online services rather than a computer, and they are less likely to use Apple phones.[76] According to the Pew Research Center, high-earning and higher educated people are more likely to own an iPhone while the poor more commonly use Android devices.[77] Unlike iPhones, which are exclusively manufactured by Apple, Android phones are produced by many different manufacturers. The decentralization of Google's control over the distribution and maintenance of Androids has prevented Google from establishing encryption as the default setting. In addition, many devices with Android software have cheap, out-of-date hardware that would be unable to handle continuous encryption and decryption. Though Google has more recently attempted to overcome the obstacle of decentralized manufacturing

and require all new devices to encrypt data by default, the company had to still exempt all older, less expensive smartphones from the mandate. Therefore, many of the phones still in circulation and the phones most attainable to the poor do not have a high level of privacy protection by default. Further, the default messaging applications on Android phones are less secure than Apple's iMessage service. When Apple users text one another, the messages have end-to-end encryption.[78] By contrast, Android phones have SMS messaging by default or also include Google's Hangouts chat service, both of which lack end-to-end encryption. More recently, Google unveiled a new messaging platform called "Rich Communication Services" (RCS). However, RCS still does not provide end-to-end encryption. Because the readily available Android messaging programs fail to provide end-to-end encryption by default, the data is still more accessible to police, state entities, or third-party organizations. Therefore, encryption is a de-facto luxury feature for those who can afford it. Christopher Soghoian, the former principal technologist of the American Civil Liberties Union (ACLU), refers to this as the "digital-security divide," asserting that "when encryption remains a luxury feature, those who are the most surveilled in our society are using devices that protect them the least from that surveillance."[79]

Moreover, many Android phones run outdated versions of operating systems, which leave them more vulnerable to hacking. The issue of Google's decentralization resurfaces as a barrier to data protection. Even when Google releases updates and patches to correct for security breaches, accompanying improvements in protection do not extend to many phones. In 2013, the ACLU filed a complaint with the Federal Trade Commission (FTC) which found that many Android smartphone owners were using an operating system that had "known, exploitable security vulnerabilities for which fixes have been published by Google, but have not been distributed to consumers' smartphones by the wireless carriers and their handset manufacturer partners."[80]

In discussing security risks, identity theft is a growing and significant concern across social classes. The consequences of identity theft are particularly devastating for low-income Americans as they lack the resources to adequately cope with associated harms while also experiencing more severe collateral consequences relating to government assistance and employment. For the impoverished who are already financially insecure and often indebted, identity theft often results in "wrongful arrests, improper child support garnishments, and harassment by collection agencies."[81] The way in which poor Americans interact with online services in the current Big Data era relegates them to a vulnerable class.

While the nature of their online access already places the poor at a disadvantage, low-income Americans also fall victim to the digital literacy divide. This divide is a fundamental determinant of an individual's vulnerability to privacy- and security-related harms. The United States relies mostly on self-regulation by entities that gather and maintain personal data rather than on a comprehensive privacy law, placing the burden on individuals to police and protect their own data disclosures. In this context, the promise to improve problem-solving through analysis of Big Data raises significant perils for low-income Americans as studies have found that "poor Americans' patterns of technology use and privacy-relevant behaviors expose them to greater risk than their wealthier counterparts."[82] Low-income internet users are more likely to report that their email or social media account has been compromised and that their reputation has been damaged by online activity.[83] However, it is important to note that this study relying on self-reported data does not capture the privacy harms that remain unseen. Social media users in the "lowest income bracket are significantly less likely to say they have used privacy settings to restrict access to the content they post online."[84] Also, low-income social media users are less likely to say they feel as though they "know enough" about privacy settings and are also less likely to engage in other privacy-protective

strategies.

While poor Americans are more vulnerable in their access to the online community and less likely to take protective measures, data aggregation and algorithmic profiling have enabled companies to categorically discriminate against and exploit consumers. Soft surveillance and data collection have led to pervasive price discrimination practices. While optimists hoped the advent of the Internet and new improvements in information sharing would enhance consumer decision-making and consumers' ability to discern pricing, businesses have ultimately constructed the opposite effect. A 2012 report by the *Wall Street Journal* found that major companies, including Staples, Home Depot, Discover Financial Services, and Rosetta Stone, systematically used information on users' physical locations to display varying prices to different customers online.[85] Though one might expect companies to use this information on users' locations to offer lower prices to lower-income individuals while still maintaining a profit, the *Wall Street Journal* reported that individuals in high-income areas were offered better deals than individuals in low-income communities. Similarly, credit card companies like Capital One were caught providing different offers with different credit card deals based on online consumer locations and subsequent assumptions about their income.[86]

The internet provides a false sense of anonymity that obscures existent discrimination. For instance, companies like Wells Fargo were recently caught tailoring house listings to online browsers' demographic characteristics and zip codes, directing these potential buyers to neighborhoods where most residents are of their same race. This virtual redlining, or "weblining," has reinforced historical discrimination to the detriment of poor individuals and members of marginalized groups. Prior to the burst of the housing bubble in 2007 and the subprime mortgage crisis, Wells Fargo was also caught "illegally steering an estimated 30,000 black and Hispanic borrowers from 2004 to 2009 into more costly subprime mortgages

or charging them higher fees than comparable white borrowers."[87]

In fact, Big Data was crucial in inducing the subprime mortgage crisis and the Great Recession. By the mid-2000s, subprime and related mortgage lenders were the dominant occupants of the online advertising market. A 2007 Nielsen and Netratings survey of online display advertisers found that the top five advertisers were all involved in the mortgage lending industry to some extent.[88] Online companies or data brokers sold information about users they identified as likely prospects to mortgage companies. Those targeted were found to be disproportionately low-income, Black, and Latino. Not only were these groups targeted for junk, exploitative mortgages and refinancing plans, but they were also 30% more likely to be charged higher interest rates than white, wealthy borrowers with similar credit ratings. Beneath remarkably low teaser rates were loan agreements that chained already financially strained individuals to unpayable rates and unmanageable debts. While the data platforms that enabled predatory lending continued to profit, these practices led to "one of the largest scale destructions of wealth among low income and minority communities in the modern era."[89] The poor found little relief or protection from online snake oil salesmen and profiteers after the financial crisis. Subprime mortgage offers were simply replaced by companies exploiting families' financial distress, specifically payday lenders.

While the financial crisis expanded the population considered financially insecure and worsened the condition of those who were already vulnerable, data brokers connected predatory lenders with desperate individuals. Big Data may not have been the executioner, but it did escort the poor to the gallows. Equifax, a data broker and credit score company known for its privacy breach in 2017, also sold lists of people late in their mortgage payments to fraudulent marketers. Equifax was ultimately fined $1.6 million by the FTC for these practices in 2012.[90] At the same time, individuals who tried to escape the grasp of predatory lenders by searching online for help

were often met by advertisements from scam loan modification firms, which paid for their names to appear when people searched queries like "stop foreclosure."[91] Despite reports of these practices, Google refused to intervene and remove the advertising, and instead decided to continue to receive revenue from the promotion of illegal scams. The Treasury Department, using Troubled Assistant Relief Program (TARP) authority, finally stepped in and shut down the advertising practices of 85 companies.[92] This example is indicative of the need for government intervention in order to effectively protect consumer interests and stop the exploitation of the poor by predatory companies.

The digital security and digital literacy divide have left poor Americans out in the cold, vulnerable to the wolves. A Senate Commerce Committee report on data broker practices found that the poor have been profiled and categorically placed into a variety of "financially vulnerable" market segments such as "Rural and Barely Making It," and "Fragile Families."[93] These lists are sold and distributed to ease marketers' ability to "target vulnerable consumers for dubious financial products such as payday loans, online classes, or debt relief services."[94]

Privacy advocates are recognizing new kinds of "networked privacy" harms in which "users are simultaneously held liable for their own behavior and the actions of those in their networks."[95] Unfortunately, *NAACP v Alabama* (1958) and associational privacy rights have not yet been extended to the online world. After returning from his honeymoon, Kevin Johnson, a condo owner and businessman, found that his credit limit had been lowered from $10,800 to $3,800.[96] This decrease was not because of any improper acts or changes in his financial status. Instead, the credit card company explained that he had simply shopped at stores whose patrons "have a poor repayment history." Credit companies are increasingly incorporating data from social media networks, and some have gone so far as to also include credit histories of those

within that person's social network.[97] Such measures further cement the rigidity of the class structure.

Associational data is increasingly collected, analyzed, and sold in areas which promote socio-economic mobility, like college admissions and job employment. Automated assessment methods to determine "employability" among job candidates have become widespread features of the job application process. More than 95 percent of Fortune 500 companies use Applicant Tracking Systems (ATS). ATS casts a wide net, integrating data from a variety of sources including "mining a potential applicant's personal profile on social networks for deeper insights."[98] Former FTC Chairwoman Edith Ramirez has referred to this type of data-driven decision making as "data determinism."[99] Because the poor experience little legal protection from intentional discrimination, networked inferences raise serious potential for associational discrimination and further dampening of economic mobility. As the Supreme Court has asserted, guilt by association is "alien to the traditions of a free society."[100] The current freedom of association doctrine does not incorporate consideration of algorithms that extract and absorb metadata and other non-content data. Doctrinal revitalization is necessary to protect against guilt by online association as the right of free association "for the advancement of beliefs and ideas is an inseparable aspect of…liberty.'"[101]

Although big data holds tremendous promise, the unequal access experienced by different members of the online community and the relatively diminished technological fluency of low-income Americans creates disproportionate vulnerability to the perils of misuse, misinterpretation, mischaracterization, and abuse of personal data. As poor Americans are targeted for predatory financial products, charged more for goods and services online, and profiled in ways that limit their employment and educational opportunities, employment provides little respite in their overly monitored and surveilled lives.

V. The Surveilled Workplace: Low-Income Laborers' Privacy

As "they [work] under the eye of the bosses," "each day the struggle becomes fiercer, the pace more cruel" as "they would drive the men on with new machinery."[102] Capturing the poor conditions and exploitation of the poor working class, Upton Sinclair's 1906 novel, *The Jungle*, describes a surveilled workplace in which "watch-men" oversaw workers as they toiled. Over the past century, the new machinery of surveillance and monitoring would replace these watch-men and inherit their salient presence, using the threat of unemployment to ensure the pace of labor continually quickened since "[i]f any man could not keep up with the pace, there were hundreds outside begging to try."[103] Generally, "[e]mployers today log computer keystrokes, listen to telephone calls, review emails and Internet usage, conduct drug tests, employ mystery shoppers, watch closed-circuit television, and require psychometric and 'honesty' tests as conditions of employment."[104] Though these are considered forms of privacy intrusions, some argue they serve legitimate interests in security and job performance. While employers monitor the workplace to deter theft, protect proprietary information, guard against lawsuits, and discourage improper conduct, there must be bounds to the level of intrusion they engage. As long as the employer can demonstrate that the surveillance serves non-discriminatory business purposes, there is little legal protection from overly intrusive and harmful surveillance of workers.

Though workplace surveillance is widespread, low-wage workers — workers whose wages are so low that full-time work does not push them over the poverty line — are concentrated in the most surveilled industries. While many workers are drug tested, "working-class members with the lowest incomes are those most likely to be subjected to drug testing."[105] One study also found that "[t]he majority of employees being electronically monitored are

women in low-paying clerical positions."[106] For domestic workers, privacy while on the job is a rarity made ever more difficult by the rise in private home surveillance like nanny cameras. A study of workers in the fast food and grocery industries found extensive forms of surveillance, "ranging from rows upon rows of hanging video cameras to drug tests to honesty tests."[107]

Under the demands of the working conditions exposed by Sinclair, even the most powerful men were broken down to rubble in a few years. The pace would be pushed further and further "until finally the time had come when [the workers] could not keep up... anymore."[108] Today, in Amazon's fulfillment centers, low-income workers are indistinguishably also pressed to "make rate," losing their job if they do not move fast enough. In order to hit packaging targets and delivery goals, warehouse workers are reportedly subjected to timed bathroom breaks and electronic timers that monitor how many boxes are packed per hour during their fifty-five-hour workweeks: "Amazon's system tracks the rates of each individual associate's productivity and automatically generates any warnings or terminations regarding quality or productivity without input from supervisors."[109] But just as Sinclair warned through his novel, the inhumane pushing of pace cannot be maintained without cost. According to an analysis of internal injury records from twenty-three of the Amazon's 110 nationwide fulfillment centers nationwide, "the rate of serious injuries for those facilities was more than double the national average for the warehousing industry: 9.6 serious injuries per 100 full-time workers in 2018, compared with an industry average that year of 4 percent."[110] The injury and illness rate in some warehouse and storage facilities are higher than that of the coal mining, construction, and lodging industries.

Beyond Amazon, most large retailers either have their own warehouse operations or contract withs to third-party warehouses, all with similar monitoring practices to keep productivity highthe high pace of productivity requirements. Today, "employers increasingly

track employee movements through GPS or radio frequency devices, which also 'create new streams of data about where employees are during the workday, what they are doing, how long their tasks take, and whether they comply with employment rules.'"[111] Amazon, the second-largest non-governmental employer, reportedly plans on increasing its surveillance even further than its current tracking of productivity as it has recently patented a wristband that keeps track of where workers' hands are while packing delivery boxes among other biometric measurements.[112] Today's reliance on e-commerce has not only enhanced the extraction of personal data through consumer input, but also has consequently increased the monitoring of low-income laborers to meet ever-increasing productivity demands.

While some surveillance is overtly present as a form of control, more extreme covert measures are increasingly installed in the contemporary workplace, including "the use of facial recognition technology to ensure employees are smiling enough and audio recording to monitor employees' tone of voice."[113] Walmart, the largest non-government employer in the country, has patented monitoring technology they call "listening to the frontend."[114] With non-managerial workers still making wages that keep them below the national poverty line, the policies of Walmart both define the retail industry and fall predominately on low-income workers. The system combines audio technology, which listens to conversations among employees and between clerks and shoppers, and productivity monitoring that tracks "the length of lines at the checkout counter, how many items are scanned, and the number of bags employees use."[115] This technology reflects the two-pronged impact of the increasingly surveilled state of labor as both employees and consumers are monitored.

On the extreme end, for migrant agricultural workers, privacy is almost nonexistent as they often live in employer-owned housing.[116] The condition of the agricultural worker living on the employer's land is not far from that of all low-income workers in

terms of control over their conditions. The freedom to enter into an employment contract is not without restrictions. While the worker may submit to the excessive monitoring and surveillance, there is little room for individual choice when the alternative is the uncertainty of unemployment. For the employer, the trade-off is between a concern of productivity and the privacy of the employee. For the worker, it is between protecting a fundamental right and maintaining their wage and health insurance that allows them to put food on the table and not have to ration medicine. Although some justifications are valid, without a deeper consideration of the privacy trade-offs in workplace surveillance and lackluster worker protections, privacy harms will increasingly be inflicted upon workers generally, and low-income laborers specifically.

VI. Inequalities in Law: The Luxury of Privacy and its Unequal Protection

The poor and marginalized are subjected to some of the most technologically sophisticated and comprehensive forms of scrutiny and monitoring through their contact with law enforcement, the welfare system, and the low-wage workplace. As technology advances, so too does the harm that technology inflicts. While this new era of Big Data and information technology can be a democratizing tide that lifts all boats, its egalitarian promises have largely been unfulfilled as low-income Americans drown in predatory abuse of personal data collection and enhanced social control. Scholars need but look down to see the panopticon in which the welfare recipient and indigent are born and bound. From the circumstances in which they live to the environment in which they work, the poor experience inequitable and untenable surveillance and monitoring. The poor are criminalized by the state and targeted by predatory profit motives. The excessive invasiveness of the welfare system is rife with hypocrisy and condemnation. As long as surveillance continues to be a tool to

impose social order, the poor will continue to be subjugated in their sub-constitutional place in this nation. By nature of their sheer being and with poverty as their only crime, the wretched existence of the poor is one of surveillance and unfulfilled guarantees of rights and liberties. The Supreme Court once declared that "lines drawn on the basis of wealth or property, like those of race … are traditionally disfavored."[117] The restraint and degradation of rights on the basis of class warrants a greater scrutiny. A revitalization of this sentiment for considerations of privacy rights is necessary.

Prior to the digital revolution, low-income communities were already surveillance-saturated. Instead of providing relief and mobility to these communities, digital technology, data collection, and soft surveillance have reified the rigidity of the class structure of the United States. The ethic of the digital jungle, that of the surveilled workplace, is not far from the ethics of the jungle known to the early twentieth-century. The danger in the "soft surveillance creep" is that the means of monitoring goes relatively unseen, while the harms are just as oppressive. As Michel Foucault asserted, "Surveillance is permanent in its effects, even if it is discontinuous in its action."[118] The pervasiveness of surveillance in the lives of the least well off constructs an oppressive milieu of social control.

As Justice Marshall stated in 1971, "Such a categorical approach to an entire class of [poor] citizens would be dangerously at odds with the tenets of our democracy."[119] Poor people continue to suffer categorical privacy invasions that generate stigma and humiliation. The chilling effect of deficient and disparate privacy protection has long frozen over.

The fundamental right of privacy, which is woven into the very nature of liberty and human dignity, is as weak as it is unequal. As the social reformer and suffragette Jane Addams wrote, "[t]he good we secure for ourselves is precarious and uncertain, is floating in mid-air, until it is secured for all of us and incorporated into our common life."[120] Privacy must be protected for the

individual and held resolutely within the commons. The unequal distribution of innate liberties is untenable. Though the conflation of morality and wealth, and immorality and poverty, is etched in American tradition, the waters of justice can smooth the roughest stones. The measure of freedom in society is not in dollars and cents but in its extension to the lowest rungs of the ladder. Privacy must not simply be a luxury for only those who can afford it.

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Tiered Scrutiny and Tiered Wedding Cake: Implications of Non-Identarian Constitutional Protections

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Abstract

The traditional class-based identarian framework of scrutiny doctrine has shifted over time.[1] In its place, two alternative approaches have begun to emerge to substitute the traditional method of review. The first approach developed by Justice Kennedy, replaces scrutiny with a dignity doctrine, and the second approach, developed by constitutional scholar Sonu Bedi, replaces scrutiny with a powers review. Both approaches—one practiced on the Supreme Court, the other an academic solution—attempt a means of non-identarian equal protection in contrast to the identity-focused traditional model. In this essay, I argue that both approaches are flawed. First, they refuse the legislative history of the Reconstruction Amendments themselves, which I demonstrate are explicitly aimed at restitution and support grounded in identity. Second, neither Kennedy's dignity doctrine nor Bedi's powers review can resolve the substantive questions at stake in recent Supreme Court rulings. I demonstrate this second critique by applying both approaches to *Masterpiece Cakeshop v Colorado Civil Rights Commission.* Ultimately, my analysis reveals the integral role identity plays in any robust Fourteenth-Amendment Equal Protection judicial review, and thereby highlights why the turn away from identity by the contemporary Court proves troubling.

I. Introduction

Understanding the human limitations to Supreme Court judgment makes critiquing how the Court rules on matters of identity all the more important. Currently, there are conflicting understandings

on how to approach protecting identities in a constitutional context. While the traditional means of regulating laws that involve or specifically impact minority groups were streamlined through the Fourteenth Amendment's equal protection clause and its extension the scrutiny framework, this traditional model has been neglected over time. Coinciding with its neglect the queer community's rights, recently enforced by the Supreme Court was attended to by an entirely new approach than the scrutiny model.

Two central approaches have come forward to replace the traditional model: the Dignity Approach, and the powers review. Originating from conservative and liberal thought respectively, both approaches attempt to replace the model through non-identity specific methods. For replacing a traditional model that is rooted in a history of identity-incorporation, do either of these approaches achieve a satisfying replacement for determining the admissibility of laws and regulations under the equal protection clause?

To answer my central question, I review both approaches, I first briefly outline the history of scrutiny doctrine and trace it through its early prevalence and later disuse. In Part III, I review the Dignity Approach as a means of replacing scrutiny, and, in Part IV, I introduce the powers review as a second means of replacing scrutiny. In Part V, I critique both approaches through the lens of both the historical and substantive requirements scrutiny's replacement, finding that neither is a sufficient substitute. As a result, I argue that identity, and the history of that identity group in the United States, play an essential role in both determining legislative admissibility and questions of competing rights. Consequently, the contemporary Court's turn away from attending to the history and political context of identity and instead toward an aspiration of neutral universalism in the application of the Fourteenth Amendment proves troubling indeed.

II. The Birth, Life, and Abandonment of Scrutiny Doctrine

The Fourteenth Amendment served to legally integrate emancipated slaves through establishing a revised form of American citizenship rooted in identity. Prior to the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, no formal definition of citizenship existed: "citizenship was juridically unregulated, politically inconsistent, and indelibly shaped by the assumptions, fears, and aspirations of the individuals who presumed to merely describe it."[2] The passage of the Fourteenth Amendment marked the judicial expansion of the concept of not only who an American was, but how the state could enforce civil, political, and social emancipation.

Although the conclusion of the Civil War resolved the American debate over slavery, incorporating freed-slaves into the concept of citizenship was necessary in order to achieve full compliance with the spirit of emancipation. Without constitutional enforcement through identity-based acknowledgement, Senator Charles Sumner stated, "Emancipation will only be half done. It is our duty to see it wholly done."[3] The elimination of "slavery required far more than formal emancipation. It required a positive federal guarantee of individual civil rights."[4] To ensure the enforcement of emancipation, the Fourteenth Amendment expansively defined citizenship and introduced protections of the rights of said citizens. The new definition of citizenship constituted "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,"[5] subsequently overturning *Dred Scott v Sandford*, which held that American citizenship did not include African-Americans.[6]

The inclusion of African-Americans into constitutionally defined citizenship was not just a statement of blank-slate equality. Historian Pamela Brandwein argued that this definition of citizenship, and its ensuing protections with guaranteed enforcement, were intended not merely as an establishment of civil and political equality and protections. Rather, they were intended

to enforce social and relational equality during the incorporation of newly freed slaves.[7] The elimination of "slavery required far more than formal emancipation. It required a positive federal guarantee of individual civil rights."[8]

The idea that the Fourteenth Amendment was adopted to ensure the rights of particular groups who had suffered discrimination is confirmed by Justice Strong's opinion in *Strauder v West Virginia,* that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that, under the law, are enjoyed by white persons" and that "It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws" supports the notion that the Equal Protection Clause was not a statement of equality in a vacuum, but was a reaction to a history of violence and enslavement of Black people.[9]

Without the constitutional edict to incorporate Black Americans into citizenship, the inherent "contradiction between guaranteeing liberty and justice to all" would not be rectified, the power of our current constitution never fully realized.[10] The acknowledgment of how historical discrimination against an identity requires constitutional acknowledgment and protection constitutes the ethos of the Fourteenth Amendment: a reaction to a history of violence and enslavement of Black people.[11]

The passage of the Fourteenth Amendment led to an interpretation of substantive due process that led the Court to rule on the constitutionality of numerous state laws that regulated maximum hours,[12] minimum wage,[13] and interstate insurance purchases.[14] This period, known as the *Lochner* era, is characterized by the Court's brazen activism to endorse laissez-faire economics and economic substantive due process. The beginning of the era is typically marked by the Court's decision in *Allgeyer v Louisiana*,[15] in which the Court struck down a Louisiana law that prohibited foreign corporations from doing business in the state in 1897. The end of the era is typically marked by the 1937 case *West Coast Hotel*

Co. v Parrish,[16] which upheld state minimum wage, and overturned an earlier *Lochner* era case, *Adkins v Children's Hospital*.[17] The ending of the *Lochner* era occurred when the Court's conservative economics threatened President Franklin Delano Roosevelt's New Deal legislation. To pressure the Court into abandoning their approach to economic policy, Roosevelt planned to pack the Court with more progressive Justices. At the last minute, what historians refer to as "the-switch-in-time that saved the nine," Justice Owen Roberts sided with the progressive side of the bench in *West Coast Hotel*, effectively ending the era.[18]

What we now conceptualize as modern scrutiny doctrine was born out of the end of the *Lochner* era. A year after *West Coast Hotel* was decided, the Court heard the case *United States v Carolene Products Co.* The case involved a federal law that prohibited the sale of filled milk, a formula made up of skimmed milk mixed with fats and oils. The defendant, Carolene Products, claimed that this prohibition unconstitutionally violated the Commerce Clause and Due Process Clause.[19] Reacting still to the remains of Court overreach in the *Lochner* era, the Court ruled 8-1 that the constitutional authority of state and federal legislatures over economic issues is plenary: that laws passed to regulate such measures are presumptively constitutional, and held to a standard of rational basis.[20] A caveat to the ruling was the famous Footnote Four, which introduced the limitations of receiving rational basis review:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...prejudice against discrete and insular minorities may be a special

> condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[21]

By acknowledging the "prejudice against discrete and insular minorities," Footnote Four, through the introduction of a process of review for minority classes that are vulnerable to discrimination in their social and legal treatment, recalled the roots of the Fourteenth Amendment.

The traditional scrutiny model contains three tiers to determine standard of review. The first tier, rational basis review, is applied when considering constitutional questions, including due process or equal protection questions under the Fifth Amendment or Fourteenth Amendment that do not involve a suspect class, classification, or a fundamental right. Courts applying rational basis review seek to determine whether a law is "rationally related" to a "legitimate" government interest, stemming from *Carolene*'s ruling that the power of the state and federal court is plenary with regard to economic regulation. The burden of rationality, however light, is limited. While the Court ruled that *Maher v Roe,* which upheld a Connecticut state law limiting Medicaid benefits for first-trimester abortions, was "rationally related" to a legitimate state interest,[22] the Court ruled in *Eisenstadt v Baird* that the striking down of a Massachusetts law prohibiting the distribution of contraceptives to unmarried people lacked a rational basis.[23] However, in most cases reviewed under rational basis, the existing laws pass scrutiny and are upheld.[24]

The second tier, intermediate scrutiny, requires that the challenged law or policy substantially related to furthering an important government interest. The approach officially originated over forty years after the establishment of rational basis and strict scrutiny in *Craig v Boren*, which challenged an Oklahoma law that

sold beer to women over 18 but men over 21.[25] The Court relied on precedent from *Reed v Reed*[26] to officially state that "classification by gender must substantially further important governmental objectives."[27] In addition to laws involving gender,[28] intermediate scrutiny is the applied standard for certain First Amendment issues,[29] gun regulation,[30] and restrictions based on illegitimacy.[31] In these cases, the Court "upholds nearly any legitimate interest that is defined broadly in terms of its animating values."[32]

The third and most threatening tier to a law or regulation is strict scrutiny. To pass the threshold of admissibility for strict scrutiny, the law must (i) be necessary to a compelling state interest; (ii) be narrowly tailored to achieving this compelling purpose; and (iii) use the least restrictive means for achieving stated interest. This tier is invoked when a fundamental right is infringed, or when a government action involves a suspect class or classification. While the Courts have never fully defined the metric to determine whether or not an interest is compelling, the concept generally refers to something crucial, as opposed to something merely preferred. Under strict scrutiny the court ruled against compulsory sterilization,[33] miscegenation laws,[34] and abortion bans.[35] The most infamous case in which the government's discrimination on the basis of class was considered admissible was in *Korematsu v United States*, where the Court upheld the relocation of Japanese-Americans to concentration camps because they believed it was a matter of national security during World War II.[36]

Over time, the scrutiny doctrine has been invoked less and less. A 2006 study found that, while legal scholars often use the phrase "strict in theory, fatal in fact," cases survive *strict scrutiny*, the level supposed to be most deadly, over 30 percent of the time.[37] The weakening and abandonment of the scrutiny doctrine occurred through intersectional academic critique, and the Court's refusal to incorporate queer persons as a suspect class.

Kimberlé Williams Crenshaw first introduced the concept of intersectionality in her 1989 paper, "Demarginalizing the Intersection

of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics."[38] Intersectionality is a framework through which a person's political and social identities are not isolated, but rather exist together and leave them more or less vulnerable to unique modes of discrimination. Crenshaw describes the damage in stratifying identity into race, gender, and nationality, noting that the tiers fail to account for the unique prejudice that exists against a person with multiple marginalized identities. Crenshaw's theory led to an increasing liberal critique of scrutiny doctrine in legal and political scholarship.[39]

Finally, the introduction of queer persons into the Court's ruling without their recognition as a suspect class contributed to the weakening and abandonment of scrutiny doctrine. The disparate use of scrutiny in these cases is especially important with regard to the impact of sequencing in future court decisions. Because cases like *Brown*[40] and *Korematsu*[41] cemented knee-jerk implementation of strict scrutiny with regards to statutes affecting persons of color, *Loving*[42] was able to utilize the doctrine in such a way with marriage equality. However, because of the precedent set by *Lawrence v Texas*[43] and *Romer v Evans,*[44] which failed to attribute suspect classification to the LGBTQ community, no such employment of intermediate or strict scrutiny was able to be utilized in same-sex marriage cases. I will continue to demonstrate the impact of this approach on queer persons in the following section.

III. Dignity Approach

Evaluating equal protection treatments through the lens of "dignity" is an approach that proclaims the worthiness of a certain class regardless of a history of discrimination. In proposing an approach that rejects incorporating history into the decision making of a contemporary minority group, the Court avoids the harmful perception of groups as in and out of acceptability. This approach is most easily identifiable in queer case law, notably

United States v Windsor (2013) and *Obergefell v Hodges* (2015), but is also demonstrated in race case law, with the bussing case *Parents Involved in Community Schools v Seattle School District No. 1* (2007). In this section, I will use these three cases to articulate the central components of the Dignity Approach: (i) avoiding the consideration of a history of discrimination, (ii) emphasis on social uniformity, and (iii) the Court acts as a moral authority over the states. Erasure of a history of discrimination is essential to the Dignity Approach, as such erasure allows for a normative judgment of how the groups in question "should" be perceived. Since we all *have* dignity, denying any questioning of that dignity, in theory, gives individuals the ability to rectify historical injustice.

Replacing historical discrimination with contemporary tolerance manifests itself in SCOTUS opinions in the form of colorblindness. Colorblindness takes on two forms: *constitutional* colorblindness, to what extent the constitution allows for the recognition of difference on a racial level, and *normative* colorblindness, to what extent resisting disparate treatment on the basis of race creates a better society. Both of these interpretations contribute to the Dignity Approach in that they introduce a binary to shaping race-based Court decisions.

The Equal Protection Clause (EPC) evolved over time into the use of *constitutional* colorblindness. Initial proposals for an overtly colorblind EPC were rejected: In 1865, Wendell Phillips and Thaddeus Stevens proposed two separate constitutional amendments that promoted a colorblind constitution. Phillips' rejected amendment stipulated: "No State shall make any distinction in civil rights and privileges among the naturalized citizens of the United States residing within its limits, or among persons born on its soil of parents permanently resident there, on account of race, color, or descent."[45] Five months later, Stevens introduced his own potential amendment: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."[46] Phillips and Stevens were absolute in

their non-discriminatory approach, which, if not rejected, would have rendered the doctrine completely colorblind.

Rather than accepting Phillips and Stevens' proposals, the EPC allows for extenuating circumstances wherein rights would be distributed unevenly between racial groups and leaves those circumstances to state powers. In this, the Fourteenth Amendment forever legitimizes racial discrimination. Such legitimacy is demonstrated in the introduction of *constitutional* colorblindness in *Plessy v Ferguson* (1896). Defending his position in the face of a 7-1 majority upholding a discriminating train practice, Justice John Harlan wrote, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens...The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[47] In this regard, *constitutional* colorblindness differentiates itself from *normative* colorblindness. Rather than assert the state of social tolerance, Harlan personifies the law as tolerant enough for all Americans.

Normative colorblindness is most clearly identified through Justice Kennedy's opinion in *Parents Involved in Community Schools v Seattle School District No. 1* (2007). The case concerned efforts to incorporate voluntary school desegregation and integration in both Seattle, Washington, and Louisville, Kentucky, through a series of plans incorporating classification on the basis of race. The court found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The Court held that the District's tiebreaker plan was targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. The District also failed to show that its objectives could not have been met with non-race-conscious means. In a separate opinion concurring with the majority, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity. Chief Justice

Roberts, however, wrote in the plurality opinion that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[48] Closely mirroring the *normative* colorblindness approach, Roberts implies that racial justice can come from acting as if there was a reality of racial equality, acting as if the problems that society was facing did not exist as a means of solving those problems.

Beyond colorblindness, normative decision making is also present in sexuality case law, where the evocation of dignity is more explicit. In place of scrutiny doctrine, marriage equality cases on the Supreme Court have been saturated with romanticized notions of the fundamental right to marriage. In *Windsor*, "dignity" is mentioned eleven times in the majority opinion, and "community" five. Families are "injured" when DOMA "humiliates" children placed in "second-tier" marriages. The state doesn't merely progress, it evolves through the "way the members of a discrete community treat each other in their daily contact and constant interaction with each other."[49] *Obergefell* maintains *Windsor's* legacy of relying on rhetorical justification, the opening lines of the ruling are: "Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together."[50] The Court continues, "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union." The closing lines read like the closing of a wedding, acknowledging the history, intensity, and sanctity of marriage, and are also seemingly moved by the "plea" of the petitioners.[51]

This rhetorical glorification of marriage translates on the federal level to the protection of the institution of marriage rather than the protection of those seeking it. Scrutiny doctrine in same-sex marriage cases functions to protect a fundamental right rather than a suspect class. Both *Windsor* and *Obergefell v Hodges* involved the question of equal protection with regard to same-sex marriage. However, in *Windsor*, rather than classifying homosexuals as a

suspect class subject to intermediate or strict scrutiny, the court focuses on marriage as a fundamental liberty subject to strict scrutiny, arguing that marriage cannot be taken away by Congress, doing so violates those who wish to marry their fifth amendment due process rights.[52] The crux of Kennedy's argument in *Windsor* is based on adjudicating the law in an ideal world where rights are equally distributed rather than acknowledging how contemporary and historical discrimination (of which Footnote Four relies upon to identify a suspect class) contributed to the othering of these individuals. In *Obergefell*, the majority again holds that the Fourteenth Amendment's due process clause and equal protection clause guarantee the right to marry as a fundamental liberty and that that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. Even though the "immutable" nature of the plaintiff is acknowledged, again the Court falls short of designating homosexuals as a suspect class, relying instead on the violation of the substantive fundamental right to marriage articulated in *Loving v Virginia* and *Windsor*.[53] In emphasizing that "marriage itself possesses dignity - and in so doing, may confer that dignity to those who enter into the institution,"[54] the Court addresses the institution rather than the individuals.

However, not all cases that avoided the use of scrutiny doctrine erased queer history, as demonstrated in Kennedy's majority opinion in *Lawrence v Texas*. Professor Stephen Engel notes that Kennedy "does not suggest the long history of discrimination against gays and lesbians, which he nevertheless traces out, merits that the Court must be more skeptical of the statute than it otherwise would be."[55] While the Court acknowledges the history of queer discrimination as they do for their female and POC counterparts, the Court does not identify homosexuals as a suspect class, implying that the history of discrimination queer individuals faced is not sufficient enough to warrant protection.

Scholarship responding to the Dignity Approach in race-based and queer cases has both celebrated and criticized the

approach as a replacement for the scrutiny process. With regard to *normative* colorblindness and its relationship to dignity, "Chief Justice Roberts's concern on this point is racial classifications are not permitted because they affront individual dignity, even if they are benign."[56] This equation of any sort of classification with the stripping of dignity, regardless of consequence and merely due to the alleged harm of the classification itself, was widely criticized. This criticism came partially due to the fact that the Court seemed singularly focused on classification and disregarded the true harms that should be of concern to the Court; "the only harm that the plurality seems to be concerned about is the harm of racial classification," preventing the Court from seeing beyond issues of ideal societal reality to an attempt at solving current inequality.[57] On the other hand, scholars like Kevin Brown view Kennedy's decision as a legitimate concern regarding the school's employment of "efficient means to accomplish the goal of school integration, not school integration itself."[58] These two distinct perspectives—of colorblindness mistaking protection for discrimination and vice-versa—illustrate the central push and pull of the Dignity Approach.

As previously established, for the purposes of this thesis, I define dignity as a status consisting of a given set of rights. This definition includes an understanding of how dignity was central to equal marriage rights; in establishing the right to marry as having value rather than the class of people deserving attention, the Court reframes the discussion around the rights that comprise a status of dignity, rather than specifying why some are granted this status over others. As a result, not only does marriage achieve recognition over queer individuals seeking union, but it also achieves special status above other forms of relationships, creating a "fundamental inequality of other relationships and kinship forms."[59]

Rather than address the decline of traditional doctrine or the flaws in its approach, the Dignity Approach serves merely to replace such a review. This approach drew ire amongst Justice Kennedy's fellow justices in his *Windsor* and *Obergefell* decisions. Justice Scalia,

in his dissent in *Windsor*, took issue with the Court's reliance on *Department of Agriculture v Moreno* as precedent without "apply[ing] anything that resembles that deferential framework,"[60] citing *Heller v Doe*'s stipulation that there has to be an establishment of a suspect classification to warrant strict scrutiny.[61] Chief Justice Roberts' dissent in *Lawrence* claimed that "the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'"[62] In the same dissent, Roberts alluded to the conflicting dignity issues with religious Americans who take issue with the ruling, stating, "Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."[63] Roberts' dissent foreshadowed struggles the Court would have with balancing rights under the dignity doctrine.

Dignity serves to substitute aspects of the traditional scrutiny framework with rhetorical grandeur and revisionist history. Through employing thematic colorblindness in cases involving both race and sexuality, dignity mandates nothing of the court's metric other than delivering righteous opinions. Formally, the dignity doctrine is as far as possible from its traditional predecessor: rather than process, it relies on poignance, and rather than identity, it opts for sameness.

IV. Powers Approach

While the Dignity Approach to equal protection is associated with conservative legal thought and practice, one academic perspective from the liberal legal movement also prefers non-identarian protection in the form of "powers," which evaluates whether the state has violated the Equal Protection Clause by scrutinizing not the subjects of the violation but the violator itself. Professor Sonu Bedi claims that in placing the burden on the state rather than on the identity of the individual, the Court would avoid defining *in* and *out*-groups. To avoid this binary the Court would filter

identity-based cases by intent rather than subjective admissibility, which allows for affirmative action and other attempts at supporting marginalized communities and holds greater fidelity to the original intent of the Equal Protection Clause than the scrutiny doctrine.[64]

Rather than merely replacing the previous framework, Bedi provides four distinct problems with the scrutiny doctrine before providing an alternative. First, the traditional framework requires the Court to "demarcate certain groups but not others as suspect classes."[65] This places the power of self-definition in the hands of the Court rather than empowering individuals to identify themselves. Additionally, it provides the false notion that socially-constructed identities are concrete, identifiable entities that must be subject to Court definition.

Second, because the Court considers only the suspect classes involved, it increases the tension of the counter-majoritarian difficulty.[66] Bedi utilizes *Brown v Board of Education* to demonstrate this phenomenon. Interpreting the Court's reasoning that because racial segregation harms Black children it is unconstitutional, Bedi takes issue with the Court's consideration of a singular group over the interests of the whole, which he considers evades the importance of constitutional review.[67]

Third, because the Court holds racist and sexist laws up to a higher standard of review, it implies that there is a type of oppression that can be constitutionally admissible. In holding racism and sexism to any kind of review, Bedi claims that the Court is considering circumstances wherein racist actions have a level of validity. Concurrently, the higher burden of proof with regard to race makes remedial legislation, like affirmative action, difficult for legislatures to adopt. In combining both the validation of racist laws and intolerance for legislative reform, the doctrine protects racism and prevents remedial action.

Fourth, the terminology of scrutiny is too vague for blanket application. Bedi demonstrates the flexibility of terms like "compelling" by comparing *Korematsu v United States* to *Grutter*

v Bollinger. While in *Korematsu*, "compelling" referred to national security interests, in *Grutter*, "compelling" referred to racial diversity in higher education.[68] Such differential judicial rulings, Bedi suggests, should be decided legislatively rather than judicially. To solve these issues, Bedi utilizes a three-pronged approach to determine inadmissibility. The first inadmissible reason is one that is based on "certain conceptions of the good life" as defined by John Rawls.[69] This principle of liberal neutrality eschews ideas about perfectionist ways of being because an authoritative stance on how to be is anathema to a democratic polity.

Bedi utilizes queer case law to support his proposal. In *Lawrence v Texas,* Justice Kennedy invokes Justice John Paul Stevens's dissent in *Bowers v Hardwick* to deem "constitutionally inadmissible laws and policies prohibiting a practice based simply on the idea that a majority finds it immoral."[70] Such invocation, Bedi claims, renders a heightened scrutiny review unnecessary, since it needs no more proof of unconstitutionality than a morality-based rationale. Bedi continues with *Goodridge v Department of Public Health*, which he argues "makes clear that the court's role is to avoid appealing to contested religious and moral views in deciding the constitutionality of a ban on same-sex marriage."[71] Bedi further cements the constitutionality of liberal neutrality through the Establishment Clause of the First Amendment, which makes unconstitutional laws respecting the establishment of religion.[72] In both political theory, case law, and other Constitutional Amendments, Bedi argues that laws motivated by a certain conception of "the good life" must be made constitutionally inadmissible.

The second prong of inadmissibility in the powers review is laws with reasons based on animus or hostility. Mere animus or hostility is based in disgust, which "is merely an emotion and a particularly visceral one at that."[73] Without any reason, resting on pure emotion, a law cannot be constitutionally admissible. Bedi cites *Bakke* and *Yick Wo v Hopkins* as cases that support this measure. While Bedi ultimately critiques *Bakke*'s decision, he agrees with

Justice Powell's opinion that preferential treatment solely based on race is inadmissible discrimination.[74] Favoritism and hostility are only shared by the person who feels such sentiment; as such, it is not constitutional but personal.

The third and final prong of inadmissibility in the powers review requires that the state not act in "bad faith" by falsifying the intent of its law to pass the powers review.[75] With regard to the role of the Court, the approach requires the Court to discern the prima facie intent from the true intent to determine if the state has acted intentionally to thwart the Court's review. Bedi likens this third standard to rational basis review with bite, citing *Williamson v Lee Optical Co.* The case concerned an Oklahoma law that required only optometrists or ophthalmologists to practice lens fitting and application without prescriptive authority from the state.[76] An optician sued the state, claiming that the act violated the Fourteenth Amendment's Due Process and Equal Protection Clauses. The Court ruled, among other things, that the law's provisions did not violate the Fourteenth Amendment. Justice Douglas stated, "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[77] Bedi's third prong is a two-fold interpretation of bad faith: that the law may be insidious in its discriminatory intent but prima facie passing the powers review or that the law may be utterly innocent, but the plaintiff is fabricating a mal-intent. In both cases, Bedi finds the law inadmissible.

To demonstrate how the powers framework would resolve cases distinctly from those previously decided through scrutiny, I will apply Bedi's approach to the affirmative action case *Grutter v Bollinger*. *Grutter* was argued before the Supreme Court on April 1, 2003 and was decided on June 23, 2003. The question at stake was whether or not the University of Michigan Law School's use of racial preference in their admissions process violated Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the

Fourteenth Amendment.[78]

Barbara Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, was denied admission to the University of Michigan Law School. Grutter sued, claiming that she was rejected due to the school's use of race as a predominant factor in its admissions decisions, which she argued violated the 1964 Civil Rights Act, the Fourteenth Amendment, and 42 U.S.C. § 1981. At the District Court for Eastern Michigan, the judge ruled in favor of Grutter, claiming that the University of Michigan's policies considered race and was no different from a quota system.[79] This decision was reversed at the U.S. Court of Appeals for the Sixth Circuit, which cited *Bakke* to claim that the University of Michigan passed the strict scrutiny requirement of compelling interest.[80] Grutter then filed a certiorari petition to the Supreme Court.[81]

The Court found that the University's admissions process did not violate the Equal Protection Clause. Writing for the majority, Justice Sandra Day O'Connor found that the policy was narrowly tailored to a compelling government interest. The majority's reasoning in *Grutter* is almost entirely consistent with Justice Powell's concurrence in *Bakke*.

O'Connor stresses how critical a diverse and educated citizenry is for national and democratic security. Citing numerous *amicus curiae* briefs, O'Connor maintains that a critical mass is essential in the fields of business: 3M and General Motors "made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[82] Referencing an amicus brief from Army Lieutenant Julius W. Becton Jr., O'Connor notes that "a highly qualified, racially diverse officer corps is essential to national security."[83] She cites *Brown's* declaration on the importance of education and references practical considerations for the preservation of democracy. In doing so, she argues that "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to

talented and qualified individuals of every race and ethnicity."

The Court held that the policy was narrowly tailored. Distinguishing the policy from *Bakke*, O'Connor noted that because race was merely one consideration in an application, rather than to fill a quota, the policy did not violate the EPC. The considerations of an applicant extend beyond standardized test scores to "include soft variables, such as 'the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of an undergraduate course selection.'" As such, race is only one of many considerations that contribute to the University's admission of applicants. Thus the Court ruled Michigan's admissions policies were narrowly tailored enough to pass strict scrutiny.

Examining *Grutter* with Bedi's powers framework places less of a burden on the University of Michigan to demonstrate that their admissions policies are admissible. Rather than related to a morally prescriptive notion, the objective benefits of a well-educated and diverse cohort of young people was the central justification for the admissions process. With this basis the policy effectively passes the first prong of the powers review, not related to a prescription of moral notions of "the good life."[84] The second requisite, "reasons based in animus or hostility," emotional legal decisions that reflect disgust or favoritism towards a certain group, is more relevant to *Grutter,* as Bedi does not believe that *Bakke*, the affirmative action case preceding *Grutter*, passed it. Further, because the University admitted to considering race in the process, this prong does not seem relevant to *Bakke*. Considering *Grutter*, Bedi ultimately deems the case admissible, stating:

> A powers review only asks the Court to strike down such laws if they are based on a constitutionally inadmissible purpose such as racial animus. This imposes a more basic and straightforward constitutional test, one that carries a steeper

> argumentative burden. For a Justice to strike down affirmative action legislation, he or she must proclaim that some kind of animus or brute favoritism is afoot. Tellingly, none of the dissenting justices in *Grutter* does so.[85]

Since neither the majority opinion nor the dissentc found animus or favoritism present in the University's policy, it is clear that the policies considered in *Grutter* would be admissible by all three prongs in the powers review. This case, and affirmative action cases in general, are especially indicative of the distinctions between Bedi's framework and the traditional scrutiny doctrine. The alternative "powers" framework that Bedi proposes focuses not on the law itself, but on the basis of the law's reasoning, ultimately settling the issues Bedi held with the traditional framework.

By exploring the question of the constitutionality of the state's *power* to pass the laws in question, this approach resolves Bedi's previously discussed issues with scrutiny. Through dismissing identity altogether and focusing on the constitutionality of the state's exercise of powers, the first issue of identity demarcation is resolved.[86] The goal of a state with limited power is enticing enough that it precludes the need for identity-related limits on state action.[87] In examining all cases by the same three-pronged standard, Bedi focuses on animus or hostility as being inadmissible, rather than holding protected classes up to a higher standard, avoiding the concept that there are some cases where racist or sexist laws can be valid. Finally, because the questions posed by the prongs of admissibility are directed at the state's reasoning, there no longer has to be a reliance on the Court's impression of the relative marginalization of identity.

V. Non-Identarian Analysis

As previously demonstrated, the Court's refusal to

incorporate queer persons into scrutiny doctrine has led to issues of competing rights. That is, if the Court does not treat queer people as a suspect class, then strict scrutiny does not afford them the same protections of other suspect classes. In this paper, I have outlined two possible substitutes for the scrutiny doctrine: the powers review and the Dignity Approach. While both have been used or applied to traditional scrutiny models, neither have been tested with competing rights cases involving queer classes. In this section, I will apply both methods of review to *Masterpiece Cakeshop v Colorado Civil Rights Commission* to demonstrate that neither non-identarian approach sufficiently resolves the case of competing rights. I will also return to the history of the Fourteenth Amendment to argue that neither approach sufficiently addresses the historical intent of the doctrine.

In 2012, Charlie Craig and David Mullins were engaged to be married. At the time, the Colorado constitution prohibited same-sex marriage, so the couple planned to be married in Massachusetts to receive legal recognition. After their legal marriage, the couple planned to return to Lakewood, Colorado and celebrate with friends and family.[88] For their celebration, the couple visited Masterpiece Cakeshop with the intent to place an order for their wedding cake. Jack Phillips, the owner of the bakery, refused to sell a wedding cake to the couple because his Christian beliefs prevented him from supporting same-sex marriage. Phillips offered to sell any other item to the couple except for a wedding cake. Craig and Mullins left immediately, visited another bakery that provided a cake to the couple, and then filed a complaint to the Colorado Civil Rights Commission (CCRC) under the state's public accommodations law.[89]

The couples' complaint to the CCRC resulted in a lawsuit, *Craig v Masterpiece Cakeshop*, which ruled in favor of the plaintiffs. In addition to ordering Phillips to make a cake for the plaintiffs, the CCRC ordered Masterpiece Cakeshop to undergo additional remedial measures including "comprehensive staff training on the Public Accommodations section" of the state law.[90] Masterpiece

then appealed the decision, supported by the conservative Christian advocacy group the Alliance Defending Freedom.[91] The Court of Appeals upheld the state's decision, ruling:

> Masterpiece asserts that its refusal to create the cake was 'because of' its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was 'because of' their sexual orientation, in violation of CADA.[92]

The Supreme Court of Colorado declined to hear the appeal, so Masterpiece Cakeshop petitioned the Supreme Court for cert, asking if "applying Colorado's public accommodations law to compel Phillips to create an expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment."[93] The Court agreed to hear the case in the 2017 term, and oral arguments were heard on December 5, 2017.

The nature of the cert allowed for a narrow interpretation of the question at stake in the case. Rather than pursuing an exploration of balancing rights and levels of scrutiny with regard to sexual orientation versus religious affiliation that could resolve the trajectory of scrutiny as stated above, the Court chose to examine the CCRC's treatment of Phillips in their hearing of the case.[94] Kennedy, writing for the majority, repeatedly acknowledged the case's potential for a landmark ruling considering competing rights and intersectionality. Rather than pursuing such a ruling, Kennedy chose to focus the case on the CCRC's treatment of Phillips which "showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection."[95] One transcript

from a CCRC meeting on the case contained a statement from a commissioner that Kennedy deemed particularly inflammatory: "we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to - to use their religion to hurt others."[96] Rather than resolving a substantive matter, the Court chose to dismiss the case as a process failure.[97]

If the Court had addressed the inherent conflict between rights and classes within the case, the decision would have been immensely impactful. In comparing race and gender-based claims of discrimination to discrimination against same-sex couples, the Court would either blatantly deny queer people the same level of scrutiny they provide to laws involving gender and race, or the Court would include queer people as a suspect class. Because neither of these things occurred and Kennedy instead (seemingly intentionally) avoided this more complicated and impactful approach, the case became yet another to prolong setting a clear and constitutionally-rooted precedent for deciding queer cases.

Both of the previously outlined approaches claim to rectify the current issues with scrutiny doctrine through a non-identarian approach. To test these approaches, I will apply each of them to *Masterpiece*, opting to disregard the flawed-process approach in favor of the more meaty discussion of competing rights and equal protection. I will first apply the powers review, demonstrating how, by its very nature, *Masterpiece* defines the weakness in Bedi's framework. I will then apply the dignity doctrine, demonstrating how, without incorporating dignity, the competing rights of the parties are irreconcilable. In applying both approaches to *Masterpiece*, the necessity for an identarian approach to Equal Protection, and its presence in any substitute for scrutiny doctrine, will become evident.

The preeminent text on the powers review is Bedi's *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity.* In his text Bedi reviews the flaws of the traditional scrutiny framework, proposes the powers review as a substitute for said flaws, and applies

them to cases involving race, sex, and sexual orientation. Within the introduction to the powers review, Bedi acknowledges the review's limitations. One limitation Bedi lists is the powers review's failure to comprehensively address competing rights issues: "If such a review has implications for other constitutional doctrines, I leave that to be worked out another time. So, even if a law passes the Equal Protection Clause and does not invoke a constitutionally inadmissible rationale, it may well violate other provisions or rights contained in the Constitution."[98] Despite this admission, competing rights are not left wholly unaddressed in Bedi's work. He includes a powers application to *Loving v Virginia*, a case that involves a couple's Fourteenth Amendment right to Equal Protection versus a state's Tenth Amendment right to legislate constitutionally unenumerated rights.[99] However, rather than introduce a method for evaluating competing rights claims, Bedi finds that the consideration of marriage itself in *Loving* violates the "good life" principle in his powers review, disregarding competing rights.

Thus, *Loving* is an exception to the powers review's competing-rights flaw, because it is addressed not through balancing Tenth and Fourteenth Amendment rights, but dismissing the very question of marriage law itself.[100]

Given this weakness, the powers review approach would not be able to resolve the tension between the First and Fourteenth Amendment rights at issue in *Masterpiece*. In order to provide insight into the case, Bedi's framework would require working with a common denominator, that of two Fourteenth Amendment claims. This limitation suggests that in the progressing issues that limit scrutiny cases, such as competing religious freedom and equal-protection cases for queer rights, identity is necessary for resolving such cases. While Bedi's approach works for simplified competing Fourteenth Amendment claims, his cases involve almost exclusively state rights versus individual rights, rather than the competing rights of two individual parties. As many legal scholars have noted, addressing emergent issues in constitutional law would require

an approach that incorporates the religious claims versus Equal Protection claims.[101]

This limitation in Bedi's framework is inherently connected to his dismissal of identity–a dismissal that, I argue, overlooks the history of the Fourteenth Amendment. While Bedi attempts to avoid further marginalization of the groups that scrutiny doctrine specifies and attempts to protect, in denying specific identity groups' centrality to the history and purpose of scrutiny, he risks the efficacy of the amendment and the potential for the erasure of the groups themselves. Bedi's non-identarian logic argues that the notion that identity "needlessly" considered in the adjudication of Equal Protection denies the intent of the Fourteenth Amendment, the origins of which are inseparable from the recognition of history's role in how Americans view equality and identity. As I demonstrated previously, drawing on the scholarship of Brandwein and the precedent of *Strauder*, the Fourteenth Amendment was not about the limitation of state power, but rather about the intentional incorporation of Black people into the legal and social conception of American citizenship. The scrutiny doctrine was an iteration of that approach and has been expanded to support other minority classes that have been historically denied such privileges both socially and legally. Embedded in the history and legacy of this Amendment is the recognition of historical and continual discrimination and bias in America against factions of society that suffer consistent harm.

Applying the Dignity Approach to *Masterpiece* requires a reliance on the proposed suspension of disbelief–that the question of *Masterpiece* directly corresponds to the competing rights issue rather than a narrow interrogation of the processes conducted during the CCRC's deliberations. This is especially true due to Kennedy's role in forming the Dignity Approach, as well as his penning of the majority opinion in *Masterpiece.* Dignity is present in Kennedy's ruling, mentioned three times exclusively to describe gay persons; however, it is not relied upon to determine the Court's holding, since the Court opts instead to focus on the treatment of Phillips.[102] I argue

this ducking is the result of the dignity doctrine's failure to amply resolve the tension between the two rights.

The dignity doctrine's main approach to Equal Protection cases is to rule that all are granted equal dignity in a vacuum. Similar to Bedi's powers review, this approach does not account for competing rights of two distinct identity groups. It would be inconsistent with the doctrine to say that one group, gay persons, should have *more* dignity than another group, religious persons, or are more deserving of said dignity. Dignity definitionally cannot be measured to be more or less. If dignity is, as Jeremy Waldron defines, a status comprising a given set of rights, then that status and said rights are shared by all, and cannot be distinguished between individuals competing for specific treatment.[103] Thus, the dignity doctrine fails to resolve competing rights claims.

Again, this failure serves to support an identarian approach to Equal Protection. The dignity doctrine, a previously argued extension of a tradition of colorblindness, relies upon an erasure of history. Through claiming that such identities should be evaluated and treated as if in a vacuum, the history of each identity group is abandoned in an attempt to normatively progress a social and legal reality. Rather than examine the historical ramifications of social discrimination (see *Brown v Board* footnote eleven), homosexuals under the court have been treated as an unidentified class that should receive equal treatment as anyone else.[104] As a result, in competing rights claims, it is not difficult to imagine that religious freedom will begin to override class-based claims in future cases as a result of the court's refusal to reflect on the histories of discrimination against certain classes. In removing queer identity and history, the violated would likely be Phillips for being denied his religious freedom. Thus, this right is protected over the rights of queer people who, rather than being a protected class, are considered no different with regards to dignity and rights than heterosexual Americans.

The failure of the dignity doctrine rests on the conflation of the notion of "equality" and the intent and function of the Equal

Protection Clause. The failure of the powers review rests on the conviction that identity is "needlessly" involved in the scrutiny doctrine. I argue that it is not the denial of the ontological equality of all persons that drives tiered evaluation of different cases on the basis of discriminated classes. Rather, it is the implicit understanding that our country is riddled with bias and discrimination, and that it would take an exceptional circumstance to justify practices that distinguish or discriminate on the basis of class. Rather than highlighting the differences in human value or worth, the tiers call out a history of discrimination and strive to protect specific classes from enduring further violence.

The trend away from the traditional, identarian model of scrutiny doctrine claims an inherent value in the non-identarian evaluation of Equal Protection claims. However, in reviewing and applying two proposed models from the legal and academic fields that were representative of both conservative and liberal schools of thought, I suggest that identarian models are still necessary for evaluating Equal Protection and the increasingly prevalent competing-rights claims. Overlooking identity and the history of those identities in the United States is a mistake that disregards the very purpose of the Fourteenth Amendment.

[1] The term "Identarian" is used frequently throughout this paper to mean based in or reliant upon identity.
[2] Carrie Hyde, *Civic Longing: The Speculative Origins of U.S. Citizenship* (Cambridge: Harvard University Press, 2018), 7.
[3] Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham and London: Duke University Press, 1999), 48.
[4] Stephen Engel and Timothy Lyle, working manuscript.
[5] U.S. Const. amend. XIV,§ 1
[6] *Dred Scott v Sandford*, 60 U.S. (1857), 393.
[7] Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham and London: Duke University Press, 1999), 48.
[8] Stephen Engel and Timothy Lyle, working manuscript.
[9] *Buchanan v Warley*, 245 U.S. (1917), 77: "The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case, Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment".
[10] "While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the 14th Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally. In the meantime, blacks joined America's military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country's magnificent wealth and waiting to share in its prosperity." Thurgood Marshall, *"*Commentary: Reflections on the Bicentennial of the United States Constitution,*"* *Valparaiso University Law Review* 21, no. 1 (1991): 24.
[11] *Buchanan v Warley*, 245 U.S. (1917), 77: "The reasons for the adoption of the Amendments were elaborately considered by a court familiar with the times in which the necessity for the Amendments arose and with the circumstances which impelled their adoption. In that case, Mr. Justice Miller, who spoke for the majority, pointed out that the colored race, having been freed from slavery by

the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment".
[12] *Lochner v New York,* 198 U.S. 45 (1905)*, Muller v Oregon*, 208 U.S. 412 (1908).
[13] *Adkins v Children's Hospital*, 261 U.S. 525 (1923), *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937).
[14] *Allgeyer v Louisiana*, 165 U.S. 578 (1897).
[15] Ibid.
[16] *West Coast Hotel Co. v Parrish*, 300 U.S. 379 (1937).
[17] *Adkins v Children's Hospital*, 261 U.S. 525 (1923).
[18] Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Policepowers Jurisprudence*, (Durham: Duke University Press, 1993).
[19] *United States v Carolene Products Company*, 304 U.S. 144 (1938).
[20] Ibid.
[21] Ibid.,
[22] *Maher v Roe*, 432 US 464 (1977).
[23] *Eisenstadt v Baird*, 405 U.S. 438 (1972).
[24] Sonu Bedi, "Reclaiming the Conceptual Legacy of the Progressives' Critique of Rights: Equal Protection Without Higher Scrutiny," in *The Progressives' Century,* edited by Stephen Skowronek, Stephen M. Engel, and Bruce Ackerman 121 (New Haven: Yale University Press, 2016).
[25] *Craig v Boren*, 429 U.S. 190 (1976).
[26] *Reed v Reed,* 404 U.S. 71 (1971): A state statute preferencing males over females in the administrators of estates is a violation of the Equal Protection Clause. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.
[27] *Craig v Boren*, 429 U.S. 190 (1976).
[28] Including: *Frontiero v Richardson*, 411 U.S. 677 (1973); *United States v Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v Hogan*, 458 U.S. 718 (1982); *Glenn v Brumby et al.*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010).
[29] *US West, Inc. v United States,* 855 F. Supp. 1184 (W.D. Wash. 1994); *Am. Library Ass'n v Reno*, 33 F.3d 78 (D.C. Cir. 1994); *MD II Entertainment, Inc. v Dallas*, 28 F.3d 492 n. 21 (5th Cir. 1994); *Rappa v New Caste County*, 18 F. 3d 1043 (3d Cir. 1994).
[30] *District of Columbia v Heller*, 554 U.S. 570 (2008).
[31] *Caban v Mohammed*, 441 U.S. 380 (1979).
[32] "Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's

Compelling-And-Important-Interest Inquiries," 129 *Harvard Law Review* 1406, 69 (2016).
[33] *Skinner v State of Oklahoma, ex rel. Williamson,* 316 U.S. 535 (1942).
[34] *Loving v Virginia*, 388 U.S. 1 (1967).
[35] *Roe v Wade*, 410 U.S. 113 (1973).
[36] *Korematsu v United States*, 323 U.S. 214 (1944).
[37] Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," 59 *Vanderbilt Law Review* 793, (2006).
[38] Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 *University of Chicago Legal Forum* 139, 139-168 (1989).
[39] Dean Spade, "Intersectional Resistance and Law Reform," 38 *Signs* 1031, (2013).
[40] *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).
[41] *Korematsu v United States*, 323 U.S. 214 (1944).
[42] *Loving v Virginia*, 388 U.S. 1 (1967).
[43] *Lawrence v Texas*, 539 U.S. 558 (2003).
[44] *Romer v Evans*, 517 U.S. 620 (1996).
[45] Paul Brest, et al, *Processes of Constitutional Decisionmaking: Cases and Materials Fifth Edition* 309-310 (Aspen Publishers Fifth Edition, 2006).
[46] Ibid.
[47] *Plessy v Ferguson*, 163 U.S. 537 (1896).
[48] *Parents Involved in Community Schools v Seattle School District No. 1*, 551 U.S. 701 (2007).
[49] United States v Windsor, 570 U.S. 744 (2013).
[50] *Obergefell v Hodges*, 576 U.S. ___ (2015).
[51] *Obergefell v Hodges*, 576 U.S. ___ (2015): "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."
[52] *United States v Windsor*, 570 U.S. 744 (2013).
[53] *Loving v Virginia,* 388 U.S. 1 (1967).

[54] Melissa Murray, "Obergefell v Hodges and Nonmarriage Inequality," *California Law Review* 104, no. 5 (2016): 1215.
[55] Stephen Engel and Timothy Lyle, working manuscript.
[56] John Powell and Stephen Menendian, "Parents Involved: The Mantle of Brown, the Shadow of Plessy," *University of Louisville Law Review* 46, no. 4 (2008): 659.
[57] Ibid., 699.
[58] Kevin Brown, "Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy is Right," *South Carolina Law Review* 59, no. 4 (2008): 746.
[59] Melissa Murray, "Obergefell v Hodges and Nonmarriage Inequality," *The Michigan Law Review* 102, no. 7 (2004): 1207.
[60] *United States v Windsor*, 570 U.S. 744 (2013), 17, J. Scalia dissent.
[61] *Heller v Doe*, 509 U.S. 312 (1993).
[62] *Obergefell v Hodges*, 576 U.S. ____(2015), 24, C. J. Thomas dissent.
[63] Ibid., 28
[64] It is important to note that while the previous section analyzed the Dignity Approach that is present and identifiable in Supreme Court practice, the powers approach is a purely academic normative legal theory. As such, I am analyzing both actual case law and normative legal theory, which Professor Adrian Vermeule describes as creating two conceptual gaps between fact and value and internal and external perspectives in law. Rather than reason to avoid the implementation of the two, however, the tension between both forms of metaphysical truth is instead evidence of its salience and serves to justify intrigue and exploration. To join the positive and theoretical means of inquiry together, I will apply thepowers review to the same cases that I addressed in the dignity overview to demonstrate the distinctions between their approaches. Adrian Vermeule, "Connecting Positive and Normative Legal Theory," *University of Pennsylvania Journal of Constitutional Law* 10, no. 2 (2008): 387; Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge: Cambridge University Press, 2013), 72.
[65] Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* (Cambridge: Cambridge University Press, 2013), 3.
[66] Ibid.,
[67] Ibid., 4.
[68] Ibid.
[69] Ibid., 74.
[70] Ibid., 76.
[71] Ibid., 80.

[72] Ibid., 81-85.
[73] Ibid., 86.
[74] Ibid., 87.
[75] Ibid., 97
[76] *Williamson v Lee Optical Co.,* 348 U.S. 483 (1955).
[77] Ibid.
[78] *Grutter v Bollinger*, 539 U.S. 306 (2003).
[79] 137 F. Supp. 2d 821 (E.D. Mich. 2001).
[80] 288 F.3d 732 (6th Cir. 2002) (en banc).
[81] *Grutter v Bollinger*, 539 U.S. 306 (2003).
[82] Ibid., 308.
[83] Ibid.
[84] Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* (Cambridge: Cambridge University Press, 2013), 43.
[85] Ibid., 145.
[86] Ibid., 72
[87] Ibid., 104
[88] Robert Barnes, "Supreme Court to take case on baker who refused to sell wedding cake to gay couple," *The Washington Post,* June 26 2017, https://www.washingtonpost.com/politics/courts_law/supreme-court-to-take-case-on-baker-who-refused-to-sell-wedding-cake-to-gay-couple/2017/06/26/0c2f8606-0cde-11e7-9d5a-a83e627dc120_story.html.
[89] *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. ___ (2018).
[90] Ibid.
[91] David G. Savage, "A baker refused to make a cake for a gay couple due to religious beliefs. Supreme Court will rule on the case in fall," *The Los Angeles Times,* June 26 2017, https://www.latimes.com/politics/la-na-pol-court-gays-religion-20170626-story.html.
[92] Craig v Masterpiece Cake Shop et al., No. 14CA1351 (Colo. Ct. of App. August 13, 2015).
[93] *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. ___ (2018).
[94] Ibid.
[95] Ibid., 2.
[96] Ibid., 13.
[97] Stephen Engel and Timothy Lyle, working manuscript.
[98] Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* (Cambridge: Cambridge University Press, 2013), 21.

[99] *Loving v Virginia*, 388 U.S. 1 (1967).
[100] Sonu Bedi, *Beyond Race, Sex, and Sexual Orientation: Legal Equality without Identity* (Cambridge: Cambridge University Press, 2013), 235-236.
[101] Prominent scholarship noting the trend toward competing rights between 1st and 14th Amendment cases include: Kenneth L. Karst, "The Liberties of Equal Citizens: Groups and the Due Process Clause," *UCLA Law Review* 55, no. 1 (2007): 99-142; Nathan A. Berkely, "Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism," *Gonzaga Law Review* 50, no. 1 (2014): 1-28; Ira C. Lupu and Robert W. Tuttle, "Same-Sex Equality and Religious Freedom," *Northwestern Journal of Law and Social Policy* 5, no. 2 (2010): 274-306; James M. Oleske Jr., "State Inaction, Equal Protection, and Religious Resistance to LGBT Rights," *University of Colorado Law Review* 87, no.1 (2016): 1-64.
[102] "The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services."; "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."; "This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 U.S. ___ (2018).
[103] Jeremy Waldron, *Philosophical Foundations of Human Rights*, ed. Cruft, Rowan, S. Matthew Liao, and Massimo Renzo (Oxford: Oxford University Press, 2015), 125.
[104] *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

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California v Texas and its Attack on the Affordable Care Act

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Abstract

Enacted in 2010, the Affordable Care Act (ACA) has been the subject of countless political and legal battles since its inception. From legislative proposals to "repeal and replace" to challenges to the law's constitutionality, opponents of the ACA have not given up their partisan efforts to dispose of the nine-hundred-page long law since its passage. Impressively, apart from minor legislative changes and sporadic administrative alterations, the ACA has survived. However, one such small change, included in the notorious Tax Cuts and Jobs Act (TCJA) of 2017, set the stage for a renewed attempt to dismantle the crucial healthcare law. In this omnibus bill, a Republican-controlled House and Senate managed to alter the ACA's highly controversial individual mandate provision, which requires that all individuals maintain qualified health insurance or else pay a corresponding fee, or tax, to the Internal Revenue Service (IRS). By reducing the provision's tax-penalty to $0, Congress created an opportunity for a narrow challenge of the law's constitutionality resting at the intersection of the TCJA amendment and the majority decision of the first Supreme Court case to uphold the ACA, *National Federation of Independent Businesses v Sebelius*. Despite widespread recognition of the flimsiness of the plaintiffs' claims, this challenge, filed as *Texas v United State* but refashioned as *California v Texas* at the Supreme Court, was heard by the Supreme Court on November 10, 2020. This paper discusses this latest ACA case to reach the Supreme Court and fervently argues that the individual mandate remains constitutional, but, in the event the Court mistakenly finds otherwise, this paper demonstrates that the mandate is unequivocally severable from the rest of the ACA.

I. Introduction

Ten years ago, Congress enacted the Patient Protection and Affordable Care Act (ACA), the most significant change to the U.S. healthcare system since Congress created Medicare and Medicaid in the 1960s.[1] The ACA has drastically increased the number of Americans with health quality health insurance, expanded access to crucial healthcare series, reduced healthcare disparities by critical factors like income and race, slowed the historically rapid growth in U.S. healthcare spending, and pushed the country closer to universal health coverage. Now fully ingrained in this nation's healthcare system, economy, and values, the ACA has permanently altered how "Americans and the political arena think about healthcare and the entitlement to it."[2] Remarkably, its monumental success has occurred amidst unrelenting criticism, congressional battles, and formal legal challenges.

Prominent legal scholars have hailed the ACA as "the most challenged—and the most resilient—statute in modern American history."[3] The law came into effect despite intense partisan opposition, passing without any Republican votes in the House or Senate. Since its enactment, Republicans in Congress have branded the ACA as their most notorious enemy, launching more than seventy attempts to repeal the law. During its first nine years of existence, the ACA made it to the Supreme Court five times.[4] Administrative regulations slowing implementation of the law and weakening certain consumer protections have further threatened the ACA's survival. Ultimately, however, Congress and the courts have saved the bulk of the ACA, allowing only slight modifications to prevail.

Congress made one such modification in 2017 when it chose to amend the ACA's infamous individual mandate provision. The individual mandate provides that individuals shall maintain qualified health insurance and that those who fail to do must pay a "shared responsibility payment" to the IRS as part of the taxpayer's income

tax returns. Congress's seemingly tiny change to this language, buried among complex revisions to the U.S. Tax Code, lies at the center of the most recent challenge to the ACA to reach the Supreme Court. Following the 2016 election, with President Trump in the White House and a Republican majority in both chambers of Congress, opponents of the ACA revived their attempts to eliminate some of the law's most crucial provisions.[5] While multiple repeal efforts were voted down, Congress did succeed in passing the Tax Cuts and Jobs Act (TCJA) of 2017, an omnibus bill that included a small alteration to the ACA's controversial individual mandate provision. Specifically, the TCJA reduced the shared responsibility payment amount to zero dollars.

Only two months following the passage of the TCJA, a group of states, led by Texas Attorney General Ken Paxton, filed a lawsuit challenging the altered provision and, with it, the entire ACA. The plaintiffs claim that the TCJA amendment has rendered the individual mandate provision unconstitutional and that the courts must strike down the entire ACA with, what they claim is, the newly invalid provision. While this most recent attack on the healthcare law has been labeled by prominent legal scholars, members of Congress, and numerous healthcare industry stakeholders as outlandish, baseless, and extremely harmful, it has become the latest case surrounding the ACA to reach the Supreme Court. This *California v Texas* litigation—originally fashioned as *Texas v United States*—for which the Supreme Court just heard oral arguments and is expected to issue a decision around June of 2021, is the focus of this paper.

The ACA's incremental approach to healthcare reform has proven largely successful, but this new litigation has put the statute's significant gains in jeopardy once again. The expansive law closed major coverage gaps in the fragmented U.S. healthcare system by standardizing and broadening coverage, establishing crucial consumer protections, extending financial assistance to low and middle-income families on the individual insurance market, and

ultimately helping to break the links between employment status, income, health status, and access to quality health insurance. This latest legal challenge found in *Texas v United States* threatens to jeopardize this progress by asking the Court to find the entire ACA invalid. In Part I of this paper, I discuss the details of *Texas v United States*, the parties involved, the arguments presented, and its procedural posture thus far. In Part II, I dispute the plaintiffs' claims, addressing two of the lawsuit's legal questions—whether the TCJA has rendered the individual mandate unconstitutional and, if so, whether the individual mandate is severable from the remaining portions of the ACA—and argue in favor of saving the individual mandate and the rest of the ACA. Finally, in Part III, I explain what will come next for *Texas v United States*, now titled *California v Texas*, and what legislative actions could alter the course of this controversial litigation.

II. Legal Issue

A. Litigation: *Texas v United States*

On February 26, 2018, a group of eighteen Republican attorneys general and two Republican governors filed a lawsuit in the United States District Court of the Northern District of Texas challenging the constitutionality of the ACA. This suit, *Texas v United States,* constitutes the law's third constitutional challenge to be heard by the Supreme Court and the second surrounding the ACA's individual mandate provision. The plaintiffs' argument lies at the intersection of the Supreme Court's decision in *National Federation of Independent Business v Sebelius* (*NFIB*)—the case in which the Supreme Court originally upheld the ACA's individual mandate—and the Tax Cuts and Jobs Act of 2017 (TCJA), creating two complex and controversial legal questions regarding constitutionality and severability.

a. The Individual Mandate

Included in the original version of the ACA was the individual mandate, or 26 U.S. Code Section 5000A. Subsection (a) of this controversial provision, officially titled the "Requirement to maintain minimum essential coverage," provides that "an applicable individual shall ensure that the individual ... is covered under minimum essential coverage," as defined under the law, for each month starting in 2013.[6] If one fails to purchase qualifying coverage, they are subject to Section 5000A(b), the "shared responsibility payment," a federal penalty imposed on taxpayers who forgo minimum coverage.[7] When originally enacted, the sum of the penalty, as set forth in Section 5000A(c), was determined based on one's income and paid via one's income taxes.[8] Taken together, the ACA's individual mandate and shared responsibility payment require that individuals either purchase health insurance or pay a fee to the IRS.

b. Constitutional Powers (Article I, Section 8): Power to Legislate the ACA

The United States Congress has certain limited powers as outlined in Article I, Section 8 of the U.S. Constitution. Those powers "not delegated to the United States [Congress] by the Constitution … are reserved to the States respectively, or to the people."[9] Congress's legislative actions, including each individual statutory provision, are thus limited to those that fall within the enumerated powers. The federal courts have the final say in interpreting what specific Congressional actions are justified by the powers outlined in Article I, Section 8. As Congress continues to pass new legislation reaching into unprecedented territory, the courts are repeatedly asked to reexamine the scope of these powers.[10]

Typically, due to the vast scope of most statutes, only a single provision within a much larger piece of legislation is challenged on the basis of exceeding Congress's enumerated powers. When a court chooses to invalidate the opposed provision, it raises the question of *severability*. Severability is a well-established constitutional doctrine that requires a court to determine whether the enacting Congress would prefer for the remaining valid portions of the law to survive without the problematic provision or for the entire law to be struck down. This doctrine will be more thoroughly explained in this paper within Section II.B., which argues for the mandate's severability.

As is required of any piece of legislation, Congress must demonstrate constitutional authority to enact the ACA, as well as any of its subsequent amendments or changes. Congress originally attempted to justify the ACA—and specifically the individual mandate—under the Commerce Clause, which broadly endows Congress with the power to regulate interstate commerce.[11] When this was unsuccessful, Congress turned to its enumerated power to tax and spend,[12] which has become the most relevant to the ACA's individual mandate provision due to the Supreme Court's decision in *National Federation of Independent Business v Sebelius*. This *NFIB* decision now lies at the center of the present Supreme Court case, *California v Texas.*

c. National Federation of Independent Business v Sebelius

The Supreme Court upheld the constitutionality of the ACA's individual mandate provision in its five-to-four decision in *National Federation of Independent Business v Sebelius* (*NFIB*). In 2012, twenty-six states challenged the constitutionality of the recently passed ACA, specifically arguing:

> "(1) that the individual mandate 'exceeded Congress's powers under Article I of the Constitution,' and (2) that, if the Court invalidated the mandate, it should enjoin the entire ACA because the mandate could not be severed from the rest of the Act."[13]

A shifting majority of Justices—which is when the specific Justices that comprise the Court's majority is different for each of the Court's holdings—issued the opinion of the court. The majority ruled that, while Section 5000A could not be upheld under the Commerce Clause or the Necessary and Proper Clause, it could be reasonably upheld under Congress's power to tax and spend.

In its defense of the ACA, the Department of Justice maintained that the individual mandate was justified by the Commerce Clause because an individual's failure to purchase health insurance affects interstate commerce. The Court, however, rejected this logic, explaining that the enumerated "power to *regulate* commerce presupposes the existence of commercial activity to be regulated"[14] and the ACA's minimum coverage provision does not regulate existing activity, but instead "compels individuals to *become* active in commerce" by commanding that they purchase insurance coverage.[15] The Supreme Court reasoned that, if the Commerce Clause grants Congress the authority to create commercial activity by forcing individual action on the ground that inactivity affects interstate commerce, the limits of Congress's enumerated powers become meaningless. If Congress can enact the individual mandate under the Commerce Clause, Congress could compel individuals to undertake almost any activity by claiming that their doing nothing affects interstate commerce, an implication that does not correspond with the framers' intention in limiting Congress's powers to certain specified authorities. Following this logic, the Supreme Court rejected the Justice Department's primary defense.

The majority opinion also clashed with the government's

attempt to justify the individual mandate under the Necessary and Proper Clause, which allows Congress to enact laws that are "necessary and proper" to Congress's ability to carry out its enumerated powers. The government asserted that the individual mandate is integral to Congress's ability to regulate commerce with the law's guaranteed-issue and community-rating provisions. Therefore, the government concluded that the individual mandate is "necessary and proper" to Congress's execution of its constitutionally endowed power. The Court, however, did not accept this argument. The Court noted that, while it recognizes the Necessary and Proper Clause as allowing for a "vast mass of incidental powers," it does not authorize "great substantive and independent powers" outside of those already specified.[16] The Court found that the individual mandate was not "incidental" to Congress's Commerce power, but instead involved a significant extension of federal power. Thus, the Court concluded that sustaining the individual mandate under the Necessary and Proper Clause would blur, if not eliminate, the bounds of Congress's constitutional powers by expanding its authority to activity that is far outside its limited powers.

Since statutory language can be interpreted in myriad ways, under the canon of constitutional avoidance, the Court must examine every plausible interpretation of a statute with the goal of finding the statute constitutional and valid.[17] Thus, the Court next turned to the Department of Justice's "alternative argument" for upholding Section 5000A: that the ACA's minimum coverage provision could be justified by Congress's taxing power. This required the Court to read Section 5000A slightly differently. Instead of reading the provision as a command, which the mandate's use of the word "shall" prompts, the government argued that the provision can read simply as "establishing a condition—not owning health insurance—that triggers a tax," since the only consequence for not complying is an additional payment to the IRS with one's income taxes. The government contended that Congress's taxing power supports the

individual mandate and shared responsibility payment by instead reading Section 5000A as simply taxing individuals who do not purchase health insurance.[18] A majority agreed with this argument.

The Court concluded that it was "fairly possible" to read the individual mandate and shared responsibility payment together as a tax on going without insurance because Section 5000A's penalty "looks like a tax in many respects."[19] The Court noted that the shared responsibility payment is paid when individuals file their income taxes; it only applies to individuals who actually pay federal income taxes; the penalty "amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status"; and "the requirement to pay is found in the Internal Revenue Code and enforced by the IRS."[20] Furthermore, the Court stated that, altogether, Section 5000A "yields the essential feature of any tax: it produces at least some revenue for the federal government."[21] Accordingly, the Court concluded that, in practice, the individual mandate acts together with the shared responsibility payment to serve as a constitutional "tax hike" on individuals who forgo health insurance.[22]

The Court also explained that, even though the shared responsibility payment is called a penalty in the plain text of the law, it can reasonably be interpreted as a tax for the purposes of saving it under Congress's taxing power because of a number of the provision's characteristics. First, the exaction triggered by a failure to comply with the individual mandate is less than the actual cost of purchasing coverage. Furthermore, the mandate contains no language that would suggest the illegality of a failure to maintain coverage, since there are no "negative legal consequences to not buying insurance, beyond requiring payment to the IRS."[23] That is not to say that the mandate does not attempt to influence or alter individuals' decisions with regards to insurance. However, failing to comply with the mandate triggers no other consequences than the nominal shared responsibility payment. Thus, individuals have

a lawful and accessible choice between not purchasing health insurance and paying a penalty, or purchasing health insurance and not paying a penalty. In effect, Section 5000A simply adds the failure to purchase health insurance to the long list of things the government taxes.[24]

Since the majority in *National Federation of Independent Business v Sebelius (NFIB)* found the individual mandate provision constitutional by upholding it as a tax, it did not reach the issue of severability. Only the dissenting Justices (Justices Scalia, Kennedy, Thomas, and Alito) discussed whether Section 5000A was severable from the rest of the ACA. These dissenting Justices opined that the ACA's minimum coverage provision could not be upheld under the Commerce Clause or the Tax Clause and that the unconstitutional individual mandate could not be severed from the rest of the law. The dissenting Justices thus argued that the entire ACA was invalid.

d. Tax Cuts and Jobs Act of 2017

On December 22, 2017, after a failed attempt at ACA repeal, the Republican-controlled Congress amended the ACA's shared responsibility payment "tax" provision through the tax reconciliation process—reducing the penalty amount to "zero percent" and "$0," effective January 1, 2019.[25] This omnibus bill, however, did not *repeal* 26 U.S. Code Section 5000A (the individual mandate), and it did not repeal the shared responsibility payment (Section 5000A(b)); it simply reduced the tax amount to zero dollars (i.e. it "zeroes out" the penalty).

This amendment prompted *Texas v United States*, the Texas-led lawsuit that has become the second constitutional challenge to the ACA's individual mandate provision to make its way to the Supreme Court. The plaintiffs argue that the TCJA has unsettled the *NFIB* decision and rendered the provision no longer justifiable under Congress's power to tax.[26] The plaintiffs claim that, with the

shared responsibility payment at $0, Section 5000A no longer raises any revenue for the federal government and thus can no longer be justified as a tax within Congress's enumerated powers. Even further, the plaintiffs assert that the mandate is so essential to the rest of the ACA that the rest of the statute must fall within what they insist to be a now invalid portion of the law.

With this groundwork laid, this paper will address two of the main legal questions that have emerged from these arguments in the following section: (1) Does the amended "Requirement to maintain minimum essential coverage" now exceed Congress's enumerated powers and render it unconstitutional? and (2) If found unconstitutional, is the individual mandate severable from the rest of the ACA, according to congressional intent surrounding the remaining portions of the law? So far, both lower courts that have reviewed the current case have sided with the plaintiffs on both legal questions.

e. Procedural Posture

Since its initial filing, this lawsuit has been marked by many oddities and controversies, and a number of the parties originally involved in the lawsuit have changed. While the litigation started with twenty plaintiff states—represented by eighteen Republican attorneys general and two Republican governors—the 2018 midterm elections altered this makeup, as Democratic wins caused Wisconsin and Maine to withdraw from the lawsuit. Furthermore, two individuals joined the state plaintiffs in April of 2018.

The makeup of the defense has proven rather atypical as well. First, the Department of Justice (DOJ) unconventionally decided not to defend the mandate, stating that it agreed with plaintiffs that the mandate was now unconstitutional. In response, a group of seventeen Democratic attorneys general, led by California

Attorney General Xavier Becerra, intervened to defend the ACA at the District Court. Since then, four more states joined the intervenor states on appeal, and six more states filed an *amicus curiae* brief at the Supreme Court in support of the ACA.[27] The U.S. House of Representatives also intervened as defendants at the U.S. Court of Appeals for the Fifth Circuit.

While the DOJ initially disagreed with the plaintiffs on severability and argued that the mandate was only inseverable from the ACA's guaranteed-issue and community-rating provisions, the federal government has since changed its stance. Throughout the appeals process, the Trump administration changed its position multiple times and now argues that the mandate is unconstitutional and inseverable from the entire rest of the ACA. However, the DOJ argues that "the relief awarded to plaintiffs should extend only to the ACA's provisions that actually injure them."[28] The DOJ has not itself identified which provisions actually injure the plaintiffs and has instead asked the Supreme Court to remand the case to the lower courts to decide which specific provisions actually cause injury.[29]

In terms of the lower courts' decisions, the District Court determined that the penalty-less mandate is unconstitutional, agreeing with the plaintiffs' logic that Section 5000A no longer qualifies as a tax due to the TCJA's change to the provision. Primarily relying on an analysis of the intent of the 2010 Congress, the District Court also determined that Section 5000A could not be severed from any of the rest of the ACA. On appeal to the U.S. Court of Appeals for the Fifth Circuit, the court, in a two-to-one decision, only partially affirmed the District Court's decision. The Fifth Circuit agreed that the individual mandate post-TCJA is unconstitutional, however, instead of ruling on severability, the Court remanded the case to the District Court and ordered Judge O'Connor to carry out a more comprehensive analysis of severability. California, on behalf of the Intervenors-Defendant states, appealed the Fifth Circuit's decision to the Supreme Court. The case, now titled *California v*

Texas, currently sits there. The following sections demonstrate that the most logical and compelling position in this case is the one of the defendants; therefore, the Supreme Court should leave the ACA untouched. Until the Supreme Court issues its judgment, the ACA will operate as normal, continuing to allow millions of Americans to receive the coverage and care that they need and would not be able to otherwise access.

III. Legal Argument: The Individual Mandate is Constitutional and Severable

Invalidating the entire ACA will immediately force an estimated twenty million people off of their health insurance.[30] For those able to maintain their health insurance without the healthcare law in place, their coverage will likely cover fewer services, require them to pay higher out of pocket costs, and discriminatorily charge them higher premiums based on characteristics like gender, health status, and race. The implications of ACA repeal are clear: it would wreak havoc on the U.S. healthcare system and the lives of millions of Americans. However, the ACA's policy ramifications must be considered within the bounds of the U.S. legal system, and so it is important to also address the legal basis for upholding the ACA. This litigation concerns the following legal issues: (1) whether the plaintiffs—both state and individual—have standing to bring the case; (2) whether the ACA's individual mandate provision (26 US Code Section 5000A) is now unconstitutional without a positive shared responsibility payment; and (3) whether Section 5000A is severable from the rest of the ACA if the provision is found unconstitutional. This paper does not address the issue of standing and assumes that it has been satisfied in order to answer the second and third questions. The answer to these two questions is painfully clear: the individual mandate does not violate the constitution in its post-TCJA form but is severable if the Court finds otherwise.

A. The Individual Mandate Does Not Violate the Constitution

The individual mandate does not present a constitutional problem following the 2017 Congress's passage of the TCJA because (1) Section 5000A has not been rendered an unconstitutional legal command to purchase insurance, and (2) Section 5000A remains a constitutional exercise of Congress's taxing power, albeit one that has been temporarily suspended. The plaintiffs argue, and the District Court and Fifth Circuit Court have affirmed, that, by zeroing out the shared responsibility payment, the individual mandate can no longer be upheld under Congress's taxing power. However, when examining the actual effects of the TCJA's change to the individual mandate, and the legal precedent surrounding Congress's taxing power, it becomes quite evident that this logic is fundamentally flawed.

The plaintiffs assert that, in *NFIB,* the majority concluded that it was "fairly possible" to read the individual mandate as a constitutional tax because it raised "some revenue" for the federal government.[31] They claim that, since Section 5000A no longer produces revenue while set at zero dollars, it no longer contains the essential feature of a tax. In other words, the plaintiffs claim that the crux of the Court's saving construction in *NFIB* no longer holds true.[32] Since Section 5000A can no longer be read as a tax justified by Congress's taxing power, the plaintiffs opine that the Court must revert to what the Court in *NFIB* explained was the "most natural" reading of the provision: that Section 5000A is a command to purchase insurance.[33] According to the plaintiffs, since the Supreme Court already ruled that a standalone command to purchase insurance is not justifiable by any of Congress's enumerated powers, the TCJA-altered individual mandate is now unconstitutional.

The TCJA rendered the individual mandate essentially inoperative, and an inoperative provision, in which Congress exerts no power, cannot exceed Congress's enumerated powers.[34]

The Supreme Court already established in *NFIB* that failure to purchase insurance under Section 5000A does not result in any legal repercussions other than an additional payment to the IRS when the individual files their tax returns.[35] An individual has satisfied Section 5000A if they decide to pay Section 5000A(b)'s exaction instead of maintaining qualified health insurance.[36] Now, with the TCJA, the required payment for not buying health insurance is $0. Therefore, now, if one pays $0, and does nothing else, one has complied with Section 5000A. Even the IRS has made it clear that it is not collecting this tax, going so far as to eliminate the question on income tax filing forms used previously to assess taxpayers' insurance status.[37] With the individual mandate in its current form, Congress does not compel any activity or exert any power and thus cannot exceed its enumerated powers as the plaintiffs claim.

The plaintiffs claim that Congress transformed the individual mandate into a command by enacting the TCJA. The Supreme Court, however, already established that Section 5000A was not a command because it "leaves an individual with a lawful choice" to purchase insurance or not.[38] The individual mandate post-TCJA is no different, as individuals still have a lawful choice between the two.[39] The plaintiffs emphasize that the Court's decision to uphold the mandate was a "saving construction"; however, regardless of whether this is a saving construction, it is the governing construction.[40] The Supreme Court made an "authoritative determination" that Section 5000A(a)'s language not be read as a command.[41] Accordingly, the individual mandate is not a command because the Supreme Court already established that it not be interpreted that way. Further, the TCJA did not "change the statutory structure" such that the meaning of the provision has changed and this interpretation no longer applies.[42] Since Congress did not alter the structure of Section 5000A, the Supreme Court's binding interpretation of the provision must still apply.[43]

Furthermore, the plaintiffs argue that the Court's initial

interpretation in *NFIB* of the mandate is the only remaining one. However, in concluding that the individual mandate could not be upheld when reading it as a command to purchase insurance, the *NFIB* Court was reviewing and ruling on a mandate that had an enforcement mechanism attached to it. The mandate in question today does not. Thus, what the *NFIB* Court asserted was the "most straightforward reading" of Section 5000A—that it reads as a command—does not even apply to the current situation.[44]

If anything, the Supreme Court's reasoning for concluding that the individual mandate did not impose a legal command in *NFIB* is even stronger with the shared-responsibility payment set at $0.[45] The Supreme Court found the fact that there were no legal consequences for not complying with the mandate and that the shared responsibility payment was significantly less than the actual price of insurance as opposed to a "prohibitory" financial punishment to be convincing evidence that the individual mandate was simply a provision of two choices.[46] The TCJA made the only consequence for not complying with the individual mandate, which the Supreme Court saw as minor enough to avoid interpreting as a legal command, even less significant. It is illogical to suggest that a provision that the Supreme Court already determined to not be a command would somehow become a command by removing its only mechanism for encouraging compliance.[47]

At this point, the individual mandate is simply a suggestion. It may, in language, encourage certain behavior, but Congress regularly adopts precatory provisions that outline Congress's behavioral preferences.[49] Such provisions do not require constitutional justification and are not constitutionally problematic. Thus, the individual mandate is no different. For these reasons, the District Court and the Fifth Circuit Court are mistaken in concluding that the individual mandate has become an unconstitutional command to purchase insurance due to the TCJA.

a. Raising Revenue At All Times is Not a Requirement of a Tax

Furthermore, "Section 5000A may, if necessary, be fairly interpreted as a lawful exercise of Congress's taxing powers," because raising revenue *at all* times is not a requirement under Congress's taxing power.[50] The plaintiff's main argument rests on the claim that raising revenue is the essential feature of any tax. The plaintiffs assert that, if this requirement is not met, the provision in question cannot be upheld under Congress's taxing power. As proven above, Section 5000A with a $0 shared responsibility payment does not need to be justified by an enumerated power because it does nothing. However, if need be, it can still be justified by Congress's taxing power.

The Supreme Court in *NFIB* explained that the shared responsibility payment could be upheld under Congress's taxing power because it resembles a tax on multiple accounts. Specifically, the Court highlighted that the shared responsibility payment is paid with an individual's federal income taxes; it is only paid by those individuals who pay federal income taxes; when an individual owes the tax, the amount is calculated using "such familiar factors as taxable income, number of dependents, and joint filing status;" and finally, "the requirement to pay is found in the Internal Revenue Code and enforced by the IRS."[51] These specifications are all still outlined in Section 5000A, and thus all remain true.[52] Therefore, the individual mandate post-TCJA still satisfies all of the criteria the *NFIB* Court clearly understood to be convincing evidence of a tax within Congress's taxing power.

Next, the Supreme Court stated that the factors listed above set the framework to produce "at least some revenue" for the federal government. The Court explains that the production of "at least some revenue" is essential for a provision to be interpreted as a tax within Congress's enumerated powers.[53] The plaintiffs argue that this is where the individual mandate as amended by the TCJA fails. They

claim that, because the individual mandate's penalty is now set at $0, Section 5000A no longer possesses "the essential feature of any tax" and thus can no longer be upheld as a constitutional exertion of Congress's taxing power.[54] However, "at least some revenue" does not mean the constant production of revenue, it means some revenue in total, or, at least, the *potential* to produce revenue at some point.

First, according to Supreme Court precedent, it is an established principle that "a statute does not cease to be a valid tax measure because it deters the activity taxed" or "because the revenue obtained is negligible."[55] In fact, the Court has noted that taxes created to deter unwanted activity are quite common.[56] If a tax is extremely successful in fulfilling this goal, it will not produce any revenue for the federal government. It would not make sense for such a provision to then be seen as invalid—the provision allowed for two equally acceptable choices and the population just happened to choose the legislature's preferred response. For example, if everyone decided to purchase insurance instead of paying the shared responsibility payment, this would not render the individual mandate unconstitutional—the mandate, together with its corresponding penalty, has simply served its purpose in deterring the unwanted activity, while it maintains its statutory structure such that it has the *potential* to produce revenue. As long as the tax amount is not prohibitively high such that the two options provided are only for show—which the Court already determined to be the case in *NFIB* while the penalty was significantly higher than it is now—a penalty that the population chooses not to pay is valid. If the plaintiff's "strict 'revenue production' requirement" were true, a tax that was successful in discouraging unwanted activity would "apparently become unconstitutional in the following year."[57] Since the Court has made it clear that taxes that set out to influence "individual conduct are nothing new," it is only logical to conclude that a tax under Congress's taxing power must instead have the *potential* to produce revenue.[58]

Furthermore, with Section 5000A(b)'s tax amount set at $0, but the rest of Section 5000A's language kept in place—satisfying the rest of the *NFIB* Court's tax criteria—the provision should be read as a tax suspension, or an adjustment in the implementation date. Congress has enacted many taxes with delayed implementation or delayed collection of revenue. For example, Section 5000A itself was included in the original ACA language passed in 2010 but was not scheduled to collect revenue through income taxes until 2014. In addition, the Supreme Court upheld Section 5000A as a tax in 2012, before the provision actually started collecting revenue. Thus, it is clear that the Supreme Court did not mean that, to satisfy Congress's taxing power, a provision must collect revenue at that time. The amended individual mandate still has the potential to collect revenue, as the rest of Section 5000A's language that allowed for tax collection has not changed.

Reading Section 5000A simply as another suspension of an ACA tax provision is consistent with Congress's choices concerning other taxes included under the law. A handful of other tax provisions included in the ACA have been delayed or suspended since the ACA's passage in 2010. For example, the Cadillac Tax—a tax included in the original language of the ACA on high premium employer-sponsored health insurance plans—was not scheduled to take effect until 2013. Before it did, however, Congress delayed the date at which it would take effect until 2022. The Cadillac tax was officially repealed in December of 2019 before the tax ever raised any revenue for the federal government, remaining on the books for many years without collecting any revenue.[59]

The Medical Device tax included in the original language of the ACA has had a similar history. Passed in 2010 with the rest of the ACA, the tax did not take effect until 2012, collecting revenue between 2013 and 2015 until Congress suspended it in 2016.[60] Even though the method of these suspensions—delaying the implementation date—is structurally different from the method

used in suspending collection of Section 5000A(b)—via a reduction of the tax amount to $0—it is, in effect, the same. As a unified tax provision, moving the shared responsibility payment to $0 suspends enforcement of provision until later action is taken—just as changing the date of implementation does. Therefore, by reducing the shared responsibility payment to $0 but leaving the rest of Section 5000A untouched, Congress could at any point increase the tax amount under Section 5000A(b) and begin collecting revenue from this provision once again. This was an intentional decision, as Congress could have instead chosen to repeal the shared responsibility payment altogether and remove the ability of this provision to collect taxes at all. Instead, it simply rendered the provision inoperative for the time being.[61] There is plenty of evidence that tax suspensions are relatively common and unproblematic under the taxing clause and Section 5000A should be read as no different.

Of course, the canon of constitutional avoidance applies to the present case just as any other. The Court must examine all possible interpretations of Section 5000A as amended by the TCJA.[62] As demonstrated above, there are plenty of reasonable constructions. As explained by the State Defendants, the Court can reasonably read Section 5000A as an encouragement or suggestion to purchase health insurance, or as an acceptable temporary suspension of the federal tax on going without insurance.[63] Either perfectly reasonable interpretation allows the Court to find Section 5000A constitutional.

B. The Individual Mandate as Amended by the 2017 Congress is Severable from the Rest of the ACA

In the unlikely event that the Court finds the individual mandate unconstitutional, it must then turn to the question of severability. In the current case, this is an even more pressing issue than the question of constitutionality. As demonstrated above, the

individual mandate now does nothing—whether Section 5000A stays or goes has no tangible impact on individual behavior or coverage. However, the rest of the nine-hundred-page law, packed with financial assistance, consumer protections, and public insurance expansions, affects millions of Americans every day. The ACA has become thoroughly ingrained in our nation's healthcare system and economy. Thus, what happens with the rest of the law is what is really at stake in this lawsuit. A finding of severability is not only consistent with the settled legal doctrine, it is societally crucial.

a. Severability is Settled Legal Doctrine—The Court is Governed by Congressional Intent

In answering the question of severability, is it important to understand the well-established constitutional law guiding the interpretation of this principle. A group of prominent constitutional law scholars submitted a brief of amicus curiae in support of the intervenor defendants that solely focuses on the issue of severability—an issue they claim is "not debatable" in the present case. Interestingly, these intervenors all maintain very different politics and have each submitted *amicus curiae* briefs arguing on opposite sides in cases that previously reached the Supreme Court surrounding the ACA's constitutionality, including *NFIB*. In this case, however, they are uniform. The intervenors explain that "severability doctrine rests on two foundational principles."[64] First, it is well established that a court must err on the side of severability. When an individual provision within a larger statute is found to be problematic, courts must "try to limit the solution to the problem," preferring to enjoin only the statute's unconstitutional applications while leaving the others in force.[65] This is because, when a court invalidates a statute, it frustrates the democratic process of law creation.[66] To preserve the divisions of power intended by the

constitution, a court must limit statute invalidation to only where it is absolutely necessary.

The second foundational principle of the severability analysis is legislative intent. To respect the will of Congress, when a court finds a specific provision to be problematic, it "must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"[67] In other words, a court must attempt to deduce what Congress would choose to do with the remaining portion of the law if made aware the invalid provision could not stand. In this analysis, a court should reach a finding of inseverability only if it is unmistakable that the relevant Congress would want the rest of the statute to fall with the problematic portion of the law. Applying this to the present case, it must be indisputable that the 2017 Congress would prefer no ACA at all to an ACA without Section 5000A. Otherwise, a court must find the rest of the Act's provisions severable.[68]

In certain cases, a court may find difficulty in determining what the enacting Congress would have wanted and will instead ask whether the remaining portions of the law can function sufficiently and according to Congress's original intent without the unconstitutional provision.[69] However, the court must be cautious not to supplant its own opinion on functionality for Congress'.[70] Ultimately, a court must choose to sever the unconstitutional portion only when it is "'evident' that the legislature intended for the statute to fall without the unconstitutional provision,"[71] unless those remaining portions are "incapable of functioning independently."[72]

b. The 2017 Congress Intended for the Rest of ACA to Remain in Place

Understanding established severability doctrine, the question of severability could not be more simple. In this instance, we can "determine what Congress would have done by examining what it

did."[73] In 2017, Congress removed the only enforcement mechanism attached to the individual mandate—the only language that gave the provision teeth. By zeroing out the shared responsibility payment while leaving the rest of the ACA alone, the 2017 Congress clearly intended for the rest of the ACA to operate in the absence of an enforceable individual mandate.[74] Not only is it *not* "evident" that the 2017 Congress preferred no statute to a statute without the excised Section 5000A, it is "evident" that the relevant Congress preferred the rest of the ACA to operate even without a meaningful individual mandate. Congress's active and intentional decision to pass the TCJA is more than sufficient to establish severability.

The legislative activity that came before and after the TJCA further proves that the 2017 Congress intended for the rest of the ACA to stand without an enforceable individual mandate. Congress has reviewed multiple proposals to repeal the entire ACA or alter its major provisions, and it has voted them all down. For example, in 2017, the House and Senate each considered major repeal and replace bills that would have invalidated the entire ACA. Neither was successful, proving that Congress does not prefer that the entire statute fall.

At the same time, Congress chose to make other minor alterations to the ACA following its passage of the TCJA, proving that it reviewed the law multiple times after rendering the mandate unenforceable and chose not to make the sweeping changes that the plaintiffs claim Congress would want in the present case.[75] In 2019, Congress voted to repeal the health insurance tax, the medical device tax, and the Cadillac tax—all tax provisions included in the original ACA.[76] Clearly, Congress had the opportunity to reexamine its decision regarding the ACA several times and could have eliminated or changed other provisions of the ACA if it felt that they could not function without an enforceable individual mandate. It instead chose to leave the vast majority of the ACA intact, even with an inoperative mandate. The 2017 Congress, as well as the

following Congress, made their intent regarding the ACA without an enforceable mandate very clear—they want it to remain as is.

At the District Court, Judge O'Connor claimed that the 2017 Congress's action does not govern the present severability analysis because, he asserted, that Congress only acted with regard to the shared responsibility payment, and not the individual mandate itself. He claimed that by leaving the language of the minimum coverage requirement in place, Congress did not have any intention with respect to the actual requirement to maintain minimum coverage. Therefore, he concluded that Congress's passage of the TCJA does not govern severability in the present case. However, this grossly underestimates the competency and awareness of the U.S. Congress and misunderstands the clear intentions of Congress in zeroing out the shared responsibility payment. Congress knows that there is no guarantee that its legislation will have any effect without some kind of enforcement mechanism attached. Yet, Congress still decided to remove the individual mandate's only enforcement mechanism.

The Congressional Budget Office (CBO) report published just a month before the TCJA's passage evinces that Congress was fully aware of the implications of its actions. The report presents the CBO's findings that the removal of just the shared responsibility payment from Section 5000A would have a very similar effect compared to the elimination of the entire provision.[77] The District Court most definitely cannot mean to say that the 2017 Congress intended for mere precatory language that will have very little, if any, effect on the public to be considered "essential" to the rest of the statute.

Since Congress's intent surrounding the essentiality of the TCJA amended individual mandate to the rest of the ACA is perfectly clear, the Supreme Court need not take its own inquiry into functionality, nor should it. By zeroing out the individual mandate penalty and leaving the rest of the law in place, "Congress's intent was explicitly and duly enacted into statutory law."[78] There is no

need for the Court to go down a rabbit-hole of whether the other portions of the ACA "remain 'fully operative'" because Congress—whose opinion regarding functionality is what governs the present analysis—has already done this legwork, and it has clearly determined that the rest of the law can adequately function without an insurance mandate enforced by a penalty.[79] Therefore, the ACA will function exactly how Congress intended "whether or not [the] Court declares Section 5000(A) unconstitutional" because both have the same effect. Either way, no one will face any repercussions for not purchasing health coverage.[80] It is clear exactly what Congress wanted with respect to the rest of the ACA and how it intended the law to function, the Court must leave it at that.

The severability question presented in this case is unusually easy. Customarily, a court invalidates a provision and renders it unenforceable against Congress's wishes. The court must then "engage in a thought experiment" to determine what it thinks Congress would have done with the rest of the law if it was forced to make that decision itself. But, in this case, Congress was the one to render the mandate unenforceable. The Supreme Court need not look any further than that fact. The Court must defer to Congress on questions of lawmaking and not undertake its own probe into policy functionality when the Constitution's separation of powers makes it clear such a job is reserved for the Congress.[81] Whether the Court thinks the ACA should function without the individual mandate does not matter—Congress has proven that it thinks it should. It is not the judiciary's job to make legislative decisions in place of the actual legislature.

c. The Plaintiffs and District Court Wrongly Assess the Intent of the 2010 Congress

Severability doctrine requires the Court to examine the

intent of the 2017 Congress because that is the Congress whose activity on which the plaintiffs' complaint is based.[82] However, the plaintiffs and the District Court wrongly look to the intent of the 2010 Congress in their determination of severability, arguing that the 2010 Congress viewed the individual mandate so essential to the rest of the ACA that if the Court strikes the individual mandate it would prefer for the entire statute to fall with it. The plaintiffs and District Court cited the "legislative findings" (42 U.S.C. Section 18091) included in the ACA when it was first passed and previous Supreme Court decisions regarding the ACA to bolster this claim. However, as the constitutional scholars serving as amici for the intervenor states note, this "fundamentally misapplies severability doctrine and misunderstands the legislative process."[83]

The 2017 Congress, not the 2010 Congress, amended the individual mandate. The 2017 Congress's decision triggered the present lawsuit. There is no need to examine what the 2010 Congress would have wanted in this situation, nor should one undertake such an inquiry. The highest court has already made clear that:

> statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.[84]

The 2017 Congress made its own decision to amend the ACA and set the individual mandate's only penalty to zero. This legislative decision does not hold any less weight than the possibly contrary decisions of the 2010 Congress.[85] The 2017 Congress made this decision according to operational experience to which the 2010 Congress was not privy.[86] This decision is what must be at the center of the severability discussion.

The plaintiffs and District Court cited the legislative findings

(42 U.S. Code Section 18091. Requirement to maintain minimum essential coverage; findings) included in the original version of the ACA as evidence of inseverability. According to the District Court, each Supreme Court Justice to rule on the ACA found this language to be convincing evidence that the 2010 Congress felt the individual mandate was an essential part of the larger ACA.[87] They further argue that, since the 2017 Congress did not repeal these findings, it did not reject this conclusion, and thus Congress still finds the individual mandate essential to the rest of the law.

However, there are a number of reasons why the plaintiffs' arguments concerning the ACA's findings provision are mistaken. These findings were written for a different purpose and addressed a very different version of the law, and thus no longer offer appropriate guidance. First, these findings do not actually address severability at all. Congress originally included these findings in the ACA to support a Commerce Clause justification for Section 5000A. The plaintiffs attempt to argue that these findings serve as an inseverability clause, however, Congress's only clear intent towards these findings was to argue why the individual mandate falls within its enumerated power to legislate.[88] Therefore, the 2017 Congress's failure to repeal these findings says nothing about its intentions surrounding severability.

Even more convincingly, in drafting 42 U.S. Code Section 18091, Congress was referring to the requirement to maintain minimum coverage and the rest of the ACA in their *original* forms. Specifically, the findings discuss the predicted accomplishments of the ACA, stating that "the requirement, together with the other provisions of this Act," will increase the number of Americans with health insurance, increase demand for health care services, and reduce the costs associated with a high number of uninsured Americans. The plaintiffs take this to mean that the mandate is still necessary to the policy goals of the ACA as a whole. However, the 2010 Congress had no idea what later Congresses would choose to do with regards to the provision, and could thus only speak to its

own intent regarding the provision and its interaction with the larger ACA.[89] The requirement that the 2010 Congress was discussing included an enforcement mechanism while the TCJA amended requirement does not.[90] Additionally, this language refers to the other provisions of the Act as they were *originally* written. However, Congress has modified the ACA many times since 2010. Thus, the findings included in the ACA no longer apply to the present-day version of the law. Each Congress has its own policy goals and can make legislative changes accordingly. The Court cannot disregard new goals just because an earlier Congress may have felt differently. Again, the 2017 Congress, privy to years of experience with the ACA's operation and presented with newly available data, knew that the ACA could operate without an enforceable mandate and made its decision accordingly.

Similarly, it is inaccurate to look to past Supreme Court rulings that spoke on a different version of the law. The plaintiffs and the District Court relied heavily on the dissenting opinion in *NFIB*—the only opinion to explicitly address the issue of severability. In their dissenting opinion, the four Justices assert that the individual mandate—then with a positive shared responsibility payment—is essential to the rest of the ACA and therefore not severable. The plaintiffs and District Court also cited language from *King v Burwell*—a Supreme Court case that decided the constitutionality of federally run individual Marketplaces—that indicates the Supreme Court hearing this case thought that an enforceable individual mandate was essential to the proper functioning of the ACA and its guaranteed-issue and community-rating provisions. However, again, these Justices were speaking on a different provision (one that was enforceable by a corresponding penalty) within a different law (many ACA amendments have been enacted since these cases). As Judge King explains in her dissent, these Courts were examining the mandate with an attached positive shared responsibility payment and thus "give little valuable insight into the coverage requirement's

role in the post-TCJA ACA."[91] Therefore, in ruling on this case, the Supreme Court must not look to these decisions to determine severability.

Ultimately, it is irrational to claim that an inoperative and, at most, precatory provision is essential to such an extensive law.[92] By de-clawing the mandate, the 2017 Congress made it overtly clear that it understood the ACA could function just fine without the provision. It is indisputable that Congress wants the ACA to live on without an enforceable individual mandate, and, according to established severability doctrine, the Court must answer the question of severability with this fact.

IV. Next Steps: Grant of Certiorari and Oral Arguments

The fate of the ACA remains unclear until the Supreme Court rules. In the meantime, millions of Americans are left anxiously wondering whether at this time next year they will still have the comprehensive coverage that the ACA affords. In March 2020, the Supreme Court granted certiorari to hear this case, now referred as to *California v Texas*, and decide on three legal questions: (1) Whether the plaintiffs have the standing to challenge the individual mandate; (2) whether the post-TCJA individual mandate (that is, without a nonzero monetary penalty) is unconstitutional; and (3) if the mandate in its current form is found to be unconstitutional, whether it is severable from the rest of the ACA.

The Supreme Court heard eighty minutes of oral arguments on November 10, 2020.[93] While it is impossible to accurately predict the Court's decision based on oral arguments, the Justices' line of questioning gives reason to be optimistic about the fate of the ACA. Many legal scholars and news outlets have released their analyses of oral arguments and have expressed a similar assessment: while the fate of the mandate is unclear, it appears that enough members of the Court agree with the defendants on severability.

Of specific concern going into the oral arguments was the Court's composition, especially with the sudden death of Justice Ginsburg and replacement by Justice Barrett. The three liberal Justices—Breyer, Kagan, and Sotomayor—will almost certainly side with the defendants, and their comments during oral arguments did not indicate otherwise. Overall, though, the Court leans conservative, worrying many about the outcome of this litigation. However, conservative-leaning Chief Justice Roberts and Justice Kavanaugh have somewhat quelled fears due to their apparent skepticism with the plaintiffs' severability arguments. For example, during oral arguments, Justice Kavanaugh commented, "It does seem fairly clear that the proper remedy would be to sever the mandate provision and leave the rest of the act in place."[94] Chief Justice Roberts expressed similar sentiments in saying, "I think it's hard for you to argue that Congress intended the entire act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the act."[95] As noted above, what matters in this lawsuit is the Court's severability decision, and it is looking like there may be the necessary five Justices to save the ACA from complete ruin even if the mandate is struck down. As of now, a final decision is expected from the Court around June 2021.[96]

A. Political Remedies

According to Nicholas Bagley and Richard Primus, law professors at the University of Michigan, there are three ways in which Congress would prevent any need for remedy by the Court and permanently frustrate the efforts of the plaintiffs through legislative action: Congress could repeal Section 5000A, Congress could increase the $0 shared responsibility payment, or Congress could amend the ACA to include a severability clause specifically for the individual mandate.[97] All of these options are rather

straightforward—each "could be accomplished in a one-sentence statute"—and equally capable of saving the rest of the ACA from the plaintiff's lawsuit.[98]

The first, and likely most obvious, remedy is for Congress to repeal Section 5000A in its entirety. As previously outlined, the mandate currently serves no purpose and the ACA can function without Section 5000A. Repealing this provision would eliminate the very basis of the plaintiff's argument in this litigation. Moreover, since this provision has repeatedly been used as the footing for opponents' endeavors to invalidate the entire ACA, repealing the individual mandate could prevent future challenges to the statute.

Alternatively, Congress could increase the shared responsibility payment amount to anything above $0 to interrupt the present lawsuit. According to the plaintiff's logic, raising Section 5000A(b) to even just one dollar would constitute as "some revenue" for the purposes of the Tax Clause.[99] Even though it is clear that the Tax Clause only requires a provision to maintain the potential to produce some revenue, increasing the shared responsibility payment to some negligible amount would satisfy the plaintiff's rationale for bringing the lawsuit, and eliminate the basis for this legal challenge.

Finally, Congress could pass a law amending the ACA to include a severability clause that explicitly states its intention concerning Section 5000A's severability. While Congress's intent in zeroing out the shared responsibility payment is explicit—that it prefers the ACA to operate without an enforceable mandate—passing a severability clause would eliminate any uncertainty regarding congressional intent, and would govern the Court's decision on severability.[100] In fact, the plaintiffs themselves have even emphasized that the inclusion of a "textual instruction" as to what should be done with the rest of the ACA would settle the severability question for the Court.[101]

All of these remedies are relatively simple, and Congress should implement one in order to preclude the Court from making

policy decisions in place of the legislative branch. With any of these three options, Congress could remove any opportunity for the Court to misinterpret the plethora of evidence proving that Section 5000A is constitutional and severable. Doing so would definitively save the ACA, and, with it, the healthcare of millions of Americans.

V. Conclusion

The ACA has become ingrained not only in our healthcare system and economy but also in the way we think about and approach healthcare as a nation. Because of the ACA, protections for individuals with preexisting conditions are nonnegotiable, universal coverage seems feasible, and government regulation of health insurance has become the norm. Through its creation of insurance exchanges with subsidies, expansion of Medicaid, and enactment of extensive consumer protections, the ACA has filled in massive coverage gaps that previously left millions of Americans without health insurance. Because of the ACA, millions of Americans can obtain quality, affordable health insurance, regardless of income, health status, race, or gender.

However, despite the law's substantial contributions, opponents of the ACA have launched countless attempts to dismantle the legislation. From litigation reaching the Supreme Court and congressional proposals to "repeal and replace" to administrative rulings aimed at stifling the law's scope of impact, the ACA's ultimate fate has been in jeopardy since its passage in 2010. With such unrelenting efforts to take down the crucial statute, the continued struggle in *California v Texas* is almost unsurprising. However, the predictability of partisan attacks makes such efforts no less harmful. The plaintiffs' arguments and lower courts' decisions have drawn criticism from renowned legal scholars, Republican politicians, the National Review and Wall Street Journal editorial boards, and state officials, who have dismissed the plaintiff's arguments as weak,

farfetched, and inappropriately partisan.[102] The litigation's recent oral arguments suggest that the majority of the Supreme Court might feel the same way. As the Court considers the questions presented in *California v Texas*, the answers should be clear: the ACA's mandate, as amended by the 2017 Congress, is constitutional and severable.

[1] The Patient Protection and Affordable Care Act was enacted March 23, 2010 and was amended by the Health Care and Education Reconciliation Act on March 30, 2010. "Affordable Care Act," (ACA) or "Obamacare" generally refer to the "final, amended version of the law." U.S. Centers for Medicare and Medicaid Services, *Patient Protection and Affordable Care Act of 2010* (Feb 11, 2020) online at https://www.cms.gov/Regulations-and-Guidance/Legislation/LegislativeUpdate (visited Nov 25, 2020).
[2] Abbe R. Gluck and Thomas Scott-Railton, "Affordable Care Act Entrenchment," 108 *Georgetown Law Center* 495, 496 (2020).
[3] Ibid.
[4] Ibid at 498.
[5] State Defendants Opening Brief, *Texas v United States*, 945 F.3d 355, 366 (5th Cir 2019).
[6] 26 U.S. Code § 5000A.
[7] 26 U.S. Code § 5000A(b).
[8] The penalty amount was "the lesser of a dollar amount or a specified percentage of income, which varied depending on the relevant taxable year." State Defendants Opening Brief, *Texas v United States*, 945 F.3d 355, 367 (5th Cir 2019).
[9] U.S. Const Amend X.
[10] *National Federation of Independent. Business v Sebelius*, 567 U.S. 519, 533 (2012) citing *McCulloch v Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819).
[11] Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress named the Commerce Clause in its "findings" regarding the Requirement to Maintain Minimum Essential Coverage in attempting to justify the mandate provision using this power. These are included in the statutory text in 42 U.S. Code § 18091. U.S. Const Art I, § 8, cl. 3.
[12] Article I, Section 8, Clause 1 sets for Congress's taxing power. It states Congress's power as: to "lay and collect taxes… to pay the Debts and provide for the common Defense and general welfare of the United States." U.S. Const Art I, § 8, cl. 1.
[13] Brief for State Appellees, *Texas v United States*, 945 F.3d 355, 383 (5th Cir 2019), citing *NFIB*, 567 U.S. 519, 540 (2012) (Roberts majority op.).
[14] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 550 (2012).
[15] Ibid at 552.

[16] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 559 (2012), citing *McCulloch v Maryland*, 17 U.S. at 441, 442, 4 Wheat. 411, 421, 4 L. Ed. 579 (1819).
[17] Ibid at 563, citing *Hooper v California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895).
[18] Ibid at 521.
[19] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 563 (2012).
[20] Ibid.
[21] Ibid at 564.
[22] Ibid at 563.
[23] Ibid at 568.
[24] Ibid at 563.
[25] Brief for State Appellees, *Texas v United States*, 945 F.3d 355, 370 (5th Cir 2019).
[26] State Defendants Opening Brief, *Texas v United States*, 945 F.3d 355, 357 (5th Cir 2019).
[27] MaryBeth Musumeci, *Explaining California v Texas: A Guide to the Case Challenging the ACA* (Kaiser Family Foundation Sep 1, 2020), online at https://www.kff.org/health-reform/issue-brief/explaining-california-v-texas-a-guide-to-the-case-challenging-the-aca/ (visited Nov 25, 2020)
[28] Federal Brief at 5th Circuit.
[29] Katie Keith, *Continued Uncertainty As Fifth Circuit Strikes Mandate*, (Health Affairs Dec 19, 2019), online at https://www.healthaffairs.org/do/10.1377/hblog20191219.863104/full/ (visited Nov 25, 2020).
[30] Linda Blumberg et al, *State-by-State Estimates of the Coverage and Funding Consequences of Full Repeal of the ACA* (Urban Institute Mar 26, 2019), online at https://www.urban.org/research/publication/state-state-estimates-coverage-and-funding-consequences-full-repeal-aca (visited Nov 25, 2020).
[31] Brief for State Appellees, *Texas v United States*, 945 F.3d 355, 390 (5th Cir 2019).
[32] Ibid at 34.
[33] Ibid at 36.
[34] *Texas v United States*, 945 F.3d 355, 413 (5th Cir 2019) (King dissenting op.).
[35] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 568 (2012).
[36] Ibid at 568.
[37] Internal Revenue Service, *Individual Shared Responsibility Provision,* (IRS Oct 21, 2020), online at https://www.irs.gov/affordable-care-act/individuals-and-

families/individual-shared-responsibility-provision (visited Nov 25, 2020).
[38] Ibid at 563.
[39] Ibid at 574.
[40] The Supreme Court "ha[s] a duty to construe a statute to save it." Ibid at 574.
[41] *Texas v United States*, 945 F.3d 355, 414 (5th Cir 2019) (King dissenting op.).
[42] State Defendants' Reply Brief, *Texas v United States*, 945 F.3d 355, 414 (5th Cir 2019).
[43] Ibid at 415.
[44] *National federation of Independent Business v. Sebelius*, 567 U.S. 519, 562 (2012).
[45] *Texas v United States*, 945 F.3d 355, 415 (5th Cir 2019) (King dissenting op.).
[46] Ibid at 566 citing *Bailey v. Drexel Furniture Company* 259 U.S. 20, 37 (1922)
[47] *Texas v United States*, 945 F.3d 355, 415 (5th Cir 2019) (King dissenting op.).
[48] Ibid at 416.
[49] Opening Brief for the Petitioners, Texas v United States, 945 F.3d 355 (5th Cir 2019)
[50] Ibid.
[51] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 563 (2012).
[52] State Defendants Opening Brief, *Texas v United States*, 945 F.3d 355, 384 (5th Cir 2019).
[53] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 564 (2012).
[54] Brief for State Appellees, *Texas v United States*, 945 F.3d 355, 388 (5th Cir 2019).
[55] *Minor v United States,* 396 U.S. 87, 98 n. 13 (1969).
[56] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 567 (2012).
[57] State Defendants' Opening Brief, *Texas v United States*, 945 F.3d 355, 384 (5th Cir 2019).
[58] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 567 (2012).
[59] Katie Keith, *ACA Provisions in The New Budget Bill*, (Health Affairs Dec 20, 2019), online at https://www.healthaffairs.org/do/10.1377/hblog20191220.115975/full/ (visited Nov 25, 2020).
[60] The Medical Device tax was officially repealed in December of 2019. Katie Keith, *ACA Provisions in The New Budget Bill*, (Health Affairs Dec 20, 2019), online at https://www.healthaffairs.org/do/10.1377/hblog20191220.115975/full/ (visited Nov 25, 2020).

[61] Intervenor-Defendants' Brief, *Texas v United States*, 340 F. Supp. 3d 579, 599 (N.D. Tex. 2018).
[62] *National Federation of Independent Business v Sebelius*, 567 U.S. 519, 563 (2012) citing *Hooper v California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297.
[63] State Defendants' Opening Brief, *Texas v United States*, 945 F.3d 355, 387 (5th Cir 2019).
[64] Amicus Briefs submitted to the District Court and the 5th Circuit Court of Appeals by Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, and Ilya Somin in Support of Intervenor-Defendant-Appellants. Jonathan H. Adler is the Johan Verheij Memorial professor of law at Case Western Reserve University School of Law and the director of its Center for Business Law and Regulation. Nicholas Bagley is a professor of law at the University of Michigan Law School. Abbe R. Gluck is a professor of law at the Yale Law School and the director of its Solomon Center for Health Law and Policy. Ilya Somin is a professor of law at George Mason University. Brief of Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, And Ilya Somin as Amici Curiae In Support Of Intervenors-Defendants-Appellants, *Texas v United States*, 945 F.3d 355 (5th Cir 2019).
[65] *Ayotte v Planned Parenthood*, 546 U.S. 320, 323, 126 S. Ct. 961 (2006).
[66] *Ayotte v Planned Parenthood*, 546 U.S. 320, 329 (2006) citing *Regan v Time, Inc*., 468 U.S. 641, 652, 104 S. Ct. 3262, 82 L. Ed. 2d 487.
[67] *Ayotte v Planned Parenthood*, 546 U.S. 320, 330 (2006).
[68] *Alaska Airlines, Incorporated v Brock*, 480 U.S. 684, citing *Buckley v Valeo*, 424 U.S. 1, 108 (1976).
[69] *Free Enterprise Fund v Public Company Accounting Oversight Board,* 561 U.S. 477, 509 (2010) citing *New York v United States*, 505 U.S. 144, 186, 112 S. Ct. 2408, 120 L. Ed. 2d 120.
[70] Brief of Adler et al as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 366 (5th Cir 2019).
[71] Ibid at 9 citing *Free Enterprise Fund v Public Company Accounting Oversight Board,* 561 U.S. 477, 509 (2010).
[72] *Free Enterprise Fund v Public Company Accounting Oversight Board,* 561 U.S. 477, 509 (2010) citing *Alaska Airlines, Incorporated v Brock*, 480 U.S., at 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661
[73] State Defendants' Reply brief, *Texas v United States*, 945 F.3d 355, 369 (5th Cir 2019) citing *Legal Services Corporation v Velazquez*, 531 U.S. 533, 560 (2001) (Scalia dissenting op.).
[74] Brief of Adler et al as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 365 (5th Cir 2019).

[75] *Texas v United States*, 945 F.3d 355, 419 (5th Cir 2019) (King dissenting op.).
[76] Katie Keith, *ACA Provisions in The New Budget Bill*, (Health Affairs Dec 20, 2019), online at https://www.healthaffairs.org/do/10.1377/hblog20191220.115975/full/ (visited Nov 25, 2020).
[77] Susan Beyer et al, *Repealing the Individual Health Insurance Mandate: An Updated Estimate* (Congressional Budget Office Nov 8, 2017), online at https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53300-individualmandate.pdf (visited Nov 25, 2020).
[78] Brief of Adler et al. as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 365 (5th Cir 2019).
[79] Ibid at 366.
[80] State Defendants Opening Brief, *Texas v United States*, 945 F.3d 355, 390 (5th Cir 2019).
[81] Brief of Adler et al. as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 366 (5th Cir 2019).
[82] Ibid at 369.
[83] Brief of Adler et al as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 368 (5th Cir 2019).
[84] Ibid citing *Dorsey v United States,* 567 U.S. 260, 274 (2012).
[85] Ibid.
[86] Ibid.
[87] *Texas v United States*, 340 F. Supp. 3d 579, 617 (N.D. Tex. 2018)
[88] As noted by Judge King in her dissent "When [Congress] invokes its commerce power, [it] routinely makes such findings to facilitate judicial review." *Texas v United States*, 945 F.3d 355, 420 (5th Cir 2019) (King dissenting op.).
[89] 42 U.S. Code § 18091 (H).
[90] Brief of Adler et al as Amicus Curiae, *Texas v United States*, 945 F.3d 355, 372 (5th Cir 2019).
[91] *Texas v United States*, 945 F.3d 355, 421 (5th Cir 2019) (dissenting op.).
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Shallow and Deep Approaches to 'Greening' Property Law

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Abstract

Climate change and environmental degradation present an enormous threat to people's lives and wellbeing around the world. Property law plays an important role in both the creation of these phenomena as well as in the pathways to combat them, because property law determines the authority of an owner's decision making in relation to objects and other people—the ability to drive a car or alter a landscape, for instance. Many scholars have criticized liberal property law for its emphasis on individual control over resources and its connection to a growth-focused economy, and how these emphases sometimes run counter to the goals of environmentalists. This paper first examines the role that our modern system of liberal property law and its foundational assumptions have in climate change and environmental destruction. This paper then considers various proposed "green" approaches to the liberal property regime, ranging from shallow to deep alterations. The paper concludes with a consideration of the pros and cons of different approaches to property law and identifies how different solutions could become reality.

I. Introduction

Recent United Nations reports on climate change and environmental destruction add to the mounting pile of evidence that humans continue to accelerate the warming of Earth's climate systems and the destruction of the ecosystems that support life

on Earth.[1] Greenhouse gas emissions from industrial processes are warming the planet, sea levels are rising, and humans may be initiating a sixth mass extinction.[2] Despite some environmental successes over the past few decades, humans, disproportionately driven by the powerful members of wealthy, developed nations, continue down a path towards destruction of Earth's biosphere. Some scholars propose that we have entered a new geological epoch, the Anthropocene, characterized by the irreversible impact of humans on the Earth's geological record.[3] According to the UN's 2005 Millennium Ecosystem Assessment Report, we may have already eliminated the ability of Earth's ecological systems to sustain future generations.[4]

Faced with these crises and new scientific understandings of ecosystems and climate change, property law theorists have attempted to analyze the extent to which our property regime is responsible for current environmental disaster. Legal theorists have also studied whether there are changes we can make to the property regime to limit the negative impact humans can have on the world. One can define the property regime as the set of laws and customs governing how we relate to property.

Scientific understanding of the interconnectedness of living things underlies much of the scholarship on environmental property theory. For example, the study of ecology is especially important for many property theorists engaging in this work. Ecology, very generally, is the study of energy transfers and relationships within natural systems. One of the central tenets of ecology is the understanding that living things are interconnected. For example, the disappearance or alteration of one species affects all the other species that shares its ecosystem.[5] In addition to the study of ecology, the realm of quantum physics provides further emphasis and a similar perspective on the interconnectedness of physical reality, as Einstein and Planck demonstrated that subatomic particles move constantly in *relation* to one another, leaving scientists only able to calculate

probabilities rather than precise locations.[6] On a much more global level, the science of climate change increasingly illustrates the interconnectedness and global effects of individual behavior. One can theoretically trace one's greenhouse gas emissions, no matter how small, into a causal relationship with the global climate operating upon everything on Earth.

Armed with an understanding of these relationships and interconnectedness, some legal scholars have attempted to reconcile ecological knowledge with our current concepts of property. According to Baker, property rules determine the authority of an owner's decision making in relation to things and other people.[7] If we acknowledge that our current decision making in relation to land, other species, and people drives current ecological destruction, it follows that we should examine the role of property in that process. In their book *Property Rights and Sustainability,* Taylor and Grinlinton demonstrate that most environmental harm derives from the legitimate, or legal, exercising of modern liberal property rights.[8] Therefore, the question before us is: to what extent should we reclassify what counts as "legitimate" exercising of property rights in order to advance environmentalist values?

When I refer to our liberal property regime, I am referring to the current legal understanding of property in the United States. The intellectual tradition of liberal property stems from classical liberal theory which prioritizes the liberty of the individual. Broadly, I am referring to the conception of property as a 'bundle of rights' that determines ownership. Often included in this bundle of rights is the right to physically control a thing, the right to exclude others from what one owns, and the right to sell and destroy.[9] Liberal property generally emphasizes ownership and individual choice as the pathway to an owner's liberty, autonomy, happiness, and self-identity.[10]

The range of solutions provided by environmental legal theorists span from slight alterations within our current liberal

property regime to calls for changing the fundamental ethical considerations underlying our property system in favor of a 'Green Property Theory'. There is not a definitive standard for what qualifies as a Green Property Theory, and what some authors call Green Property, other authors may refer to under different names like "Earth Jurisprudence" or "Wild Law". Some of these scholars find inspiration from ideas present in indigenous communities around the world, which I address in the final section of the paper.

The solutions that legal theorists advocate for largely are determined by the problems they identify in our current property system. For this paper I will attempt to survey property solutions to environmental harm along a categorization of 'shallow' critiques and the solutions which arise from them, and 'deeper' critiques of liberal property and the more fundamental solutions which might arise from those deeper critiques. I have tried to place in the 'deep' section the critiques and ideas that are at odds with some of the metaphysical assumptions of liberal property. In the shallow section I include ideas and critiques that can maintain or reconcile with the basic assumptions of liberal property. I will attempt to draw common themes among the shallow and deep categories and explain what these critiques can illuminate about the meaning of property. It is important for us to understand these classifications and their justifications to best evaluate potential property-based solutions to environmental crises.

It is also important to note that my categorization of 'shallow' and 'deep' should not be understood as strict boundaries, but rather general tools to help us understand the breadth of property-based solutions to environmental problems. Additionally, just because a critique or solution is in the "shallow" section does not mean that its implementation would not substantially alter our property practices and economy. I do not mean to assign inherent values of 'better' or 'worse' to deep and shallow. I should also stress that my list of critiques is by no means all-encompassing; I only provide a brief

summary of each critique's general idea.

II. Shallow Critiques

A. Critiquing the Weight of Interests

Many environmentalists criticize the liberal property right to complete control in ownership and liberal property's emphasis on protecting individual decisions regardless of their community impact. Under liberal property theory, the use of one's property is restrained by its interference with other owner's rights, which the common law characterizes as nuisance. Derived from English law, the common law is a body of law based on judicial precedent, as opposed to statutory laws written by a legislature. This conception of property minimizes or eliminates the general public interest in property decisions. Defenders of the liberal property system argue that allowing and incentivizing individuals to pursue their own benefits will cumulatively lead to the common good.[11] In his influential article, "Environmental Law Forty Years Later: Looking Back and Looking Ahead," Joseph Sax demonstrates how such a balancing of interests embodied in the principle of *"jus abutendi"* can harm natural resources. *"Jus abutendi"* is the right to make full use of property, even to the extent of wasting or destroying it.[12] In the same way that liberal property allows an owner to act against the public interest by destroying a well-liked or culturally significant art piece, a landowner may destroy natural resources on their land even if that destruction is harmful to the public. Sax provides an illustrative example of a landowner cutting down redwood trees, some of which may have started growing before a Roman ever uttered the Latin phrase that justifies their destruction.[13]

Modern environmental law often attempts to use state power to assert societal interest in property decisions. However, some property critics point out that in such regulations or environmental lawsuits under our current system, the burden of proof lies with the

plaintiff or regulator to demonstrate the net social harm of an owner's actions. Often in industrial cases, a plaintiff must demonstrate that the social harm of a polluter's actions outweighs the economic benefit. In Joseph Guth's paper "Law for the Ecological Age," he argues that this burden of proof makes winning lawsuits based on nuisance in environmental issues extremely difficult, especially in cases of slow environmental degradation where the harm is diffuse and the causal incident is vague.[14] Additionally, industrial actors can measure their economic benefit in quantifiable dollars, whereas environmentalists struggle to quantify harm to ecosystems or entities they assign inherent non-economic value, like endangered species. In unclear cases, the burden of proof operates as the decisive factor. Guth concludes that "The law's allocation of the burden of proof confers on economic activity the status of being society's preferred interest."[15]

Liberal property's role in the facilitation of economic growth and profit generation draws numerous critiques from environmentalists. C. B. Macpherson notes in the latter half of the twentieth century, driven in part by the rise of the corporation as a legal entity, the new "dominant form of property is the expectation of revenue."[16] Taylor and Grinlinton blame environmental law's failures to stop ecological damage on its reluctance to penetrate the view imbued in liberal property that economic growth is the only path to human well-being.[17] Guth substantiates this claim by first illustrating that property evolved in the United States in the nineteenth and twentieth century at a time of perceived limitless resources and westward expansion with the goal of accelerating the Industrial Revolution.[18] After demonstrating that our current property system carries holdovers from that time, he concludes that "[environmental statutes] generally harbors the same core presumption that economic activity provides a net social benefit… and is incapable of restraining the economy's cumulative ecological damage to a sustainable scale."[19]

Generally, these critics of our property system understand that the pursuit of endless economic growth destroys the very ecological foundations for human life and an economy in the first place. They argue that our property laws should reflect the understanding that the pursuit of endless economic growth is not reconcilable with environmental goals and is not a sustainable economy on which to build a healthy society. While I assign most of J. Ronald Engel's writing on Faustian Pacts to the "deep" section of this paper, his references to economic growth are relevant to repeat here. Drawing on insights from author Wendell Berry, Engel deploys the myth of Doctor Faustus to our attachment to limitless growth. The German myth Doctor Faustus portrays a doctor who, with assistance from the agent of the devil Mephistopheles, signs away his soul to the devil in return for twenty-four years of limitless knowledge and gratification. Engel situates our pursuit of limitless economic growth as our own Faustian pact doomed from the beginning.[20]

B. Sovereignty and Global Climate Change

Morris Cohen's sovereignty function of property provides another perspective on the possible environmental harms of a liberal property system. Cohen conceptualized private property as a delegation of sovereign power from the state to the individual owner.[21] Through the control of their property, property owners can assert power over other people. Eric Freyfogle provides an environmental perspective of this function while discussing the history of private land control, stating "Control over nature meant (and still means) control over the people dependent upon that nature for survival."[22]

Knowledge of atmospheric science and the effects of climate change contribute to this strand of critique of liberal property theory and the difficulty its current iteration poses for combating global environmental issues. Specifically, critics point to liberal property's

lack of consideration for future generations and its emphasis on individual choice in determining the use of the sovereignty function. Paul Babie's "Idea, Sovereignty, Eco-Colonialism and the Future – Four Reflections on Private Property and Climate Change" provides an excellent overview of a climate change-based critique. Babie uses Cohen's sovereignty function of property to illustrate how state conferment of sovereignty and choice upon the individual in a liberal property regime allows for individuals to exercise *global* sovereignty through the release of greenhouse gases. Babie illustrates that liberalism and liberal property encourage individual control over goods and resources to choose a "life project" in order to achieve autonomy for individuals. He further argues that this encouragement and conception of freedom leads to choices contributing to climate change.[23] For example, if a person had the means to choose my transportation and housing, that person would be exercising choice and control over goods and resources and realizing their own autonomy in the format encouraged by liberal property. At the same time I would be emitting greenhouse gases and exerting atmosphere-mediated sovereignty over the rest of the world.

Power relationships in property play a large role in Babie's analysis. He deploys the term "eco-colonialist" for the perpetrators of this emission-based sovereignty, implicating almost all private property owners in developed countries.[24] The power imbalance between countries is not lost on Babie. He reminds his readers that the populations on the receiving end of the worst effects of eco-colonialism both contribute almost insignificantly to the overall problem and have no legal or political influence on the choices conferred by wealthy industrial states on their citizens.[25] While not heavily emphasized in Babie's article, it is crucial to note that within these wealthy nations, large corporations and international financial firms play an outsized role in perpetuating greenhouse gas intensive activities in the pursuit of short-term profit.[26] We might now be

seeing some of the terrible effects of Morris Cohen's diagnosis that we confer large amounts of sovereign power on industry and finance.[27]

A property analysis of climate change highlights another large environmental critique of liberal property theory: the lack of influence in harmful choices from those harmed by the choice. Two groups without influence on the decisions that harm them are non-human entities, (i.e. ecosystems, species, and waterways) and future human generations. Historically, with a few exceptions, law has only concerned present interpersonal relationships, leaving out non-human species and unborn humans.[28] Environmentalists concerned with biodiversity loss run into conflict with this history, lamenting the difficulty in achieving standing to defend ecosystems. While there are examples of the government protecting specific species and wilderness areas, biodiversity and non-endangered species lack a value of existence or any value beyond human economic interest.[29]Additionally, in many cases standing to protect these interests relies on specific injury rather than public injury, therefore limiting the ability of environmentalists to advance their goals.[30]

Environmentalism has an inherent focus on the future, changing behaviors now to prevent a detrimental future. This focus can run into conflict with current property law, which mostly concerns property infringement in the present, not anticipated infringements.[31] This attribute of our modern property regime is present in its weak protection of future generations interests. While it is difficult, if not impossible, to determine the property interests of future individuals, a changing climate and the effects of biodiversity loss on the ability of future generations to grow food is in the general interest of those future generations. Activities contributing to climate change and biodiversity loss continue today. Therefore our current property regime does not provide strong enough protection or channels for protecting the future generations.

III. Shallow Solutions

Broadly construed, the shallow critiques I have examined criticize how property law's weighing of interests in property decisions hampers environmental protection, and that property law ignores ecological reality and the interconnectedness of living things. The mindsets of these critiques are reflected in the following proposed solutions.

When property theorists advocate for a change in property law, both "shallow" and "deep," they often begin by explaining that property law requires a justification and a function. They also note that the function of property law has changed over time in relation to societal values. For example, in order to encourage hydropower mills and industrialization in the nineteenth century, courts altered the traditional property rights to waterways.[32] Some justify property law by reasoning that property should serve the common good since property law is a social institution enforced by the community through the state.[33] For environmentalists, the common good includes protection of ecosystems and stopping climate change, and they generally recognize that our current property system is not explicitly built to serve either of these functions. Because lawyers have used the common law to fight for environmental values in the past, and the common law includes options for including community interest, environmentalists often point to the common law instruments of nuisance and public trust to advance environmental values.

A simple expression of nuisance law's historical character is "Use your own property so as not to harm another's."[34] If a person's property use harms one's property, those experiencing harm can file suit for an injunction or for damages under a private nuisance claim. A public nuisance claim occurs when an entity harms the property rights of the public in general, often harming common or public property.[35]

On the shallow end of property solutions to environmental

problems is the extension of private and public property rights into previously public or common property. Using this type of solution for climate change may include establishing a private property regime in the atmosphere where owners could trade their rights to pollution overseen by the state, such as a cap and trade program.[36]

Another solution would be to increase the ability of persons to bring nuisance actions. In the United States, a plaintiff can only bring a nuisance action if they demonstrate "special injury" which is injury that is of a "different in kind" from the general public.[37] We can see the negative consequences of this doctrine in the aftermath of the 1989 Exxon-Valdez oil spill. Alaskan natives filed claims for damages from Exxon on the basis that the oil spill harmed their subsistence fishing and cultural rights. While the courts delivered damages on some commercial grounds, they agreed with Exxon's lawyers throughout the appeals process who claimed the injury was too widespread and not "special" enough.[38]

Scholar Denise E. Antolini offers some possible solutions to this problem of standing in her paper "Modernizing Public Nuisance." One of her proposed solutions is the abandonment of the special injury rule and instituting an "actual community injury" rule applicable to both damages and injunctions.[39] This rule would focus nuisance actions on community injury rather than just individual injury. It is evident how this principle is extendable to other environmental interests. Depending on one's definition of "injury," one could extend the community injury rule into climate litigation or to protect wildlife and biodiversity.

While such a rule change would award damages after-the-fact or stop ongoing activities through an injunction, the "actual community injury" rule, realistically applied, likely would not have stopped the Exxon-Valdez oil spill. Courts would have stopped the spill if they had previously passed an injunction against all production of fossil fuels, but nuisance cases typically rely on actualized harm rather than future potential harm. To address this

issue, some property theorists have advocated for the implementation of the precautionary principle, which operates to shift the burden of proof in property decisions. Drawing from ecological insights and building on Aldo Leopold's land ethic, the precautionary principle states that "any activity, or the use of any substance, that might have a negative impact on the function and integrity of an ecosystem should be curtailed-even if the scientific proof of potential harm is not conclusive."[40] Under the precautionary principle, institutions and landowners would have the burden of proof to show that their actions pose no harm to the function of an ecosystem. Although not tailored to ecosystems, such a principle already exists in laws regulating drug manufacturing.

Public trust is an additional common law tool which may align more with the future oriented mindset of environmentalism. Public trust refers to the recognition that there are some resources, or property, which are important enough for future society to function that the state should hold them in trusts.[41] In the United States, public trust varies in precedent across states but often protects tidelands, waterways, and roads.[42] Joseph Sax's 1970 article "The Public Trust Doctrine in Natural Resource Law" inspired many environmental legal theorists to pursue public trust as an avenue for advancing environmental values.[43] Beyond just using public trust to protect natural resources, scholars have proposed stretching public trusts to include protection of ecosystems. Johnson and Galloway advocate for recognizing the universal interest in protection of biodiversity by making it part of the common property of the state.[44] Recent litigation focused on climate change also tries to utilize public trust. For example, the organization "Our Children's Trust" is currently pursuing a case against the United States federal government for its failure to guarantee a healthy climate.[45]

The implementation of these solutions, such as the precautionary principle, or a more radical interpretation of public trust, would have profound impacts on the operation of our

economy. These solutions shift the rights included in the bundle of liberal property rights by emphasizing the influence of community interests or altering the burden of proof. However, these changes do not fundamentally change what property means in the liberal context. This is evident in that the shallow solutions rely on tools pre-existing in the liberal property regime. Some of the shallow solutions surveyed operate to extend the interests involved in property decisions and confer the liberal conception of property rights on previously 'right-less' entities.

IV. Deep Critiques

As opposed to the shallow critiques I surveyed, deeper critiques often argue that the core metaphysical assumptions of liberal property are to blame for ecological destruction, and solutions that only float over the surface will fail to sufficiently address the crises we face.

A. Dephysicalisation

Nicole Graham provides a useful deep critique of one of the metaphysical assumptions of liberal property. She notes that one of the first characteristics of property law students learn is that "Modern property law is about abstract 'rights' between 'persons'."[46] Property law is abstract, and contains no reference to the physical condition of the thing or land because the thing itself doesn't really matter. What matters are the rights and persons involved. This structure of property is therefore "dephysicalised," an understanding of property widespread and accepted among attorneys and legislators.[47] Ownership and use rights are closely related, but the process of establishing ownership rights has no relationship to the land being owned.

Infamous in environmental legal circles, the Supreme Court

case *Lucas v South Carolina Coastal Council* illustrates the dangers of an emphasis on the "dephysicalisation" of liberal property ownership. The state of South Carolina recognized the ecological importance of the dunes on its barrier islands and instituted new regulations restricting development on the islands. David Lucas, a real estate developer and owner of some land on the islands, sued the state. Lucas argued that the new regulations constituted a "taking" of his ownership of the land, and that he therefore deserved compensation under the Constitution. The Supreme Court majority, written by Justice Scalia, ruled in favor of Lucas, and agreed that Lucas had lost ownership because he lost rights, regardless of the fact that the physical land was not taken.[48] Such a decision would be impossible without the inherent structure of property law which allows us to conceptualize ownership as abstract rights devoid of physical relationships.

In his article "The Reconstitution Of Property: Property as a Web Of Interests," Craig Anthony Arnold delivers a critique at what he identifies as one of the driving factors of the dephysicalisation of property law. Craig directs his critique at the common metaphor for property as a "bundle of rights," which generally includes rights such as the right to exclude, use, alienate, and metaphorically conceptualizes each of these rights as a stick in a bundle.[49] One of Arnold's arguments is that the 'bundle' metaphor is a driving factor of property law's dephysicalisation because the metaphor does not account for the "thing" involved in property and allows for property rights to inhabit the same conceptual plane as civil rights and human rights, when in fact those entail very different relationships.[50] A deeper critique of the metaphor focuses on its orientation to the language of rights or entitlement, which impedes realization of responsibilities and sharing of interests in ecosystems.[51]

B. Anthropocentrism

The critique that liberal property is inherently anthropocentric is a foundational deep critique of our modern property regime. Peter Burdon frames the term succinctly, defining anthropocentrism as "the view that human beings are the final aim and end of the universe and that the universe exists to satisfy the needs and desires of human beings."[52] As mentioned earlier in this paper, liberal property theory concerns the use of property to achieve individual *human* autonomy, which makes its fundamental operation anthropocentric. While some property scholars argue that one can be anthropocentric and still appreciate biodiversity and the integrity of an ecosystem, a deep critique places the blame on anthropocentrism itself as the driving worldview of current ecological destruction.[53] In her book chapter "The Mythology of Environmental Markets," Nicole Graham contends that the anthropocentric worldview of non-human things as instruments of human happiness drives our current crises, and that any shift in property that maintains the anthropocentric and instrumental view will not appropriately contend with the challenges we face.[54] Examples of anthropocentrism are common in environmental discourse, like speaking of natural "resources" for people's utilization.

A possibly deeper critique of liberal property takes aim at the dichotomy that provides the building block for anthropocentrism: the conceptual divide between humans and nature. Some scholars believe this conceptual dichotomy to be the defining characteristic of modern Western thought.[55] Modern people in the West conceive of themselves as subjects and nature as objects.[56] This idea is central to liberal property, which encourages the subject to express its desires in objects and concerns itself with subject-subject relations, while ignoring the possibility of desires or inherent value in objects. This subject/object divide is essential to modern science, which attempts to reveal truth through the removal of the subject from its object

of study. Peter Horsley claims that this scientific view is crucial for the rise of industrialism and capitalism, forces which many environmentalists blame for our current ecological crises.[57] An ecological understanding of the interconnectedness of living things renders a boundary between human and non-human living things false and inoperable. Bruno Latour uses recent insights from climate change to problematize the subject/object divide further. Latour demonstrates that in the Anthropocene, the Earth is completely subjectified, and it cannot be rid of its human influences.[58]

Drawing more on theology than previously mentioned authors, J. Ronald Engel criticizes what he refers to as the covenant underlying our current property regime. Engel uses "covenant" to mean commitments regarding our "most fundamental relationships and behaviors."[59] He claims we need to think about the "unconditional covenantal commitments we make to our understanding of reality" and how we use those commitments to give meaning to property law.[60] Engel argues that the overarching covenant of our time is a commitment to domination of nature in pursuit of limitless growth. Engel frames this domination and pursuit as a collective "Faustian Pact" which we cannot sustain forever. While I used Engel's Faustian Pact analogy to highlight the inclination of liberal property law to favor economic interests in the Shallow section, I place the majority of his analysis in the "deep section" due his critiques' emphasis on the covenant of limitless domination as an underlying element of our property system.

The deep critiques and solution I have surveyed are not as easy to conceptualize and classify as the shallow section, and this difficulty of conceptualization may in part emerge from the extent of their shift away from our current methods of understanding the world. These deep critiques vary in focus, and some of them even work to criticize the understanding of other critiques. For example, Craig Arnold's characterization of property as lacking an "understanding of the intersection of the person-person plane with the person-thing

plane" operates under the presumption of a boundary between person/thing, which I have included as another deep critique.[61] That in no way casts fault on Arnold's analysis; after all, as Horsley indicates, the presumption of a boundary between persons and things may be the distinguishing factor of modern thought.[62] However, the discrepancy illustrates that there may be levels of deepness for each critique. Despite their variation and complexities, the deep critiques all problematize core elements of liberal property beyond just its current preferences and incentives, instead focusing on liberal property's functional underlying assumptions. The deep solutions, to varying degrees, attempt to reflect this problematization.

V. Deep Solutions

Deep solutions often build upon the writings of Aldo Leopold, an influential environmentalist who Engels calls a "prophetic voice" for a new covenant.[63] In his book, *The Sand County Almanac,* Leopold presents a new vision of ourselves in relation to non-humans which may address the problem of "instrumentalizing" nature. Leopold writes, "When we see land as a community to which we belong, we may begin to use it with love and respect."[64] Like Leopold, many deep solutions try to alter the way we perceive the world in property to engender different, responsible relationships with the Earth.

To address the problems he identified within the "bundle of rights" metaphor and the language of "rights" generally, scholar Craig Arnold proposes a new metaphor: a web of interests.[65] Within this new metaphor, "property is a set of interconnections among persons, groups, and entities each with some stake in an identifiable object at the center of the web."[66] A web of interests emphasizes relationships, acknowledges ecological principles of interconnectedness, and crucially centers the context of the object of interest, thereby reducing the abstraction of property law.

Law professor Nicole Graham recommends we change the

concept of ownership controlling an object in the present to the form of ownership we think of when we talk about owning our own behavior and its consequences.[67] This would entail a language of responsibility towards that which we own for its past, present, and future. Graham also suggests embracing the role of "custodian" rather than owner, which is reminiscent of the idea of 'stewardship' in environmental property law.

Stewardship entails recognizing that we are only temporary inhabitants of a land community, or ecosystem. Professor of property law E. Lees defines stewardship as "devoting a substantial percentage of one's thoughts and efforts to maintaining or enhancing the condition of some thing(s) or person(s), not primarily for the steward's own sake."[68] A stewardship-oriented understanding of property works to move away from an anthropocentric worldview because of its emphasis that a steward is not always pursuing their self-interest. Instead, the steward (no longer "owner") must work for the maintenance of ecological integrity. This is a significant difference from the colloquial use of the word "stewardship" in terms of land management for human benefit. To address Engel's anti-covenant for limitless growth, the temporal aspects of stewardship can mean acceptance of our aging and death as necessary for "good."[69] Stewardship could also help eliminate the subject/object divide. Stewards recognize their role as members of a community where there is shared interest, rather than only recognizing interest and desires of human subjects. In this sense, stewardship can take on an ecocentric character that recognizes and respects the value of non-living things.[70] While there are examples of voluntary stewardship-esque behavior in land trusts, a true deep solution requires that stewardship duties are enforced by law.

Our understanding of land would change in many deep solutions. Influential environmental lay scholar Joseph Sax uses the term "economy of nature" to describe a property system based on ecology, as opposed to the "transformative economy" we currently

have, where land is passively waiting to be put to use by an owner. The economy of nature recognizes the functions land serves without human involvement, like holding soil and moderating the climate. The economy of nature also diminishes the importance of property boundary lines through recognizing the ecological connections between land tracts.[71] This economy of nature institutes, similar to stewardship, an "affirmative protective role for ecological functions."[72]

These deep solutions attempt to bring attention to missing characteristics of liberal property in an ecological age. Increasing the place specificity of property law, moving towards ecocentrism, and diminishing the subject-object divide all attempt to re-conceptualize the place of the human in relation to the rest of the world. I labeled these solutions "deep" because rather than merely change the number of person's rights involved in property decisions or altering a few of the "sticks" in the "bundle of rights," these solutions attempt to change whether such a bundle exists and the fundamental assumptions driving our conceptions of property and rights.

VI. Possible Pathways for the Future and Sources of Inspiration

It is important to note that while many of the critiques and solutions mentioned rely on "new" scientific understandings, many scholars are not the first to think of their jurisprudential insights, as many of the solutions they advocate can be traced to the heritage of indigenous peoples. Professor Terry Frazier mentions that the idea of "intergenerational equity" used in environmentalist circles and by public trust scholars is present in Iroquois culture. A chant for the inclusion of a new member in the Iroquois Council of the Lords states,

> In all of your deliberations in the Confederate

> Council, in your efforts at law making, in all your official acts, . . . have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.[73]

Nicole Graham also cites Indigenous Australian jurisprudence as a major influence for alternative understandings of human relationships to land, with the land as the source of law and a cultivation of a custodial relationship.[74] Youth climate activist Xiye Bastida articulates a covenantal sentiment when she repeats the indigenous Otomi belief that "Earth is our home, it gives you air, water and shelter. Everything we need. All it asks is that we protect it."[75] As we consider new forms of property relationships to the Earth, it is important that we continue to listen to and learn from indigenous practices.

A. Shallow or Deep?

If one agrees with some of the deep critiques targeting foundational beliefs and worldviews in our society, the shallow solutions with only alterations of forms within property law may feel inadequate. For example, if rights-based discourse is theoretically the driver of ecological collapse, can we solve the problem by merely assigning new rights to people and expanding the entities that have rights? Worse, some authors claim that environmental law's focus on common law tools like the public trust prevented law itself from fundamentally confronting modern property.[76] Although common law methods of property reform are appealing and more receptive to environmentalists, they often lack written definition and rely on malleable societal beliefs to solve conflicts.[77] Alexandra B. Klass portrays a situation playing out across the country that public trust advocates will have to grapple with as they advocate for common

law methods of environmentalism. Both proponents and detractors of renewable energy projects use public trust arguments in energy siting decisions.[78] One side claims that we need renewable energy to ensure a healthy climate for future generations, while the opposition, often local environmental and indigenous groups, oppose the land-intensive energy projects for disrupting ecosystems.[79] This conflict within environmentalism also draws attention to a surprising lack of full engagement with energy use decisions among some prominent scholars of green or sustainable property theories, even in texts written long after the science of climate change was clear and the pressing nature of the problem obvious.[80]

Regardless, it is possible that conflicts of moral decision-making in common law result from a lack of "inherent limitations to property rights."[81] As Guth demonstrates, even when common law environmental protections and values are clearly stated, they occasionally remain unenforced by the courts.[82] This problem highlights Klaus Bosselmann's argument that reconciling property with sustainability is not dependent on legal constructs, but has "everything to do with associated values."[83] The deep solutions I have surveyed would also run into the problem of different societal values, maybe even more so than in the common law. I cannot imagine an enforced stewardship principle without a large shift in general societal values. At this point, we have reached the difficulty of determining how societal values shape property and how property operates to shape social values, as well as where environmentalists may want to direct their energies.

Paul Babie's writing on the interplay between 'concept' and 'idea' is helpful here. He states that the *concept* of property is essentially the understanding of property from an academic, legal, and theoretical perspective; he defines the *idea* of property, on the other hand, as "the ways in which society—people—actually understands what private property means."[84] Babie argues that the aforementioned elements take on a simplified form within

our psyche through myths, education, and the way we speak about what is "ours."[85] He specifically addresses how the idea of property creates globalized climate change, and his analysis and framing are helpful when environmentalists consider shallow and deep solutions, concepts that stretch the idea of ownership to its limits (shallow) and concepts that push for wholly new ideas once the previous one has reached its limit (deep). Until a new idea of ownership becomes universal enough that it is enforceable through state power, supporters of the deep critiques will have no hope for feasible implementation of the deep solutions.

Climate change poses temporal challenges that require immediate action—for instance, drastic emissions reductions to prevent further irreparable environmental damage. Deep solutions call for a paradigmatic shift, which can be very time-consuming. If we agree with Thomas Kuhn's argument that young professionals drive paradigm shifts, we must acknowledge that the process of waiting for the "old guard" to be replaced with young professionals is far too lengthy of a process for the immediacy of climate change.[86] Additionally, I would wager that the current young professional class generally do not yet have the worldview of deep critiques to carry out a paradigm shift necessary for the implementation of deep solutions.

With this state of affairs in mind, insights from Carol Rose demonstrate the possibilities of using immediate shallow solutions to counter climate change in the short term and prepare for later shifts to deep solutions. Previously, I mentioned a concern about extending rights to new entities if rights are the basis of the economic system that causes ecological crises. In a review of Mark Sagoff's book *The Economy Of The Earth,* Rose acknowledges the possible rhetorical use of rights and entitlements for libertarian economics, but also argues that rights-talk can have beneficial rhetorical uses as well.[87] Rose points out that using rights-talk with wildlife and ecosystems enables current rights-holders to consider the new rights-

holding entities as things which would defend themselves if they were able, rather than inert things deserving of violation. Many of the shallow solutions I have included extend "rights-talk" to entities like future generations, ecosystems, and the global property-less. Such shallow solutions can provide the most immediate solutions to climate change, but can also operate within and extend the "idea" of property within the population in order to lay the foundations for future deep solutions like stewardship.

If supporters of deep critiques are to undertake this goal, they must be mindful of the challenges of achieving change in the property system, which some authors I have cited gloss over. Multiple environmental legal theorists point to the shift in property rights in the industrial period as evidence that environmentalists can change them again to fit new societal goals. What they ignore is that the 1800s pre-industrial switch in property rights *benefited those who already held the most property,* such as wealthy mill owners and dam builders . A change of property concept that harms the current holders of property is unlikely to be as easy.

Klaus Bosselman's answer to the question "can property rights and sustainability be reconciled?" is "Yes, because they must be, but it will not be easy."[88] I agree with his assessment; however, I wish he would have added the agent, the "who," of reconciliatory action. Within property law, these individuals are certainly lawyers, theorists, professors, and the like, who must listen to indigenous peoples; find solutions, both shallow and deep; and work to stop current ecological destruction. The legal field is not the only sector needed in these tasks, but hopefully their analyses and teachings will orient our ideas of ownership toward a sustainable future.

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