

# UTAH LAW REVIEW

Volume 2010

Number 1



## SYMPOSIUM NON-STATE GOVERNANCE

- |  |   |
|--|---|
| Introduction   | <i>Brittany Enniss &amp;<br/>Amos N. Guiora</i> |
| Non-State Governance   | <i>Michael W. McConnell</i>                     |
| Towards a Jurisprudence of Hybridity   | <i>Paul Schiff Berman</i>                       |
| The Mirage of Non-State Governance   | <i>Ralf Michaels</i>                            |
| The Recurring Paradox of Groups<br>in the Liberal State  | <i>Frederick Mark Gedicks</i>                   |
| The Challenge of Change:<br>Social Movements as Non-State Actors   | <i>Robert A. Goldberg</i>                       |
| Non-State Actors in the Global Order   | <i>Michael K. Young</i>                         |
| When Is Non-State Global Governance Really Governance?   | <i>Steven Bernstein</i>                         |
| Religion and Non-State Governance:<br>Warren Jeffs and the FLDS  | <i>Mark Shurtleff</i>                           |
| The NCAA and Religion: Insights About Non-State<br>Governance from Sunday Play and End Zone Celebrations | <i>Kevin J. Worthen</i>                         |
| Assessing the Constitutional Autonomy of Such<br>Non-State Institutions as the Press and Academia        | <i>Patrick M. Garry</i>                         |
| The Responsibilities of the Liberal State:<br>Comprehensive vs. Political Liberalism                     | <i>Bruce M. Landesman</i>                       |

## NOTES

- |   |                      |
|---|----------------------|
| From the BCS to the BS: Why "Championship"<br>Must Be Removed from the Bowl Championship Series | <i>Parker Allred</i> |
| Utah's Open Courts: Will Hikes in Civil Filing Fees<br>Restrict Access to Justice?              | <i>Erin K. Burke</i> |



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VOLUME 2010

NUMBER 1

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# UTAH LAW REVIEW

VOLUME 2010

NUMBER 1

## TABLE OF CONTENTS

### SYMPOSIUM NON-STATE GOVERNANCE

Introduction	<i>Brittany Enniss &amp; Amos N. Guiora</i>	1
Non-State Governance	<i>Michael W. McConnell</i>	7
Towards a Jurisprudence of Hybridity	<i>Paul Schiff Berman</i>	11
The Mirage of Non-State Governance	<i>Ralf Michaels</i>	31
The Recurring Paradox of Groups in the Liberal State	<i>Frederick Mark Gedicks</i>	47
The Challenge of Change: Social Movements as Non-State Actors	<i>Robert A. Goldberg</i>	65
Non-State Actors in the Global Order	<i>Michael K. Young</i>	81
When Is Non-State Global Governance Really Governance?	<i>Steven Bernstein</i>	91
Religion and Non-State Governance: Warren Jeffs and the FLDS	<i>Mark Shurtleff</i>	115
The NCAA and Religion: Insights About Non-State Governance from Sunday Play and End Zone Celebrations	<i>Kevin J Worthen</i>	123
Assessing the Constitutional Autonomy of Such Non-State Institutions as the Press and Academia	<i>Patrick M. Garry</i>	141
The Responsibilities of the Liberal State: Comprehensive vs. Political Liberalism	<i>Bruce M. Landesman</i>	171

## NOTES

From the BCS to the BS: Why “Championship” Must Be Removed from the Bowl Championship Series	<i>Parker Allred</i>	183
Utah’s Open Courts: Will Hikes in Civil Filing Fees Restrict Access to Justice?	<i>Erin K. Burke</i>	201

## INTRODUCTION: NON-STATE GOVERNANCE

Brittany Enniss\* and Amos N. Guiora\*\*

Non-state governance has become an increasingly “hot legal topic” over the past several years.<sup>1</sup> During this period, a handful of prominent scholars have endeavored to uncover precisely what non-state governance means, both in definition and possibilities.<sup>2</sup> Yet, despite the increased focus, little is known or understood about the abstract term.<sup>3</sup> What many scholars find so interesting about the idea of non-state governance is that its boundaries are not limited to any one discipline.<sup>4</sup> The idea of non-state actors governing themselves is of interest to political theorists, legal scholars, local and global politicians, religious leaders, and even the National Collegiate Athletic Association.

Given the current economic climate, it seems clear we have reached a point where non-state actors may be called upon to take a more central role within the state. Realizing the impact non-state governance may potentially have and its critical role in both local and global governments, we hoped the Non-State

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<sup>1</sup> See, e.g., JEREMY RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005) (expressing concerns regarding transnational law and the efficacy of existing international institutions and arguing that submission to international legal standards and organizations that are supposed to supervise their implementation undermines normative commitments to self-government that are foundational to the liberal-democratic tradition); Kate Macdonald, *Emerging Institutions of Non-state Governance Within Transnational Supply Chains: A Global Agenda for Empowering Southern Workers?* (Sept. 2-5, 2004) (prepared for delivery at the 2004 Annual Meeting of the American Political Science Association) (copyright by the American Political Science Association), available at [http://www.allacademic.com/meta/p59880\\_index.html](http://www.allacademic.com/meta/p59880_index.html); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273 (2000) (discussing that the development and experience of the European Union have an impact on the development of multilateral governance).

<sup>2</sup> See INTERNATIONAL GOVERNANCE AND LAW: STATE REGULATION AND NON-STATE LAW (Hanneke van Schooten & Jonathan Verschuuren eds., 2008) (addressing the question of to what extent non-state law currently influences state regulation).

<sup>3</sup> See Michael K. Young, *Non-state Governance: Non-State Actors in the Global Order*, 2010 UTAH L. REV. 81.

<sup>4</sup> See Hiram Chodosh, Dean, S.J. Quinney College of Law, Introduction at the University of Utah Law Review's Non-State Governance Symposium, Feb. 6, 2009, available at <http://www.ulaw.tv/watch/635/non-state-governance-symposium-introduction>.

Governance Symposium<sup>5</sup> would create a forum for leading scholars to more clearly define what non-state governance truly means.<sup>6</sup> The symposium was an opportunity for prominent scholars and practitioners from a wide array of disciplines to gather and discuss the specifics, goals, responsibilities, and ramifications of non-state governance.

In this symposium edition of the *Utah Law Review*, the Honorable Judge Michael McConnell sets the stage by asking whether non-state governance exists. Is exercise of power by a non-state entity enough to qualify as non-state governance? Is this exercise of power by a private, non-state actor simply a product of state action in some sense? In an effort to flesh out the issues related to these questions, Judge McConnell provides historical examples of legal theory beginning with the collapse of imperial Rome, when standard legal thinking was not based on the public/private distinction, but rather on the theory of two kingdoms—secular and sacred. He proceeds to discuss the non-state introduction of the *Lex Mercatoria* and ends with a discussion of how non-state governance can be seen with the authority a father and mother has over their children. Judge McConnell identifies the topic's paradox: When talking about non-state governance, are we talking about nothing or everything? He concludes by asking a series of questions this symposium issue seeks to answer: To what extent does liberal theory demand non-state governance to conform to liberal values such as impartiality and non-discrimination? Is non-state governance desirable? Should we answer these questions differently depending on whether we are talking of voluntary membership in non-state governing groups? Is non-state governance a real subject?

The first panel of articles serves as a base for defining non-state governance. Dean Paul Schiff Berman lays the foundation for defining non-state governance. Berman goes beyond merely observing that state and non-state actors co-exist and argues for the desirability of having state and non-state lawmaking interact in an effort to create what he has termed a “jurisprudence of hybridity.” Dean Berman argues that, by accepting the reality of “multiple community affiliations,” we avoid compartmentalizing such groups and instead embrace innovative ways to ensure that various communities have a voice. Dean Berman asks us to consider procedures, institutions, and practices that factor a jurisprudence of hybridity into the equation of good governance.

In sharp contrast to Dean Berman's argument, Professor Ralf Michaels argues that non-state governance rarely exists and that any discussion of effective governance should move beyond the state and non-state distinction. First, he argues that non-state governance is conceptually unattractive. With surprising ease, he shows the inherent paradox with the term “non-state governance.” For example,

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<sup>5</sup> Held at the S.J. Quinney College of Law, The University of Utah, Feb. 6, 2009.

<sup>6</sup> Indeed, at the symposium S.J. Quinney College of Law Dean Hiram Chodosh advised the audience that the conference title was tremendously abstract. *See supra* note 4. However, Dean Chodosh assured conference attendees that the world-class experts presenting at the symposium would diligently guide symposium participants through the complexities of analyzing the interactions between state actors and non-state actors.

the Establishment Clause demands that the state avoid any interactivity with non-state religious communities, but the clause itself is a state-created rule of law and is enforced via state action. Second, Michaels argues that non-state governance is empirically inadequate. He explains that the state so intricately works with apparent “non-state” communities that, in reality, non-state governance can only be found where no state exists, and very few populations would fall within this category. Lastly, Professor Michaels argues that non-state governance is normatively unattractive and theoretically backward. He argues that governance apart from the state is merely a counterpart of the state and that anchoring discussions of governance in such a binary way limits our ability to creatively think about governance in more crucial and vital ways.

Professor Frederick Mark Gedicks examines non-state governance from a group’s rights perspective. Gedicks eloquently discusses the paradox in American jurisprudence of desiring to protect individual liberties while at the same time threatening to destroy the foundations of those liberties. He observes that if internal groups are granted full liberties to govern themselves, there is a great risk that members within the community will not be protected. In examining the rights and responsibilities of the state to internal groups, particularly to groups whose membership may not be consensual, Gedicks presents three analytical touchstones for dealing with the paradox. First, we must ask whether the group has been afforded constitutional protection as an entity, or only as an affiliation of individuals. Second, we must examine the voluntariness of the internal group membership, and we must be concerned with protecting the entry and exit of group members. Lastly, he proposes that we, as the state, should be concerned with whether internal group rights impose external costs on non-members, in which case the state ought to be allowed to intervene.

Following Professor Gedicks’ group-rights examination of non-state governance, Professor Robert Goldberg examines it from a social movement perspective. Professor Goldberg provides examples of historic social movements that show both the ability of the internal group to create crises and the power of American state actors to repress and preempt efforts of social change. By supplying an insightful analysis of social movements of the twentieth century up to the current presidential administration, Professor Goldberg paints a masterful picture of the continuing struggle between state and non-state actors.

Next, President Michael K. Young, in his keynote piece, raises thought-provoking questions regarding non-state governance from a global and domestic perspective. Non-state actors both domestically and globally are broken into two general types in an effort to answer vexing questions about the state’s limits and responsibilities when interacting with such actors. By breaking non-state actors into two groups—the first being semi-voluntary organizations, groups to which the state cedes a significant amount of regulatory authority; and the second being wholly voluntary organizations—President Young underlines just how difficult and fascinating the discussion of non-state governance can be.

Professor Steven F. Bernstein focuses specifically on global non-state governance. First, Bernstein argues that political governance beyond the state is

possible, provided that it is authoritative and rests on a notion of political legitimacy. Furthermore, he argues that meaningful global non-state governance should look much different from authoritative coercion or domination. Bernstein provides a framework for evaluating “good” global governance from a normative perspective. He then applies the framework to a small subset of examples of previous efforts of non-state actors who have attempted to socially and environmentally regulate the global marketplace. Although he offers possible limitations to his claims, more than anything, Bernstein offers a fresh approach for tackling issues of non-state governance in the global realm.

Subsequent articles focus on practical aspects of religion and non-state governance. Utah State Attorney General Mark L. Shurtleff addresses what are perhaps the paradigmatic non-state actors: religion and church. Attorney General Shurtleff begins with a history of theocracy—an idea that God and the law work together as a sovereign law. His account of well-known historical theocracies culminates with a fascinating discussion of a common-day theocracy led by Warren Jeffs and the Fundamentalist Church of Jesus Christ of Latter Day Saints. Attorney General Shurtleff offers detailed accounts of how the FLDS church and its leader use power and dominion to hold themselves out as a democracy, while in reality functioning as a prototype modern-day theocracy. Arising from Jeffs’s ability to eliminate all opposition, the FLDS completely isolated itself from the state for decades. Attorney General Shurtleff admits that the State of Utah struggles to find an appropriate balance in upholding freedom of religion while also protecting the rights of internal members. He argues that the best way for non-state actors and state actors to proceed in the future is for lines of communication to remain open between the two entities.

Professor Kevin Worthen, former dean of Brigham Young University Law School, addresses this issue not from how religious entities govern, but rather how non-state government actors interact with religion. To frame the discussion, Worthen focuses on the National Collegiate Athletic Association, an entity easily overlooked as a non-state governing actor. The NCAA is made up of members who govern themselves and can avoid sanctions by simply withdrawing. Regulations set forth by the NCAA are vast, including admissions criteria for NCAA member students. After a general discussion of the immense governing power the NCAA wields, Professor Worthen turns his focus to two religious issues that have concerned the NCAA for decades: the accommodation for and prohibition of Sunday play, and the prohibition of extended celebration by a player after a touchdown—including dropping to one knee in prayer. By looking at these two religion-oriented issues, Professor Worthen presents examples of how non-state government entities can have an enormous impact on religious groups—even though both are non-state entities.

Lastly, Professors Patrick Garry and Bruce Landesman tackle the issue of the state’s responsibilities when dealing with non-state actors. Professor Garry presents a comparison of how the rights of journalists and academics are protected internally within their professional organizations with how those same rights are protected externally by the state. Garry argues that non-state governance is a

truism, particularly in a society with limited government. Furthermore, Garry suggests that various non-state institutions—religion, higher education, and the press—all provide a check on government and provide a marketplace of new ideas for how society and the liberal state could operate.

Professor Landesman then looks at the liberal state's responsibilities when private groups wish to engage in conduct perceived to be highly illiberal. He effortlessly states the problem for liberalism: if one believes in freedom, individualism, and liberty, what does one do about an illiberal group within a society? Professor Landesman presents a political theory that arises from recognizing and acknowledging non-state actors. The state, he argues, should foster tolerance and what he terms the "self-directed life." This theory goes beyond basic individualism theories that tend to trap non-state governance discussions.

This conference allowed scholars and legal minds to begin exploring issues that are both relevant and extremely important. Despite the relative recency of this field and the concomitant lack of understanding, we might yet be in a position to come to some agreement regarding the functional outcomes affected by non-state actors and an appropriate set of principles that can guide the activities of those organizations, as well as the state's reactions to those activities. Although discussion and analysis produce far more questions than answers, we believe that a critical first step was taken. While many participants—frankly—left the conference not agreeing as to the definition of non-state governance, unanimity was reached as to its existence. Whether this is akin to Justice Powell's observation regarding pornography—"I know it when I see it"<sup>7</sup>—remains an open question. What is not an open question is a principled agreement among a broad range of leading thinkers that non-state governance is a living, breathing entity.

When we undertook to organize this conference, we were met by two competing (and paradoxical) responses: "How do you convene a conference addressing an undefined issue" and "of course, I would be delighted to attend." We welcomed—actually encouraged—the healthy skepticism articulated by the participants, for it resonated with our fundamental belief: yes, non-state governance exist; no, we are not sure how to define it.

It is our hope that this conference—from which we enormously benefitted—will be the first of many to grapple with this extraordinarily complex issue. It is clear that in the contemporary world of reduced government resources, non-state governance has an increasingly vital role to play in the daily lives of citizens. How to define the term remains undecided; to understand its significance and centrality is essential.

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<sup>7</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

## NON-STATE GOVERNANCE

Michael W. McConnell\*

Non-state governance is a term shot through with paradox and illusion. From one point of view, there is no such thing. If we define the state as an omniscient sovereign, then only the state truly governs: any space that may be reserved for non-state entities to control their own affairs is itself a product of state action, a decision by the state to allow individuals to make binding contracts, to form churches and other associations, and so forth. From this point of view, we might argue normatively for more autonomy for various forms of subordinate association, but this is simply arguing for a particular approach to state governance while leaving room for private ordering.

This way of thinking is encouraged—if not demanded—by a common understanding of classical liberal theory and by the particular forms of American constitutionalism, which are organized around the idea of state action and limited government. Under Lockean liberal theory, the state has a monopoly over the legitimate use of force to punish transgressions against private rights or the public weal. Our Constitution authorizes the national government to regulate only matters within its enumerated powers, and the rest are left to subordinate entities called states, or to the people. Only government—federal, state, and local—is constitutionally compelled to act in accordance with dictates of equal protection of the law, due process, and democracy.

In the private sphere, we are free to be partial and to be arbitrary, and to adopt nondemocratic forms of governance, unless the legislature has passed laws restricting that natural freedom. And in some cases, which we denominate by terms like “privacy,” “freedom of association,” “free exercise,” and the like, the government may not abridge that natural freedom of private groups and individuals to be partial and arbitrary. Anyone brought up to think about social affairs and governance in our society will be inclined to think in this way—in terms of the dualism between government and the private sphere.

But from another point of view, this dualism is artificial and even silly. As a matter of fact and history, non-state entities regularly exercise authority and discipline—call it “governance”—over both members and non-members, often without their consent, at least in particular cases. Just ask a child who has been grounded for the weekend or forced to do his homework; a worker who is forced to contribute to a union-supported political campaign he abhors; a diamond merchant who follows the rules of his trade; a non-Indian who gets into a legal dispute on a

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reservation; a student who wants to exercise free speech on a modern American campus; or a Catholic or a Mormon who has been excommunicated for heresy.

These are certainly exercises of power by entities other than the state. And while a positivist might say they all are the product of state action in a sense, that observation is more a truism than a truth.

Let us take a look at history.

After the collapse of imperial Rome, from at least the time of Pope Gelasius, standard legal thinking in Western Europe was based on the theory of Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal, sacred and secular, church and state.<sup>1</sup> These spheres were undeniably separate, and not because the state chose to make them so.

During the long centuries of the Middle Ages, church and state struggled for dominance. Sometimes the Church got the upper hand, as when priests were exempted from civil and criminal jurisdiction of the state,<sup>2</sup> or when Henry II, one of the most powerful kings in England's history, was forced to strip and submit to flogging by priests for his official murder of Thomas Becket.<sup>3</sup> Sometimes the state got the upper hand, as when kings won the power to name bishops,<sup>4</sup> or when the kings of France captured the papacy during the so-called Babylonian Captivity.<sup>5</sup> But mostly there was struggle.

Take also the example of the law merchant, in which merchants and guilds developed their own sets of rules and enforcement mechanisms, often differing in important ways from the common law.<sup>6</sup> When Lord Mansfield brought the *lex mercatoria* into the common law of England, this was one of the first official acts of state recognition of the authority of non-state governance.<sup>7</sup>

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<sup>1</sup> See Martin Luther, *Temporal Authority: To What Extent It Should Be Obeyed*, in LUTHER'S WORKS 75, 81–129 (Walther I. Brandt ed. & J.J. Schindel trans., 1962) (1523); Brian Tierney, *Religious Rights: A Historical Perspective*, in RELIGIOUS LIBERTY IN WESTERN THOUGHT 29, 34 (Noel B. Reynolds & W. Cole Durham, Jr., eds., 1996); Robert Joseph Renaud & Lael Daniel Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. KY. L. REV. 67, 67–69 (2008).

<sup>2</sup> See *St. Thomas Becket*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.search.eb.com/eb/article-9014041> (last visited Jan. 27, 2010).

<sup>3</sup> Cf. *Henry II*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.search.eb.com.tproxy01.lib.utah.edu/eb/article-9040020> (last visited Jan. 27, 2010).

<sup>4</sup> See *Investiture Controversy*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.search.eb.com.tproxy01.lib.utah.edu/eb/article-9042671> (last visited Jan. 27, 2010).

<sup>5</sup> See *Roman Catholicism: Babylonian Captivity*, ENCYCLOPAEDIA BRITANNICA ONLINE, <http://www.search.eb.com/eb/article-257692> (last visited Jan. 27, 2010).

<sup>6</sup> See generally J. H. Baker, *The Law Merchant and the Common Law*, 38 CAMBRIDGE L.J. 295 (1979) (analyzing the history and roles of law merchants in common law courts).

<sup>7</sup> See generally S. Todd Lowry, *Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century*, 7 J. ECON. ISSUES 605 (1973) (examining eighteenth-century law and economics as conceived by Mansfield).

Or take a field even older than church and state, even older than guilds and merchants: the family. Fathers and mothers, patriarchs and matriarchs, have been exercising power over non-volunteers since the dawn of time. Of course, the state interferes with families sometimes, for good or for ill. But who would say that familial authority is simply delegated from the state?

From this point of view, the government is only one of a bewildering array of overlapping and competing authorities. So, when we talk of non-state governance, some will say we are talking of nothing, and some will say we are talking of everything. Precision will no doubt prove difficult in describing such a complex and amorphous concept, but let me suggest that the subject has to do with collective entities that share all, or nearly all, of these characteristics:

- Entry is not entirely voluntary;
- Exit is either not permitted or is very costly;
- The entity enacts its own rules; and

The entity can discipline infractions of those rules. Some institutions of non-state governance are mostly good, some are mostly bad, and some of them are debatable. But it is safe to say that none of them could survive without some ability to be autonomous and, in particular, to govern themselves in a way that, if it were done by the government, would violate the norms of impartiality and non-arbitrariness, as well as that of democratic control.

The fundamental questions that arise are these, among others:

1. To what extent does liberal theory demand that non-state governing entities conform to the principles of impartiality and non-arbitrariness reflected in the norms of equal protection and due process that we apply to state governance?
2. To what extent does liberal theory demand that some or all non-state entities be permitted to be autonomous, including being partial, arbitrary, and undemocratic?
3. Should we answer those questions differently when we speak of voluntary members, non-voluntary members, and outsiders?
4. Is there a basis for differentiating among non-state groups that transcends our own personal or ideological approval or disapproval of these groups?

As for the question of whether this is even a real subject: put me in the camp that thinks it is.

# TOWARDS A JURISPRUDENCE OF HYBRIDITY

Paul Schiff Berman\*

## INTRODUCTION

Debates about non-state normative communities often devolve into clashes between two polarized positions. On the one hand, we see the desire to eradicate difference through forced obeisance to a single overarching state norm. On the other, we see claims of complete autonomy for non-state lawmaking, as if such non-state communities could plausibly exist in isolation from the communities that both surround and intersect them.

Neither of these positions takes seriously the importance of engagement and dialogue across difference. Navigating difference doesn't require either assimilation or separation; it requires negotiation. Legal pluralists have long charted this process of negotiation,<sup>1</sup> noting, for example, that colonial legal

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<sup>1</sup> See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) ("[N]ot all the phenomena related to law and not all that are lawlike have their source in government."). For further discussions of legal pluralism, see generally BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 85–98 (2d ed. 2002); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002); Keebet von Benda-Beckmann, *Transnational Dimensions of Legal Pluralism*, in BEGEGNUNG UND KONFLIKT EINE KULTURANTHROPOLOGISCHE BESTANDSAUFNAHME 33 (2001); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 27–34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. IN L., POL. & SOC'Y (SPECIAL ISSUE) 149 (2008); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y

systems did not eradicate indigenous systems (even when they tried to).<sup>2</sup> Instead, there was a layering and intermingling of systems. And, just as important, actors strategically used the variety of fora to gain leverage and make their voices heard.

But legal pluralists have usually stopped at the descriptive. Thus, while they have catalogued the myriad ways in which state and non-state lawmaking interact, they have not taken the next step and attempted to articulate the normative jurisprudence that might flow from these observations. After all, it is one thing to say that as a descriptive matter interactions among legal and quasi-legal systems operating in the same social field inevitably occur; it is quite another to argue (as I will attempt to do here) that such messy interactivity is actually a potentially *desirable* feature to build into legal and political systems.

I call this messy interactivity a jurisprudence of hybridity, and I argue that such a jurisprudence may actually be preferable to either a hierarchical jurisprudence whereby the hegemonic state imposes a universal norm, or a separatist jurisprudence whereby non-state communities attempt to maintain complete autonomy.<sup>3</sup> Why do I prefer a jurisprudence of hybridity? First, such a jurisprudence acknowledges the reality that people hold multiple community affiliations, rather than dissolving that multiplicity into either universality or separatism. Second, developing procedural mechanisms, institutions, or discursive practices that acknowledge hybridity helps to ensure that multiple communities are at least taken seriously and given a voice. Third, providing space for multiple communities may result in better substantive decisions because there is more space for variations and experimentation.<sup>4</sup>

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REV. 869, 870 (1988); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973); Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT'L L. 345 (2005); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296 (2000); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

<sup>2</sup> See, e.g., Leopold Pospisil, *Modern and Traditional Administration of Justice in New Guinea*, 19 J. LEGAL PLURALISM 93 (1981) (examining the change from a traditional to a modern legal system in New Guinea).

<sup>3</sup> This is a position I advance at greater length in Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

<sup>4</sup> In focusing on the pluralist opportunities inherent in jurisdictional redundancy, I echo the insights of Robert Cover. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). Although his essay was focused particularly on the variety of official law pronouncers in the U.S. federal system, Cover celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions. Such benefits included greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation. And though Cover acknowledged that it might seem perverse “to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict,” he nevertheless argued that we should “embrace” a “system that permits tensions and conflicts of the social order” to be played out in the jurisdictional

Of course, acknowledging non-state community affiliations does not necessarily mean that they are the *same* as state communities. Most important, states usually (though not always) possess greater access to coercive power such as armies, police officers, and the like. Thus, it will often be agents of the state who determine the parameters of accommodation to non-state norms, so one should not naively assume that there is no hierarchy here.

Moreover, building mechanisms for acknowledging and accommodating multiple community affiliations does not mean states should always *defer* to those communities. For example, some community norms are sufficiently repressive, violent, and/or profoundly illiberal that they might not be followed. I argue here only that such norms should be *considered*, not that they should always win. But if they are considered, then when a decision maker refuses to defer, that decision maker will at least be required to justify why deference is impossible. As we will see, requiring such justifications acknowledges and respects community norms even when they don't win and forces the decision maker to offer a compelling justification on the other side of the ledger to explain why deference is impossible. It seems to me that this process of acknowledgment and justification is a good thing.

In this Essay, I start by referencing work of sociologists and political theorists analyzing interpersonal and societal communication, and I contrast a vision whereby difference is overcome by assuming commonality with one in which "otherness" is seen as an inevitable part of human interaction. I argue that it is unwise to attempt to "overcome" difference by trying to forge sameness. Yet, it is equally unwise, in a globally integrated world, to expect that walls of separation (either literal or conceptual) will be effective. Thus, we should aspire to a state of unassimilated otherness in an integrated community. In such a state, we seek communication across difference rather than annihilation of difference.

Then, I turn to law and survey three different procedural mechanisms that are or could be examples of a jurisprudence of hybridity with regard to non-state communities. First, I examine the idea of building margins of appreciation into constitutional jurisprudence to allow some scope for local and non-state community variation. Second, I explore the possibility that limited autonomy or participation regimes can help ensure some scope for non-state norms. And third, I suggest that thinking of non-state norms through the prism of conflict of laws doctrines—jurisdiction, choice of law, and recognition of judgments—might be preferable to the more mechanistic ways in which clashes between state and non-state norms are often judged.

The excruciatingly difficult case-by-case questions concerning how much to defer and how much to impose are probably impossible to answer definitively and are, at any rate, beyond the scope of this Essay. The crucial antecedent point, however, is that although people may never reach agreement on *norms*, they may

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structure of the system. *Id.* at 682. Thus, Cover's pluralism, though here focused on U.S. federalism, can be said to include the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and non-state entities in whatever context they arise.

at least acquiesce in *procedures, institutions, or practices* that take hybridity seriously, rather than ignoring it through assertions of either universalist state imperatives or inflexible conceptions of non-state autonomy. A jurisprudence of hybridity, in contrast, seeks to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented, and therefore a focus on hybridity may at times be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult. And again, the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations.

Of course, one thing that a jurisprudence of hybridity will *not* do is provide an authoritative metric for determining which norms should prevail in this messy hybrid world. Nor does it answer the question of who gets to decide. Indeed, pluralism fundamentally challenges both the positivist and natural rights-based assumption that there can ever be a single answer to such questions. For example, as noted previously, the state's efforts to squelch a non-state community are likely only to be partial, so the state's assertion of its own trumping authority is not the end of the debate, but only one gambit in an ongoing normative discourse that has no final resolution.<sup>5</sup> Likewise, there is no external position from which one could make a definitive statement as to who is authorized to make decisions in any given case. Rather, a statement of authority is itself inevitably open to contest. Power disparities matter, of course, and those who wield coercive force may be able to silence competing voices for a time. But even that sort of temporary silencing is rarely the end of the story, either. Thus, instead of the unitary answers assumed by universalism and separatism, a jurisprudence of hybridity is a "jurisgenerative" model<sup>6</sup> focusing on the creative interventions offered by various normative communities, drawing on a variety of normative sources in ongoing political, rhetorical, and legal iterations.<sup>7</sup>

At the same time, mechanisms, institutions, and practices of the sort discussed in this Essay require actors to at least be willing to take part in a common set of discursive forms. This is not as idealistic as it may at first appear. Indeed, as

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<sup>5</sup> Lauren Benton, *Making Order out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands*, 26 L. & SOC. INQUIRY 373, 375–76 (2001) (describing jurisdictional politics in seventeenth-century New Mexico and observing that, while "the crown made aggressive claims that royal authority and state law superseded other legal authorities," in reality, "[j]urisdictional disputes became not just commonplace but a defining feature of the legal order").

<sup>6</sup> See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–15 (1983).

<sup>7</sup> Cf. SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* 49 (2006) ("Whereas natural right philosophies assume that the principles that undergird democratic politics are impervious to transformative acts of popular collective will, and whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature, jurisgenerative politics is a model that permits us to think of creative interventions that mediate between universal norms and the will of democratic majorities.").

Jeremy Waldron has argued, “[t]he difficulties of inter-cultural or religious-secular dialogue are often exaggerated when we talk about the incommensurability of cultural frameworks and the impossibility of conversation without a common conceptual scheme. In fact, conversation between members of different cultural and religious communities is seldom a dialogue of the deaf . . . .”<sup>8</sup> Nevertheless, it is certainly true that some normative systems deny even this limited goal of mutual dialogue. Such systems would (correctly) recognize the liberal bias within the hybrid vision I explore here, and they may reject the vision on that basis. For example, although abortion rights and antiabortion activists could, despite their differences, be said to share a willingness to engage in a common practice of constitutional adjudication, those bombing abortion clinics are not similarly willing; accordingly, there may not be any way to accommodate such actors even within a more pluralist, hybrid framework. Likewise, communities that refuse to allow even the participation of particular subgroups, such as women or minorities, may be difficult to include within the pluralist vision I have in mind. Of course, these groups are undeniably important forces to recognize and take account of as a descriptive matter. But from a normative perspective, an embrace of a jurisprudence of hybridity need not commit one to a worldview free from judgment, where all positions are equivalently embraced. Thus, I argue not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more likely to expand the range of voices heard or considered, thereby creating more opportunities to forge a common social space than either statism or separatism.<sup>9</sup>

#### I. SELF, OTHER, AND THE NEGOTIATION OF DIFFERENCE

Sociological studies of communication often start from the idea that interpersonal interaction requires both parties in an encounter to believe (or at least assume) that the other is not truly other at all.<sup>10</sup> According to this view, most associated with Alfred Schutz,<sup>11</sup> differences in individual perspectives are overcome only if each party tacitly believes that he/she could effectively trade places with the other. As Schutz describes it, “I am able to understand other

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<sup>8</sup> Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L., PHIL. & CULTURE 107, 112 (2007).

<sup>9</sup> This focus on jurisgenerative structures, rather than on the necessary inclusion of, or deference to, all points of view, may differentiate a jurisprudence of hybridity from multiculturalism.

<sup>10</sup> My discussion here relies heavily on Z.D. Gurevitch, *The Other Side of Dialogue: On Making the Other Strange and the Experience of Otherness*, 93 AM. J. SOC. 1179 (1988).

<sup>11</sup> See generally ALFRED SCHUTZ, ON PHENOMENOLOGY AND SOCIAL RELATIONS (Helmut R. Wagner ed., 1970) [hereinafter SCHUTZ, ON PHENOMENOLOGY]; ALFRED SCHUTZ, COLLECTED PAPERS I: THE PROBLEM OF SOCIAL REALITY (Maurice Natanson ed., 4th ed. 1973) [hereinafter SCHUTZ, PROBLEM]; Alfred Schutz, *The Stranger: An Essay in Social Psychology*, 49 AM. J. SOC. 499 (1944).

people's acts only if I can imagine that I myself would perform analogous acts if I were in the same situation . . . ."<sup>12</sup> Thus, differences in perspective are reduced to differences in situation. Any possibly more fundamental differences are suppressed to facilitate dialogue.

As a result, the deliberate "assuming away" of the unfamiliar is seen as a constant part of everyday life. The unfamiliar is relegated to the category of "strange," and "strangeness" necessarily is placed elsewhere, somewhere other than the interaction at hand.<sup>13</sup> Moreover, Harold Garfinkel and other ethnomethodologists have argued that individuals do not simply passively maintain these assumptions, but are constantly engaged in a joint enterprise aimed at sustaining this familiarity.<sup>14</sup> In all of these studies, the emphasis is on "the human production of common worlds of meaning as the only axis on which dialogue rotates."<sup>15</sup>

But is that all there is to the experience of the other? Is it really imperative constantly to assume that our fellow human beings are fundamentally identical to us? After all, as Z.D. Gurevitch has argued, "[u]nder this principle, if a dialogue is to take place, strangeness as a phenomenon of everyday interaction must be considered negatively, namely, as that part of an encounter that must be constantly 'assumed away' by the participants."<sup>16</sup> Thus, we are left with a world in which people are classified either as familiar or as strangers. And, even more problematic, these studies suggest that it will be simply impossible to bridge the communication gap with those deemed strangers. Yet, as Georg Simmel noted long ago, the stranger is never truly distant,<sup>17</sup> so there will need to be some way of bridging gaps short of assuming away strangeness altogether.

To seek an alternative formulation, we might turn to political philosophy. Hannah Arendt, for example, offers a different way of conceptualizing the encounter with the stranger. Instead of assuming commonality, she seeks, in "Understanding and Politics," the quality that "makes it bearable to live with other people, strangers forever, in the same world, and makes it possible for them to bear with us."<sup>18</sup> Note that for Arendt the task is how to "bear with" strangers, even

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<sup>12</sup> SCHUTZ, ON PHENOMENOLOGY, *supra* note 11, at 181.

<sup>13</sup> See Gurevitch, *supra* note 10, at 1180 (summarizing arguments in SCHUTZ, PROBLEM, *supra* note 11).

<sup>14</sup> See Harold Garfinkel, *Studies of the Routine Grounds of Everyday Activities*, in STUDIES IN SOCIAL INTERACTION 1, 3 (David Sudnow ed., 1972).

<sup>15</sup> Gurevitch, *supra* note 10, at 1180.

<sup>16</sup> *Id.* at 1181–82.

<sup>17</sup> See GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 402–08 (Kurt H. Wolff ed. & trans., 1950) (describing the phenomenon of how a stranger, who appears distant, is actually very near).

<sup>18</sup> HANNAH ARENDT, *Understanding and Politics (The Difficulties of Understanding)*, in ESSAYS IN UNDERSTANDING 307, 322 (Jerome Kohn ed., 1994).



while recognizing that they will forever be strange.<sup>19</sup> Significantly, this task is very different from the more intimate communication relationships studied in the sociological literature discussed above. After all, if strangers are “forever strange,” their strangeness cannot be overcome through psychological assumptions; a different strategy is necessary.

Arendt’s strategy for bearing with strangers is more than just mutual indifference and more than just toleration. It “involves a mental capacity appropriate for an active relation to that which is distant,”<sup>20</sup> which Arendt locates in King Solomon’s gift of the “understanding heart.”<sup>21</sup> Understanding, according to Arendt, “is the specifically human way of being alive; for every single person needs to be reconciled to a world into which he was born a stranger and in which, to the extent of his distinct uniqueness, he always remains a stranger.”<sup>22</sup> And what does “understanding” entail for Arendt? This is a bit difficult to pin down, but she makes clear that it is not gained through direct experience of the other, and it is not just knowledge of the other.<sup>23</sup> Instead, understanding starts from the individual situated apart from others. Thus, instead of “feeling your pain,” understanding involves determining what aspects of the pain people feel has to do with politics, and what politics can do to resolve our common dilemmas. Moreover, “[u]nderstanding can be challenged and is compelled to respond to an alternative argument or interpretation.”<sup>24</sup> In short, understanding in Arendt’s formulation looks a lot less like empathy and a lot more like judging.<sup>25</sup>

This more distanced conception of the encounter with the stranger appears to have something in common with Iris M. Young’s vision of “unassimilated otherness,” which she posits as the relation among people in the ideal “unoppressive city.”<sup>26</sup> Young envisions ideal city life as the “‘being-together’ of strangers.”<sup>27</sup> These strangers may remain strangers and continue to “experience each other as other.”<sup>28</sup> Indeed, they do not necessarily seek an overall group identification and loyalty. Yet, they are open to “unassimilated otherness.”<sup>29</sup> They belong to various distinct groups or cultures and are constantly interacting with

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<sup>19</sup> In focusing on Arendt’s idea of “bearing with strangers,” I draw from the analysis in Phillip Hansen, *Hannah Arendt and Bearing with Strangers*, 3 CONTEMP. POL. THEORY 3 (2004).

<sup>20</sup> *Id.* at 3.

<sup>21</sup> ARENDT, *supra* note 18, at 322.

<sup>22</sup> *Id.* at 308.

<sup>23</sup> *See id.* at 313.

<sup>24</sup> Jean Bethke Elshtain, *Judging Rightly*, FIRST THINGS 49, 49 (November 1994) (reviewing ARENDT, *supra* note 18).

<sup>25</sup> *See* ARENDT, *supra* note 18, at 313.

<sup>26</sup> *See* Iris Marion Young, *The Ideal of Community and the Politics of Difference*, 12 SOC. THEORY & PRACTICE 1, reprinted in FEMINISM/POSTMODERNISM 300, 317, 319 (Linda J. Nicholson ed., 1990) (“Our political ideal is the unoppressive city.”).

<sup>27</sup> *Id.* at 318.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 319.

other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community,<sup>30</sup> one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another.<sup>31</sup> In a city's public spaces, Young argues, we see glimpses of this ideal: "The city consists in a great diversity of people and groups, with a multitude of subcultures and differentiated activities and functions, whose lives and movements mingle and overlap in public spaces."<sup>32</sup> In this vision, there can be community without sameness, shifting affiliations without ostracism.

This discussion does not, of course, even scratch the surface concerning the myriad ideas and writings available about the encounter between Self and Other. Yet, for our purposes, we can at least establish one possible dichotomy that might be useful. At the most general level, the analyses discussed above suggest that, in responding to the other, we can pursue at least two possible strategies, which are very different from each other. We can seek commonality and assume away perceived difference, or we can acknowledge entrenched difference and attempt to bridge gaps.

Each of these strategies has its analogue in law. We could assume that in the encounter with other communities our choices are limited to either full commonality or complete separation. If so, then in the consideration of non-state community norms we end up with a debate among the statist and separatist positions. And we would be forced simply to draw lines between the two. But the alternative, represented here by Arendt and Young, posits a hybrid reality. Here, the idea is to build legal structures that foster dialogue across difference, negotiation without assimilation. Is such a hybrid jurisprudence possible? Let us see.

## II. A JURISPRUDENCE OF HYBRIDITY

Now we turn to explore three possible mechanisms that might form components of a jurisprudence of hybridity. Each of these mechanisms is premised on the idea of multiple community affiliation. Therefore, instead of insisting that one affiliation necessarily trumps the others, we seek ways of fostering dialogue and mutual accommodation if possible. And if accommodation is not possible, a

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<sup>30</sup> Young resists using the word "community" because of the "urge to unity" the term conveys, but acknowledges that "[i]n the end it may be a matter of stipulation whether one chooses to call . . . [her vision] 'community.'" *Id.* at 320; *see also* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1049 (1996) ("Unlike Young, I do not cede the term community to those who evoke the romance of togetherness.").

<sup>31</sup> *See* Young, *supra* note 26, at 319 (positing that a group of strangers living side by side "instantiates social relations as difference in the sense of an understanding of groups and cultures that are different, with exchanging and overlapping interactions that do not issue in community, yet which prevent them from being outside of one another").

<sup>32</sup> *Id.*

jurisprudence of hybridity at least requires an explanation of why it is impossible to defer.

### A. *Margins of Appreciation*

One mechanism of accommodation can be drawn from the jurisprudence of the European Court of Human Rights (ECHR): the oft-discussed “margin of appreciation” doctrine.<sup>33</sup> The idea here is to strike a balance between deference to national courts and legislators on the one hand, and maintaining “European supervision” that “empower[s the ECHR] to give the final ruling” on whether a challenged practice is compatible with the Convention, on the other.<sup>34</sup> Thus, the margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions to accommodate local variation. How big that margin is depends on a number of factors including, for example, the degree of consensus among the member states. Thus, in a case involving parental rights of transsexuals, the ECHR noted that because there was as yet no common European standard and “generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.”<sup>35</sup>

Affording this sort of variable margin of appreciation usefully accommodates a limited range of pluralism. It does not permit domestic courts to fully ignore the supranational pronouncement (though domestic courts have sometimes asserted greater independence<sup>36</sup>). Nevertheless, it does allow space for local variation, particularly when the law is in transition or when no consensus exists among member states on a given issue. Moreover, by framing the inquiry as one of local consensus, the margin of appreciation doctrine disciplines the ECHR and forces it to move incrementally, pushing towards consensus without running too far ahead of it. Finally, the margin of appreciation functions as a signaling mechanism through which “the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question.”<sup>37</sup> And,

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<sup>33</sup> A particular useful, succinct summary can be found in Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316–17 (1997). My discussion here largely tracks theirs.

<sup>34</sup> *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 276 (1979).

<sup>35</sup> *X v. United Kingdom*, 24 Eur. Ct. H.R. 143, 169 (1997); *see also* *Otto-Preminger Inst. v. Austria*, 19 Eur. Ct. H.R. 34 (ser. A) at 58 (1995) (finding that the lack of a uniform European conception of rights to freedom of expression “directed against the religious feelings of others” dictates a wider margin of appreciation).

<sup>36</sup> *See, e.g.*, Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 196–97 (2008) (discussing the interaction between the ECHR and state constitutional courts).

<sup>37</sup> Helfer & Slaughter, *supra* note 33, at 317 (citing Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 141 (1993)) (noting that the Convention “puts other less progressive states on notice that the laws may no longer be compatible with the Convention if their nationals were to

of course, there is reverse signaling as well, because domestic states, by their societal evolution away from consensus, effectively maintain space for local variation. As Laurence Helfer and Anne-Marie Slaughter have observed, “The conjunction of the margin of appreciation doctrine and the consensus inquiry thus permits the ECHR to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.”<sup>38</sup> A similar sort of interaction could be established by a constitutional court adopting some form of the classic concept/conception distinction<sup>39</sup> with regard to the adoption of norms by other actors. Thus, an entity such as the ECHR could, for example, articulate a particular concept of rights while recognizing that the way this right is implemented is subject to various alternative conceptions. Thus, legal regimes could usefully adopt margins of appreciation with regard to non-state community norms. Such a flexible approach might allow communities more leeway in trying to make statements of rights work within a particularized community context.

### *B. Limited Autonomy Regimes*

As noted above, interactions between state and non-state law pose a particular kind of margin of appreciation issue. Here, as with the supranational/national dialectic, we have two different normative orders that can neither ignore nor eliminate the other. Thus, the question becomes what mechanisms of pluralism can be created to mediate the conflicts? This problem classically arises in the context of religion or ethnicity, though it is in no way limited to such communities. Nevertheless, an overview of mechanisms for managing religious and ethnic (or linguistic-group) hybridity may shed light on the possibility of building institutions to address non-state normative communities in a variety of settings.

In a useful summary, Henry Steiner has delineated three distinct types of autonomy regime.<sup>40</sup> The first allows a territorially concentrated ethnic, religious, or

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challenge them.”). For an example of this type of signaling, see J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 81 (2d ed. 1993) (1986) (interpreting the ECHR’s statement in *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986), that “[t]he need for appropriate legal measures [to protect transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments” as a “strong hint that while British practice currently satisfied [the Convention], the Court’s duty to interpret the Convention as a living instrument may lead it to a different conclusion in the future.”).

<sup>38</sup> Helfer & Slaughter, *supra* note 33, at 317.

<sup>39</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 71 (1986) (discussing the difference between “concept” and “conception” as “a contrast between levels of abstraction at which the interpretation of the practice can be studied”).

<sup>40</sup> Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1541–42 (1991) (identifying three different types of autonomy regimes for ethnic minorities including a power-sharing regime, a territorial regime, and an autonomy regime).

linguistic minority group limited autonomy within the nation-state.<sup>41</sup> The precise contours of this autonomy can vary considerably from situation to situation. However, such schemes can include the creation of regional elective governments, command of local police, control over natural resources, management of regional schools, and so on.<sup>42</sup> With regard to language, communities may be empowered to create language rights within their regions.<sup>43</sup>

Of course, non-state normative communities are often dispersed throughout a state, making it difficult to create specific local zones of autonomy.<sup>44</sup> In such cases, other potential autonomy regimes may be more effective.<sup>45</sup> A second possibility, therefore, involves direct power-sharing arrangements.<sup>46</sup> “Such regimes carve up a state’s population in ethnic terms to assure one or several ethnic groups of a particular form of participation in governance or economic opportunities.”<sup>47</sup> Thus, we may see provisions that set aside a fixed number of legislative seats, executive branch positions, or judicial appointments to a particular religious or ethnic minority group.<sup>48</sup> In addition, legislators who are members of a particular minority group may be granted the ability to veto proposed measures adversely affecting that group.<sup>49</sup> Alternatively, states may enact rules requiring formal consultation

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<sup>41</sup> See, e.g., WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 156–59 (2001) (arguing that the creation of linguistically homogeneous, separate institutions for minority subgroups within a larger federal structure will foster the participation of minority groups in democracy by giving them the autonomy to control cultural policy).

<sup>42</sup> See Steiner, *supra* note 40, at 1542 (listing examples).

<sup>43</sup> See, e.g., Wouter Pas, *A Dynamic Federalism Built on Static Principles: The Case of Belgium*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 157, 158–59 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) (“[I]n 1970, the Belgian State was divided into four territorial linguistic regions: The Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital, and the German-speaking region. . . . The authorities in each region may, in principle, only use the official language of that region in their dealings with citizens. In some municipalities, where a significant number of the inhabitants speak another language, special provisions were enacted to give individuals the right to continue to use their own language in their relations with the local authorities.”) (citation omitted).

<sup>44</sup> See, e.g., Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 744 (2006) (“Devolution to minority-run institutions will not help secure rights for disparate ethnic groups spread out over a nation’s territory . . .”).

<sup>45</sup> See *id.*

<sup>46</sup> See, e.g., Ivo D. Duchacek, *Federalist Responses to Ethnic Demands: An Overview*, in *FEDERALISM AND POLITICAL INTEGRATION* 59, 67, 71 (Daniel J. Elazar ed., 1979) (arguing that fostering democratic pluralism and an open political system is one way to meet ethnic demands); Arend Lijphart, *The Power-Sharing Approach*, in *CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES* 491 (J. Montville ed. 1990).

<sup>47</sup> Steiner, *supra* note 40, at 1541.

<sup>48</sup> *Id.* at 1541–42.

<sup>49</sup> *Id.*

before decisions are taken on issues that particularly impact minority communities.<sup>50</sup>

Finally, a third autonomy regime contemplates the reality that members of an ethnic community may invoke the idea of a personal law that is carried with the individual, regardless of territorial location. This personal law is often religious in character, and it reflects a primary identification with one's religious or ethnic group, rather than the territorially delimited community of the nation-state.<sup>51</sup> Accordingly, state law may seek to create what are essentially margins of appreciation to recognize forms of autonomy for these identities.<sup>52</sup> "Like power sharing, a personal law can provide an important degree of autonomy and cohesion even for minorities that are territorially dispersed."<sup>53</sup>

The question of accommodation to personal law is not a new one, nor is it limited to religious groups. In ancient Egypt, foreign merchants in commercial disputes were sometimes permitted to choose judges of their own nationality so foreigners could settle their dispute "in accordance with their own foreign laws and customs."<sup>54</sup> Greek city-states adopted similar rules.<sup>55</sup> Later, legal systems in England and continental Europe applied personal law to foreign litigants, judging many criminal and civil matters based not on the territorial location of the actors, but on their citizenship.<sup>56</sup> In the ninth century, for example, King Edgar allowed Danes to be judged by the laws of their homeland.<sup>57</sup> Likewise, William the Conqueror granted eleventh-century French immigrants the right to be judged by rules based on their national identity.<sup>58</sup> Foreign merchants trading under King John, in the twelfth and thirteenth centuries, were similarly governed by the law of their home communities.<sup>59</sup>

As noted previously, the relationship between state and personal law frequently arose in colonial settings where western legal systems were layered on top of the personal laws and customs of indigenous communities. Indeed, in the colonial context, margins of appreciation and other forms of accommodation were

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<sup>50</sup> *Id.* at 1542.

<sup>51</sup> See, e.g., Chibli Mallat, *On the Specificity of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 47 (2006) (contrasting the "personal model" with the "territorial model").

<sup>52</sup> Chibli Mallat calls this scheme "'communitarian' (or personal) federalism." *Id.* at 51.

<sup>53</sup> Steiner, *supra* note 40, at 1542.

<sup>54</sup> COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 193 (1911).

<sup>55</sup> See DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 220, 222–24 (H. H. Scullard ed., 1978) (noting that the Athenian legal system provided "xenodikai" or "judges of aliens" to handle an influx of cases involving foreign citizens in the first half of the fifth century).

<sup>56</sup> See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 7 (1994).

<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.* at 12–13.

often invoked as governing legal principles. For example, English courts were empowered to exercise the jurisdiction of the English courts of law and chancery only “as far as circumstances [would] admit.”<sup>60</sup> Likewise, with respect to personal laws, the Straits Settlements Charter of 1855 allowed the courts of judicature to exercise jurisdiction as an ecclesiastical court “so far as the religions, manners and customs of the inhabitants admit.”<sup>61</sup> “By the end of the colonial era, indigenous law was recognized as law proper by all the colonial powers.”<sup>62</sup>

Today, particularly in countries with a large minority Muslim population, many states maintain space for personal law within a nominally Westphalian legal structure. These nation-states—ranging from Canada to the United Kingdom to Egypt to India to Singapore—recognize parallel civil and religious legal systems, often with their own separate courts.<sup>63</sup> And civil legal authorities are frequently called on to determine the margin of appreciation to be given to such personal law. For example, the Indian Supreme Court has famously attempted to bridge secular and Islamic law in two decisions involving Muslim women’s right to maintenance after divorce.<sup>64</sup> At the same time, issues arise concerning the extent to which members of a particular religious or ethnic community can opt *out* of their personal law and adopt the law of the nation-state. For example, in 1988 a Sri Lankan court decided that a Muslim couple could adopt a child according to state regulation but could not confer inheritance rights on their adopted child because Islamic Law did

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<sup>60</sup> *Siak v. Drashid*, [1946] 1 MALAYAN L.J. 147, 152 (App. Ct. Sept. 13, 1941).

<sup>61</sup> ROLAND ST. JOHN BRADDELL, *THE LAW OF THE STRAITS SETTLEMENTS: A COMMENTARY* 17 (3d ed. 1982). Interestingly, in the era prior to the Age of Empire, English courts would only defer to indigenous laws of Christian communities. For example, in *Calvin’s Case*, 7 Co. Rep. 1 a, [18a] (1608), *reprinted in* 77 Eng. Rep. 377, 398 (1932), Lord Coke stated that if a King conquers a Christian kingdom, “he may, at his pleasure, alter the laws of the kingdom, but until he [does] so the ancient laws . . . remain. But if a Christian king should conquer the kingdom of an infidel, and bring them under his subjugation, [then] ipso facto, the laws of the infidels are abrogated, for that they are not only against Christianity but against the law of God and of nature, contained in the decalogue . . . .” However, by at least 1774, that distinction appears to have fallen into disrepute. *See, e.g.*, *Campbell v. Hall*, (1774) 98 Eng. Rep. 848 (K.B.) at 882 (“Don’t quote the distinction [between Christians and non-Christians] for the honour of my Lord Coke.”).

<sup>62</sup> DAVID PEARL, *INTERPERSONAL CONFLICT OF LAWS IN INDIA, PAKISTAN, AND BANGLADESH* 26 (1981). Pearl excludes Germany and notes that the recognition of indigenous law created an internal conflicts of law regime, which seems implicitly to recognize some sort of autonomous legitimacy for indigenous practices.

<sup>63</sup> *See* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1984 (1995); DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes: Sharia Gains Foothold in Ontario*, WASH. POST, Apr. 28, 2004, at A14 (discussing an Islamic Court of Civil Justice in Ontario, staffed by arbitrators trained in both Sharia and Canadian civil law).

<sup>64</sup> *See* *Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, 3973; *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844 (India).

not recognize adoption.<sup>65</sup> Even outside of the context of Islamic law, the United States Supreme Court has at times deferred to the independent parallel courts maintained by Indian populations located within U.S. territorial borders.<sup>66</sup> And beyond judicial bodies, we will increasingly see other governmental entities, such as banking regulators, forced to oversee forms of financing that conform to religious principles.<sup>67</sup> These sorts of negotiations, like all the limited autonomy regimes surveyed in this section, reflect official recognition of essential hybridity that the state cannot wish away.

### C. *Conflicts of Laws*

Because non-state lawmaking is not usually conceived of as law, we do not usually think of clashes between state and non-state law through the prism of conflicts of law jurisprudence. But we could. Indeed, the three classic legal doctrines often grouped together under the rubric of conflict of laws—jurisdiction, choice of law, and judgment recognition—are specifically meant to manage hybrid legal spaces. However, although these doctrines are where one would most expect to see creative innovations springing forth to address hybridity, they have only infrequently been used in this way. Thus, it may be helpful to consider how communities could use choice-of-law and judgment recognition doctrines to manage the reality of multiple community affiliation.

To illustrate, I explore two well-known cases in which the U.S. Supreme Court was forced to determine how state-based lawmaking would interact with the norms of a religious community. First, in *Bob Jones University v. United States*, the Court addressed an IRS decision to deny tax-exempt status to a religious school that interpreted Christian scriptures to forbid “interracial dating and marriage.”<sup>68</sup> Second, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the question was whether a general state statute forbidding certain narcotics should be applied to an Indian tribe’s religious practice that included the use of peyote.<sup>69</sup> To my mind, viewing these conflicts as choice-of-law questions makes the analytical framework more coherent (though, it should be noted, no less difficult).

Turning to *Bob Jones*, the Internal Revenue Service had interpreted Section 501(c)(3) of the Internal Revenue Code, which gives tax-exempt status to qualifying charitable institutions, to apply to schools only if such schools have a “racially nondiscriminatory policy as to students.”<sup>70</sup> Accordingly, the Service denied tax exemption to Bob Jones University, which had not admitted blacks at

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<sup>65</sup> See, e.g., *Ghouse v. Ghouse*, (1988) 1 Sri L.R. 25, 28.

<sup>66</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71–72 (1978).

<sup>67</sup> See, e.g., Tavia Grant, *Sharia-Compliant Finance Is Increasingly Popular*, GLOBE & MAIL (Toronto), May 7, 2007, <https://secure.globeadvisor.com/servlet/ArticleNews/story/RTGAM/20070507/wrislam07>.

<sup>68</sup> 461 U.S. 574, 580–82 (1983).

<sup>69</sup> 494 U.S. 872, 874 (1990).

<sup>70</sup> *Bob Jones*, 461 U.S. at 579.



all until 1971, and had admitted them thereafter but had forbidden interracial dating, interracial marriage, the espousal of violation of these prohibitions, and membership in groups that advocated interracial marriage.<sup>71</sup> Crucial to the case was the fact that the university grounded its rule not on racial attitudes, but on Biblical scripture. The school therefore considered the exclusion of interracial dating to be a principal tenet of its religious community.<sup>72</sup> Nevertheless, although the text of section 501(c)(3) did not speak to racial discrimination at all, the Supreme Court upheld the IRS determination, finding the service's interpretation of the code provision to be permissible.<sup>73</sup>

Robert Cover, in his article *Nomos and Narrative*, has famously criticized the reasoning of the *Bob Jones* decision, even while agreeing with the Court's result. According to Cover, the Court assumed "a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional."<sup>74</sup> In particular, Cover argued that, by grounding its decision on an interpretation of the Internal Revenue Code, the Court had sidestepped the crucial constitutional question of whether Congress could grant tax exemptions to schools that discriminated on the basis of race.<sup>75</sup> This was a problem for Cover because he believed that if a state legal authority were going to "kill off" the competing normative commitment of an alternative community, it should do so based on a profound normative commitment of its own.<sup>76</sup> By avoiding the constitutional question, Cover complained, the Court had disserved both the religious community—whose normative commitments would be placed at the mercy of mere public policy judgments—and disserved racial minorities—who "deserved a constitutional commitment to avoiding public subsidization of racism."<sup>77</sup>

In contrast, had the clash between the university's religious rule and the IRS code, or between the religious rule and the United States Constitution, been viewed as a choice-of-law decision, two aspects of the case would have been clarified. First, the Court would have analyzed and defined the relevant community affiliations at stake. Second, the Court would have been forced to grapple with the strength of its commitment to the principle of nondiscrimination, just as Cover urged. As a result, instead of simply asserting federal law, a conflicts analysis encourages negotiation among the different norms advanced by different communities.

A more cosmopolitan and pluralist vision of conflict of laws recognizes that people and groups hold multiple community affiliations and takes those affiliations seriously. Thus, when a non-state legal practice is largely internal and primarily

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<sup>71</sup> *Id.* at 580–81.

<sup>72</sup> *Id.* at 580.

<sup>73</sup> *Id.* at 595.

<sup>74</sup> Cover, *supra* note 6, at 66.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 53–60.

<sup>77</sup> *Id.* at 67.

reflects individuals' affiliation with the non-state community, the practice should be given more leeway than when the state itself is part of the relevant affiliation. In this case, the issue at stake was a tax exemption, a quintessentially state matter. Indeed, Bob Jones University was asking for a particular benefit for charitable organizations that was contained in the United States tax code. Therefore, for these purposes the place of the university within the nation-state was the most salient tie, making application of the federal law more justifiable. In contrast, as we shall see, other non-state normative commitments do not implicate the nation-state so directly.

Moreover, even if the relevant community tie were largely with the religious community itself, certain norms might be held so strongly by the nation-state community that such norms would be applied *regardless* of the community affiliation. In choice-of-law analysis, this is usually called the public policy exception, and it allows courts to refuse to apply foreign law that would otherwise apply, if those legal norms are sufficiently repugnant. However, as noted previously, application of the public policy exception is rare, both as a normative and descriptive matter. Thus, if a court asserts such an exception, it must justify the use of public policy grounds by reference to precisely the sorts of deeply held commitments that Cover envisioned. In the *Bob Jones* case, for example, it might be that the nation-state's deep commitment to eradicating racial discrimination would independently justify overriding the religious norms, regardless of the community affiliation analysis.

Accordingly, a conflicts approach would not simply throw the claim of protected religious insularity to the mercy of political or bureaucratic judgments. Taking the ban on interracial dating seriously as law and performing a choice-of-law analysis would create the obligation to engage in crucial line drawing. And although the community affiliation and public policy exception analyses *in this case* might justify application of state law, that will not always be the case.

Consider, by way of contrast, *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Supreme Court refused to extend First Amendment protection to the religious use of peyote.<sup>78</sup> There, unlike the tax exemption at issue in *Bob Jones*, the Indian tribe was not negotiating its relationship with the state; rather the use of peyote was part of a purely internal religious practice open primarily (or exclusively) to members of that community. Thus, a choice-of-law analysis based on community affiliation might well result in deference to the non-state norm. Moreover, the normative commitment to drug enforcement is perhaps better characterized as a governance choice than as an inexorable normative command. As such, the public policy exception is arguably less appropriate in this context than when addressing racial discrimination. Applying these principles, a choice-of-law analysis might well have permitted the religious practice in *Smith*.

In the end, however, I am less concerned with the particular outcome than with the analytical framework. Conceiving of these clashes between religious and

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<sup>78</sup> 494 U.S. 872 (1990).

state-based norms in conflicts terms reorients the inquiry in a way that takes more seriously the non-state community assertion. As a result, courts must wrestle both with the nature of the multiple community affiliations potentially at issue and with the need to articulate truly strong normative justifications for not deferring to the non-state norm. Both consequences make the choice-of-law decision a constructive terrain of engagement among multiple normative systems, rather than an arm of state government imposing its normative vision on all within its coercive power.

Of course, this vision is not unproblematic. Two related objections immediately present themselves. First, a choice-of-law rule that tends to defer to non-state norms when they implicate only internal community affiliation might be seen to rest on the often-criticized distinction between public and private action. Indeed, the idea of deference in this context might come to look like the classic state deference to family privacy or autonomy.<sup>79</sup> And just as family privacy was often invoked to shield domestic violence and gender hierarchy, so too may deference to “internal” community norms become deference to fundamentally illiberal norms.

Second, as in the family context, we may make a mistake by assuming that the non-state community at issue is monolithic. Indeed, it may be that some members of the relevant community would prefer to have the *state* norm applied to their situation. As Judith Resnik has noted, Cover’s vision of multiple norm-generating communities did not address the problem of conflict “*within* [such] communities about their own practices and authoritative interpretations.”<sup>80</sup> Yet, such “contestation from within”<sup>81</sup> (which is likely to occur along the fault lines of power hierarchies within the community) is an almost inevitable part of community norm creation. Thus, the choice-of-law question becomes, in part, a question of whose voices within a community are heard by which speakers of nation-state power.

As to the concern that too much deference to “private” norms within a community will overly empower illiberal communities, it is important to remember that, because of the public policy exception, these norms, if sufficiently abhorrent, need not be applied by the state authority. After all, a lynch mob may also be a statement of community norms, but it need not for that reason necessarily be embraced. The object of a choice-of-law analysis is not to blindly follow non-state community norms, but to ensure that if a state asserts its own norms it does so self-consciously. Indeed, simply identifying the state’s jurispathic power does not necessarily mean that we must reject all exercises of that power.<sup>82</sup> Even Cover recognized the utility of a state court’s speaking in “imperial mode.”<sup>83</sup> He noted that, when judges kill off competing law by asserting that “*this one* is law,” they

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<sup>79</sup> See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836–37 (1985).

<sup>80</sup> Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 27 (2005).

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* at 25.

<sup>83</sup> See Cover, *supra* note 6, at 13–14.

may do violence to the competing visions, but they also enable peace both because too much law is too chaotic to sustain and because some laws are simply too noxious to be applied.<sup>84</sup> The point then is simply to make sure that the imposition of imperial, jurispthic law is not done blindly or arrogantly, but with intentionality and a respect for the other sources of law-making that are being displaced.<sup>85</sup> A conflicts analysis at least opens space for such self-consciousness and care.

More difficult is the problem of how to respond to Resnik's arguments about inevitable conflicts within a non-state community concerning the content of that community's norms. Certainly the existence of significant disagreement within the community might be factored into the decision of whether to apply the state norm. Thus, if some substantial portion of the non-state community were clamoring for the application of *state* law, such clamoring might blunt somewhat the need to defer to the non-state norm.

More important, in thinking about how to address disputes within a non-state community, we must distinguish between two types of challenges. One concerns the proper understanding of what the content of the community's law *actually is*, and the other concerns what that law *ought to be*. For example, in *Santa Clara Pueblo v. Martinez*, a woman who was a member of an Indian tribe challenged her tribe's refusal to consider her children to be tribal members.<sup>86</sup> She did so, however, not based on an argument that the tribe had improperly interpreted its own community law (which based tribal membership on the father's tribal membership, not the mother's). Instead, she argued that the tribe's law was inconsistent with a federal equal protection statute.<sup>87</sup> Thus, the case did not present a contestation about the content of the community's norms; it merely raised a choice-of-law issue about whether the tribal law or the federal statute should govern. And however difficult the resolution of that choice-of-law question might be, it does not raise the conundrum of how to determine the appropriate content of the non-state norms in the first place.

Finally, in those relatively infrequent situations when the actual content of the non-state norm *is* at issue, courts can seek evidence to determine that community's governing norm. Historical documentation, anthropological testimony, and evidence of ongoing practice might all be relevant. And again, to the extent that there are concerns that the non-state norm is the product of hierarchy, those concerns can be factored into the choice-of-law inquiry itself; they do not render it impossible to determine the content of the norm.

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<sup>84</sup> See *id.* at 53.

<sup>85</sup> See Resnik, *supra* note 80, at 25 (“[Cover] wanted the state’s actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”).

<sup>86</sup> 436 U.S. 49, 49 (1978).

<sup>87</sup> *Id.* at 51.

## CONCLUSION

A jurisprudence of hybridity does not, of course, make it any easier to reach actual decisions in individual cases. Indeed, determining when to defer to a non-state norm and when not, when to allow a margin of appreciation and when to insist on a state norm, when to carve out zones of autonomy and when to encroach on them—these are all issues that are probably impossible ever to resolve satisfactorily. And I do not suggest that merely adopting a more inclusive set of jurisprudential or institutional mechanisms will eliminate clashes between state and non-state normative communities. Such clashes are both inevitable and unlikely ever to be dissolved.

But the relevant question, it seems to me, is not whether law can eliminate conflict, but whether it has a chance of mediating disputes among multiple communities. And this question becomes increasingly important as normative communities increasingly overlap and intersect. Accordingly, instead of bemoaning the messiness of jurisdictional overlaps, we should accept them as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other. Moreover, we can go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced.

Most fundamentally, all of this interaction is elided or ignored if we continue to think and speak as if legal and quasi-legal spheres can be formally differentiated from each other. Instead, we need to accept and perhaps even celebrate, the potentially jurisgenerative and creative role law might play in a plural world. Indeed, it is only if we take multiple affiliation seriously, if we seek dialogue across difference, if we accept unassimilated otherness, that we will have some hope of navigating the hybrid legal spaces that are all around us.

## THE MIRAGE OF NON-STATE GOVERNANCE

Ralf Michaels\*

*Maybe what is really important for our modernity—that is, for our present—is not so much the statization [étatisation] of society, as the “governmentalization” of the state.<sup>1</sup>*

*[I]f that collective force, the State, is to be the liberator of the individual, it has itself need of some counter-balance; it must be restrained by other collective forces . . . . It is not a good thing for the groups to stand alone, nevertheless they have to exist. And it is out of this conflict of social forces that individual liberties are born.<sup>2</sup>*

### I. BEYOND THE STATE

In a story that does not lose its appeal merely because it is apocryphal, the adolescent Luis Buñuel tries to convince his friend to go pee with him at the altar in their staunchly catholic village. The friend says no. “Come on, let’s pee on the altar,” says Buñuel. No, says the friend. “What’s the matter?” insists Buñuel. “Are you a coward? Are you afraid of the priest? Are you afraid of God’s wrath?” The friend says no. “Then why won’t you pee on the altar?” “I have no need to pee at the altar,” replies the friend. “I do not believe in God.”

The fascination with non-state governance reminds me of this story. The debate about global governance and the corresponding role of the state has had its fair share of altar-peeing and offered challenges (sometimes adolescent, sometimes brilliant) to the state’s overarching authority. Some of this work has been pathbreaking—as have, of course, the films of Buñuel, who has certainly been more influential than his apocryphal friend. But in the end, Buñuel’s filmmaking always displayed, in its strongest atheist provocations, a deep ultimate faith, so nicely expressed in Buñuel’s famous quote that he is “still an atheist, thank God.”<sup>3</sup> The same is true with much of the state-opposing and state-denying literature in globalization. Its greatest weakness is that, by putting the object of its opposition and its denial at the center of analysis, it cannot escape it.

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<sup>1</sup> MICHEL FOUCAULT, *Governmentality*, in POWER: ESSENTIAL WORKS OF FOUCAULT, 1954–1984, at 201, 220 (Robert Hurley et al. trans., James D. Faubion ed., The New Press 2000) (1978).

<sup>2</sup> EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 63 (Cornelia Brookfield trans., 2d ed. 1992).

<sup>3</sup> Michèle Manceaux, *Luis Buñuel: athée grâce à Dieu*, L’EXPRESS, May 12, 1960, at 41–43.

This is not for lack of trying. During the heyday of globalization discourse, in the 1990s, there was much talk of a “decline of the state,”<sup>4</sup> which in turn spurred an intense search for alternatives to state law and state-based government. Non-state governance was suddenly chic. Markets, corporations, industries, religious communities, ethnic communities, Internet users—diverse groups of all kinds—were praised (or damned) for their ability to self-govern without interference from the state. After the wars in Iraq and Afghanistan and the bailout of the financial system, some of this excitement has decreased, and now we are said to be witnessing a return of the state, of some sorts.<sup>5</sup> If global capital markets once served as the most impressive example of extensive governance structures allegedly outside the state—with private regulators in the Basle Committee, private rule-makers in corporate law offices<sup>6</sup>—then the massive bailout reactions by governments after the collapse of the financial system reminded everyone of the remaining central position of the state. As a consequence, “non-state governance” sounds outdated again.

The problem is not just the rise and fall of the non-state in parallel with the fall and rise of the state in the world. A bigger problem in discussions over the rise and fall of the relative position of the state in the world, as well as with discussions over the “proper mix” of public and private governance structures, is that the core elements—the state, public, and private governance—are abstract entities taken to be constant over space and time. Is “the state” always the same over time and space? What exactly is the difference between public and private governance? Issues of method—whether the state still presents the paradigm of our research into

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<sup>4</sup> See, e.g., MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 336–414 (1999) (arguing that forces exerting pressure will inevitably cause the collapse of nation states); KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 141–49 (1995) (proposing governments de-regulate regional and cross-border economic development to maximize the global economy); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 3–66 (1996) (positing the world economy is now driven by private actors, not international politicians).

<sup>5</sup> See, e.g., DAVID HELD & ANDREW MCGREW, *GLOBALIZATION/ANTIGLOBALIZATION: BEYOND THE GREAT DIVIDE* 1–10 (2d ed. 2007) (discussing changes in globalization in the wake of the September 11 attacks); *Leviathan Stirs Again*, *ECONOMIST*, Jan. 23, 2010, at 23–25 (discussing the reemergence of big government in the wake of the economic crisis); Donald Nordberg, *Return of the State? The G20, the Financial Crisis and Power in the World Economy* (2009), available at <http://ssrn.com/abstract=1375387> (discussing how states have become individually weak following the current financial crisis and “that power lies dispersed in the network—the mesh of states and markets, of corporations, non-state organizations and institutions”).

<sup>6</sup> See, e.g., Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 *CONN. L. REV.* 1739 *passim* (2007) (examining how Wal-Mart is able to legislate its suppliers’ behavior through its contractual relationships and how outside influences, such as the media and civil society, shape this private lawmaking); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 *YALE J. INT’L L.* 125, 167–68, 183–88 (2005) (describing private lawmaking).

governance—are intermingled with matters of history, i.e., what role “the state” actually plays in the world.<sup>7</sup>

But the biggest problem is, why does all of this matter? Simply put, do we not care more about good versus bad governance than we care about state versus non-state governance? And if we do, is the difference state/non-state or the difference public/private really the prime criterion by which to assess governance?

The state has long been the most important political myth to determine and constrain our political thinking.<sup>8</sup> Yet non-state governance is, if anything, more, not less, mythical: an ideologically laden concept, a romantic idea. It looks attractive to those who oppose the state—free market proponents on the political right, advocates for local indigenous communities on the left. But from this perspective, the idea of non-state law and non-state governance appears rather antiquated. Of course, the broadened focus on non-state structures is crucial, and any attempt, in legal studies as well as in political science, to integrate such traditionally neglected structures is to be welcomed. However, non-state is the false perspective for these phenomena. Non-state governance is a mirage, a mere mirror image of the state—its opposite or its copy. Instead of overcoming the state, the perspective on non-state governance essentializes the state. If we want to overcome our traditional focus on the state, we must overcome our focus on the non-state, too. Instead of the formal and artificial differentiation state/non-state, we should look for functional differentiations between different modes of governance.

In this Essay, I offer three theses, all of which are critical. First, non-state governance is *conceptually* unattractive; it is a concept that makes little sense.<sup>9</sup> Second, non-state governance is *empirically* unattractive; meaningful non-state governance rarely exists.<sup>10</sup> Third, meaningful non-state governance is *normatively* unattractive; we would rarely want it, and people postulating it usually expect the state to play an important role.<sup>11</sup> However, I also have something constructive: a proposed trajectory. Talk about the state and the non-state can only be an

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<sup>7</sup> This concept relates to the equation of historical and theoretical methodological nationalism, where historical methodological nationalism is directed at the historical phenomenon of the nation state as a “container” of society (Giddens) and methodological nationalism is the equation of society and state.

For a general discussion on methodological nationalism, see DANIEL CHERNILO, *A SOCIAL THEORY OF THE NATION-STATE passim* (2007), and the discussion and references in Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?* [Which Globalization for the Law? Which Law for Globalization?] (review essay), 69 *RABELSZ* 525, 537–40 (2005); see also HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 275 (1977) (“[O]ne reason for the vitality of the states system is the tyranny of the concepts and normative principles associated with it.”).

<sup>8</sup> Still enlightening is ERNST CASSIRER, *THE MYTH OF THE STATE passim* (2009) (2d ed. 1946) (describing the history of the idea of the state as a powerful myth in Western thought).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part IV.



intermediary stage in a trajectory of a theory of governance that might lead to a new paradigm of governance. This trajectory would move from state centralism via a state/non-state dichotomy and a state/non-state hybridity toward a new paradigm of governance *beyond* the state.<sup>12</sup>

## II. CONCEPTS

What exactly is meant by non-state governance? It makes sense to start with governance, a notoriously unclear term, though not an entirely useless one. Current usage of the term emerges from the search in the 1970s and 1980s for a broader concept than that of government, which was seen to be too focused on the state.<sup>13</sup> Such a broader concept appeared necessary for empirical and normative reasons. Empirically, it had become clear that traditional ideas about regulation that focused on direct state regulation were not working, a situation sometimes referred to as the crisis of governability.<sup>14</sup> Normatively, it seemed desirable to focus on broader reforms than merely those of state institutions in order to bring about change and progress. Governance thus provided an alternative to government in the sense that it was more encompassing: it included non-state actors in addition to state actors, and it included additional tools to that of top-down regulation.

The term governance, however, is as old as government. The roots of both terms lie in Greek (κυβερνήτης) and Latin (gubernare); usage in English goes back to at least Chaucer, as evidenced by the Oxford English Dictionary.<sup>15</sup> More important, both governance and government were long used interchangeably, because government meant largely what we today refer to as governance. Foucault, in his lecture on governmentality, reminds us that the virulent debates in the sixteenth century on “good government” were not at all confined to state government, but concerned all aspects of public and private life:

One has, for example, the question of the government of oneself, that ritualization of the problem of personal conduct characteristic of the sixteenth century Stoic revival. There is the problem too of the government of souls and lives, the entire theme of Catholic and Protestant pastoral doctrine. There is government of children and the great problematic of pedagogy that emerges and develops during the sixteenth century. And, perhaps only as the last of these questions to be taken up, there is the government of the state by the prince.<sup>16</sup>

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<sup>12</sup> See *infra* Part V.

<sup>13</sup> See generally Joan Corkery, *Governance: Evolution of the Meaning of the Word*, in GOVERNANCE: CONCEPTS AND APPLICATIONS, 9–19 (Joan Corkery ed., 1999).

<sup>14</sup> MICHEL CROZIER ET AL., THE CRISIS OF DEMOCRACY: REPORT ON THE GOVERNABILITY OF DEMOCRACIES TO THE TRILATERAL COMMISSION *passim* (1975).

<sup>15</sup> (Governance) OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>16</sup> FOUCAULT, *supra* note 1, at 87.

In other words, neither governance nor government was confined in any particular way to the state. Only with the rise of the nation-state as an organizing concept of politics and of society did a hierarchical system emerge, and the state maintained an important stage at the top of the hierarchy of different governments (“the last of these questions to be taken up”): self-government (morality), family government (or economy, in the old sense of *oiko-nomia*, literally house[hold] administration), and state government (politics).<sup>17</sup>

Notably, this hierarchy, established in political theory, mirrors the hierarchy established in the legal theory of natural law system. A famous example is the hierarchy of laws established by Pufendorf, which also runs up from the individual (law of persons) via family law to state law.<sup>18</sup> Just as government was not confined to the state for sixteenth century political theory, likewise, law was not confined to state law for the natural law tradition.<sup>19</sup>

This has, of course, changed dramatically. Foucault describes the struggle in the seventeenth century to establish the economy within the (state) governmental sphere, and it did not take long until the individual level, including morality, also came to be viewed as a function of state government.<sup>20</sup> In fact, the detailed rules in the Prussian Civil Code on such seemingly private matters as how often a mother should nurse her child<sup>21</sup> were possible because the Code was based on Pufendorf’s hierarchical system.<sup>22</sup> Simultaneously, law was more and more connected to the emerging nation state—first public law (as the idea, quite radical at first, that the government should be bound by rules),<sup>23</sup> later private law.<sup>24</sup> When Justice Holmes, in 1917, derided the idea of a law that transcends political authority as “a brooding omnipresence in the sky,”<sup>25</sup> law had become necessarily tied to a political entity, and that entity could at the time be only the state. This is, in a nutshell, how we have come to think of both government and law as tied to the state—as the

<sup>17</sup> *Id.* at 206–07 (referring to François de La Mothe Le Vayer).

<sup>18</sup> See the table of contents in SAMUEL PUFENDORF, *DE JURAE NATURAE ET GENTIUM LIBRI OCTO* (1672).

<sup>19</sup> See Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71 *RABELSZ* 345 *passim* (2007); see generally Charles Donahue, Jr., *Private Law Without the State and During Its Formation*, 56 *AM. J. COMP. L.* 541 *passim* (2008) (analyzing the development of private law and its relation to the state in Europe in the medieval and early modern periods).

<sup>20</sup> As one of many examples, see D.G. RITCHIE, *THE MORAL FUNCTION OF THE STATE: A PAPER READ BEFORE THE OXFORD BRANCH OF THE GUILD OF ST. MATTHEW ON MAY 17TH, 1887* (1887).

<sup>21</sup> *Allgemeines Landrecht für die preußischen Staaten* [A.L.R.], Feb. 5, 1794, §§ 67–69, II, 2 (regulating maternal nursing).

<sup>22</sup> The code is based on the work of Suarez, who in turn was taught by Pufendorf. See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 264 (Tony Weir trans., 1995).

<sup>23</sup> See MICHAEL STOLLEIS, *1 GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND* *passim* (1988).

<sup>24</sup> Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. PA. L. REV.* 1349 *passim* (1982).

<sup>25</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

consequence of convergent developments in politics (the rise of the nation state), ideology (the desire to delegitimize authority outside the government, a continuous theme between absolutism and representative democracy) and theory. From this perspective, the introduction of governance beyond the state is not a revolution, but a counterrevolution, directed against the revolutionary redefinition of government as exclusively resting in the state.

However, the idea of governance does not fully turn back the clock; it remains, in its contemporary emanations, defined by its relation to state government. Governance is what the state does, even if other groups do it, too. Non-state governance is what these other groups and institutions do like the state, just minus the state. Consider, for example, the variety described in Stewart Macaulay's important essay on private government:

If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some of [*recte*: or] all of this is done by such different clusters of people as the Mafia, the National Collegiate Athletic Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey's tavern.<sup>26</sup>

True, interesting, and important. But nothing, it appears, holds these groups together apart from a characteristic they share—making rules, etc.—that is borrowed from the state, and from a negative quality they have: they are not the state. We should pay more attention to these groups, but it is unclear how any comprehensive concept of governance can leave the state out while keeping everything else in. Whatever these groups are doing, it seems, is defined by what the state does.

The problem thus described—that non-state governance, far from being independent from the state, is defined by it—is enhanced by another finding. “The state” (and thus the non-state) is an abstract entity, abstracted both from the institutions that it combines and from the great variation of actual states we find over space and time. This abstraction is to some degree justified, even necessary, in law, especially where, as in continental European thinking, the state is often equated with the law.<sup>27</sup> It also correlates, at least in the past, to popular ideas of common identity<sup>28</sup> and in findings of relatively great value coherence within

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<sup>26</sup> Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCE* 445, 445 (1986).

<sup>27</sup> On different meanings of state in European and U.S. legal discourse, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 *AM. J. COMP. L.* 843, 851–56 (2006).

<sup>28</sup> See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5–6 (Verso 2003) (1983); CAROL J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* 56–60 (1996) (emphasizing the idea of the state as embodiment of community).

states.<sup>29</sup> Beyond this, the abstract idea of the state is deeply problematic in social scientific research of governance. Over space, the similar treatment of big Western states and small postcolonial states as “states” is at best unhelpful. Over time, the ever-changing nature of the state has been an important factor in its longevity. Saskia Sassen has rightly emphasized that globalization is not an occurrence outside the state but instead that the state is an active participant in it and in its own transformation.<sup>30</sup> As a consequence, the state under conditions of globalization is different from the state prior to globalization, and any category of non-state governance must be updated constantly to take account of this changing character. It may thus be that certain new governance institutions are incompatible with the traditional states of the nineteenth and twentieth centuries, but this suggests only that we should leave those traditional ideas of the state behind, not the state altogether.

### III. EMPIRICS

The conceptual unattractiveness of non-state governance as a purely negative category is enhanced by the empirical insight that real non-state governance—governance in the absence of a state—may indeed exist, but it is exceedingly rare.<sup>31</sup> Almost all governance combines public and private, or governmental and non-governmental, aspects. This is hardly ever denied, but it is often forgotten. The starkest example is the incessant invocation of a *lex mercatoria* as an alleged self-made and autonomous law of international trade, created and administered by merchants (and their lawyers) in the absence of the state. Once a topic mainly for lawyers, *lex mercatoria* is now increasingly being discussed in the social sciences, too.<sup>32</sup> But the autonomous *lex mercatoria* is a myth, both in its ancient and in its

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<sup>29</sup> See GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* *passim* (2d ed. 2001).

<sup>30</sup> See, e.g., SASKIA SASSEN, *A SOCIOLOGY OF GLOBALIZATION* 46 (Jeffrey C. Alexander ed., 2007):

[F]ar from being mutually exclusive, the state is one of the strategic institutional domains in which critical work on the development of globalization takes place. . . . The state becomes the site for foundational transformations in the relationship between the private and the public domains, in the state’s internal balance of power, and in the larger field of both national and global forces within which the state now has to function.

See also Clyde W. Barrow, *The Return of the State: Globalization, State Theory, and the New Imperialism*, 27 NEW POL. SCI. 123, 125 (2005) (arguing that the state has rebounded in the form of American Empire).

<sup>31</sup> It is worth pointing out that the opposite is also true. Pure state governance in the absence of other institutions involved in the governance does not exist, either. This insight, hardly counterintuitive, was what led to the shift from government to governance discussed before.

<sup>32</sup> See generally A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY*:

modern form.<sup>33</sup> The purported autonomous and trans-European commercial law of the middle ages consisted, at best, of procedural rules; substantive commercial law rules were built on those of the European common law, sometimes referred to as the mother of the law merchant.<sup>34</sup> The contemporary *lex mercatoria* combines rules from domestic and international law with those emerging in commerce; institutionally, the need to enforce arbitral awards and the possibility to nullify them in state court are evidence not of the autonomy of *lex mercatoria* but instead of the entwinement between transnational commerce and the state.<sup>35</sup> Participants in global commerce seem to have no interest in an autonomous non-state law, and why would they? They pick and choose between state and non-state laws and institutions on the basis of functionality.<sup>36</sup> *Lex mercatoria* as non-state law is a myth.

This insight applies not only to *lex mercatoria* but also to various other alleged sites of non-state governance. The self-regulation of corporations comes with the strong protection and enforcement of the state with its law; the internal affairs doctrine is just that—not a social reality of self-governance, but instead a rule of state law necessary for corporate self-governance. The self-regulation of industries is often a way to stave off or to replicate state regulation.<sup>37</sup> Early fantasies of an autonomous Internet with its own legal order have given way to realization of the role played by detailed regulation by the state.<sup>38</sup> Global Islam

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TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY *passim* (2003) (offering a critical analysis of the role international economic law plays in creating and maintaining of global power relations); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 *passim* (2006) (discussing how the transnational business community has evolved and uses “‘a-national’ principles of contract and a system of private ‘courts’ to organize and regulate cross-border commercial exchange”).

<sup>33</sup> See Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL. STUD. 447, 452–60 (2007).

<sup>34</sup> See Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, OXFORD U. COMP. L. F. (2003), <http://ouclf.iuscomp.org/articles/cordes.shtml>, text accompanying nn. 11, 12, & 13; Charles Donahue, Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT'L L. 21, 27–29 (2004); Jansen & Michaels, *supra* note 19, at 368; Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427, 446–47 (1999).

<sup>35</sup> See Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, *passim* (2006).

<sup>36</sup> Michaels, *supra* note 33, at 462–64.

<sup>37</sup> Jürgen Basedow, *The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 711–12 (2008). Here, as elsewhere, the impact goes both ways: as the state influences business, so business influences the state. See Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 169–72 (2009).

<sup>38</sup> See JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 10 (2006). The insight of the state's continuing control over Internet governance is older. See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty*

may look like a powerful non-state network, but in reality it is so intimately linked with existing states that claiming it as non-state governance would be bold.<sup>39</sup> Religious groups in the United States enjoy a large degree of autonomy from the state and consequent freedom to self-regulate, but the basis for this autonomy, at least from the perspective of the state, is the First Amendment, and the boundaries of the autonomy are a matter of adjudication in secular courts. The Catholic Church, far from being a non-state institution, has even been characterized as the precursor to the first modern Western state.<sup>40</sup> The allegedly autochthonous non-state legal orders in colonies have been shown to be largely constructs by and for the purpose of the colonizing state.<sup>41</sup>

Actually, we find real non-state governance only in areas where no functioning state exists, and there are few such areas in our world of states. One candidate is local communities that remain untouched by civilization; but even here the state is anything but absent. Take the news of the uncontacted tribe found in the Amazon jungle in Brazil in 2008.<sup>42</sup> That tribe is nowhere autonomous from the state; quite the contrary, the very reason we have pictures of the tribe is that the Brazilian government department for Indian affairs (together with non-governmental organizations) uses them to advocate their position in the ongoing struggle over land rights in Brazil.<sup>43</sup> Autonomy from the state is a direct consequence of protection by the state. Another example is governance in failed states—Taliban in Afghanistan, terrorists in Somalia, the Mafia in Sicily. Here we may be able to speak of non-state governance simply because no effective state exists (although the actual role of the respective state in the protection of these groups, especially in Afghanistan and Somalia, is not irrelevant). But even this is not governance independent from the state; it is governance enabled by the absence of a state that can hardly yield generalizable insights.

One might argue that governance without the state must be possible because governance existed prior to the modern state.<sup>44</sup> But the fact that governance

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*and Hardwired Censors*, 66 U. CIN. L. REV. 177, 178 (1997) (“[T]he conceptual structure and jurisprudential assumptions of digital libertarianism lead its practitioners to ignore the ways in which the state can often use privatized enforcement and state-backed technologies to evade some of the supposed practical (and constitutional) restraints on the exercise of legal power over the Internet.”).

<sup>39</sup> See CLARK BENNER LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT* 1 (2006) (explaining that Muslim nations incorporate the law of Islam into their state constitutions). Another issue is the Islamic theory of the (Islamic) state itself and of the ummah.

<sup>40</sup> HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 113–15 (1983).

<sup>41</sup> See Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 245–46 (2009) with references.

<sup>42</sup> *Isolated Tribe Spotted in Brazil*, BBC NEWS, May 30, 2008, <http://news.bbc.co.uk/2/hi/americas/7426794.stm>.

<sup>43</sup> *Id.*

<sup>44</sup> See Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30 OX. J. LEGAL STUD. 207 (2010).

without a state was possible in a world without states has few direct implications for a world with states.<sup>45</sup> Macaulay's article on "private government" demonstrates this point. The entire article is devoted to the question of how private governance relates to that of the state—whether it stands in harmony or conflict with it,<sup>46</sup> to what extent structures of private governance are an impediment to effective state regulation,<sup>47</sup> whether private governance can fulfill the role traditionally reserved for state law in different social theories,<sup>48</sup> and whether private governance can fulfill the legitimacy criteria traditionally used for the state.<sup>49</sup> In other words, in an article ostentatiously devoted to private governance, Macaulay displays an almost obsessive focus on the state. He himself hastens to add that a sharp line between public and private governments such as these cannot be drawn.<sup>50</sup> But then his analysis becomes murky. When he advocates "a 'private government perspective' which both recognizes private associations that affect government and also treats distinctions between public and private spheres as doubtful rather than as given,"<sup>51</sup> he manages, in one sentence, to proclaim the need of a distinction between a public and a private perspective, and the impossibility of that very distinction. We need a private perspective, he seems to be saying, precisely because the private cannot be distinguished from the public. We need to isolate non-state governance because we cannot separate it from state government.

Although state governance and non-state governance rarely exist in isolation, this does not mean that they are similar. Quite the contrary: if almost all governance is a mix between private and public—or state and non-state—governance, the relative distribution of labor between state and non-state is not random. The state has strategic advantages: "a technical administrative capacity that cannot be replicated at this time by any other institutional arrangement[,] . . . military power, which for some states is global power," as well as unmatched financial means to save an ailing financial system,<sup>52</sup> as we know after the bailout. At the same time, the state still faces strategic disadvantages: relative immobility

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<sup>45</sup> See Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 5–11 (2005) ("We can . . . identify law with a diffuse . . . notion of normative order. But that characterization of the understandings and practices of 'stateless' societies, as constituting legal orders, does not tell us much we might want to know about them."); cf. A. Claire Cutler, *Globalization, the Rule of Law, and the Modern Law Merchant: Medieval or Late Capitalist Associations?*, 8 CONSTELLATIONS 480, 486–87 (2001) (arguing that the analytical utility of an analogy between the modern "global business civilization" and the medieval law merchant system is limited because of the lack of regulation of international commerce in medieval societies).

<sup>46</sup> Macaulay, *supra* note 26, at 449–54.

<sup>47</sup> *Id.* at 454–67.

<sup>48</sup> *Id.* at 470–85.

<sup>49</sup> *Id.* at 485–502.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 446; see also *id.* at 449 ("[A] private government perspective requires that we both see the amount and nature of private governing and recognize at the same time that public and private governments are interpenetrated rather than distinct entities.").

<sup>52</sup> See SASSEN, *supra* note 30, at 38.

and locality, transparency of decision making, and the ensuing relative inflexibility. Legally the state combines advantages—its rules are generally hierarchically superior to privately made rules like contracts, and the state maintains the monopoly of violence to enforce its laws—and disadvantages; it is bound to a Constitution, unlike private actors. Effective governance aims at combining the advantages of the state with the advantages of the respective private groups and institutions. Private actors find it attractive to invoke the state for enforcement because of its monopoly of power. The state, by contrast, sometimes finds it attractive to outsource certain state functions to escape scrutiny. The fact that private groups rely on the state for the enforcement of private rights is a well-known argument against the idea of an autonomous private sphere.<sup>53</sup> By contrast, the outsourcing of state functions like military functions suggests that privatization is not just the release of power from the state to the private realm; it is at least as much a strategic move by the state and thus an explicit state government policy, the privatization of the state by the state.<sup>54</sup>

Often then, questions as to non-state governance are really questions about a particular form of state governance, namely that of deference.<sup>55</sup> For example, when we ask whether it is appropriate to limit freedoms, such as speech, religion and association, if members of non-state communities are at risk, we ask not about these groups' autonomous governance but about the state's role in it, because it is the state that would limit these freedoms, and it is usually the state that we ask to prevent such limitations. The question whether the state should interfere in the self-governance of a religious group engaged in discrimination against its female members is not a question about state governance versus non-state governance; it is a question as to one kind of state governance (enforce the woman's claim to non-discrimination) versus another (enforce the group's right to self-determination).<sup>56</sup> The problem in the debate is not whether "we" should assign a greater role to non-state institutions; the problem is that the "we" almost invariably refers to the state and its policies.

This suggests that it is not enough to replace the state/non-state dichotomy with an unspecified hybridity. To say that all governance is somehow public/private is trivial. To dig deeper, we would have to analyze the specifics and modalities of this hybridity—the modes, processes, and institutions that enable a

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<sup>53</sup> See Julian D. Lew, *Achieving the Dream: Autonomous Arbitration*, ARB. INT'L, July 2006, at 179, 194.

<sup>54</sup> See PHILIP BOBBIT, *THE SHIELD OF ACHILLES* 667 (2002); PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS (Simon Chesterman & Angelina Fisher eds., 2009); SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 179 (2006) (stating that President Bush used military secrecy to accumulate power in the executive).

<sup>55</sup> See Ralf Michaels, *The Re-state-ment of Non-State-Law*, 51 WAYNE L. REV. 1209, 1233–34 (2005).

<sup>56</sup> Cf., e.g., AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 130 (2001) (noting that a dominant majority group in government has "undeniable power to impose cultural conformity on its minorities").



fruitful cooperation between state and non-state groups. In what specific way is governance shared among institutions, some belonging to the state and some not? What are the exact hierarchies between these institutions? Are they in conflict or in consensus? Etc.

#### IV. LEGITIMACY

Such closer analyses are not merely analytical and empirical, they also have a normative dimension. If the debate on non-state governance were confined to Taliban and Mafia, we would probably not hesitate to condemn it. Instead, however, non-state governance is praised as superior to state government in a variety of areas. Religious groups should be left alone from state intervention; markets can best regulate themselves; codes of conduct developed by corporate actors are more fine-tuned and more appropriate than state regulation; indigenous populations should be allowed to devise their own norms instead of having to adopt official state norms, etc. This raises a normative question. Regardless of conceptual and empirical problems, would non-state governance actually be desirable, and under what conditions? Is state governance desirable? Or what public-private combination would be legitimate?

Such questions have become popular, but they are far too general and broad to yield any meaningful answers—the non-category of the non-state does not allow for any but the most general assessments. The question whether non-state governance is legitimate or not cannot be answered in the abstract, just as the question what kinds of governance actions are legitimate cannot be answered in the abstract. More important, even whether such governance is instituted or administered by the state or by other groups is a criterion of very limited relevance for questions of legitimacy. Of course, there are some specific legitimacy criteria for state action, and there are other legitimacy criteria for non-state action. For example, state action must comply with certain constitutional requirements from which private action is free, while private action must comply with state law while the state can change sub-constitutional law. But these legal standards of legitimacy are extremely contingent. They were created at a particular point in time for a particular constellation of state and society, and as this constellation changes, such legitimacy standards may change as well. The more deterritorialized the economy becomes, the more willing we are to consider extraterritorial regulation by the state justified.<sup>57</sup> The less able the state becomes to provide proper frameworks for corporate governance, the more legitimate private concepts become. In the United States, private enforcement of product standards (through tort actions) may be

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<sup>57</sup> KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 123 (2009); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459, 487 (2009).

more justified than in Europe simply because state institutions other than courts are less successful at regulating such standards in the United States.<sup>58</sup>

Nonetheless, what we can see in the debate is how the state and our experience with it permeate much of the debate.<sup>59</sup> Thus, on the one hand, we see attempts to replicate the legitimacy strategies within the state, to ask how non-state governance can be similar to the state, for example how to constitutionalize the private sphere. However, given that state constitutionalization took place in a very specific constellation—that of the state—it is neither clear that it can be achieved in the private sphere, nor certain that, if it can be achieved, it confers the same legitimacy to the non-state group as does the constitution to the state. More promising are attempts to show how non-state mechanisms are superior to the state insofar as they avoid its shortcomings.<sup>60</sup> However, not infrequently these mechanisms cannot fulfill these functions, while at the same time they weaken the state.<sup>61</sup>

The methodological problem is the same here as elsewhere: the state is used as a benchmark. In one, it provides the criteria of legitimacy; in the other, it provides what we want to get away from. Yet it is not clear why criteria of legitimacy developed within one particular global constellation—that of the nation state of the nineteenth and twentieth centuries—should be applicable to a twenty-first-century world. There is no doubt that our criteria of legitimacy must be informed by our experience with and in the state. But it also cannot be doubtful that these criteria must be dislodged from the nation state. In the public sphere, we see this in debates on the legitimacy of the European Union, which, because it is not a state, is now increasingly (and rightly) being judged with criteria other than those against which nation states are held.<sup>62</sup>

## V. BEYOND THE NON-STATE

Many disciplines—political science, sociology, international relations, law—have too long been focused exclusively on the state. The attention currently given in these disciplines to different emanations of non-state governance is a welcome development insofar as it broadens our field of study by requiring us to develop more general theories of governance. These theories, however, will not make significant progress unless they help us leave our focus on the state behind. To

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<sup>58</sup> See Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J. 1413, 1413–15 (2004).

<sup>59</sup> For a more detailed typology of reactions to the change of the role of the state (revolution, resistance, regression, reproduction, renovation), see Michaels & Jansen, *supra* note 27, at 882–89.

<sup>60</sup> See *supra* Part III.

<sup>61</sup> See, e.g., Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 970–87 (2007) (discussing some of the shortcomings of extralegal activism).

<sup>62</sup> See James A. Caporaso, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern*, 34 J. COMM. MKT. STUD. 29, 31–34 (1996).

focus on the non-state as a category will not help us in this endeavor. What needs to be done is to put the state in perspective in order to overcome it.

A first step is to deny the state its point at the top of the hierarchy. I pointed out earlier the parallel hierarchies between French government studies and Pufendorf's natural law system, both of which move from the individual upward to the state.<sup>63</sup> Yet, the parallel is not complete. The state is the peak of the hierarchy only for the authors that Foucault discusses—and, ultimately, also for Foucault himself, who does not address the supranational and international realms.<sup>64</sup> For Pufendorf, by contrast, the state is merely one level in the hierarchy below the higher level of international law.<sup>65</sup> His system of law was not particularly focused on the state; the state had only one of several functions to play in it.<sup>66</sup> Granted, the state later achieved a more central position, as Foucault shows, that justified, for the time being, a focus on the “governmentalization” of the state. As such, it was long central also for an “internationalized world.”<sup>67</sup> But this may be changing.

A more important step concerns the very hierarchy of levels. If it is correct that we are observing a move in the world from a political segmentary differentiation along state borders toward a functional differentiation along different societal groups, then this suggests that the methodologically central position of the state is wavering, too.<sup>68</sup> Note that in a world that shifts from territoriality to functionality, the territorial state does not automatically lose its role, but it must now justify that role on functional grounds.

A trajectory of theoretical accounts of governance should enable us to overcome this focus on the state. We have already left behind a first stage of this trajectory, namely the exclusive focus on the state, something that is sometimes called methodological nationalism.<sup>69</sup> The idea of non-state governance suggests a second stage, that of a dichotomy of state and non-state, including the possibility of hybridity. However, as I have argued, this is not a very fruitful stage, so a third stage will be a more specific analysis of the particular modes and structures of that hybridity, or of the particular mix of public and private governance. This makes it

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<sup>63</sup> See discussion *supra* Part II.

<sup>64</sup> On the limitations of Foucault as a theorist of world politics, see Jan Selby, *Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR*, 21 INT'L REL. 324 *passim* (2007). Interestingly, Foucault acknowledges Pufendorf's request for limits on sovereign discretion but does not put it in the context of supranational or natural law. FOUCAULT, *supra* note 1, at 210.

<sup>65</sup> See *Editor's Introduction*, in THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 16 (Craig L. Carr ed., 1994).

<sup>66</sup> A modern pyramid that bears obvious similarities has been proposed by RAFAEL DOMINGO, THE NEW GLOBAL LAW 147–53 (2010).

<sup>67</sup> SASSEN, *supra* note 30, at 15; see also *id.* at 49 (“The centralized national state acts as an interface between national and supranational forces and as a ‘container’ for the former.”).

<sup>68</sup> *Id.* at 57. The foundational formulation of this development is Niklas Luhmann, *Die Weltgesellschaft*, in Niklas Luhmann, II SOZIOLOGISCHE AUFLÄRUNG 71 (1975).

<sup>69</sup> See *supra* note 7 and accompanying text.

possible, at last, to deny the state its central position in the analysis and to develop, on a fourth level, a governance theory beyond the state. On that level, the state's institutions exist on an equal level, analytically, with non-state institutions.

Postulating non-state governance challenges the state's monopoly on the creation and adjudication of law, but it does not challenge the framework in which we think of governance, or government, as related and linked to the state. Non-state governance is merely the flipside of a state government. Ironically, such a conception does not weaken the importance of the state for governance, but perpetuates it. It changes the state from a tacit background assumption to the prime criterion with which we differentiate between kinds of governance. This limits in crucial ways our ability to think creatively about governance. When we talk of non-state governance, we imagine governance that either reproduces the way in which we know law from the state, or provides its counterpart. A governance concept that transcends the distinction between state and non-state laws, by contrast, should enable us truly to imagine governance not only outside the state, but outside even the dichotomy of state/non-state, outside the state framework altogether. Non-state governance may once have been a necessary concept to overcome the idea that all law is state law. However, as the mere negation of that idea, it lacks constructive potential; its implications collapse into either the negation or the replication of law within the state. We should leave this behind and devote our attention to a governance concept that transcends these boundaries and presents a more credible candidate for globalization and a functionally differentiated global system: governance *beyond* the state.

# THE RECURRING PARADOX OF GROUPS IN THE LIBERAL STATE

Frederick Mark Gedicks \*

*The question of groups for liberal theory and constitutional doctrine is not new. For at least the last half century, every time some unguarded Supreme Court language has hinted at group rights, academics have responded that the Court should confirm such rights in doctrine. But the Court never has.*

*The Court's lack of enthusiasm for group rights is related to their paradoxical quality of simultaneously protecting and threatening individual liberty. This paradox requires analytic touchstones to guide the decision when the liberal state should intervene in the internal affairs of groups, such as groups' lack of foundational status in constitutional doctrine, whether group membership is consensual, and the extent to which group rights impose external costs on non-members. It also suggests the need for a more nuanced approach to group rights than is suggested by the binary choice between doctrinal recognition and non-recognition. Constitutional doctrine might make greater use of intermediate measures, such as revocation of tax-exempt status or other state privileges, for groups whose beliefs and practices threaten the rights and interests of non-members. This enables the state to preserve the pluralist contributions that groups make to liberal democracy without subsidizing antiliberal values and practices.*

## I. INTRODUCTION: THE PUZZLING PERSISTENCE OF GROUP RIGHTS THEORIES

The question of groups for liberal theory and constitutional doctrine is not new and has always been posed with special intensity for *religious* groups. Consider this argument for the constitutional protection of religious group rights from the *Harvard Law Review*:

The heart of the pluralistic thesis is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free

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lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority. To make this assertion is to suggest that private groups have liberties similar to those of individuals and that those liberties, as such, are to be secured by law from governmental infringement.

This paragraph sounds as if it could have been written last week,<sup>1</sup> but in fact it was published in 1953, by legal historian Mark DeWolfe Howe in his foreword to the Supreme Court's 1952 Term.<sup>2</sup> The occasion was a single sentence in a 1953 Supreme Court opinion, *Kedroff v. St. Nicholas Cathedral*, which declared that a state statute purporting to resolve a dispute over control of certain church-owned property in the United States "directly prohibits the free exercise of an ecclesiastical right, the Church's choice of its hierarchy."<sup>3</sup> Professor Howe took this line and ran with it, arguing that a constitutionally protected right to choose church leaders attached to the church as an institution, rather than to its members.

Thus began the long and unrequited love affair between legal academics and constitutional theories of group rights. Since *Kedroff*, every time some unguarded Supreme Court language has hinted at the existence of group rights,<sup>4</sup> academics

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<sup>1</sup> See, e.g., Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C. R.-C. L. L. REV. 79, 83–84 (2009) (arguing a "sphere sovereignty" theory of group rights under which certain decisions of religious and other institutions would be held free of state regulation or judicial review because of the contributions such institutions make to the freedom of speech and the free exercise of religion).

<sup>2</sup> Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

<sup>3</sup> 344 U.S. 94, 119 (1952).

<sup>4</sup> See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) ("[Freedom of association] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. . . . Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association like a regulation that forces the group to accept members it does not desire.") (internal quotation marks omitted); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("[A religious] community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.") (footnote omitted); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, 507 (1979) ("The key role played by teachers in [a parochial] school system has been the predicate for our conclusions that governmental aid channeled

have responded with law review articles arguing that the Court could, or should, or might, or must confirm such rights in doctrine.<sup>5</sup> But the Court never has. This has been going on for more than fifty years, and we are now no closer to a constitutional doctrine of group rights than we were when Professor Howe wrote in 1953.<sup>6</sup>

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through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools. . . . [T]he [National Labor Relations] Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) ("Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations.") (internal quotation marks and citations omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) ("[C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.").

<sup>5</sup> See, e.g., Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1006–18 (1983); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 291–93 (2008) [hereinafter Garnett, *Do Churches Matter?*]; Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 516 (2008) [hereinafter Garnett, *Religion and Group Rights*]; Horwitz, *supra* note 1, at 81–84; Howe, *supra* note 2, at 91–95; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373–74 (1981); see also Thomas Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, GEO. J. L. & PUB. POL'Y (forthcoming 2009) (manuscript at 3, available at <http://papers.ssrn.com/sol3/results.cfm> (arguing that religious group rights limit Congress's power to place conditions on such groups' receipt of federal funds and benefits)); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1635–36 (arguing that the principles and logic of *Employment Division v. Smith* support a strong doctrine of church autonomy); Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 26–35 (1983) (elucidating the law-creating character of private groups in liberal democracies); Perry Dane, "Omalous" Autonomy, 2004 BYU L. REV. 1715, 1715–22 (arguing that *Smith*'s abandonment of individual free exercise exemptions did not constitute abandonment of religious group autonomy rights).

True confession: I wrote one, too. See Frederick Mark Gedicks, *Towards a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 99–106. For less sympathetic treatments of group rights, see Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 391–95 (1987); Laura S. Underkuffler, *Thoughts on Smith and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1773–76.

<sup>6</sup> See Garnett, *Do Churches Matter?*, *supra* note 5, at 292–93 (arguing that the

The Court's lack of enthusiasm for group rights is undoubtedly related to their paradoxical quality. This paradox requires analytic touchstones to guide the decision when the liberal state should intervene in the internal affairs of groups, such as groups' lack of foundational status in constitutional doctrine, whether group membership is consensual, and the extent to which group rights impose external costs on non-members. It also suggests the need for a more nuanced approach to group rights than that suggested by the binary choice between recognition and non-recognition. Here I agree with Dean Berman that constitutional doctrine might make greater use of intermediate measures, such as revocation of tax exempt status or other state privileges, for groups whose beliefs and practices threaten the rights and interests of non-members.<sup>7</sup> This enables the state to preserve the pluralist contributions that groups make to liberal democracy without subsidizing antiliberal values and practices.

## II. THE PARADOX OF GROUPS IN A LIBERAL STATE

### A. *The Case for a Constitutional Jurisprudence of Group Rights*

There is a democratic case, and even a liberal one, for a group rights doctrine in constitutional law. Private groups are crucial to the formation and maintenance of a person's individual beliefs and identity, whose connections to autonomy and freedom are obvious.<sup>8</sup> Groups also buffer the individual against the leviathan of the contemporary liberal state, which now occupies virtually every area of contemporary life; the importance of that protection to autonomy and freedom is

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doctrinal autonomy and institutional self-governance of churches are underprotected by free exercise doctrine); Horwitz, *supra* note 1, at 95–96 (observing that free speech doctrine generally ignores institutional implications); Lupu, *supra* note 5, at 401 (observing that constitutional doctrine does not afford special protection to institutions engaged in constitutionally protected activities).

<sup>7</sup> See Paul Schiff Berman, *Towards a Jurisprudence of Hybridity*, 2010 UTAH L. REV. 11.

<sup>8</sup> E.g., ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 246 (1976) (“[M]an makes himself through the different forms of social life he establishes.”); Brady, *supra* note 5, at 1677 (“If religious communities are not able to teach, develop, and live out their ideas free from state interference, individual belief will also be suppressed.”); Cover, *supra* note 5, at 31 (Religious groups provide “a refuge not simply from persecution, but for associational self-realization in nomian terms.”); Gedicks, *supra* note 5, at 108–09 (“[A] religious narrative is a source of moral authority in the lives of those who wish to become or to remain members of the religious group to which the narrative pertains.”); Stephen L. Pepper, *Autonomy, Community, and Lawyers’ Ethics*, 19 CAP. U. L. REV. 939, 940 (1990) (“We come to be physically, psychologically, and socially through others. . . . [W]e are necessarily and basically connected to others: first to families; later to larger intermediate groups; ultimately, and pervasively, a large part of our ‘selves’ [is] determined by and part of the culture and society in which we are raised.”); see also Gedicks, *supra* note 5, at 116; Horwitz, *supra* note 1, at 122–23.



equally obvious.<sup>9</sup> So the imperative for a constitutional doctrine of group rights is precisely their contribution to individual freedom and autonomy: without groups, individuals would find themselves adrift in a social chaos, bereft of personal meaning and exposed to abuse by the state.

*B. The Dark Side of Groups and Group Rights*

The narrative of group rights as a source and protector of individual identity, autonomy, and freedom is the optimistic story told by legal academics who see group rights theories as a vehicle for protecting institutional religious freedom.<sup>10</sup> There is a less optimistic account of group rights—indeed, one that has particular salience for religious groups. The dependence of individuals on group membership for personal meaning and identity leaves them exposed to coercion by the group.<sup>11</sup> When a group tells a person who she is, or supplies the meaning of his life, the prospect of being cut off from the group is chilling; Professor Goldberg supplies insightful examples of individuals who are so deeply socialized in and so closely identify with a group that leaving it would feel like killing off a part of themselves.<sup>12</sup> It is easy to see how a person in such a situation may feel group pressure to do things she would not otherwise do, or to avoid doing things he otherwise would, to escape the existential threat posed by excommunication or expulsion. Even in the absence of this psychological threat, it remains that state recognition of the autonomy or privacy of groups often leaves groups free to act on their members in ways that the state otherwise would not permit, as when religious or other groups are exempted from antidiscrimination laws.<sup>13</sup> Finally, group rights

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<sup>9</sup> See, e.g., Cover, *supra* note 5, at 49–50 (describing the liberty-creating quality of “texts of resistance” to the liberal state); Garnett, *Do Churches Matter?*, *supra* note 5, at 294–95 (arguing that a social “infrastructure” of “independent, thriving, distinctive institutions” is necessary for meaningful individual religious freedom); Pepper, *supra* note 8, at 944 (“If one has on the one side very large governmental institutions and very large corporate entities and on the other side isolated individuals, freedom for the individuals is not likely to mean a lot: single individuals are not likely to have much power to exercise their freedom in relation to those vastly larger corporate and governmental entities.”); see also UNGER, *supra* note 8, at 282 (“[T]he group serves as a buffer between the individual and the state, protecting the former from the encroachments of the latter.”); Gedicks, *supra* note 5, at 115–16 (summarizing the pluralist thesis that the interposition of private groups between the individual and the state safeguards individual liberty against state coercion).

<sup>10</sup> See, e.g., Brady, *supra* note 5; Garnett, *supra* note 5; Horwitz, *supra* note 1.

<sup>11</sup> See Gedicks, *supra* note 5, at 117; Underkuffler, *supra* note 5, at 1776; see also UNGER, *supra* note 8, at 266–67 (“By its very nature, community is always on the verge of becoming oppression. The existing [group] consensus may be mistaken for the final expression of the good, and used as a justification for denying the humanity of individuals and rejecting the legitimacy of dissident groups.”).

<sup>12</sup> Robert Goldberg, *The Challenge of Change: Social Movements as Non-State Actors*, 2010 UTAH L. REV. 65.

<sup>13</sup> See Lupu, *supra* note 5, at 431–32; Pepper, *supra* note 8, at 943–44; Underkuffler,

threaten liberal democracy and political stability by enabling groups to challenge the sovereignty of democratically elected actors.<sup>14</sup>

The imperative against a constitutional doctrine of group rights is thus the mirror image of the imperative for them: the threat that groups pose to individual identity, autonomy, and freedom. Groups can and do coerce individuals by threatening to cut them off from sources of personal meaning and identity. They often operate internally in violation of social norms embodied in laws designed to protect individual liberty, and they can threaten the efficacy of the liberal democratic state.

### C. *The Paradox of Groups*

Hence the paradox of groups: they are simultaneously instruments of individual liberty and individual oppression, in the precise measure that the state forgoes or insists upon intervention in group affairs. Take, for example, the so-called “privacy” of family life, which Dean Berman also discusses.<sup>15</sup> The character of the family in which a person grows up is a crucial component of her identity and buffers her against coercion by the state and other external actors.<sup>16</sup> American constitutional doctrine generally allows adults to order their family relationships according to their own values, and not those of the state.<sup>17</sup> Indeed, among the unenumerated constitutional rights to have survived the Court’s rejection of *Lochner*-era substantive due process are privacy and autonomy rights relating to

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*supra* note 5, at 1783; *see also* Garnett, *Do Churches Matter?*, *supra* note 5, at 287 (observing that religious groups enjoy a “license to discriminate” that is not available to other groups).

<sup>14</sup> *See* Lupu, *supra* note 5, at 442.

<sup>15</sup> *See* Berman, *supra* note 7, at 27.

<sup>16</sup> *See* Donna Palladino Schultheiss & David L. Blustein, *Contributions of Family Relationship Factors to the Identity Formation Process*, 73 J. COUNSELING & DEVELOP. 159, 160 (1994).

<sup>17</sup> *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895–98 (1992) (right of woman to terminate pregnancy without notifying husband); *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (right of parent to receive notification of minor child’s intention to terminate pregnancy); *Zablocki v. Redhail*, 434 U.S. 374, 383–85 (1978) (right to marry without regard to the fulfillment of pre-existing child support obligations); *Moore v. City of E. Cleveland*, 431 U.S. 494, 504–06 (1977) (right of extended family to live together); *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1976) (right of parent to withdraw children from public high school to preserve religious community); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (right of married couple to use contraceptives); *cf. Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (equal protection right of unmarried persons to have the same access to contraceptives as married persons). *But see* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (rejecting right of parent to give consent before a minor child receives an abortion); *Reynolds v. United States*, 98 U.S. 145, 165–166 (1878) (rejecting right to polygamous marriage).

family, such as the rights to marry and to conceive, bear, and raise one's children substantially free of state interference.<sup>18</sup>

At the same time, familial privacy rights leave some family members (disproportionately women and young children) at the mercy of others (disproportionately men and older boys).<sup>19</sup> The relation between family life and identity formation, moreover, greatly complicates the prosecution and punishment of domestic abuse. A family member who experiences abuse at the hands of a family member faces the existential crisis that I have described when asked to cooperate in the prosecution of her abuser: a large portion of her identity, even the very meaning of her life, may depend to a significant extent on her life history with the family member who is abusing her, and in whose prosecution and punishment she must now participate. It is common for domestic abuse victims to experience great anguish at the choice between reporting or testifying against an abusive family member (and thereby causing his imprisonment and removal from the family) and failing to report or testify (thereby relieving the abusers of responsibility and, perhaps, enabling the abuse to continue).<sup>20</sup>

The cost of leaving women or children at the mercy of domestic abusers is obviously unacceptable. The state must intervene in even intimate aspects of family life to prevent and to punish such abuse.<sup>21</sup> But also there is no denying that such intervention exacts costs from both the victims as individuals and their families as groups.

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<sup>18</sup> See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (right of parent to send minor children to private schools); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (right of parent to retain foreign language instructor for minor children).

<sup>19</sup> See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974–75 (1991) (arguing that the constitutional principle of marital privacy is often used to legitimize the state's refusal to protect women from domestic violence); see also Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 494–95 (1999) (“Traditionally, the law has viewed violence in the family as a private issue, into which the law should not intrude, for fear of exposing the family to ‘public curiosity and criticism’ and thus undermining it. Feminists have shown that, to the extent family violence is beyond the reach of the law, men’s abuse of and power over women is enabled and affirmed.”); Reva B. Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2152–53 (1996) (“A [nineteenth century] judge reasoning about marriage as a companionate relationship could invoke values of marital privacy to justify giving wife beaters immunity from prosecution, much as he could invoke authority-based conceptions of marriage to justify giving husbands a formal prerogative to beat their wives.”).

<sup>20</sup> See KRISTIN A. KELLY, DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY 46, 57, 123 (2003).

<sup>21</sup> Compare Bartlett, *supra* note 19, at 495 (describing state abrogation or qualification of the common law immunity for spousal rape as a welcome advance in the fight against domestic violence), with MODEL PENAL CODE § 213.1 cmt. 8(c) (1980) (defending retention of the spousal rape immunity as a guarantee of marital privacy).

With specific regard to religious groups, one also sees the paradox in clergy abuse scandals. A strong religious group autonomy right gives to churches and other religious congregations the breathing space necessary to develop distinctive norms and values, without the distortion of state regulation or other influence, as well as the independence necessary to challenge coercive state actions before which its members would otherwise be powerless.<sup>22</sup> On the other hand, a strong religious group autonomy right also insulates churches and congregations from the liability for leader misconduct to which organizations are generally subject, by substantially reducing the range of internal group decisions that are subject to judicial review.<sup>23</sup> The presence of a strong autonomy right thus tends to insulate abusers from punishment and their religious employers from liability. Even in the absence of such a right, clergy abuse victims face the psychologically difficult task of denouncing the spiritual representative of an organization whose actions and values are embedded in her identity. Again, regardless of how this paradox is resolved, the personal, institutional, and societal costs are substantial.

My last example illustrates the progressive reform that can be triggered by external state pressure on groups. Some years ago, I attended a Society of American Law Teachers discussion group whose topic was polygamy and the protection of religious group autonomy generally. During the discussion, a number of feminist scholars observed that Mormon polygamists, not to mention many Catholics, evangelicals, and mainstream Latter-day Saints, are organized around beliefs about inherent differences in the capacities, roles, and obligations of men and women, and argued that protection of such religious groups amounted to a perpetuation of sexism and patriarchy. I was pretty invested in group rights arguments in those days,<sup>24</sup> so along with some other Latter-day Saint scholars, I vigorously defended blanket constitutional protection for religious group autonomy and privacy, despite the fact that such protection would shelter the antiliberal beliefs and practices of some religious groups. I and others maintained that because groups constitute individual identity and protect individuals from state oppression, it is critical for the beliefs and practices and general culture of the group to develop “naturally,” free from the distortion of state intervention on the

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<sup>22</sup> See Mark E. Chopko, *Continuing the Lord's Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU L. REV. 1897, 1907, 1920 (explaining that case law establishes the right of churches to “organize, administer, and govern themselves according to their own internal law” and arguing that churches need this freedom to operate and fulfill their primary responsibilities); Horwitz, *supra* note 1, at 123–24 (discussing Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1860–65).

<sup>23</sup> See Marci Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1107, 1187–1204 (explaining the results of religious institutions seeking freedom from judicial oversight in disputes based solely on beliefs, disputes between the institution and adult clergy and employees, and claims brought by third parties against the clergy or institution).

<sup>24</sup> See, e.g., Gedicks, *supra* note 5.

basis of conventional liberal values, even if this imposed some costs on particular individuals. Otherwise, we maintained, the contributions of groups to identity, liberty, and democracy itself would be lost.

Now, as it happened, all of us fighting the good fight at this discussion were Mormon males, so our insistence that the value of religious group autonomy outweighed the need to protect particular women against gender discrimination by such groups lacked, shall we say, a certain credibility. It was not long before a feminist scholar raised her hand and asked, “Where are all the Mormon women? How come no Mormon woman is making this argument?” In fact, a Mormon woman was present at this very discussion, and I excitedly waited for her to raise her hand and shout, “I’m a Mormon woman, and Gedicks is right!” But she never did.

After the discussion, I tracked her down and asked, with some frustration, why she had left me and the others out there twisting in the rhetorical wind. Her response changed how I think about group rights. She pointed out that while she loved the LDS Church, the historical patterns of its in-group culture sometimes work to disadvantage women, and she thought that the external pressure exerted by antidiscrimination laws helped to stimulate thinking about whether discriminatory practices are theologically or doctrinally required or merely cultural habits. So notwithstanding her loyalty to the church, she was glad that at least Brigham Young University, the church’s flagship university, was subject to the legal pressure of antidiscrimination norms relating to gender equality.

### III. TOUCHSTONES FOR A DOCTRINE OF STATE INTERVENTION INTO GROUPS

Given the paradox of groups, when and how should the liberal state intervene in internal group decisions and affairs to halt oppression of vulnerable group members? I will suggest three analytic touchstones: the fact that groups are not accorded ontological status by constitutional doctrine; whether there exists true consent to group membership; and whether group rights impose external costs on non-members.

#### *A. Groups’ Lack of Ontological Status in Constitutional Doctrine*

A threshold question is the ontological status of groups in constitutional doctrine—that is, does the Constitution protect groups as such, or only as associations of individuals or to the extent that they enhance individual rights or interests? One way of understanding the stakes in this question is by a business associations analogy: are groups more like corporations or partnerships? Because corporations are legal entities, the circumstances in which the law will look past the corporation to its individual owners and managers are limited. Because partnerships are not legal entities, however, the situation is reversed: the

circumstances in which the law will look to the partnership as an entity, rather than to its owners and managers, are limited.<sup>25</sup>

So the question here is whether groups hold constitutional rights *as groups*, or whether the rights they hold depend on the rights of individuals? Individuals have intrinsic constitutional status; they have standing to make powerful claims on or against the state.<sup>26</sup> If groups were to have a comparable organic or intrinsic constitutional status, then they would be presumptively entitled to constitutional protection as groups, regardless of, and even at some considerable cost to, societal interests and the rights of natural persons. The Court's nineteenth century determination that corporations are "persons" within the meaning of the Fourteenth Amendment,<sup>27</sup> for example, afforded corporations the powerful protection of the Due Process Clause against state police power regulations during the Gilded Age.<sup>28</sup> A similar conclusion with respect to undocumented resident aliens gave them the right to free public education, notwithstanding the costs to local school districts and taxpayers.<sup>29</sup> These protections and claims are not absolute, of course, so it follows that even if groups were to have intrinsic constitutional status, their rights might be overridden by sufficiently weighty individual or state interests.<sup>30</sup> Still, the circumstances in which such overriding may take place would be fewer and more constrained.

By contrast, if groups are merely a means to the end of enhancing individual liberty, then they are presumptively entitled to constitutional protection only to the extent that they do, in fact, enhance individual liberty. The group claim to

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<sup>25</sup> See, e.g., ROBERT C. CLARK, CORPORATE LAW § 1.2.3, at 15, 17 (1986) (observing that "for some purposes a partnership is thought of as an aggregate of its members rather than a legal entity," whereas "a corporation is almost as much an entity as a natural person").

<sup>26</sup> See, e.g., U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

<sup>27</sup> See, e.g., *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Santa Clara City v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (announcement at oral argument).

<sup>28</sup> See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (applying to corporation the substantive due process protections of unenumerated fundamental rights that are insulated from state police power regulation); *Chicago, Burlington & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 262–63 (1897) (applying to corporation the substantive due process requirement that the city pay just compensation for municipal taking of corporation's property).

<sup>29</sup> See *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (explaining that regardless of immigration status, undocumented aliens are considered persons guaranteed due process of law under the Fifth and Fourteenth amendments).

<sup>30</sup> Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the compelling governmental interest in eradicating racial discrimination in education justified revocation of tax exempt status of a religious university that prohibited interracial dating and marriage among its students).

constitutional protection, in other words, is parasitic upon or derivative of some individual rights claim.<sup>31</sup> This would suggest diminished group claims against the state, and much lower barriers to state regulation of groups and intervention into their internal affairs, because the focus of constitutional protection would be individuals and their interests, not the group and its interests.

Several constitutional doctrines create the illusion of organic or intrinsic status but ultimately confirm that the constitutional status of groups is derivative of individual rights rather than intrinsic to groups themselves. The freedom of association under the Speech Clause,<sup>32</sup> for example, can be misunderstood as a constitutional doctrine that protects groups as groups.<sup>33</sup> As the Court has made clear on numerous occasions, however, freedom of association is founded upon the associational rights of individuals, and even then only to the extent that such rights advance speech and expression.<sup>34</sup>

The misnamed “church autonomy cases” likewise sound in group rights—or, at least, religious group rights.<sup>35</sup> But again, the Court has made it clear that these cases are more about judicial competence than they are about religious group autonomy. These cases hold that courts must avoid intervening in religious disputes when doing so would entail their deciding theological or ecclesiastical questions—which secular courts have no competence or even jurisdiction to address.<sup>36</sup> When such disputes can be decided by reference to secular legal principles, however, the courts are free to intervene, even when doing so subverts religious group autonomy.<sup>37</sup>

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<sup>31</sup> Cf. Lupu, *supra* note 5, at 426 (“Recognition of derivative, organizational rights in our legal system is generally defended on instrumental grounds, rather than on the basis of any claim that organizations are entitled to ‘personhood’ status.”).

<sup>32</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

<sup>33</sup> See Garnett, *Religion and Group Rights*, *supra* note 5, at 521–22 (endorsing group rights reading of *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000), which held that freedom of association excused the Scouts from complying with anti-discrimination provisions of state public accommodations law).

<sup>34</sup> *E.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620–21 (1984) (holding that business networking organization was not protected by freedom of association because litigation and other group expression did not form a significant part of its activities); see Gedicks, *supra* note 5, at 124 (arguing that a group’s interest in self-definition is protected by freedom of association “only to the extent that a governmentally coerced change would alter ideas that the group advocates in the first amendment marketplace”).

<sup>35</sup> See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

<sup>36</sup> See, e.g., *Wolf*, 443 U.S. at 602–04; *Serbian E. Orthodox*, 426 U.S. at 708–09; *Mary Elizabeth*, 393 U.S. at 443–48; *Watson*, 80 U.S. (13 Wall.) at 729, 732.

<sup>37</sup> Garnett, *Religion and Group Rights*, *supra* note 5, at 527–28; Gedicks, *supra* note 5, at 133; Lupu, *supra* note 5, at 407–08; see also, e.g., *Wolf*, 443 U.S. at 602–03.

There are other isolated hints of group rights. Justice Brennan once argued that a religious group is an “organic entity” that is not “reducible to a mere aggregation of individuals,”<sup>38</sup> and Justices Douglas and Harlan similarly suggested that marriage is a constitutionally organic institution that is not reducible to the spouses who constitute it.<sup>39</sup> These hints, however, have never been developed into a doctrine of group rights.

In sum, American constitutional rights doctrine is relentlessly individualistic. The answer to the ontological question is that under contemporary constitutional doctrine, groups are presumptively subject to government regulation whenever regulation is necessary to protect individual liberty interests. Consequently, an exceptionally powerful justification must be presented to prevent state intervention into group matters that threaten individual liberty.

### *B. Consensual Group Membership*

Unlike one’s race, which has traditionally been treated as an involuntary status,<sup>40</sup> group affiliation has traditionally been viewed as voluntary.<sup>41</sup> This is a familiar conception of religious group membership; it is not unusual for people to convert to a religion in which they were not raised, to change churches or congregations or synagogues, or to lapse into spiritual inactivity, agnosticism, or unbelief. If this voluntarist conception of group membership is correct, it follows that the internal workings of groups should be largely opaque to outside state regulation. The state should generally be concerned with the entry and exit of members—that is, with ensuring that an individual’s decision to affiliate with a religious or other group is genuinely voluntary.<sup>42</sup> The state could help to ensure that membership decisions are based on accurate information and are the result of a current and freely given consent, as it does in the area of contract and other transactions. The state could also ensure that members who desire to leave the group are able to. For example, a flurry of “deprogramming” arguments in the 1980s focused on groups who purportedly used various nefarious techniques to

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<sup>38</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

<sup>39</sup> *See Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *id.* at 500–01 (Harlan, J., concurring).

<sup>40</sup> This conventional wisdom has lately been challenged by the argument that racial categories are socially constructed and by individuals who refuse to be bound by traditional racial categories. An increasing number of people with one African American parent and one white parent, for example, reject the convention that classifies them as “black” or “African American” in favor of “bi-racial” or some similar category that suggests multi-racial ancestry. *See Dorcas D. Bowles, Bi-Racial Identity: Children Born to African-American and White Couples*, 21 CLINICAL SOC. WORK J. 417, 417 (1993).

<sup>41</sup> *See, e.g., Watson v. Jones*, 80 U.S. 679, 714, 727–29 (1872) (applying common law of voluntary associations to church property dispute).

<sup>42</sup> *See Gedicks, supra* note 5, at 151, 153.



undermine a proselyte's ability to make a voluntary decision to join the group and to prevent a member from leaving it.<sup>43</sup>

If group membership is not voluntary, however, group boundaries should be largely transparent to government regulation, as they are with race: the state probably should be empowered to violate even the constitutive core of group beliefs and practices when necessary to rescue group members whose belonging is the consequence of physical or economic coercion.<sup>44</sup> Some kinds of psychological or emotional coercion may also constitute a legitimate predicate for state intervention; "plural wives" in religious polygamist communities, for example, may feel trapped by fear that they will lose custody of or access to their children if they withdraw from the community. Whether the existential threat of expulsion alone should qualify as such a predicate, however, is more doubtful, because government insistence that a group retain a member it no longer wants would destroy the independence of the group from the government.<sup>45</sup>

Beyond situations of coercion lies the trap of "false consciousness," the idea that people cannot act in their own best interests because they are uninformed or deceived about what that interest is or where it lies.<sup>46</sup> There is obvious validity to the notion of false consciousness, but as a predicate for state intervention it can be an excuse for the paternalistic authoritarianism that purports to know what is good for individuals even better than they know it for themselves.<sup>47</sup> Many religious individuals believe that achievement of genuine happiness lies in conformity to demanding, counter-cultural standards of belief and conduct.<sup>48</sup> Although there are polygamous wives who feel trapped in their communities, there are also polygamous wives who feel fulfilled and derive significant personal and spiritual meaning from their participation in the community.<sup>49</sup> When apparently free and

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<sup>43</sup> See, e.g., Richard L. Cupp, Jr., Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949, 957 (1986); Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533, 537 (1982).

<sup>44</sup> See UNGER, *supra* note 5, at 279–80; Gedicks, *supra* note 5, at 151–52.

<sup>45</sup> See Horwitz, *supra* note 1, at 98 ("The Church may not be forced to tolerate as a member one whom she feels obliged to expel from her circle; but on the other hand no citizen of the State must be compelled to remain in a church which his conscience forces him to leave.") (quoting theologian Abraham Kuyper)).

<sup>46</sup> See, e.g., STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 279 (2000); MICHAEL WALZER, POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM 1–20 (2004); John T. Jost, *Negative Illusions: Conceptual Clarification and Psychological Evidence Concerning False Consciousness*, 16 POL. PSYCHOL. 397, 417–18 (1995).

<sup>47</sup> See, e.g., Joseph Heath, *Liberal Autonomy and Consumer Sovereignty*, in AUTONOMY AND THE CHALLENGES TO LIBERALISM 204, 214 (John Christman & Joel Anderson eds., 2005); MACEDO, *supra* note 46, at 61, 130.

<sup>48</sup> See, e.g., Gedicks, *supra* note 5, at 118.

<sup>49</sup> See, e.g., Jessie L. Embry, *Effects of Polygamy on Mormon Women*, 7 FRONTIERS: J. WOMEN STUD. 56, 60 (1984).

competent adults assert the personal value of their group affiliation, we should believe them, even—perhaps especially—when the group operates according to countermajoritarian norms.

### *C. External Costs*

A final way of approaching the question of group rights is to consider the extent to which they affect non-members. This is a corollary of both the ontological and the voluntarism questions. It is one thing to insist that society as a whole bear the cost of individual rights, even when such rights impose costs on others, because individual rights holders have an ontological status in American constitutional law. It is another thing, however, to allow entities that do not command this doctrinal status to impose the costs of their group “rights” onto individuals who do not belong to the group and who have not, therefore, consented to bear such costs.<sup>50</sup> Accordingly, when group autonomy or privacy would impose substantial costs on non-members, state regulation or other intervention is generally appropriate.

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In sum, because groups have no foundational or organic status in constitutional doctrine, everything depends on whether group membership is consensual and the costs of group action are internalized. When group membership is not the product of choice, the state is always justified in intervening to ensure exit rights for group members. When group membership is voluntary, however, the focus shifts to external costs. When the externalities of group rights are small, such rights should be recognized. A good example of such a situation is the group autonomy right defended by Professor Howe—the right of a religious group to choose its own leaders. Other examples include the content and conduct of religious doctrines, creeds, and rituals. So long as these matters are confined to religious group members who are free to leave, the group should be left to chart its own course, even when its beliefs and practices are countermajoritarian and illiberal. When group rights entail significant externalities, however, the state is justified in overriding group autonomy and group rights. Professor Lupu has argued that employment discrimination by religious groups—especially social service or other auxiliary units of religious congregations—often generates this kind of situation by imposing the costs of religious discrimination in the relevant job markets on the public at large.<sup>51</sup>

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<sup>50</sup> See Laycock, *supra* note 5, at 1403–12; Lupu, *supra* note 5, at 408–09; cf. *Estate of Thornton v. Caldor*, 472 U.S. 703, 709–11 (1985) (holding that a law creating an absolute right of an employee not to work on his or her Sabbath violated the Establishment Clause because of costs imposed on other employees).

<sup>51</sup> See Lupu, *supra* note 5, at 408–09.

## IV. CONCLUSION: LIMITS TO LIBERAL TOLERANCE?

A much-noted contradiction of liberal theory is its tolerance of illiberal individuals and groups.<sup>52</sup> This is an apparent consequence of the foundational premise of liberalism, that consensus on the good life is not achievable in conditions of religious and moral pluralism.<sup>53</sup> Without consensus on a single substantive conception of the good, it follows that all such conceptions should be tolerated unless they harm the lives, liberties, or property of others. The liberal state, in other words, is procedural rather than substantive.

It is an overstatement, of course, to maintain that liberalism is devoid of a substantive conception of the good. Substantive liberal values include racial, gender, and (of late) sexual-orientation equality, as well as individual choice and autonomy. For example, Rawls argued for a “thin theory of the good,”<sup>54</sup> which assures each member of society “equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands.”<sup>55</sup>

Some group rights theorists have argued that liberalism’s rejection of any “thick” conception of the good justifies strong autonomy and other group rights even for illiberal groups whose internal activities entail racially discriminatory, patriarchal, or anti-gay beliefs and practices. Professor Brady, for example, maintains that liberal democracy is ill-served by a “homogeneity of beliefs and values, even beliefs whose correctness seems unassailable and values that seem essential for democratic life.”<sup>56</sup> She thus concludes that liberal democracy should not merely tolerate the existence of religious groups, but should also permit them actively to shape American political norms, even at the cost of protecting illiberal values:

Though the ideals of religious crusades were at one time unpopular and unorthodox, and even abhorrent to many, many were, in fact, seeds of progress. Thus, democratic government flourishes best when religious communities are free to develop, teach, and practice their religious

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<sup>52</sup> See, e.g., Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 626–30 (2002); Marlies Galenkamp, *The Limits of Tolerance in a Liberal Society: In Search of Guidelines*, in HANDBOOK OF GLOBAL SOCIAL POLICY 337, 337–51 (Stuart S. Nagel & Amy Robb eds., 2001); Douglas G. Smith, *The Illiberalism of Liberalism: Religious Discourse in the Public Square*, 34 SAN DIEGO L. REV. 1571, 1611 (1997).

<sup>53</sup> See, e.g., J. Mark Halstead, *Liberal Values and Liberal Education*, in, VALUES IN EDUCATION AND EDUCATION IN VALUES, 17, 17–28 (Mark Halstead & Monica J. Taylor eds., 1996).

<sup>54</sup> JOHN RAWLS, A THEORY OF JUSTICE 397 (1971).

<sup>55</sup> *Id.* at 94.

<sup>56</sup> Brady, *supra* note 5, at 1703.

beliefs and doctrines without government interference, no matter how unpopular and even repugnant their ideas may seem.<sup>57</sup>

There is something to this position, particularly in our current postmodern condition of religious and moral dissensus. As Justice Holmes once famously argued, the fact that “time has upset many fighting faiths” suggests that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>58</sup> Tolerance of illiberal as well as liberal groups underwrites the pluralism that is necessary for meaningful individual choice as well as social transformation. Moreover, even many illiberal groups provide benefits to non-members and to society through social service and similar charitable outreach programs.

I also once advanced the argument that the protection of group values repugnant to the majority is an acceptable price to pay for the meaning that groups supply to individuals and for the protection they offer against state oppression.<sup>59</sup> I am less sure of this argument now, however, than I was twenty years ago; the price may be too great. The toleration of illiberal groups is fraught with danger for liberal democracy, which by definition cannot guarantee that such groups will not seize the reins of democratic power.<sup>60</sup> It would not be irrational to forgo state intervention into the internal affairs of illiberal groups, while also ensuring that the state is not encouraging or subsidizing group actions that would threaten important individual and state interests if applied to non-members. I agree here with Dean Berman that some intermediate position on state regulation of groups might be desirable.<sup>61</sup> This suggests a regime of classic tolerance for illiberal groups, under which their activities are not criminalized or regulated, but the state removes the subsidy and encouragement of tax exemptions or other state privileges.

This is the posture long assumed by the Internal Revenue Service with respect to private schools and universities that engage in racially discriminatory practices.<sup>62</sup> These educational entities do not violate the criminal law when they

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<sup>57</sup> Brady, *supra* note 5, at 1705 (new paragraph indent deleted); *see also* Garnett, *Do Churches Matter?*, *supra* note 5, at 532 (suggesting that an “institutional” approach to the Religion Clauses would hold that a “civil-society landscape that is thick with churches” benefits the values the First Amendment protects).

<sup>58</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>59</sup> *See* Gedicks, *supra* note 5, at 168–69.

<sup>60</sup> *See, e.g.,* Ranjoo Seodu Herr, *In Defense of Nonliberal Nationalism*, 34 POL. THEORY 304, 305 (2006); Helder de Schutter & Ronald Tinnevelt, *Is Liberal Nationalism Incompatible with Global Democracy?* 40 METAPHIL. 109, 111 (2009).

<sup>61</sup> *See* Berman, *supra* note 7, at 29.

<sup>62</sup> *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–92 (1983); *see also* I.R.C. § 501(c)(3) (2006) (providing federal tax exemption for “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster

discriminate, nor are they legally forced to adhere to antidiscrimination laws. Nevertheless, by discriminating they forfeit their federal tax exemption as non-profit groups because racial discrimination in education violates established public policy and thus does not generate a public benefit.<sup>63</sup> Other similar measures include observance of antidiscrimination norms by private groups as the price of their obtaining liquor licenses, accreditation, or other state privileges, or of offering goods and services generally to the public.<sup>64</sup> The foregoing situations implicate the state in illiberal group beliefs and practices, by a general taxpayer subsidy (when the group is tax exempt),<sup>65</sup> or by permitting illiberal groups to externalize the costs of their illiberal beliefs and practices onto non-members (when the group offers goods and services only on condition of illiberal beliefs and practices). Whether or not *individuals* are generally entitled to impose their values on others or to command some public subsidy for unconventional or countermajoritarian values, *groups*, because they lack the ontological status of individuals in the world of constitutional doctrine, cannot command such benefits when the price of doing so is the individual liberty of non-members. On the other hand, even illiberal groups might qualify for tax exemption and state privileges when the group takes care to confine the effect of its beliefs and practices to its members.<sup>66</sup> Without imposing externalities on non-members, and with some positive social value despite some illiberal beliefs and practices, such groups can make a doctrinally coherent case for tax and other generally available subsidies and supports.

There is a lesson here for groups. Some of the threat to liberal values created by groups is caused by “thick” conceptions of the good that groups feel compelled to externalize beyond group boundaries.<sup>67</sup> Thick conceptions of the good entail commitments to a particular and powerful vision of how individuals should live and society should be, a vision that may be so strong that it seems to justify its imposition even on non-members. One measure of whether the social benefits offered by illiberal groups are worth their social costs is whether they respect the

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national or international amateur sports competition,” on condition that they refrain from partisan political activity and substantial lobbying efforts).

<sup>63</sup> See, e.g., *Bob Jones*, 461 U.S. at 595–96; *Norwood v. Harrison*, 413 U.S. 455, 462–63 (1973).

<sup>64</sup> See R. Scott Tewes, Note, *Religion, Education, and Government Regulation: Implications of Bob Jones University v. United States for Congressional Decisionmaking*, 34 S.C. L. REV. 885, 889–92 (1983).

<sup>65</sup> See, e.g., *Bob Jones*, 461 U.S. at 595 (finding that the federal government should not encourage racially discriminatory schools “by having all taxpayers share in their support by way of special tax status”).

<sup>66</sup> See David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 169–70 (2001).

<sup>67</sup> I explored this problem in the context of religious truth claims advanced in electoral campaigns in Frederick Mark Gedicks, *Truth and Consequences: Mitt Romney, Proposition 8, and Public Reason*, 61 ALA. L. REV. 337 (2010).

liberty and autonomy of others when their own liberty and autonomy are not significantly at risk.

Although there have been calls to apply *Bob Jones* beyond the context of racial discrimination in education,<sup>68</sup> these generally have not been heeded. Certainly there is currently no popular or political support for revoking the exemptions of churches and other religious groups that refuse to ordain women or to perform same-sex marriages. *Bob Jones* nevertheless makes clear that one approach to the paradox of groups is removal of state subsidy and encouragement from illiberal groups—intermediate measures that are theoretically and doctrinally viable if the stakes become sufficiently high.

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<sup>68</sup> See, e.g., Mary Becker, *Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 482–86 (1992) (arguing that churches that do not ordain woman to the priesthood should lose their tax exemptions).

## THE CHALLENGE OF CHANGE: SOCIAL MOVEMENTS AS NON-STATE ACTORS

Robert A. Goldberg\*

In a world of great crises—economic, environmental, and political—men and women usually turn to state actors for solutions. The United States government, the European Union, or the World Bank are seen as the agents of change and reform. This focus blurs the stimulus to change that comes from the bottom up via grassroots movements. The events of September 11, 2001, and more recently in Mumbai, Thailand, and Greece suggest the power of social movements, non-state actors, to move history and create the crises of current events. In challenging state authority in American history, social movement activists have nurtured revolution, pressed suffrage and equal rights for women, and transformed the racial status quo, among other changes. In the process of staking a claim to influence, a social movement organizes itself as a community governed by alternative role models, values, and rituals. From this base, social movement agents raise hope of a better world and choose mobilization strategies in a quest to govern. Claims on power demand that activists grapple with authorities who stand ready to protect established institutions and practices.

The social movement perspective on governance, then, is twofold. Activists must exercise governance within the movement to firm it for the coming struggle for power. They also must protect members from authorities who seek to disrupt and disband challengers. With its base secured and resources gathered and focused, the social movement is prepared to claim a share of governance and authority from state actors. This Article outlines internal movement characteristics and factors that effect challenges to state actors. It also considers the dynamic of contention, particularly the responses of state authorities to social movement claims on governance.

When state actors deny the legitimacy of a constituency and ignore the salience of grievances, opportunities arise for social movement mobilization. A social movement is an organized group that acts with some continuity and is consciously seeking to promote or resist change. Key to social movement activism are the means of challenge. Social movements launch collective action to influence those who make decisions about the distribution of benefits in a society. Silent vigils, parades, sit-in demonstrations, cross burnings, Boston tea parties, strikes, rallies, kidnappings, boycotts, violence, and similar collective behaviors are initiated to persuade authorities to recognize challengers and to bring change. In

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\* © 2010 Robert A. Goldberg, Professor of History, University of Utah. For a video of the author's remarks at the Non-State Governance Symposium, please visit <http://www.ulaw.tv/watch/638/non-state-governance-symposium-robert-goldberg>.

gathering numbers and offering inducements or adding disadvantages, activists warn rulers of their power and demand action.<sup>1</sup>

Such means, however, suggest the weakness of social movements. Powerful actors, unlike social movement activists, have easy access to those who govern. They routinely apply resources—for example, through lobbying or offers of information and funding—and successfully lay claims on authorities. These actors, in fact, may rely on the state's means of coercion to protect them from social movement challenges. In turn, in its role of preserving the status quo, government seeks support from established groups that have a stake in the system as it exists. Social movements cease to be such once they gather sufficient resources and abandon collective action for more prosaic means of influence. As contenders for influence, social movements yearn to sit on the balcony of power, but their weakness demands that they take a stand on the streets and behind the barricades.<sup>2</sup>

Challenging the status quo is hard labor. It requires that social movements sustain their members over time to withstand assaults from within and without. It means the creation of self-contained communities, non-state entities, administered by their own leaders and codes of conduct. Particularly important in beckoning followers and holding their allegiances are movement blueprints of the good society. These ideological statements diagnose the problems being faced and fix the blame. They offer means and goals. They provide a rationale that glorifies and justifies the movement and its cause. Ideology is a bulwark against frustration, resistance, and factionalism. It is the scaffolding of a new and alternative community of believers. Also necessary to mount a viable challenge is an organizational structure that anoints leaders who set policy, assign tasks, and harness movement resources to goals. Together, ideology and hierarchy create the crucible for challenge and protest. Moreover, they shelter an alternative world, a community of activists whose loyalty is to the challenging group and a vision of a better world.

Consider in this regard, the Invisible Empire of the Knights of the Ku Klux Klan. This social movement was founded in Georgia in 1915. Within ten years, it was estimated to have initiated five million men and women, making it the largest movement of the right wing in American history. Despite its southern origins, the Klan claimed its greatest membership in the North and West, with Pennsylvania, Indiana, Illinois, Colorado, and California its most powerful realms. Urban areas were especially susceptible, with Chicago counting 50,000 Klansmen and 35,000 wearing the hood and robe in Detroit. The Klan called white, native-born Americans to a crusade against the Pope and his Catholic minions, Jewish immigrants, lawbreakers of all stripes, and black Americans who attacked racial barriers to equal rights. These were the so-called enemies of One Hundred Percent

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<sup>1</sup> See ROBERT A. GOLDBERG, GRASSROOTS RESISTANCE: SOCIAL MOVEMENTS IN TWENTIETH CENTURY AMERICA 1–3 (1996).

<sup>2</sup> See CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION 52–57, 84, 153, 179, 229–30 (1978); JOHN WILSON, INTRODUCTION TO SOCIAL MOVEMENTS 226–30 (1973); Charles Tilly, *Does Modernization Breed Revolution?*, 5 COMP. POL. 425, 438 (1973).



Americanism and threats to the Constitution, law and order, and Protestant freedom. In response, Klansmen flooded voting booths to elect U.S. senators, governors, and hundreds of mayors and local officials. Their motto: "Put only Americans on Guard."<sup>3</sup>

But the Klan was more than a political machine. A ten-dollar initiation fee granted admission to an invisible and mysterious empire of exalted cyclopes, grand dragons, kleagles, and nighthawks. The Invisible Empire offered an exotic fraternal life complete with "ghostly costumes and eerie burning crosses." Regular lodge nights were supplemented with social activities including wrestling tournaments, parades, and automobile races. Picnics were especially popular with members and sometimes drew more than 100,000 people. The Klan was a family affair, and members encouraged their wives, mothers, and sisters to form auxiliaries. Klansmen even organized their children. Misconduct—voting for a Catholic candidate, buying from a Jewish merchant, or violating the prohibition laws—could mean trial and banishment from the Empire. In small towns, shunning had a telling effect. Strict governance in the Empire ensured a combat-ready contender for power.<sup>4</sup>

Another example is found in the Communist Party of America, which in the 1930s demanded discipline and obedience in its war against capitalism. The leadership, hand-picked and blessed by Moscow, ordered members to infiltrate unions, political organizations, and social clubs to foster a united front to battle fascism abroad and racism and poverty at home. Critical to its mobilization was the movement's ability to cocoon its members from the outside world. Weekly meetings, often lasting three and four hours, were only a part of the regimen. Under strict supervision and under the watchful eyes of comrades, Communists were expected to attend lectures and rallies, participate in petition drives, recruit new members, and sell movement literature and newspapers. Communist membership also meant absorption in a network of social relationships. After meetings, members attended movies together, went dancing, or met at one another's homes. Weekends brought picnics, hikes, and retreats. Members found their closest friends and marriage partners within the movement. "It was a total world," remembers a Philadelphia Communist, "from the schools to which I sent my children to family mores to social life to the quality of our friendships to the doctor, the dentist, and the cleaner. We had community."<sup>5</sup> In this world, a loss of commitment meant more than a shearing of political ties. Ostracism, said one Communist, was "worse tyranny than jail. . . . [F]ar worse than anything in the world. It's your mother and father, it's your social base, it's your *raison d'etat* [sic]. . . . You've got to be willing to wander alone in the night."<sup>6</sup> Even if it was

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<sup>3</sup> See ROBERT ALAN GOLDBERG, *HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO* 3–8, 54 (1981).

<sup>4</sup> See *id.* at 24–28.

<sup>5</sup> PAUL LYONS, *PHILADELPHIA COMMUNISTS, 1936–1956*, at 61–69 (1982).

<sup>6</sup> Michael Francis Urmann, *Rank and File Communists and the CIO (Committee for Industrial Organization) Unions*, at 198 (June 1981) (unpublished Ph.D. dissertation, University of Utah) (on file with Marriott Library, University of Utah).

able to steel them to their purpose and insulate them from detractors' cries of un-Americanism, the closed world of communism did not shield them from federal surveillance and infiltration.<sup>7</sup>

The emergence of social movements continued during the 1960s, when the Student Non-Violent Coordinating Committee (SNCC) waged a war against segregation in freedom rides, sit-in demonstrations, and voter registration drives. Activists saw themselves as non-violent messengers engaged in a righteous cause to make real the dream of a color-blind America. Beatings, arrests, and jail time were initiation rites, formative experiences that created the "beloved" community. Brutality strengthened the activist core by heightening mutual respect and bolstering a sense of personal power. In suffering and before bigotry, activists learned to trust and depend on one another, critical defenses against the onslaught of violence that they faced in the rural South. Yet years of combat took a toll. SNCC could not protect its members, who were engulfed in continuous waves of assaults, murders, and bombings. Nor could it govern its own community. With an ethos of participatory democracy and an animus to authority, the community fractured along fault lines of race, class, and gender. Pleas for aid to federal authorities went unheeded, and SNCC fell under the weight of enemies within and without. When members turned on each other and suspicion replaced trust, SNCC's future became futile and the community became a shell.<sup>8</sup>

None of this is to validate the claims of a school of theorists that saw social movements as populated by society's misfits, maladjusted, and deviant—what Eric Hoffer called "true believers."<sup>9</sup> According to scholars like Hannah Arendt, Seymour Lipset, and William Kornhauser who wrote in the shadows of Nazism and Cold War Communism, activists seek escape from the responsibilities of freedom. Eagerly, they sacrifice their wills and judgment to authoritarian leaders. In this scenario, personal grievances, fears, and anxieties—not real social and economic problems—ignite their activism. These scholars specifically delineated the unemployed, recently discharged war veterans, and the economically marginal as forming movement ranks. In their collective pain of estrangement and dispossession, activists find new meaning and community.<sup>10</sup>

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<sup>7</sup> See HARVEY KLEHR, *THE HEYDAY OF AMERICAN COMMUNISM: THE DEPRESSION DECADE 155* (1984) (discussing the extent to which party members' lives were overtaken with directives); ARTHUR LIEBMAN, *JEWS AND THE LEFT* 307–10 (1979) (describing the Yiddish-speaking Communists' United Workers Cooperative Colony, called "the Coops"); Lyons, *supra* note 5, at 61–64 (discussing the social and cultural interactions between party members); see generally *Agit-Prop Section*, PARTY ORGANIZER (Central Committee, Communist Party U.S.A.) Aug. 1935, at 24–32 (describing goals of the party and means of achieving them).

<sup>8</sup> See GOLDBERG, *supra* note 1, at 141–66.

<sup>9</sup> ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* 23, 39 (1951).

<sup>10</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 323–24 (1966); HOFFER, *supra* note 9, at 23, 39; WILLIAM KORNHAUSER, *THE POLITICS OF MASS SOCIETY* 32–60 (1959); SEYMOUR LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 170–76

More recent scholarship takes a different approach. Research on social movements of the 1960s indicates that the atomized and irrational were noticeable by their absence from civil rights, student, anti-war, and women's organizations. Protesters were angry and, at times, bitter, yet unconscious psychic drives offer less explanation for their motivation than real grievances enunciated in focused programs of change. Such findings even hold for movements outside the mainstream. Research on the Ku Klux Klan indicates that the hood and robe disguised a movement composed of diverse factions, often in conflict over leadership positions, tactics, and goals. When Klan officers betrayed confidence or the movement misplayed its hand, members left en masse. Similarly, Communists rarely marched in lockstep. Enclosure in the Communist cocoon quickly became confining and overwhelmed many. Inaction and failure led to defections. Reversals of the party line, for example in the wake of the Nazi-Soviet Non-Aggression Pact in 1939, led to spotty attendance at first and then desertion. It was Lenin, himself, who ruefully warned: "When the locomotive of history takes a sharp turn only the steadfast cling to the train."<sup>11</sup> Governance within movements demands skillful hands and the confidence of the governed. Such matters are fragile over time, especially when social movements are joined in the struggle with state actors for power.<sup>12</sup>

In these struggles for governance, state authorities are neither passive nor neutral. State actors will expend the resources necessary to ensure the status quo in policy and existing power relationships. Tenaciously holding on to governance, they have a variety of weapons in their arsenal, employed singly or in combination, to confront challengers. A history of state actors' responses to claims on governance is not possible here, but we can proceed with a survey of examples that reveals the complexities of official reaction.

As the principal masters of the means of coercion, American state actors have the power to repress activists and have exercised that authority repeatedly. In 1863, Union troops fresh from the Gettysburg battlefield leveled the muzzles of their howitzers and fired point blank into Irish mobs protesting the draft law. Later in the nineteenth century, federal soldiers commandeered railroads to break strikes and unions. Utah Mormons skirmished with federal authorities for decades over

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(1960); ROBERT A. NISBIT, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* 34, 198 (1953); NEIL J. SMELSER, *THEORY OF COLLECTIVE BEHAVIOR* 8, 16, 72, 79, 81–82, 117 (1962).

<sup>11</sup> GOLDBERG, *supra* note 1, at 91.

<sup>12</sup> See WILLIAM A. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* 134, 142 (Robin M. Williams, Jr., ed., 1975); GOLDBERG, *supra* note 1, at 85–87, 107–08; DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970* 20 (1982); ANTHONY OBERSCHALL, *SOCIAL CONFLICT AND SOCIAL MOVEMENTS* 24, 334–35 (1973); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 528 (1983).

the issue of polygamy, facing not only armed intervention, but also legislative censure.<sup>13</sup>

The twentieth century offers many cases of repression of non-state actors. The opposition of the Industrial Workers of the World (IWW) to the First World War brought the wrath of the United States down on the radical labor union. One hundred and one IWW leaders were tried in a single courtroom on 17,500 charges relating to anti-war agitation. The jury deliberated for fifty-five minutes before returning guilty verdicts that sent thirty-five to Leavenworth Penitentiary for five years, thirty-three for ten years, and fifteen for twenty years. Methods of repression were less refined at the local level. In South Dakota, Michigan, Nebraska, and Minnesota, authorities arrested, beat, and deported Wobblies. In Arizona, during the summer of 1917, ten communities witnessed the systematic deportation of IWW members. The largest deportation occurred in the copper town of Bisbee. There, the sheriff's office, in coordination with the Phelps-Dodge Corporation and the El Paso and Southern Railroad, deported "[e]very suspicious looking individual," a total of 1,186 men.<sup>14</sup> The IWW, wrote Bill Haywood, had been shaken "as the bull dog shakes an empty sack."<sup>15</sup> More than 2,000 Wobblies, socialists, and pacifists were imprisoned in the World War I domestic offensive.<sup>16</sup>

In the 1930s, state and federal authorities clamped down on Depression-generated protest. Police in the Midwest arrested members of the Farmers Holiday Association who had erected barriers across state highways to stop the transport of farm goods to nearby cities in hopes of depleting markets and raising prices. General Douglas MacArthur, with support from Majors Dwight Eisenhower and George Patton, routed with tanks and infantry the World War I veterans who came to Washington, D.C., to petition for their promised service bonus.<sup>17</sup> Although focused on his New Deal activities, President Franklin Roosevelt ordered FBI Director J. Edgar Hoover to undertake a comprehensive investigation of

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<sup>13</sup> See AMERICAN VIOLENCE: A DOCUMENTARY HISTORY 133–38, 211–17 (Richard Hofstadter & Michael Wallace eds., 1970); Jonathan H. Moyer, *Dancing with the Devil: The Making of the Mormon-Republican Pact*, 5–11, 19–20, 24–26, 29–60 (August 2009) (unpublished Ph.D. dissertation, University of Utah) (on file with Marriott Library, University of Utah); see also RONALD W. WALKER ET AL., MASSACRE AT MOUNTAIN MEADOWS *passim* (2008) (detailing conflicts affecting Mormons in the church's early years).

<sup>14</sup> JAMES W. BYRKIT, FORGING THE COPPER COLLAR: ARIZONA'S LABOR-MANAGEMENT WAR OF 1901–1921, at 192, 204, 229 (1982).

<sup>15</sup> REBEL VOICES: AN I.W.W. ANTHOLOGY 325 (Joyce L. Kornbluh ed., 1964).

<sup>16</sup> See MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 407, 433 (1969); ROBERT GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 110–13, 117–18, 125–29 (1978); WILLIAM PRESTON JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF DISSENTERS, 1903–1933, at 103–05, 118–49 (1963); Byrkit, *supra* note 14, at 1–3, 160–86; Philip Taft, *The Bisbee Deportation*, 13 LAB. HIST. 3, 22 (1972).

<sup>17</sup> See PAUL DICKSON & THOMAS ALLEN, THE BONUS ARMY 57–233 (2004); ROLAND WHITE, MILO RENO, FARMERS UNION PIONEER 97–98 (1975).

“subversive activities . . . particularly Fascism and Communism.”<sup>18</sup> In addition to the Communist Party, Hoover targeted the Silver Shirts, German-American Bund, Father Coughlin’s Christian Front, and other far-right groups that Roosevelt had labeled America’s “Trojan Horse.”<sup>19</sup> FBI agents opened mail, examined employment records, and initiated electronic surveillance, with the information gathered leading to grand jury indictments of twenty-eight rightist leaders on charges of conspiracy to commit sedition and cause insubordination in the armed forces. The case consumed two years of the activists’ time and resources only to end in a mistrial in 1944.<sup>20</sup>

The Communist Party’s turn came after World War II during the second American Red Scare. Administration officials formulated plans for the arrest of party members in the event of war, including more than 26,000 names on the detention list. These contingency plans received formal authorization in 1950 with the passage of the McCarran Internal Security Act. Congress closed the legal circle in 1954 with the Communist Control Act, outlawing the party in the United States. Meanwhile, without evidence of an actual plot or any incidents of violence, the Justice Department prosecuted twelve members of the Communist Party’s national board for advocating the violent overthrow of the United States government. The witch-hunt continued, and 126 high-level cadre were arrested, with ninety-three ultimately convicted.<sup>21</sup>

This was only the opening salvo against the Communist Party. In 1956, President Dwight Eisenhower authorized the FBI to undertake COINTELPRO, a counter intelligence program against the movement. To expose, disrupt, and neutralize the party, agents engaged in surreptitious entry, mail intercepts, telephone surveillance, infiltration, and disinformation campaigns. It is estimated that by 1962, the FBI had fifteen hundred of the party’s eighty-five hundred members on its payroll. At the same time, the Internal Revenue Service investigated 262 movement leaders for possible tax evasion and sued the party to collect past taxes. By 1971, the Communist Party had only 3,000 members, down from its Depression-era heyday of 350,000, and it had ceased to be a contender for power in the American polity.<sup>22</sup>

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<sup>18</sup> LEO RIBUFFO, *THE OLD CHRISTIAN RIGHT: THE PROTESTANT FAR RIGHT FROM THE GREAT DEPRESSION TO THE COLD WAR* 184 (1983).

<sup>19</sup> *See id.* at 184–85.

<sup>20</sup> *See id.* at 188–211.

<sup>21</sup> *See* MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 47, 51–52, 58, 79–81, 141–42, 152–58, 188–89, 197 (1977); DAVID A. SHANNON, *THE DECLINE OF AMERICAN COMMUNISM: A HISTORY OF THE COMMUNIST PARTY OF THE UNITED STATES SINCE 1945*, at 196–97 (1959); PETER L. STEINBERG, *THE GREAT “RED MENACE”: UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952*, at 146, 209–10, 232, 247, 251 (1984); ATHAN THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* 44–55 (1978).

<sup>22</sup> *See* GOLDBERG, *supra* note 1, at 114; JAMES KIRKPATRICK DAVIS, *SPYING ON AMERICA: THE FBI’S DOMESTIC COUNTERINTELLIGENCE PROGRAM* 25–53 (1992);

After the success against the Communists, and with Department of Justice approval, J. Edgar Hoover targeted COINTELPRO against other non-state actors. COINTELPRO pursued the American Nazi Party, the Minutemen, and particularly the Ku Klux Klan. Agents, between 1964 and 1971, initiated almost three hundred operations against seventeen Klan factions while the IRS investigated Klansmen's tax returns. In addition to wiretaps, mail openings, and surreptitious entries, the FBI planted rumors of adultery and embezzlement in Klan ranks and even established a rival Invisible Empire to lure men from their Klan affiliations. The FBI also "outed" members by sending 6,000 postcards to their places of employment, declaring "KLANSMAN . . . Someone KNOWS who you are."<sup>23</sup> In 1965, the FBI boasted that one in five Kluxers were paid informants and that it had spies in leadership circles in at least half of all Klan units. Klansmen fled under the barrage. The FBI's anti-Klan COINTELPRO operation closed in 1971 with the Invisible Empire's membership list counting 4,300 members, a loss of 10,000 Klansmen. Said an agent, "In five years we blew them all to hell."<sup>24</sup>

More publicized were COINTELPRO operations against black civil rights organizations. With a nod from Attorney General Bobby Kennedy, agents wiretapped the Reverend Martin Luther King, Jr. Hoover hoped to intimidate and discredit the civil rights leader by finding incriminating materials and making them public. FBI agents also monitored the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, the Congress of Racial Equality, the Black Panthers, and SNCC. In regard to the Nation of Islam, agents went so far as to attempt to close a Muslim grade school by unleashing the Washington, D.C., zoning, tax, and health bureaucracies. They also opened files on all parents with children in the school.<sup>25</sup>

The history of repression of non-state contenders for power is a long one and did not end with the 1960s. Since then, authorities have combated the Christian Identity movement, White Aryan Resistance, Branch Davidians, anti-abortion protesters, the Sanctuary Movement, anti-nuclear demonstrators, the Animal Liberation Front, ACT-UP—The AIDS Coalition to Unleash Power, and anti-globalization activists. Fundamentalist Mormons came under attack first in the 1950s when Arizona officials raided the Short Creek community and then in 2008 at the hands of Texas state authorities. Whether delivered covertly or overtly, repression has been a weapon of choice for state actors faced with demands for

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THEOHARIS, *supra* note 21, at 135–38; Frank Donner, *Let Him Wear a Wolf's Head: What the FBI Did to William Albertson*, 3 C.L. REV. 12–15 (1976); *see generally* NELSON BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM (1976) (providing case studies of FBI counterintelligence actions).

<sup>23</sup> MICHAEL NEWTON, THE FBI AND THE KKK: A CRITICAL HISTORY 120–21, 145 (2005).

<sup>24</sup> DAVIS, *supra* note 22, at 77, 88, 93; NEWTON, *supra* note 23, at 116–20, 122–23, 139, 147, 149.

<sup>25</sup> *See* DOUG MCADAM, FREEDOM SUMMER 129–30 (1988); DAVIS, *supra* note 22, at 41–43; KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–1972, at 200–01, 275, 278, 280 (1989).

influence. As the history suggests, if more extreme and unconventional groups bear the brunt of coercion, mainstream movements are not guaranteed reprieve from official reproach.<sup>26</sup>

Repression is a blunt-edged weapon. More scalpel-like is preemption, another strategy to curb challenge and maintain authority. This strategy disarms contenders by adopting their proposals but denying them credit and influence. Both the Populist and Socialist Parties campaigned for better working conditions, an end to child labor, a graduated income tax, and women's suffrage. Republicans and Democrats would take credit for these reforms. During the 1930s, President Franklin Roosevelt mastered this approach when faced with opposition and discontent. He hoped that the Agricultural Adjustment Act of 1933 would absorb the grievances of the Farmers' Holiday Association. Dr. Francis Townsend posed a threat with his Old-Age Revolving Pension Plan that rallied tens of thousands of Americans, young and old, behind it. The movement demobilized with the passage of the Social Security Act. When Louisiana Senator Huey Long created the Share Our Wealth Society and chartered clubs of believers across the United States, Roosevelt answered with his "soak the rich" tax bill. Here was a war against the economic royalists and for the people. This piece of class legislation played a key role in defusing Long's more vigorous demands for the redistribution of wealth.<sup>27</sup>

Preemption may be so subtle that it escapes the notice of all but its perpetrators and victims. San Antonio, Texas, proudly proclaims itself as the first southern city to desegregate its lunch counters and as "the most liberal city in the region." It housed a branch of the NAACP that vowed to bring racial progress to the Alamo city. Yet black mobilization in the 1960s ran up against a coalition of white government, religious, and business leaders who decided to control change from above. These issue-poaching authorities wanted to spare their city the strife that enveloped the rest of the South. City fathers excluded NAACP representatives from discussions to plot a strategy. White decision makers then reached a consensus and preempted civil rights activists by opening lunch counters to blacks without the pressure of demonstrations. Business and civic authorities then negotiated the voluntary desegregation of movie theaters and hotels and began the process of restaurant desegregation. Municipal facilities and public transportation were also integrated. When the desegregation effort lagged, the NAACP attempted to press the city to pass an ordinance opening all municipal public accommodations. City fathers responded by appointing a committee to study the

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<sup>26</sup> See MARTHA BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* *passim* (1993); GOLDBERG, *supra* note 1, at 220–23; KENNETH S. STERN, *A FORCE UPON THE PLAIN: THE AMERICAN MILITIA MOVEMENT AND THE POLITICS OF HATE* 23–28, 38–40, 58–64 (1996); *Police Raid Compound of Texas Polygamist Sect*, WASH. POST, April 7, 2008, at A3; Michelle Roberts, *Busloads Taken from Texas Polygamist Compound*, PITTSBURGH POST-GAZETTE, April 7, 2008, at A7.

<sup>27</sup> See ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* 79–81, 222–26, 234–35 (1982); PAUL K. CONKIN, *THE NEW DEAL* 41–42, 61 (1992); WILLIAM E. LEUCHTENBURG, *FRANKLIN ROOSEVELT AND THE NEW DEAL* 103–06, 150, 152 (1963).

matter and make recommendations. The result was a call against legislation and for an accelerated voluntary desegregation plan conducted under city government auspices. In a last push and under fear of a federal backlash that would declare segregated establishments “off limits” to the large number of military personnel in San Antonio, many of the remaining reluctant business owners relented. By July 4, 1963, nearly two-thirds of all hotels, restaurants, and other places of public accommodation had agreed to desegregate voluntarily. “These businesses accounted for nearly 95 percent of all hotel rooms, 90 percent of all motel rooms, and 90 percent of all restaurant meals served in San Antonio . . . . Three months later, only twenty-six restaurants and five motels had refused to participate in the voluntary program.”<sup>28</sup>

Black activists were more observers than participants in these happenings. Civic leaders had made peace and prosperity their goals, not racial justice. Civil rights had been granted, not won. According to the Reverend Claude Black, the strategy was

“to give it to you and not give it to you. It is a pattern that has made it most difficult to develop the kind of unity that you need in the black community in order to develop the opposition. Any time you give people in desperate conditions a glimmer of hope, you defuse them.”<sup>29</sup>

How many southern communities outside the media glare experienced similar histories and still feel the burden of that past?

In the hothouse of conspiracy thinking that was the 1990s, the federal government also experimented with information release as a preemption strategy. Authorities hoped to chill the challenges of conspiracy theorists who posed as public defenders and demanded the release of official secrets. Here was a quest by non-state actors for influence and a determination to control history. Two conspiracy theories, in particular, drew official attention and response—the assassination of John Kennedy and the military’s alleged recovery of a UFO in Roswell, New Mexico, in 1947. To lay John Kennedy’s body to rest and undercut charges of state involvement, the congressionally mandated Assassination Review Board declassified sixty thousand documents accumulating to more than four million pages from the files of the Warren Commission, the CIA, the FBI, the House Select Committee on Assassinations, and the Senate Select Committee on Intelligence. It also sought to quiet conspiracists by deposing the Parkland and Bethesda hospitals’ physicians, sponsoring new ballistics tests, and authenticating and making available the Zapruder film of the assassination. At the same time, the board’s final report issued in 1998, confirmed the Warren Commission’s finding of a lone gunman. Yet the assassination’s hold was so strong that the case did not

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<sup>28</sup> Robert A. Goldberg, *Racial Change on the Southern Periphery: The Case of San Antonio, Texas, 1960–1965*, 49 J. S. HIST. 349 *passim* (1983).

<sup>29</sup> *Id.* at 354 (quoting Interview with Reverend Claude Black in San Antonio, Texas (April 18, 1980)); *see also id.* at 356, 372–73.



close. Sustained by a culture of conspiracy and insulated within a closed circle of belief, theorists continued to search for Kennedy's killer. Polls at the end of the twentieth century showed little change in public opinion, with 75 percent of Americans convinced that President John Kennedy was gunned down in a conspiracy. Conspiracist groups remained viable, fed by a loss of public faith in authorities.<sup>30</sup>

The alleged crash of an alien craft and the recovery of extraterrestrials near Roswell received much play in the media as the fiftieth anniversary of the happening approached in 1997. The United States Air Force could not let the event pass without comment. It issued a lengthy report just a week before the occasion, insisting that Roswell witnesses had not seen spacemen, but injured test pilots, casualties from an airplane accident, or crash-test dummies. A manned balloon mishap, the report declared, had caused a pilot's head to swell to alien proportions. Witnesses could easily have mistaken the dummies for aliens because they had no ears, hair, or eyebrows. Prosecutorial in tone, the report also dripped of self-righteousness and arrogance. UFO conspiracy theorists easily deflected the Air Force's preemptive strike and chalked it up to another attempt to hide the truth from the American people. The story still gets high market shares on television as Americans continue to watch the skies.<sup>31</sup>

When state actors practice a cooptation strategy against challenging groups, they absorb leading activists into government with significant effect on the chances of non-state contenders. If not as harsh as the legal decapitation of the IWW and Communist Party, cooptation robs a social movement of its most experienced and valuable members. In turning allegiance, authorities not only temper challenge, but also gain important information about their opponents. The value of this strategy is readily apparent. Presidents Abraham Lincoln and Barak Obama have created "teams of rivals" by incorporating powerful adversaries into their cabinets. The War on Poverty, during the 1960s, recruited program managers from the ranks of civil rights organizations. Universities institutionalized protest by initially staffing

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<sup>30</sup> See ASSASSINATION RECORDS REVIEW BD., FINAL REPORT OF THE ASSASSINATION RECORDS REVIEW BOARD xxiii–xxvii, 2, 42, 49, 71–72, 175–76 (1998); *A 2nd Set of JFK Autopsy Photos?; Testimony Suggests Photos Made Public Were 'Cleaned Up'; Others Still Not Found*, SALT LAKE TRIB., Aug. 1, 1998, at A7; *Anniversary of UFO Transforms Into Roswell's Cash Cow*, SALT LAKE TRIB., July 3, 1997, at A21; *FBI to Test JFK Bullet Fragment; Archives Officials Will Not Give Reason*, SALT LAKE TRIB., Aug. 14, 1998, at A15; John Carlin, *Kennedy's Death, Nazi Gold: Research Resources Grow at the National Archives*, OAH NEWSLETTER, February 1999, at 10; *Militias and Messiahs*, ECONOMIST, April 5, 1997, at 32; *Papers Highlight Discrepancies in Autopsy of Kennedy's Brain*, N.Y. TIMES, Nov. 10, 1998, at A22; Gerald Posner, *Cracks in the Wall of Silence*, NEWSWEEK, October 12, 1998, at 49; *Remembering Lee: Oswald's Brother Feels for Families of the Infamous*, SALT LAKE TRIB., Nov. 28, 1997, at A1; Tim Weiner, *A Blast at Secrecy in Kennedy Killing: Panel on Assassination Evidence Wraps Up Its Six-Year Task*, N.Y. TIMES, Sept. 29, 1998, at A17.

<sup>31</sup> See JAMES MCANDREW, *THE ROSWELL REPORT passim* (1997); William J. Broad, *Air Force Details a New Theory in UFO Case*, N.Y. TIMES, June 25, 1997, at A1.

ethnic and gender studies programs with individuals with social movement credentials. President Ronald Reagan tempered conservative protest about his inaction on social issues when he invited evangelical ministers to prayer breakfasts and meetings in the Oval Office. The politics of inclusion through appointments, negotiation, and symbolic actions shackles activism while enhancing the authority of state actors.<sup>32</sup>

Not every official response is designed to frustrate non-state actors' influence and deflect mobilization success. In 1961, President John Kennedy and Attorney General Bobby Kennedy grew concerned about escalating racial violence in the South sparked by a wave of sit-in demonstrations and freedom rides. Federal intervention to curb bloodshed and in support of civil rights ran the risk of provoking southern Democrats and fueling opposition to the New Frontier. The violence also exposed the ugliness of American racism to a world enmeshed in Cold War competition. To resolve the administration's dilemma, Bobby Kennedy attempted to redirect the civil rights movement. He approached representatives from SNCC, CORE, SCLC, and the NAACP and offered to arrange private funding through the philanthropic Taconic and Field Foundations for activists in the Deep South if they ceased direct action campaigns and instead focused their activities on a coordinated drive to register African Americans to vote. Kennedy gave black leaders the impression that the Justice Department and FBI field agents would protect civil rights workers and enforce the law. In 1962, President Kennedy bolstered this belief when he proclaimed: "I commend those who are making the effort to register every citizen. They deserve the protection of the U.S. government, the protection of the states, the protection of the local communities. And if it requires extra legislation and extra force, we shall do that." Tax exemptions for movement organizations and draft deferments for activists were added inducements to accept the government's proposal.<sup>33</sup>

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<sup>32</sup> See CLAYBOURNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S, at 305–06 (1981); MARCIA COHEN, THE SISTERHOOD: THE TRUE STORY OF THE WOMEN WHO CHANGED THE WORLD 110 (1988); GOLDBERG, *supra* note 1, at 164, 216; Robert A. Goldberg, *Esther Rosenblatt Landa: Her Price is Far Above Rubies*, in WORTH THEIR SALT: NOTABLE BUT OFTEN UNNOTED WOMEN OF UTAH, 229, 235–36 (Colleen Whitely ed. 1996); MARY KING, FREEDOM SONG: A PERSONAL STORY OF THE 1960S CIVIL RIGHTS MOVEMENT 523, 541 (1987); Christine Grahl et al., *Women's Studies: A Case in Point*, FEMINIST STUDIES, Autumn 1972, at 109; William Martin, *How Ronald Reagan Wowed Evangelicals*, CHRISTIANITY TODAY, Aug. 2004, at 48, 48–49; see generally DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005) (attributing much of President Lincoln's political success to his relationships with his adversaries).

<sup>33</sup> See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 480 (1981); DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 161–63 (1986); STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 122–23, 258, 261, 265–66, 276–87 (1976).

Support of a voter registration campaign offered the Kennedy administration escape from a difficult position and the means to build reserves for the future. John and Bobby Kennedy, looking back to the rise of the Irish to power in Boston and Massachusetts, saw the vote as the key to full citizenship for African Americans. With large numbers voting as a bloc, blacks could elect their own while forcing southern white politicians to bow before a new electoral reality. Quiet voter registration drives, they believed, would not spawn the confrontations with whites that fed Soviet propaganda. Devoid of social and sexual overtones, the integration of the voting booth meant less resistance than had greeted efforts to achieve equality of access to schools and public accommodations. Moreover, successful registration would dampen the demand for new civil rights legislation that might provoke a southern filibuster and endanger other New Frontier requests. At the same time, the growing black electorate, aware of its benefactors, would reward Kennedy and the Democratic Party. The registration drive, then, promised gradual, directed change. Low profile Justice Department litigation in support of voting rights would complement this strategy and arouse little controversy.<sup>34</sup>

If the Kennedy attempt to redirect the movement smacked of paternalism, it still offered civil rights workers important resources. Weighing their options, activists forged a compromise that established two campaigns—one of direct action and the other of voter registration. Yet the distinction was soon moot, for segregationists found any civil rights actions provocative and reacted with a vengeance. They would not yield power willingly, and all civil rights workers and blacks seeking change became targets of reprisal. This example demonstrates the complicated nature of a state actor's response: While aid and comfort were forthcoming from the attorney general's office, the FBI, also an agency of the Department of Justice, was engaged in counter-intelligence and disruptive operations against the same non-state actors.<sup>35</sup>

Non-state actors' quests to govern can also result in recognition that brings influence and reform. Social movements, in fact, may not only win concessions, but also take the reins of government. Keys to successful mobilization are activists' efforts to win the support of opinion makers, shape alliances with established actors, maintain organizational focus and momentum, and keep authorities neutral or make them assets. In this process of gathering power, the Democratic and Republican parties play essential mediating roles.

A few examples will suffice. The Anti-Saloon League built a political machine in the first decades of the twentieth century. Its endorsement of both Republicans and Democrats led to the election of prohibitionists who voted to establish saloon-free zones around churches and schools, enforce Sunday closing

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<sup>34</sup> See LOUIS E. LOMAX, *THE NEGRO REVOLT* 232–235, 240 (1962); MCADAM, *supra* note 12, at 157–59; FRANCIS FOX PIVEN & RICHARD CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 225–27, 231–34 (1977); THEODORE C. SORENSEN, *KENNEDY* 478–79 (1965).

<sup>35</sup> CARSON, *supra* note 32, at 39–43; ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 239–40 (1984).

laws, and tighten the licensing of liquor dealers. Local option laws made possible elections to ban saloons from city and county. State prohibition laws followed and expanded dry territory. In the process, activists had added the enforcement machinery of the state to their arsenal. With the passage of the Eighteenth Amendment to the Constitution, the victory was national. The drunk had been transformed from a sinner into a criminal. A non-state actor had pressed its agenda politically and made accomplices of the authorities.<sup>36</sup>

Adroitly aligning with either the Democratic or the Republican parties, the Ku Klux Klan of the 1920s fashioned electoral alliances that captured power on the local, state, and federal levels. For many white native-born Americans, the Klan was a legitimate response to a breakdown in law and order and challenges from restive minorities seeking to remove religious, ethnic, and racial barriers to full citizenship. Governing Klansmen answered the call and declared war on crime and selectively enforced measures to discriminate against Catholics, Jews, and blacks. In Denver, Colorado, Klan justice was ensured because voters elected Kluxers to the district court bench and their clerks fed the order's membership lists into the jury wheel.<sup>37</sup>

Long struggling to better conditions for working men and women, the labor movement achieved major breakthroughs in the 1930s and became a key Democratic Party constituency. President Franklin Roosevelt's New Deal recognized the unions' right to bargain collectively and appointed sympathetic officials to handle labor disputes. Congress, meanwhile, enacted laws banning child labor, setting safety standards, and establishing maximum hours and a minimum wage. A grateful union movement enlisted in the Democratic cause and became the political machine of the party, educating, registering, and gathering voters for the polls.<sup>38</sup>

During the 1960s and after, a variety of social movements mobilized successfully to influence governance. The actions of civil rights activists prodded the Democratic Party and federal authorities into legislation desegregating public accommodations and the voting booth. Anti-war demonstrations pressured American decision makers and helped shape policy toward Vietnam. At the University of California, Berkeley, protesters, with the support of the faculty, forced campus administrators to hear student voices and make concessions about free speech rights. Authorities also yielded ground to women's, Native American, Chicano, environmental, and gay rights movements. Over time, members of these groups have won office or appointment, escaped cooptation, and continued to agitate for change. With the return of the Republican Party to power in the 1980s, conservative activists pushed back, laying claim to government influence and position. Anti-abortion activism, a slowing of equal opportunities actions, the

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<sup>36</sup> GOLDBERG, *supra* note 1, at 18–40.

<sup>37</sup> *Id.* at 65–90.

<sup>38</sup> CONKIN, *supra* note 27, at 64–66, 101; LEUCHTENBURG, *supra* note 27, at 162 n.58, 188–89, 262.

expansion of the security state, and tax policy have been measures of their success in setting the national agenda.<sup>39</sup>

The march to influence is a long one with many contenders succumbing along the way. As these illustrations suggest, governing elites resist claims on their power in creative ways and with diverse means. Repression, preemption, cooptation, and redirection subvert challenge and either deny it completely or transform it into something managed and controlled. Successful activists avoid the extremes of change and beat a path to power through the major political parties. When victorious, contenders lay down with authorities; non-state actors may even become governors. On occasion, this rising from the grassroots results in the legitimization of new constituencies and yields important cultural changes.

As non-state actors, social movements approach governance from two distinct, but entwined, perspectives. Activist leaders make themselves ready to contend for power by attracting members, rousing them to sacrifice time and energy, and efficiently marshalling and expending their resources. Ideology and organization firm governance within and act to deny weariness and factionalism. With base secure, the movement is ready to compete for power and make claims on state actors. This involves not only employing resources, but also finding influential friends, appealing to the wider community for support, and nimbly avoiding actions that antagonize movement-breaking authorities. State actors meet claims on governance by bargaining, reforming, repressing, or subverting challengers. Such contention is hardly static. Electoral shifts and economic disruption offer new opportunities to challengers by upsetting the existing balance of power and sparking the emergence of identities relevant to changing times. Building on these opportunities and taking advantage of evolving power arrangements are the successful contenders for governance, who generate the changes vital to the health of a free people.

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<sup>39</sup> See GOLDBERG, *supra* note 1, at 165, 188; DAVID GOLDFIELD ET AL., *THE AMERICAN JOURNEY: A HISTORY OF THE UNITED STATES* 628–35 (2006); GEORGE BROWN TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 1366–70, 1382–1406, 1441 (6th ed. 2004).

# NON-STATE ACTORS IN THE GLOBAL ORDER

Michael K. Young\*

## I. INTRODUCTION

In our global legal environment, the questions raised by the Non-State Governance Symposium—the role of non-state actors in the international legal order or, more simply put, non-state actors and global governance—are interesting, important and remarkably underexamined and underanalyzed. Indeed, even today, our discussion and analysis will produce far more questions than answers. The definition of non-state governance, not to mention non-state actors, is immensely broad and varied, and we are not in agreement even regarding the precise definition or nature of the topic. Nor is there any agreement on any of the possible theories underlying our analysis of the various issues presented.

But all that analysis offers an opportunity for an inquiry that is both exciting and profound. In contrast to the enthusiastic and vigorous debates that occur around the margins of international developments that are conceptually and practically settled, we have an opportunity to observe and analyze a significant international transformation, though clearly a transformation that we do not yet fully understand. And the questions are myriad. Is there, in fact, a transformation? If so, how do we understand it? What are the effects of this transformation? How do we control and channel it? What are its normative and practical implications? What are its long-range impacts and effects?

This symposium, which allows us to begin exploring these issues, is, therefore, both enormously interesting and extremely important. And, despite the relative newness of this field and our concomitant lack of understanding, we might yet be in a position to come to some agreement regarding the functional outcomes affected by non-state actors and an appropriate set of principles to guide the activities of those organizations, as well as state reactions to those activities.

To start this analysis, we might first look to the experience of the United States and the role of non-state actors within our system of government. This focus will allow us to begin at least to understand the first order questions, in some large measure because we have a rudimentary consensus on what non-state governance

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looks like and within what sort of framework the specific issues should be considered. In other words, we already have some basic answers to some of the most critical questions: How does the state relate to non-state actors to produce the functional outcomes we desire? What limits do we impose on non-state actors? What benefits do we confer on them? And to what obligations do those benefits give rise? As we examine these questions in the domestic American context, we might be able to begin to create more systematic, thoughtful and conceptual analyses and frameworks with which to deal with these problems on the international front.

Of course, the lessons we learn from this particular domestic structure for mediating interaction must be applied judiciously. In the first place, if any international constitutional structure exists at all, it is still in a most rudimentary form at best. Indeed, its very existence remains a significant point of debate both internationally and transnationally. For example, do the international human rights standards provide this guidance? I have worked in this area for much of my career, and my conclusion is that they do not. Even those human rights standards that are broadly accepted in the international arena tend to be a set of ad hoc, interstitial solutions to a series of problems that arises. These solutions provide useful, but at best, episodic guidance as to how to measure and evaluate international behavior. One may derive some principles, but those will create neither any kind of overarching conceptual framework or constitutional structure that helps us determine the propriety of certain arrangements. Nor will those interstitial solutions allow us to validate or invalidate those patterns of interactions within a state, much less between states or among states.

Rather, on the international front, we tend to address almost any question of significance on an ad hoc basis, making interstitial decisions about how to deal with a particular issue, rather than devising appropriate solutions against the backdrop of a largely agreed upon constitutional framework. Over time, a tangible structure may emerge from this methodology, and we may better understand what that structure looks like. However, at this point, conceptualizing and theorizing, while useful, will shed only limited light on how best to deal with those specific ad hoc situations. Ultimately, of course, we can hope to derive a set of operative principles that will lead us to a set of broader constructs and a systematic way of thinking about non-state governance, an international constitutional framework of sorts, so to say. But, at the present time, we are far from there.

Second, and very important, we must keep in mind that other countries have particular ways of dealing with these issues that vary widely from those we use in the United States. Accordingly, we also need to examine the patterns that exist in these other countries as we attempt to develop global understandings of how best to accommodate and interact with non-state actors. But with those cautions in mind, let's turn to the United States model.

## II. DOMESTIC ORGANIZATIONS AND LEGITIMACY

The United States is, of course, largely guided by its constitutionally shaped framework, which dictates both the federal government's and each state's relationship to non-state actors and multi-individual actors. Importantly, this constitutional structure also shapes the relationship of individuals with non-state actors.

To flesh out this domestic treatment of non-governmental organizations (NGOs) and other non-state multiparty actors, let me create a crude typology, breaking non-state actors into two broad types and examining the treatment of each. The first are semi-voluntary organizations, to which the state cedes a significant amount of regulatory authority. At times, the state is even willing to enforce that authority with criminal or regulatory penalties.<sup>1</sup> Such examples of these organizations include: bar associations, medical associations, licensing associations, and even university accrediting associations, which have an enormous amount of authority delegated to them by the government. This type might even include some quasi-monopolies to which the state has granted authority.

With respect to this kind of organization, we are on familiar constitutional ground with known, genuine and largely agreed upon constraints. These organizations either have government authority or act in lieu of the government, exercising power we generally consider reposed in our government. But precisely because they exercise something like governmental or regulatory power, we impose on them many of the same constraints we impose on our government, including, for example, obligations of due process for issues relating to expulsion, as well as requirements for the protection of free speech, non-discrimination, and the like.<sup>2</sup>

The second type of NGO or multiparty organization is the entirely voluntary organization with no real government-ceded authority or regulatory control. Religions fall in this category, as do many non-governmental organizations, such as Amnesty International and the World Wildlife Federation. These entities may be granted certain benefits by the government. For example, they may be permitted to incorporate and thereby to purchase and own property. Furthermore, the state may proffer tax deductions to donors to these organizations and even refrain from taxing their activities. Indeed, we even prevent government from discriminating against these organizations based on the ideology, race or religion of these entities and their members. These organizations have some free-speech rights and may

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<sup>1</sup> The American Bar Association has the authority to determine its membership. *See* A.B.A. CONST. § 3.1 (2009). Likewise, should one of the ABA's members violate membership terms, the state may revoke the member's license to practice law. *See id.* § 3.3(b).

<sup>2</sup> It is a well-known policy of the American Bar Association, for example, not to discriminate against any person because of race, creed or national origin. *See id.* § 6.4(e); ABA Mission and Goals, <http://www.abanet.org/about/goals.html> (last visited Jan. 30, 2010).



even be entitled to a special degree of constitutional protection, given how they are mentioned and structured within the constitutional framework.

Nevertheless, even in this second instance, we impose some clear limitations and constraints. We do not permit these organizations to do things that individuals may not do. For example, they cannot execute, imprison, or deprive another of property. Nor can they determine any legal status except membership in the organization. Of course, this very crude analysis does not adequately address problems, even within this second type of organization. For example, on occasion, struggles arise within an organization over who really controls the property. The state must then intervene to determine who actually owns the property and who controls the corporate identity. But, for most practical purposes, the state grants them limited benefits and otherwise largely leaves them alone.

A more complicated problem arises when the activities of these organizations violate some deeply held social or political value. In the mid-1800s, this concern developed around the activities of the Church of Jesus Christ of Latter-day Saints, with respect to polygamy.<sup>3</sup> Another example relates to the activities of Bob Jones University, which did not admit black students until 1971, and then it admitted only married black students, all based on a religious tenet that God intended segregation of the races and that the scriptures forbade interracial marriage.<sup>4</sup> As a result, the Internal Revenue Service successfully revoked the tax-exempt status of that university.<sup>5</sup>

These activities necessarily pit a fundamental religious belief, on the one hand, against a powerful state policy, on the other. In both of the abovementioned cases, the state policy trumped the individual actions and beliefs of the non-governmental institution. But that simply begs the question: in such cases, how do we determine when the state is entitled to trump the individual policies of organizations? And, equally important, what is the process by which we do that? The *Bob Jones University* case may be an easier problem because the Thirteenth Amendment of the Constitution expressly forbids the government from doing anything that discriminates on the basis of race. That is not a complete answer, of course, for obvious reasons, but it does provide guidance on the depth and power of the social or political value that countervails the private organizational belief. The Church of Jesus Christ of Latter-day Saints polygamy cases may be harder. No constitutional provision expressly forbids polygamy. But easy or hard, the difficult and important question remains: What are the institutional mechanisms by which we reach the degree of consensus necessary to override the deeply felt principles of the institution? The government grants some benefits to the institution, so the question cannot be ignored or easily dismissed.

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<sup>3</sup> See *Reynolds v. United States*, 98 U.S. (8 Otto.) 145, 161–67 (1878).

<sup>4</sup> *Bob Jones U. v. United States*, 461 U.S. 574, 580 (1983).

<sup>5</sup> *Id.* at 581, 605.

### III. DOMESTIC ORGANIZATIONS WITHIN THE INTERNATIONAL STRUCTURE

Now let me shift gears and place these questions in an international, or at least a multinational context. Let's start with an example from the European Union—a not entirely hypothetical example, by the way—and consider the application of this idea of a constitutional structure within which NGOs and other non-state actors must behave. Over the past few decades, Europe has been restructuring itself to create a broader shared governance pattern under the auspices of the European Union. There, principles are articulated jointly, many relating to human rights, and the members agree to comply. The countries have even agreed to be subject to rulemaking and interpretive mechanisms, like a legislature and courts, which are normally the province of domestic governments.

We can now revisit the case of *Bob Jones University* and ask what would happen to such a university if it attempted to operate in Europe in violation of the European Union's antidiscrimination policies. Or what might happen to any number of churches that are registered and permitted some corporate benefits in Europe, when those churches espouse policies and take actions that might be viewed as discriminatory against gays? Does the European Union have the right to deregister such entities due to a violation of an articulated public policy? Can the European Union revoke corporate benefits and prohibit activities?

Again, we are dealing with religious rights versus fundamental principles of public policy. But, even as we highlight these issues, we realize that the resolution may well vary significantly from country to country. The United States might give broader scope to religious principles than Europe, for example. Europe may define more broadly and give greater precedence to secularly derived principles of civil and human rights. And what of countries with an Islamic bent, like Iran or Saudi Arabia, that give great secular power to sectarian entities? Would Western or Asian countries be as comfortable with the balance struck in those Islamic-oriented countries?

All this leads to a difficult set of procedural questions. Of course, these questions are profound and pressing at the domestic level. For example, must these overarching—and overriding—principles be formally articulated? If so, where? In a constitution? In a law? In a regulation? In addition, are any and all substantive principles acceptable if properly articulated? For example, could the European Union claim that religion is unacceptably unscientific and deludes the masses and, based on that decision, thereby deny religious entities the right to register and even exist in Europe? While clearly an extreme example, this makes clear, at least to an American audience, that even if all the procedural "I's" are dotted and "T's" crossed, not all substantive policies deserve equal dignity as a basis for state action. Perhaps a certain set of substantive limits, like our Bill of Rights, ought to be imposed. But what are those substantive limits? Where do they come from? How do we structure them? How are they to be developed on an international scale? And how do we set up an international framework against which the behavior of individual countries is measured to determine the propriety of the actions they take? What procedures? What substantive limitations? It is hard

enough to do all this domestically. We have very little idea how it could be accomplished internationally.

These questions themselves highlight the lack of any overarching conceptual frameworks for resolving these issues. International human rights documents sporadically address controversial issues, but no broad, overarching, universally agreed upon framework exists. Moreover, as we think about this problem, we also understand the pressing need to transcend the kind of idiosyncratic western thinking that unreflectively assumes the only appropriate basis for governing the world is that derived from western political theory and practice.

All these problems become even more challenging when we consider membership organizations in other countries that are ceded some power to determine the bestowal and distribution of governmentally regulated benefits. For example, to which organization is ceded the power to determine citizenship? Capacity to marry? Capacity to divorce or vote? To hold office or own property? Throughout the Middle East, even including Israel, these issues are often determined not by popularly elected entities or even entities under the control of popularly elected governments, but rather by private, self-governing (often faith-based) organizations.<sup>6</sup> With those kinds of practices widely considered acceptable, how do we even begin to discuss an agreed upon set of international norms, procedures and practices?

Another interesting set of questions revolves around whether the international community should—or even can—impose constraints on a government in terms of its interaction with non-state actors. In this regard, Saudi Arabia presents an interesting case study that highlights the interplay between the state and a non-state entity and the possible need for internationally agreed upon rules and constraints. In that country, the Saud family has entered into what might well be described as an unholy alliance with the dominant religion in order to retain power.<sup>7</sup> The state, already well known for its rejection of many individual liberties, its disparagement and rejection of women's rights, and its total disregard for religious liberty, cedes most of its authority to formulate and enforce policy in these areas to religious authorities.<sup>8</sup> Women, for example, have been prohibited at some hospitals from

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<sup>6</sup> In Israel, for example, the rabbinical courts and halakah determine the question of “who is a Jew?” As such, Israeli citizenship, which is generally granted only to Jews, is ultimately determined by the rabbinical courts rather than the Israeli government. Halakah also determines other constraints related to marriage and divorce. See LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *The “Who Is a Jew?” Controversy*, in A COUNTRY STUDY: ISRAEL, <http://countrystudies.us/israel/46.htm> (last visited Mar. 1, 2010).

<sup>7</sup> See LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, *Wahhabi Theology*, in A COUNTRY STUDY: SAUDI ARABIA, <http://www.loc.gov> (follow “Researchers” hyperlink; then follow “Federal Research Division” hyperlink; then follow “Country Studies” hyperlink; then choose “Saudi Arabia” from drop-down menu under “Choose a Country Study”; then follow “Wahhabi Theology” hyperlink) (last visited Feb. 3, 2010).

<sup>8</sup> See *id.*

studying in various medical fields.<sup>9</sup> Nor can they drive legally.<sup>10</sup> They even need permission from a man to travel within or outside the state.<sup>11</sup> They must ride in the back of public buses.<sup>12</sup> They are generally prohibited from playing sports.<sup>13</sup> Their legal testimony is equivalent to half of a man's.<sup>14</sup> Nor can minorities practice their religion openly.<sup>15</sup> The testimony of non-Wahhabi Muslims can be disregarded.<sup>16</sup> Non-Muslims are also more likely to receive harsher criminal sentences.<sup>17</sup> All of this is well documented and made possible by a relationship in which the government has ceded enormous authority to the officials of the dominant religion.

But what—if anything—should the international community do? That behavior seems deeply wrong to Americans. But can—or should—we create a global framework that defines procedural and substantive limits on state entities and on non-state entities, especially with respect to their relationship to the state? These non-state entities ultimately become a virtual extension of the state. How should they be limited and constrained? In America, of course, we have a rudimentary conceptual framework to address those issues, as discussed earlier. But, compared to other countries, the United States has a very different understanding of non-state actors and their role, especially where religion is concerned. But on an international level, within what limits can we debate the legitimacy of these state and non-state entity relationships and frameworks?

#### IV. THE NON-STATE ACTOR ON THE INTERNATIONAL STAGE

To consider this set of questions on an international scale, let us return to the crude typology discussed earlier. Taking one part of that typology and applying it internationally, we see that we have already ceded real authority to a limited set of international organizations. Such institutions include the United Nations, the World Trade Organization, the European Union, the International Monetary Fund, the Air Traffic Control Association, the International Court of Justice, ad hoc international criminal courts, and more. A limited international framework for constraining those organizations derives from the principles of their creation, namely, consent. These entities are voluntary; therefore, their scope, limits and

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<sup>9</sup> See ELEANOR ABDELLA DOUMATO, FREEDOM HOUSE, WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA—SAUDI ARABIA 12 (2009), available at [http://www.freedomhouse.org/uploads/special\\_report/section/174.pdf](http://www.freedomhouse.org/uploads/special_report/section/174.pdf).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> See ELEANOR ABDELLA DOUMATO, GETTING GOD'S EAR: WOMEN, ISLAM, AND HEALING IN SAUDI ARABIA AND THE GULF 4 (2000).

<sup>13</sup> DOUMATO, *supra* note 9, at 12.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> See *id.*

<sup>16</sup> The Center for Democracy & Human Rights in Saudi Arabia, Minority Rights, <http://www.cdhr.info/> (select "Issues in Focus" and then select "Minority Rights").

<sup>17</sup> *Id.*

functions are defined by virtue of what the parties agree to. But what about non-members? And what about the requirements for joining?

International law provides no guidance or framework for dealing with these issues. What if they impose disadvantages on non-members? In the United States, we think about membership issues in terms of the benefits afforded by such organizations. Thus, the United States retains a degree of regulatory control, which provides some domestic capacity to impose constraints relating to discrimination and other such potential public policy violations. The United States also has rules derived from the antimonopoly laws that constrain the behavior of even entirely voluntary organizations.<sup>18</sup> But those constraints—or the process for determining them—have not yet been defined in the international order. What sort of international structure would allow us to examine and determine the legitimacy and propriety of what an international organization does with respect to non-members? With respect to members it is slightly easier, as long as exit is permitted. But what if exit is not permitted? Ultimately, all of this reveals just how crude a tool international law still is for organizing the increasingly complex, interrelated, dynamic world in which we live.

Different questions pertain to international organizations that are voluntary in membership and to which we cede no authority. The members of these organizations are not state actors, and possess no state-granted regulatory authority. This includes Amnesty International, Greenpeace, Human Rights Watch, World Council of Churches, the International Truckers Association, and the International Chamber of Commerce, to name a very few of the tens of thousands that exist. Such purely voluntary organizations have no power ceded to them, and thus many of the problems discussed do not pertain.

Among international law legal scholars and within government, however, we are engaged in a dynamic debate about the appropriate level of participation in international activities that should be permitted these organizations. This raises an important set of questions regarding the appropriate degree of transparency in international organizations, as well as the appropriate level of, and modalities for, NGO participation in the activities of international organizations.

It is a set of questions with no easy, obvious answers. For example, in the United States, government representatives speak for the country in international negotiation. These representatives have legitimacy to stand for U.S. interests because the U.S. government, through its own internal, domestic, political, and regulatory processes, has largely resolved all kinds of conflicts among competing interests; among Greenpeace, the housing developers and the nuclear energy industry, for example, for any given set of international negotiations. The government confirms that, through its mediating structures, it has reached

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<sup>18</sup> The National Football League (NFL) is an example of a voluntary organization in the United States that imposes, as one of its rules, salary caps on players, a practice which promotes parity among all NFL teams. See NFL Players Association, <http://www.nflplayers.com> (follow “Member Services” hyperlink; then follow “CBA Download” hyperlink).

conclusions that reflect what the government believes to be the appropriate negotiating position for the American people.

Viewed more broadly, each international player approaches the negotiation table only after their home country has finalized its position domestically, at least in theory. But does that mean that allowing certain NGOs access and even limited participation rights in international negotiations would give the NGOs a second bite at the apple? One can imagine a scenario, for example, in which Greenpeace might decide that the U.S. government was not adequately persuaded to accept its position; therefore, Greenpeace wants to join the international discussion to press internationally the position it failed to win domestically. Or, at the very least, Greenpeace wants transparency, itself a potential problem for governments as they make the various compromises essential to reach an international agreement.

This creates a host of unanswered questions. Does one organization get priority to participate and another not? How does the government, which has internally mediated these disputes already, deal with a situation in which the international mediation process is distorted by the participation—again—of certain NGOs, but not others? What impact does the differential power of these non-state actors have on the international processes and their outcomes, especially since that power has not been mediated or created through any democratic processes? (And to be sure, these organizations have no requirement, obligation or appearance of democracy in their representational activities.)

But precisely the opposite set of concerns may also exist. When I was managing government negotiations, I loved to include Greenpeace and other similar NGOs, in part because I knew that these NGOs and the interests they represented were often precluded from participating in internal domestic dialogues in many of the countries with which we were negotiating. In Russia, for example, environmental interests were generally not mediated through, or represented in, the normal governmental decision-making processes. The fact that Greenpeace would attend an international negotiation and encourage other countries to take Greenpeace's favored position often pushed those countries closer to the United States than otherwise might have been the case. Such participation might be favored in situations in which many of the state actors do not permit sufficient public input into, or participation in, the policy formation process. Such participation might, to some degree, democratize the international decision-making processes. It is almost certainly not a first best solution, but, in the current state of world affairs, it might serve as a second best solution.

But once again, that forces us to acknowledge that we do not have any useful theories or conceptual frameworks for managing such interplay and participation. So what to do? As it stands, we provide our documents to such non-state actors and allow them to observe negotiations. But we do so without the ability to think systematically through the implications of even that very limited modality of NGO participation. We lurch back and forth between rights of minimal transparency and rights of more extensive participation, each determined largely on an ad hoc basis, without conceptual rhyme or reason. The lack of a conceptually coherent, agreed

upon international framework makes determining the proper role of these non-state actors that much more difficult, if not virtually impossible.

#### V. CONCLUSION

In dealing with these vexing questions of participation in, and limits imposed on states or non-state actors in the international arena, we derive some minimal guidance from domestic theories of participatory democracy and constitutional structures and constraints. But while the tools we use domestically to help us make sense of these issues may be a starting point, much more remains to be done. Honestly speaking, we still have very few useful and effective conceptual, analytical or other tools to help us think through this crucial topic at the moment. But therein lies the excitement and the fun for international legal scholars, government officials, and international citizens the world over.

## WHEN IS NON-STATE GLOBAL GOVERNANCE REALLY GOVERNANCE?

Steven Bernstein\*

*Meaningful non-state global governance exists but is less prevalent and harder to achieve than the broader scholarship on global governance suggests. The argument proceeds in three parts. First, I put forward and defend the claim that meaningful global governance must be authoritative and rest on political legitimacy. Second, borrowing from Adler and Bernstein (2005), I introduce a framework of “good” governance to provide a foundation for assessing the empirical and normative quality of governance. Third, I apply that framework to attempts by non-state actors and institutions to socially and environmentally regulate the global marketplace. It shows that only a small subset of such efforts—usually in the form of producer certification and product labeling systems that include third-party auditing—qualify as meaningful governance.*

### I. INTRODUCTION

Looking back, the concept of global governance seems an unlikely candidate to have survived into the twenty-first century. The more recent attention given to *non-state* global governance might seem even more curious. The terms are hopelessly vague; those who see legitimate political order stemming only from sovereignty and constitutions bristle against them,<sup>1</sup> and what may look like governance beyond the state is much more often regional or sectoral than global. Moreover, despite protestations from its defenders that governance is *not* the same as government, its purposely close lexical connection to government invokes constant comparisons to the state and state authority, to which it is found wanting.

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<sup>1</sup> See, e.g., JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* *passim* (2005); John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205 *passim* (2000); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT’L L. 273 *passim* (2000).



In addition to its wooliness, critics point to its normative shallowness, stemming from its liberal origins.<sup>2</sup> Thus, although some cosmopolitan thinkers might embrace the global governance concept as the terrain in which they see a demand and the possibility for global democracy and transnational citizenship,<sup>3</sup> critics worry the resultant preoccupation with procedural legitimacy has sidelined more fundamental and longstanding substantive concerns of global justice, such as distributive justice, autonomy, or equality.<sup>4</sup> Such demands challenge the legitimacy of a global order that entrenches unequal distributional consequences and power relations.<sup>5</sup> Critical scholarship thus attacks the new focus on global governance for obfuscating a history of domination by Western states and powerful economic classes, acting at times through international institutions to further legitimize their interests.<sup>6</sup> It thereby challenges an underlying assumption of much global governance literature that procedural and substantive legitimacy will automatically be mutually reinforcing.

Despite these lines of attack, the terms global governance and non-state global governance continue to resonate among practitioners involved in international or global issues. Similarly, the academic literature on “global governance” shows little signs of abatement. There is even a journal by that name, which focuses mainly on the U.N. system but also explores the vast array of institutions, networks, and actors, both public and private, that make up an increasingly dense, complex, and crowded institutional environment beyond the state.<sup>7</sup> There is simply no other encompassing concept on the horizon to replace global governance as a category to capture the full range of norm-promoting, regulatory, administrative, and adjudicative activity that cannot be located in the traditional governance mechanisms of single sovereign states. Even more broadly, the shift to focus on “governance” as a noun—and not simply as a verb referring to processes<sup>8</sup>—in studies of political authority and regulation recognizes what Louis Pauly and Edgar Grande have usefully described as “Complex Sovereignty.”<sup>9</sup> In sum, global governance resonates with our shared experience of complex hierarchies and

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<sup>2</sup> See, e.g., Craig N. Murphy, *Global Governance: Poorly Done and Poorly Understood*, 76 INT’L AFF. 789 *passim* (2000).

<sup>3</sup> GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY *passim* (David Held & Mathias Koenig-Archibugi eds., 2005).

<sup>4</sup> See Murphy, *supra* note 2, at 789.

<sup>5</sup> *Id.* at 791.

<sup>6</sup> Robert W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, 12 MILLENNIUM: J. INT’L STUD. 162 *passim* (1983).

<sup>7</sup> GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS is published four times a year by Lynne Rienner Publishers.

<sup>8</sup> On this distinction, see Matthew J. Hoffmann & Alice D. Ba, *Introduction: Coherence and Contestation*, in *CONTENDING PERSPECTIVES ON GLOBAL GOVERNANCE: COHERENCE, CONTESTATION AND WORLD ORDER* 1, 8–10 (Alice D. Ba & Matthew J. Hoffmann eds., 2005).

<sup>9</sup> See *COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY passim* (Edgar Grande & Louis W. Pauly eds., 2005).

overlapping authorities in an increasingly globalized era, even if the state and “government” are still alive and well.

This Article, in line with the topic of this Symposium, critically examines the hardest case of global governance—“non-state” global governance—to evaluate whether it lives up to its name in a meaningful way. It argues that it can and does, but in a much more limited number of cases than the broad literature on non-state global governance suggests.

The argument proceeds in three parts. First, I critically examine the concept of global governance to make the claim that meaningful governance must be authoritative and rest on a notion of political legitimacy.<sup>10</sup> Second, borrowing from my work with Emanuel Adler,<sup>11</sup> I introduce a framework to understand “good” governance.<sup>12</sup> It suggests that governance worth its name ought also to have normative content to separate it from simple coercion or domination. Third, I apply this framework to one particular realm of non-state governance: attempts to socially and environmentally regulate the global marketplace.<sup>13</sup> I make the case that only a small subset of such efforts—what have been variously labeled “transnational regulatory systems,”<sup>14</sup> “‘non-state market driven’ (NSMD) governance systems,”<sup>15</sup> and “civil regulations”<sup>16</sup>—qualify as non-state global governance. I conclude with some possible objections and limits to my argument.<sup>17</sup>

## II. GLOBAL GOVERNANCE—FROM WOOLINESS TO CONCEPTUAL PRECISION

Rosenau and Czempiel’s landmark volume on *Governance Without Government: Order and Change in World Politics* performed both a huge service and an unfortunate disservice to those trying to understand political authority beyond the state.<sup>18</sup> On the plus side, it provided a vocabulary to speak about the fracturing of political authority, perhaps not wholly new but at least more visible, under conditions of increasing globalization. By focusing on governance rather than government, it obviated the need to invoke metaphors of world government or

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<sup>10</sup> See *infra* Part II.

<sup>11</sup> Emanuel Adler & Steven Bernstein, *Knowledge in Power: The Epistemic Construction of Global Governance*, in *POWER AND GLOBAL GOVERNANCE* 294, 294–318 (Michael Barnett & Raymond Duvall eds., 2005).

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Parts IV–V.

<sup>14</sup> See Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, in *LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS* 121, 121 (Christian Brüttsch & Dirk Lehmkuhl eds., 2007).

<sup>15</sup> See Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 14 *GOVERNANCE* 502 *passim* (2002).

<sup>16</sup> See David Vogel, *Private Global Business Regulation*, 11 *ANN. REV. POL. SCI.* 261 *passim* (2008).

<sup>17</sup> See *infra* Part VI.

<sup>18</sup> See *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

rest analyses of new spaces of authority on a strong version of the decline of sovereignty hypotheses. In sum, it became possible to speak of political authority absent centralized control of well-defined territorial spaces. New (or newly visible) sites of authority, under this lens, could co-exist and possibly interact with sovereign states, whether or not sovereignty was itself undergoing a transformation.

This analytic move, however, came at a cost. It allowed a minimalist understanding of political authority that has led many scholars to see governance nearly everywhere there appeared to be “purposeful order” or attempts to regulate human interaction for the common good.<sup>19</sup> Global governance could be located, then, in or through an enormous range of mechanisms and means to regulate, manage, promote, or control transnational activities: formal international organizations like the United Nations and its various agencies issue specific “international regimes”<sup>20</sup> (a precursor concept to global governance also famously described as “woolly”<sup>21</sup>); hybrid institutions such as private-public partnerships or other institutional configurations of private and public actors; and wholly private- or non-state-led forms that operate relatively autonomously from states. One recent overview of contemporary thinking on global governance includes even looser attempts to create order, such as harmonization of national laws and “global policy issue networks.”<sup>22</sup> Although there is nothing inherently objectionable about grouping together such a broad range of mechanisms, what precisely makes them governance as opposed to coordinated activities across borders can be easily lost given the range of mechanisms and scope of activities included. It begs the question, How far can the concept of global governance bend before its link to any meaningful concept of governance breaks?

To answer this question requires moving beyond definitions to the core features of governance. Rosenau provides a useful baseline.<sup>23</sup> He argues that, stripped of its dependency on centralized state power, governance consists of two elements.<sup>24</sup> First, it is the purposeful steering of actors towards collective or shared

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<sup>19</sup> Kennette Benedict, *Global Governance*, INT’L ENCYCLOPEDIA OF THE SOC. & BEHAV. SCI. 6232, 6232 (2004).

<sup>20</sup> The consensus definition of regimes in the international relations literature is implicit or explicit “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.” Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 185 (1982). Literature on “private” regimes is also growing. See PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

<sup>21</sup> Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, 36 INT’L ORG. 479, 484–86 (1982).

<sup>22</sup> Benedict, *supra* note 19, at 6235.

<sup>23</sup> See James N. Rosenau, *Governance in the Twenty-First Century*, 1 GLOBAL GOVERNANCE 13 (1995).

<sup>24</sup> See *id.* at 14.

goals or values.<sup>25</sup> Second, it is authoritative in the sense of consisting of “systems of rule.”<sup>26</sup> I argue that scholarship on global governance too often errs on the side of the former at the expense of the latter. As a result, one could find support in the literature to count virtually any attempt at steering as global governance with little attention to whether it also embodies a meaningful level of political authority. The opposite problem, however, should also be avoided. It would set the bar too high to suggest that political authority must always require a monopoly on authority, universal or general-purpose jurisdiction within a defined territory, or the equivalent of state sovereignty. Thus, global governance worth its name ought to more resemble government than most writings acknowledge, but not be so narrow a category as to dismiss the meaningful political authorities that exist in transnational and global spaces. Fortunately, most definitions of political authority provide room for this middle ground.

Political authority—or in the words of Max Weber, “domination”—is present when there is a good “probability that a command with a given specific content will be obeyed by a given group of persons.”<sup>27</sup> Authority relationships are those in which an actor or institution makes a *claim* to have a right to govern.<sup>28</sup> In practical terms, then, the term governance should be limited to institutions that perform some kind of regulatory function (creating, implementing, or adjudicating rules or normative standards) or where their decisions create an obligation to obey.

Political authority requires political legitimacy to link power to authority. Following from this understanding, political “legitimacy can be defined as the acceptance and justification of shared rule by a community.”<sup>29</sup> Legitimate political authority—as opposed to an empty claim to authority where the “right” to rule is not recognized—concerns situations in which a community<sup>30</sup> is subject to decisions by an authority that claims to have a right to be obeyed, and actors intersubjectively hold the belief that the claim is justified and appropriate. Authority relationships empower actors and institutions that participate in them and that construct governing institutions through their interactions. They *authorize*

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<sup>25</sup> *See id.*

<sup>26</sup> *See id.* at 14–15, 18–20. Although Rosenau clearly argues against the requirement of hierarchical forms of authority, he speaks of “systems of rule” and locations of authority as sites of governance. *See id.* On this reading, some form of authority or “rule” is part of the baseline of “governance,” even if authority is disaggregated. *See id.* at 18–20.

<sup>27</sup> *See* MAX WEBER, *ECONOMY AND SOCIETY* 53 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968).

<sup>28</sup> *See* Norman Uphoff, *Distinguishing Power, Authority & Legitimacy: Taking Max Weber at His Word by Using Resource-Exchange Analysis*, 22 *POLITY* 295, 302 (1989).

<sup>29</sup> Steven Bernstein & William D. Coleman, *Introduction: Autonomy, Legitimacy, and Power in an Era of Globalization*, in *UNSETTLED LEGITIMACY: POLITICAL COMMUNITY, POWER, AND AUTHORITY IN A GLOBAL ERA* 1, 5 (Steven Bernstein & William D. Coleman eds., 2009); Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 *J. INT’L L. & INT’L REL.* 139, 142 (2005).

<sup>30</sup> The term “community,” rather than public, avoids a necessary association with the state, but still denotes “publicness” in the sense that its members collectively empower political authority.

particular individuals or institutions to make or interpret rules. Political legitimacy concerns relationships in which commands ought to be obeyed. It reflects the “worthiness of a political order to be recognized”<sup>31</sup> or a “more general support for a regime [or governance institution], which makes subjects willing to substitute the regime’s decisions for their own evaluation of a situation.”<sup>32</sup> This idea of substitution is especially important because it directs attention to the difference between voluntary and authoritative institutions. If actors—be they states, firms, or civil society organizations—evaluate, with each decision or policy of an institution, whether to maintain or withdraw support, governance or political authority in any meaningful sense of the word is absent. Political legitimacy concerns institutionalized authority (whether concentrated or diffused) with power resources to exercise rule, as well as shared norms among the community that recognize it and grant it legitimacy. Such norms provide justifications and a shared understanding of what an acceptable or appropriate governing institution or political order should look like and the bounds of what it can and should do.

Notably, nothing in the above discussion makes a necessary or constitutive relationship between political authority and the state or political authority and a monopoly on legitimate coercive power. Weber was clear that the location of a monopoly on legitimate force (i.e., the right to rule) in the modern state is a historical construction.<sup>33</sup> The insight has two important implications for clearing up misunderstandings about political authority that may arise from the current literature on legitimacy in global governance.

First, legitimacy in global governance should not be understood only in contrast to coercion. Perhaps owing to the conceptual break of recognizing that governance can occur in the absence of hierarchy or coercive forms of state power, global governance literature has emphasized the importance of legitimacy as the main source of compliance in global governance.<sup>34</sup> For example, in Thomas Franck’s seminal work on the “power of legitimacy,” he identifies how rules exert a “pull towards compliance” not because of power or interest, but “because those addressed [normatively] believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>35</sup> Ian Hurd similarly contrasts coercive power and legitimate commands (that compel obedience in themselves) as sources of compliance.<sup>36</sup>

Theorists of global governance are understandably drawn to this analytic distinction. Even if legitimacy frequently reflects the interests of powerful actors, it

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<sup>31</sup> JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 182 (Thomas McCarthy trans., Beacon Press 1979) (1976).

<sup>32</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 602 (1999).

<sup>33</sup> See WEBER, *supra* note 27, at 54–56.

<sup>34</sup> See *infra* notes 35–37 and accompanying text.

<sup>35</sup> THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (emphasis omitted).

<sup>36</sup> See Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 383–85 (1999).

always means that the leader, rule, or institution in question has authority recognized by the relevant audience independent of brute force. Whereas new sites of authority may sometimes be backed by the coercive powers of leading states, the de-coupling of coercive force and legitimate rule is arguably a striking feature of contemporary global governance. According to Rosenau, “the essence of [new sites of authority] is that they derive their legitimacy from the voluntary and conditional participation of individuals who can revoke their consent at any time.”<sup>37</sup> However, we move too far from a meaningful definition of political authority if actors can revoke consent at a whim with little sense of obligation. Whereas Rosenau convincingly finds little indication that coercive power is moving beyond the state in any systematic fashion, and thus the importance of legitimacy is elevated, new authorities resting wholly on moral legitimacy are rare and unlikely to create broader order. The problem of politics is that compliance, even when it is the “right” thing to do, is never absolute.

Broader order relies minimally on the possibility of enforcement, although enforcement must be legitimated for governance to be sustainable. To take the analogy of social contract theory, contracts may be rational and entered into voluntarily, but they grant authority to enforce the contract for governance to be achieved. Thus global governance worth its name cannot simply be a realm of voluntary action. What makes current global governance talk something more than idealist musings is the increasing enforceability of rules and acceptance of their broader reach. The distinction between legitimacy and power can also mask power relationships inherent in the exercise of political authority. Uncovering forms and relations of power becomes an important subject of inquiry. For example, power may be indirect in the form of institutional power and law or the empowering of particular actors such as technical experts or private authorities,<sup>38</sup> or it could be direct but diffuse, reflecting the structural power of leading states or classes but without the need for their direct intervention.<sup>39</sup> Thus, whether from a positive or critical perspective, governance as political authority must be understood to combine legitimacy and power.

The second implication of recognizing the contingent relationship between political authority and the state is that governance need not be *monopolistic, territorially based or universal*.

Global governance is rarely monopolistic and frequently interacts with other rules, whether international or transnational, in the form of overlapping, nested, or intersecting regimes. It also may interact with domestic rules because many institutions of global governance explicitly link to national laws, regulations, or standards.<sup>40</sup> Nonetheless, it is still possible for non-monopolistic forms of authority

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<sup>37</sup> JAMES N. ROSENAU, *DISTANT PROXIMITIES: DYNAMICS BEYOND GLOBALIZATION* 308 (2003).

<sup>38</sup> See William D. Coleman & Tony Porter, *International Institutions, Globalisation and Democracy: Assessing the Challenges*, 14 *GLOBAL SOC'Y* 377, 380–82 (2000).

<sup>39</sup> On forms of power in global governance, see *POWER IN GLOBAL GOVERNANCE* (Michael Barnett & Raymond Duvall eds., 2005).

<sup>40</sup> See *infra* Part V.B.

to be authoritative for those who “sign on” or consent. The test is whether a sense of obligation and recognition of the authority follows that consent or whether it may be easily or arbitrarily withdrawn.

Global governance need not be territorially based because it may apply to actors who may or may not be located in contiguous geographic spaces. For example, it might apply to a transnational marketplace sector or to a profession, such as accountants in the case of the International Accounting Standards Board (IASB) or the forest sector in the case of the Forest Stewardship Council (FSC). This does not mean all global governance is non-territorial. In many cases, national decisions to adopt transnational or international standards or rules of a global institution may in practice mean much global governance is located in multiple territorial spaces, which may even be concentrated geographically. It would also be an unfairly high bar to demand that global governance necessarily have global reach. In this sense, “global” is probably a misnomer. Many examples of governance beyond the state are regional or concentrated in pockets. Nonetheless, as long as within those pockets its political authority is recognized, an institution or mechanism still counts as global (in the sense of transcending the state) governance.

Finally, global governance is never characterized by universal or general-purpose jurisdiction like states, owing to formal anarchy (the absence of world government) in the international system. Still, the scope of governance varies considerably across institutions of global governance. Some are quite narrow and issue specific, while others (the U.N. Security Council, for example) have a broader, albeit still limited, scope.

Owing to its fractured and at times decentralized nature, the problem of political community is perhaps the trickiest element of global governance to pin down: to which community does authority apply, and from which community or communities is it generated? This question cannot be easily answered *a priori*. An appropriate research strategy, then, is to identify political communities wherever they form, whether in professional or technical networks; the relevant production chains of producers, as well as the consumers, communities, and interested civil society actors in the case of social regulation of the marketplace; or the traditionally demarcated “international society” of diplomats and state officials. Determining what then is required to establish political authority will depend, in part, on what bases legitimacy within those communities rests.<sup>41</sup>

The foregoing discussion suggests that political authority is possible beyond the state, but it is much rarer and harder to achieve than a casual reading of the global governance suggests.

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<sup>41</sup> Elsewhere I explore the bases of political legitimacy in different forms of global governance, but that question is beyond the scope of this Article. See Steven Bernstein, *Legitimacy in Interstate and Non-state Global Governance*, REV. INT’L POL. ECON. (forthcoming 2010).

### III. RAISING THE BAR: “GOOD” GLOBAL GOVERNANCE

While the discussion above already sets the bar sufficiently high to be considered governance, political authority at the global level does not exist in a vacuum. Just as within state governance, a complete picture of global governance requires attention to not only the power to command, but also normative expectations and justifications for shared rule. It could be argued, then, that global governance worthy of the name must also be “good” governance. In this section, I draw on my previous work with Emanuel Adler, where we identify the conditions or building blocks of “good” global governance.<sup>42</sup> These building blocks will serve as a template by which to evaluate non-state social and environmental global governance and its adequacy or inadequacy given legitimate demands being made upon it in this period of globalization. The building blocks of global governance include both material and ideational conditions that explain and enable the global governance we get, as well as normative requirements for governance, which define whether it is “good” or “moral.”

According to Adler and Bernstein,<sup>43</sup> global governance rests, on one hand, on material capability and knowledge, and, on the other hand, on legitimacy and fairness (Table 1). Governance, in this view, is the sum of collective understandings and discourse about *material capabilities*, *knowledge* (normative, ideological, technical, and scientific), *legitimacy* (the acceptance and justification of the right to rule by relevant communities), and *fairness* (which in our account may include notions of mutual respect, equal treatment, representation (who gets to participate and how), and responsibility (the obligations to broader society of participants in any governance system), as well as distributive justice.<sup>44</sup>

Plotting these four constitutive elements of “good” governance in a 2x2 table, the results are the requirements of global governance; that is, “what material capabilities or science alone cannot explain, what, by themselves, legitimacy and fairness do not produce, and what in their absence leaves no order of things.”<sup>45</sup> The interaction of these constitutive elements produces a descriptive taxonomy of the four building blocks of global governance: authority, epistemic validity, a conception of good practices, and the institution of rationality or practical reason.<sup>46</sup>

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<sup>42</sup> Adler & Bernstein, *supra* note 11, at 305–07.

<sup>43</sup> *Id.* at 300–08.

<sup>44</sup> For a defense of why representation and responsibility are included under the rubric of fairness, see *id.* at 300. We place these values together in an attempt to capture a bundle of concepts associated with the principled demands communities make on those empowered to make and implement decisions on their behalf.

<sup>45</sup> *Id.* at 300–01.

<sup>46</sup> This table is a descriptive taxonomy, not an explanation for global governance.



**Table 1: The Requirements of Global Governance<sup>47</sup>**

	<b>Material Capability</b>	<b>Knowledge</b>
<b>Legitimacy</b>	Authority	Epistemic Validity
<b>Fairness</b>	Good Practices	Practical Reason

*A. Authority*

Authority, per the discussion above, is constituted by power, legitimacy, and political community.<sup>48</sup> In the context of “good” governance, legitimacy demands “good” reasons, or justifications, for recognizing an authority. What counts as good reasons under conditions of globalization depends on the historically contingent values, goals, and practices of the relevant society or communities, because legitimacy, at its most basic level, depends on acceptance of rule or rules as appropriate by a community with shared values, norms, and beliefs.<sup>49</sup> Different audiences of state, civil society, or marketplace actors may share different criteria or weightings of “input” (procedural), “output” (performance, efficiency), or more traditional notions of substantive (values of justice and fairness) legitimacy.<sup>50</sup> Under globalization, there is no presumption that international authority emanates solely from states; thus, the argument that different configurations of actors make up the community in which authority operates is important. Legitimacy dynamics under such conditions are not fixed, but vary accordingly.<sup>51</sup>

*B. Epistemic Validity*

Epistemic validity refers to “legitimate” knowledge—i.e., knowledge that is regarded as valid by a collectivity of subjects. It can mean widely accepted norms, consensual scientific knowledge, ideological beliefs deeply accepted by the collective, and so on. As used here, epistemic validity is rooted in a pragmatist philosophical perspective according to which validity rests on deliberation, judgment, and experience of communities that engage in rational persuasion. A useful way to think about epistemic validity is Habermas’s argument that valid knowledge claims are based on comprehensibility, truthfulness, and rightness, which are arrived at pragmatically by communities of the like-minded.<sup>52</sup> Habermas, however, refers to such validity claims as being part of an “ideal-speech

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<sup>47</sup> *Id.* at 301.

<sup>48</sup> *See infra* Part II.

<sup>49</sup> Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995).

<sup>50</sup> The input/output distinction comes from Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL’Y 18, 19 (1997), but it tends to ignore other substantive values that may produce legitimacy.

<sup>51</sup> Bernstein, *supra* note 41.

<sup>52</sup> JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION 50 (Thomas McCarthy trans., Beacon Press 1984).

situation” to which democratic societies must aspire if discussion, debate, and social communication in the public sphere are to lead to social progress.<sup>53</sup> Applying this idea to international politics, Thomas Risse points to the requirement of a “mutually accepted external authority to validate empirical or normative assertions” for negotiations or deliberations to approach a situation where rational persuasion can occur, and thus where outcomes will be perceived as legitimate by participants.<sup>54</sup> In global politics, such external sources of authority may include previously negotiated treaties or scientific findings.<sup>55</sup>

Epistemic validity can sometimes play a very direct role as a source of power in global governance. Under globalization, the combination of a lack of formal political processes beyond interstate bargaining and the highly technical nature of problems that demand international governance can lead to authority by default appearing to move to technical experts or private authorities as demands<sup>56</sup> for global governance increase.<sup>57</sup> For example, dispute resolution panels in trade agreements may rely on trade lawyers and economists rather than judges to interpret rules. Similarly, experts may develop standards in technical areas, which then may become authoritative either directly or indirectly through recognition of those standards by other institutions. For example, the Sanitary and Phytosanitary Measures (SPS) Agreement explicitly identifies three “recognized” international standard-setting bodies: the FAO-WHO Codex Alimentarius Commission for food safety; the International Office for Epizootics for animal health; and the FAO’s Secretariat of the International Plant Protection Convention for plant health.<sup>58</sup>

Experts may also gain authority through specialized cause-effect knowledge where their prescriptions gain legitimacy as focal points for cooperation or the bases of new rules. Such “epistemic communities” have been influential in the development of a variety of international institutions and agreements.<sup>59</sup>

However, when functional authority is granted to experts, purposely or by effect, it can be a source of legitimacy problems absent agreement on good practices or practical reason. This problem can be especially acute when governments simply leave technical decisions on complex issues to the private

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<sup>53</sup> HABERMAS, *supra* note 31, at 178–79.

<sup>54</sup> Thomas Risse, *Global Governance and Communicative Action*, in GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY 164, 174 (David Held & Mathias Koenig-Archibugi eds., 2005).

<sup>55</sup> *Id.*

<sup>56</sup> This demand stems primarily from a desire to maintain free global markets, which economic actors view as threatened in the absence of regulation beyond the state. At the same time, mainly non-economic actors are increasing demands for social regulation in areas such as the environment, labour and human rights, and the global economy more generally.

<sup>57</sup> Coleman & Porter, *supra* note 38, at 380–82.

<sup>58</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, art. III, ¶ 4, available at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf).

<sup>59</sup> Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3–4 (1992).

sector to design their own rules, especially if those rules are seen to have broader effects on public policy. Governance may thus be achieved, but without the required moral basis for sustaining authority, especially if it is removed from the state or from some other mechanism of direct accountability to affected parties. Expertise also can be a source of epistemic power, which can advantage some while disempowering others, thus leading to demands for increased accountability and democracy.

### *C. Good Practices*

Grouped in this category is the bundle of notions associated with fairness and procedural legitimacy. At issue here is not only the differing views around the world regarding what stands as good governance, but also the limits in applying domestic governance procedures, such as democratic accountability and transparency, to the global level.

Mainstream international relations literature, nonetheless, largely defines good practices in global governance institutions in terms of democratic procedures and notions such as accountability, responsibility, transparency, and representation.<sup>60</sup> The mostly normative scholarship on these concepts reflects the rich debate around precisely how these values might be achieved and their limits in a context beyond the state.<sup>61</sup> It includes disagreements over issues such as deliberation versus representation; who has the right or ability to represent interests and values in global governance institutions (state officials, individuals directly, NGOs that claim to speak for particular group values or interests, firms or business associations, etc.); whether there ought to be direct participation or representation; what form accountability should take; and so forth.<sup>62</sup> To adjudicate those disagreements is beyond the scope here. My argument is only that virtually all normative theories of global governance agree that “good” global governance must rest on these values, even while they may disagree on how they ought to be operationalized.

Being constituted by both legitimacy and fairness, the actual institutional practices to promote “good governance” highlight the need to pay attention to both procedural and distributional/empowering implications. Disagreements over what counts as “good” often revolve around claims that one or the other is unduly neglected. For example, the emphasis on the rule of law and anti-corruption by the World Bank is understood primarily in the context of protecting private property

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<sup>60</sup> *E.g.*, DEMOCRACY BEYOND THE STATE? THE EUROPEAN DILEMMA AND EMERGING GLOBAL ORDER 126 (Michael Th. Greven & Louis W. Pauly eds., 2000); GLOBAL GOVERNANCE AND PUBLIC ACCOUNTABILITY, *supra* note 3, *passim*; Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 426–29 (2006).

<sup>61</sup> *See, e.g.*, Buchanan & Keohane, *supra* note 60, at 426–29 (discussing accountability and transparency as “virtues” necessary to create legitimate global governance).

<sup>62</sup> *Id.*

rights and the sanctity of contracts.<sup>63</sup> However, the Bank also supports democratic and administrative reforms, including greater participation and transparency in governance.<sup>64</sup> Attempts to reconcile those values have led to criticisms by some civil society groups and communities in states subject to World Bank or IMF authority of the specific meaning of good practices.<sup>65</sup> These disagreements also reflect shifts in the communities from which international financial institutions now seek legitimacy. As a result, the old legitimating practices driven by expert-based consensus over sound financial or development policies no longer suffice.<sup>66</sup>

#### *D. Practical Reason*

Closely related to the issue of good practices is practical reason, which, like epistemic validity, relies on a pragmatist reading of rationality that is sensitive to contingent historical and cultural contexts. Practical reason builds on the notion that reasons derive from interpretive and dialogical processes (e.g., legal processes) in which intersubjectively validated knowledge and normative understandings of fairness play a major role. Practical reason, for example, concerns the epistemic requirements for democratic practice, which, according to Habermas, requires “discursive validation” and must therefore rest on “good arguments” made under “ideal speech” conditions where validity claims can be assessed.<sup>67</sup> Under such conditions, free and equal autonomous actors can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded. Governance is viewed as a truth-seeking process, and institutions should be designed to approximate such conditions. The link between epistemic validity and practical rationality is obvious in this regard, as the former is not possible without agreement on the latter. Like Habermas, international relations scholars who apply this understanding of practical reason<sup>68</sup> point out that conditions for ideal-speech are counterfactually valid but insist that approximations of such a situation can obtain. Whether one accepts this version of deliberative theory, it serves a purpose here in laying out one idealized version of practical reason against which current practices can be assessed.

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<sup>63</sup> Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, 8–11 (Carnegie Endowment for Int’l Peace, Working Paper No. 30, 2002).

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.* at 1.

<sup>66</sup> Leonard Seabrooke, *Legitimacy Gaps in the World Economy: Explaining the Sources of the IMF’s Legitimacy Crisis*, 44 INT’L POL. 250, 255–56, 264–65 (2007).

<sup>67</sup> HABERMAS, *supra* note 52, *passim*; HABERMAS, *supra* note 31, at 178–79.

<sup>68</sup> E.g., Thomas Risse, “Let’s Argue!”: *Communications in World Politics*, 54 INT’L ORG. 1 *passim* (2000); Risse, *supra* note 54, *passim*.

#### IV. THE LIMITED CASE FOR NON-STATE GLOBAL SOCIAL AND ENVIRONMENTAL GOVERNANCE

Institutions and mechanisms identified as non-state global governance come in a variety of forms (including private regimes, self-regulation, standardization bodies that may or may not include a mix of private and public actors, and private-public partnerships that blur the lines between private and public authority) and address a wide variety of issues (including bond rating, accounting, product standards, labor standards, and environmental regulation). Here, in an attempt to provide a focused illustration of the theoretical arguments above, I exclusively examine attempts to establish non-state social and environmental global governance. There has been an explosion of such efforts, primarily designed to regulate firms directly in the marketplace. However, in some cases these institutions also seek to promote standards, norms, or processes that states might adopt in their regulations or laws. The choice of realm of governance is somewhat arbitrary (I might have focused on non-state economic governance) but is meant to illustrate my central claim that, following on the above criteria of what counts as global governance, only a small fraction of non-state global governance institutions fit this category.

Out of the vast array of non-state or private attempts to socially and environmentally regulate the global marketplace—usually classified broadly under the rubric of “corporate social responsibility” (CSR)—a small subset has arisen in the last twenty-some years that can be rightfully labeled non-state global governance. These mechanisms—usually in the form of producer certification and product-labeling systems that include third-party auditing—are remarkable for their similarity to state-based regulatory and legal systems.<sup>69</sup> They aim to be *authoritative* in the sense of creating rules with a sufficient “pull toward compliance”<sup>70</sup> to create an obligation to comply on the part of firms who sign on. Institutionally they are notable for establishing their own governing systems, largely independent of state governments, with regulatory capacity to back up those obligations with enforceable rules.<sup>71</sup>

Scholars in law, political science, and business have variously labeled them “transnational regulatory systems,”<sup>72</sup> “non-state market driven” (NSMD) governance systems,<sup>73</sup> and “civil regulation.”<sup>74</sup> Here, I use the NSMD governance label. Although slightly awkward, it has significant uptake in the scholarly literature, and studies of NSMD governance systems have generated the most

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<sup>69</sup> Meidinger, *supra* note 14, at 121.

<sup>70</sup> FRANCK, *supra* note 35, at 24.

<sup>71</sup> Cashore, *supra* note 15, *passim*.

<sup>72</sup> Meidinger, *supra* note 14, at 121.

<sup>73</sup> BENJAMIN CASHORE ET AL., GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 4 (2004); Cashore, *supra* note 15, at 504.

<sup>74</sup> Vogel, *supra* note 16, at 262.

detailed and distinct categorization of these mechanisms. Moreover, the goal for many NSMD governance systems is not simply to create niche markets that apply their standards, but also to promote their standards as appropriate and legitimate across an entire market sector.

NSMD systems can be formally defined as “deliberative and adaptive governance institutions designed to embed social and environmental norms in the global marketplace that derive authority directly from interested audiences, including those they seek to regulate, not from sovereign states.”<sup>75</sup> These systems use global supply chains to recognize, track, and label products and services from environmentally and socially responsible businesses and have third-party auditing processes in place to ensure compliance.<sup>76</sup> Their governing arrangements usually include stakeholders as well as representation from the targeted firms, owners, service providers, or producers.<sup>77</sup> NSMD systems’ goals to transform markets, to establish authority independently of sovereign states, and to develop dynamic and adaptive governance mechanisms differentiate NSMD systems from most traditional eco-labeling initiatives.

The most relevant examples of NSMD systems are members of the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, an umbrella organization created to develop agreement on “best practices” for its members and to gain credibility and legitimacy for its members’ standards.<sup>78</sup> Its members include the Fairtrade Labelling Organizations International (FLO), a group that aims to improve conditions for workers and poor or marginalized producers in developing countries through certifying commodities including coffee, cocoa, and sugar;<sup>79</sup> the Forest Stewardship Council (FSC), which aims to combat global forest deterioration;<sup>80</sup> the International Federation of Organic Agriculture Movements (IFOAM), which certifies organic food;<sup>81</sup> the Marine Aquarium Council (MAC), which targets the hobby aquarium trade to promote sustainable management of marine ecosystems and fisheries;<sup>82</sup> the Marine Stewardship Council (MSC), which combats fisheries depletion;<sup>83</sup> the Rainforest

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<sup>75</sup> Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 348 (2007).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> ISEAL ALLIANCE, ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS 2 (2010), <http://www.isealliance.org/sites/default/files/P005%20ISEAL%20Std-Setting%20Code%20v5.0%20Final%20Jan10.pdf> (last visited Mar. 1, 2010) [hereinafter ISEAL CODE].

<sup>79</sup> Fairtrade Labelling Organizations International, About Us/What We Do, [http://www.fairtrade.net/what\\_we\\_do.html](http://www.fairtrade.net/what_we_do.html) (last visited Mar. 1, 2010).

<sup>80</sup> Forest Stewardship Council, <http://www.fscus.org/> (last visited Mar. 1, 2010).

<sup>81</sup> IFOAM, Mission and Goals, [http://www.ifoam.org/about\\_ifoam/inside\\_ifoam/mission.html](http://www.ifoam.org/about_ifoam/inside_ifoam/mission.html) (last visited Mar. 1, 2010).

<sup>82</sup> Marine Aquarium Council, About Us/Mission, [http://www.aquariumcouncil.org/Contact\\_us.aspx?tab=MissionID](http://www.aquariumcouncil.org/Contact_us.aspx?tab=MissionID) (last visited Mar. 1, 2010).

<sup>83</sup> See Marine Stewardship Council, Vision and Mission, <http://www.msc.org/about-us/vision-mission> (last visited Mar. 1, 2010).

Alliance, which has developed certification systems for a wide variety of agricultural products from tropical countries to promote sustainable agriculture and biodiversity;<sup>84</sup> and Social Accountability International (SAI), which aims to improve workers' rights and community development through certification programs for a wide range of manufactured products.<sup>85</sup>

Below, I briefly discuss the core features of these systems to differentiate them from other CSR initiatives. In so doing, I also show how—at least by design, if not always fully in practice—they reflect the core elements of “good” global governance.

## V. HOW IS NSMD GOVERNANCE DIFFERENT, AND WHY DOES IT COUNT AS GLOBAL GOVERNANCE?

Drawing on Cashore,<sup>86</sup> Cashore et al.,<sup>87</sup> and Bernstein and Cashore,<sup>88</sup> I outline five characteristics of an ideal NSMD system that make such systems good candidates to be considered non-state global governance. While other forms of CSR may share some of these characteristics, it is the combination that sets these governance systems apart.

### A. Absence of State Authority

First, NSMD systems do not derive policy-making ability from states' sovereign authority. As elaborated in Cashore's earlier work,<sup>89</sup> this feature does not mean that states are unimportant: some state agencies have provided financial support for particular NSMD systems,<sup>90</sup> and domestic and international regulatory environments potentially affect their activities. Moreover, many systems explicitly include adherence to existing national laws and regulations as part of their

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<sup>84</sup> See RainforestAlliance.org, What We Do, <http://www.rainforest-alliance.org/main.cfm?id=programs> (last visited Mar. 1, 2010).

<sup>85</sup> See Social Accountability International, About Us, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=472> (last visited Mar. 1, 2010).

<sup>86</sup> Cashore, *supra* note 15, at 503–04.

<sup>87</sup> CASHORE ET AL., *supra* note 73, at 17, 20–30.

<sup>88</sup> Bernstein & Cashore, *supra* note 75, at 349–50.

<sup>89</sup> Cashore, *supra* note 15, at 509–10.

<sup>90</sup> Cashore, *supra* note 15, at 513–15; see, e.g., Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31 POL. & SOC'Y 433, 450 (2003) (“In 1999, the Clinton administration allocated \$4 million a year to supporting NGOs working on global labor standards issues . . . .”); Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 321 (2007) (discussing the Austrian government's decision to allocate \$1.2 million (U.S.) to the FSC).

standard,<sup>91</sup> though also frequently include additional elements. However, even in cases where governments supported their formation or facilitated the implementation of their standards,<sup>92</sup> or where the systems interact with state regulators, government procurement policies, or international organizations interested in their standards, NSMD systems do not derive governing authority from states, nor are they accountable to them. Thus, while no global governance system may be completely autonomous from interaction with states, this characteristic firmly establishes these mechanisms in the non-state or private realm.

NSMD governance systems, therefore, can be distinguished from public-private partnerships, which still ultimately rest on state authority, and even private authorities whose competencies and powers are delegated by states. By the same logic, they differ from more traditional standard-setting bodies that derive their authority from governments or intergovernmental organizations, such as Codex Alimentarius (established by the Food and Agricultural Organization and World Health Organization), or from national standard-setting bodies, such as the International Organization for Standardization (ISO).<sup>93</sup>

### *B. Institutionalized, Adaptive, and Dynamic Governance*

NSMD institutions constitute governing arenas in which actors purposely steer themselves toward collective goals and values and in which adaptation, inclusion, and learning occur over time and across a wide range of stakeholders. Dynamic governance differentiates NSMD systems from most traditional ecolabeling initiatives (e.g., Nordic Swan), which generally identify a static measure of environmental quality a firm must adopt to receive a label.<sup>94</sup> NSMD system managers justify this design feature on the grounds that it makes NSMD systems more democratic, open, and transparent than many of the business-dominated public policy networks they seek to bypass, as well as most corporate self-regulation and many social responsibility initiatives.

These features can be understood as efforts to achieve the elements of good practices and practical reason. Indeed, ISEAL's mission is in part to promote "good practices" to ensure its members move beyond the minimum demanded to

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<sup>91</sup> See Peter Wood, *Public Forests, Private Governance: Forest Certification in Canada*, at 51 (2009) (unpublished Ph.D. thesis, University of Toronto) (on file with author).

<sup>92</sup> *Id.* at 52.

<sup>93</sup> ISO is a network of national standards institutes that is the world's largest developer and publisher of international standards. See ISO, About ISO, <http://www.iso.org/iso/about.htm> (last visited Mar. 1, 2010).

<sup>94</sup> See, e.g., Nordic Ecolabel, About the Nordic Ecolabel <http://www.svanen.nu/Default.aspx?tabName=aboutus&menuItemID=7069> (last visited Mar. 1, 2010) (explaining that the Nordic Swan is a label indicating compliance with a voluntary environmental, quality, and health requirements licensing system with the goal of creating a sustainable society).



be recognized as international standards.<sup>95</sup> For example, ISEAL's flagship document, the Code of Good Practices for Setting Social and Environmental Standards,<sup>96</sup> encourages members to incorporate many aspects of the Technical Barriers to Trade (TBT) agreement's Annexes 3 and Second Triennial Review Annex 4, as well as ISO/IEC Guide 59: Code of Good Practice for Standardization.<sup>97</sup> The code also goes beyond these documents with additional criteria aimed specifically at social and environmental standard setting. Some of these criteria are technical, illustrating the importance of being able to engage in processes of epistemic validity in regard to providing, for example, knowledge on its standards, fulfilling technical requirements, and engaging with technical arguments over trade rules.<sup>98</sup> Others aim to augment the provisions in TBT Annex 3 and Second Triennial Review Annex 4 for the participation of developing countries.<sup>99</sup> For example, the code explicitly requires multi-stakeholder consultations, and section 7.2 requires that all interested parties "be provided with meaningful opportunities to contribute to the elaboration of a standard."<sup>100</sup> Section 7.4 also requires that ISEAL members give special consideration to disadvantaged groups, such as developing country stakeholders and small and medium-size enterprises, and seek a balance of stakeholder interests among sectors, geography, and gender.<sup>101</sup> Specific recommendations include funding to participate in meetings, measures to improve technical cooperation and capacity building, and mechanisms that facilitate the spread of information.<sup>102</sup> Strategies through which NSMD systems comply with the provisions of the code are frequently re-evaluated because meaningful multi-stakeholder participation is among the most difficult requirements to fulfill.<sup>103</sup>

The code and its requirements also are clearly part of a legitimization strategy. The requirements tap into expectations within the international trading system, evolving international norms on democracy, as well as evolving international environmental and social norms from which the basic purposes of NSMD systems are constituted. A power dynamic also is at play because NSMD systems at once

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<sup>95</sup> Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575, 597 (2008).

<sup>96</sup> ISEAL CODE, *supra* note 78.

<sup>97</sup> ISO/IEC, ISO/IEC GUIDE 59: 1994 CODE OF GOOD PRACTICE FOR STANDARDIZATION (1994). This is a code of good practices for consensus-based governmental and non-governmental standardization bodies. It covers procedures for development of standards, facilitation of international trade, stakeholder participation, transparency, and coordination.

<sup>98</sup> *See, e.g., id.* § 6.1.

<sup>99</sup> *See id.* § 7.4.

<sup>100</sup> *Id.* § 7.2.

<sup>101</sup> *Id.* § 7.4.

<sup>102</sup> ISEAL, GUIDANCE ON THE APPLICATION OF THE ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS § 4 (Ver. 4, Jan. 2004).

<sup>103</sup> *See* ISEAL, STAKEHOLDER CONSULTATION PRACTICES IN STANDARDS DEVELOPMENT 1 (Pub. Ver. 1, 2005), [http://inni.pacinst.org/inni/NGOParticipation/ISEAL\\_StakeholderConsultSept05.pdf](http://inni.pacinst.org/inni/NGOParticipation/ISEAL_StakeholderConsultSept05.pdf) (last visited Mar. 1, 2010).

tap into norms that encourage market mechanisms and promote liberalized trade, while also trying to navigate concerns of environmental and social groups about the power of the marketplace or marketplace actors to shape governance in ways that may be difficult to reconcile with some environmental or social goals.

*C. Authority Arises out of Market-Based and Market-Civil Society Interactions*

Authority granted to NSMD systems emanates from the market's supply chain in interaction with civil society. These interactions occur both globally and locally, especially because particular governance systems frequently have regional standard-setting processes in addition to the general standard.<sup>104</sup> Moreover, these systems depend upon and encourage community participation in decision making and the development of standards in locations where certification is taking place.<sup>105</sup>

These communities of relevant actors—along the supply chain and within civil society—must grant legitimacy for the ongoing authority of the governing institution. Producers and consumers from extraction to retailers to end-users (in the case of commodities such as forest or agricultural products) or from service providers to consumers (in the case of services such as tourism) make individual choices about whether to require that products or services are certified for compliance to an NSMD system. Thus, the relevant political community will vary across governance systems. In the case of forestry, membership will include forest landowners and forest management companies, producers of forest products and purchasers of those products further down the supply chain, retailers and consumers, as well as members of communities where certification occurs. In the case of tourism, relevant audiences might include tour operators, travel service providers, hotel and resort owners, as well as the workforce in the local communities that are the destinations of travelers and travelers themselves. In the case of fair trade coffee, relevant audiences include coffee brokers, communities who subscribe to fair trade, coffee retailers and individual coffee consumers. The market supply chain is also a source of power, a point elaborated below in the discussion of enforcement (the fifth feature of NSMD governance systems).

The support of both market actors and civil society (including local communities) is essential for ongoing political legitimacy. Institutional design is crucial for ensuring processes of practical reason can occur. This is absolutely essential because market and civil society actors may come to the enterprise of governing with very different community norms and different understandings not only of what the institution ought to be doing, but also of what legitimacy requires. For example, whereas businesses may be focused on output legitimacy and will evaluate these systems based on whether they produce some kind of economic benefit, social and environmental groups who created the systems must perceive them as legitimate arenas of authority with which to address globally important problems, and they may highly value input legitimacy. Learning, dialogical, and

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<sup>104</sup> See Cashore, *supra* note 15, at 507.

<sup>105</sup> See *id.* at 506–09.

deliberative processes are essential for good governance, and many NSMD systems, as well as ISEAL, promote or engage with them.<sup>106</sup>

#### *D. Transformative Goals*

NSMD systems aim to reconfigure markets. They aim not only to create standards for products and services, but also to regulate processes of production, environmental and social impacts, and working conditions. They attempt to ameliorate global problems that, in their absence, firms have little incentive to address. This feature distinguishes NSMD systems from new arenas of private authority designed to standardize business practices, such as accounting, or to improve market coordination. In those cases, economic incentives for profit-maximizing firms to comply inherently exist—even if the resolution to the coordination problem that created a need for governance has distributional consequences (i.e., creates winners and losers). This feature points back to the importance of “good” practices and practical reasons highlighted above, but also to the importance of how material power and legitimacy combine to enable enforcement.

#### *E. Enforcement Mechanisms and Mandatory Requirements*

NSMD systems possess mechanisms to verify compliance and to create consequences for non-compliance. This feature means that, in effect, they develop mandatory standards for those who sign onto the system. The most common compliance mechanism is a third-party audit in which auditors “certify” firm or producer compliance with the rules or identify improvements required for a successful audit.<sup>107</sup> If thought of as “civil” regulation, NSMD systems blur the boundaries between voluntary standards and mandatory regulation, “public” and “private,” and “hard” and “soft” law.<sup>108</sup> Citing a growing body of international relations scholarship on “private” authority, Vogel notes that these sharp dichotomies may be better viewed as ends on a continuum or else they risk obscuring changing relations of power and authority in international relations and global governance.<sup>109</sup> For example, a certification system may be ostensibly voluntary to join, but firms may feel threatened by consumer boycotts or other threats to their market position. Once firms sign on, they are subject to governance, rules, and enforcement that have more in common with state regulation than standards of voluntary bodies that can be abandoned with little consequence.

In contrast, self-regulation (e.g., the chemical industry’s Responsible Care program) and CSR standards (such as the U.N. Global Compact or the OECD’s

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<sup>106</sup> See Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT’L L. 513, 519 (2008).

<sup>107</sup> See Cashore, *supra* note 15, at 513.

<sup>108</sup> Vogel, *supra* note 16, at 265.

<sup>109</sup> *Id.*

Guidelines for Multinational Enterprises (revised in 2000)) are usually voluntary and often discretionary, even for those who sign onto them. For instance, the industrial association dominated Ethical Trading Initiative does not rely on independent third-party certification that its members are following practices.<sup>110</sup> Likewise, Responsible Care does not require that members participate in the program, views its political community as limited to the industry, and, until 2005, did not require third-party auditing.<sup>111</sup> The move to a new auditing regime nonetheless illustrates that there can be evolution of non-state institutions that might bring them closer to fulfilling the core elements of good governance. To be clear, what defines NSMD governance is not NGO, rather than business sponsorship—business-dominated initiatives may evolve into NSMD systems—but rather between systems that do or do not have the five characteristics.

## VI. CONCLUSIONS AND RESPONSES TO CRITICS

This Article's goals have been quite modest: to make the case that non-state global governance can exist, but that it should be confined to a narrow band of cases that exhibit meaningful political authority. It has meant to respond both to skeptics who argue governance worth its name cannot exist absent state authority, and to those who see governing authority anywhere and everywhere, emptying the term of analytic utility. The former group does not deny attempts to generate authority internationally, but views such attempts as always rooted in the collective agreement or consent of states, as delegated by states, or as operating at the pleasure of states. To that group, I have tried to argue that non-state governing authority can be generated, rooted in political communities that may transcend states by interacting in the spaces of global society and markets.<sup>112</sup> In particular, I have shown that political authority can exist absent a monopoly on authority, universal or general-purpose jurisdiction within a defined territory, or the equivalent of state sovereignty.<sup>113</sup> To those who see governance as ubiquitous, I have argued that it should be understood as political authority, not simply any kind of authority, power, or coordinated activity.<sup>114</sup> In so doing, I set the bar very high of what counts as political authority, laying particular emphasis on its connection to legitimacy and political community. Moreover, I made the perhaps even more controversial case that governance worth its name includes—or at least should

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<sup>110</sup> See Ethical Trading Initiative, FAQs, <http://www.ethicaltrade.org/faqs> (last visited Mar. 1, 2010).

<sup>111</sup> Third-party audits are now required for many of its regional sub-groups around the world (e.g., The American Chemical Council and similar bodies in India, South Africa, and Brazil), although others have not yet fully implemented an auditing system. See RESPONSIBLE CARE, STATUS REPORT 2008, 13 (2009), [http://www.responsiblecare.org/filebank/Status%20Report%2001\\_05.pdf](http://www.responsiblecare.org/filebank/Status%20Report%2001_05.pdf).

<sup>112</sup> See *supra* Part II.

<sup>113</sup> See *supra* Part II.

<sup>114</sup> See *supra* Part II.

include—a normative dimension: it should be “good.”<sup>115</sup> Although this position has roots in the classic Weberian formulation that the right to rule is based in “legitimate” authority,<sup>116</sup> drawing on my work with Emanuel Adler I have tried to further specify the conditions of “good governance” and argue that they apply equally to state, interstate, and non-state forms of governance.<sup>117</sup>

While, no doubt, there are many possible objections to the above arguments, I conclude by identifying just two that also point the way toward broader implications and future research that might build on this study.

First, it might be objected that, in practice, the authority relationship between non-state and state-based governance is much more symbiotic than I suggest, even in cases where decision-making authority seems quite autonomous from governments. Although I have made the case for the independent basis of authority of NSMD governance systems<sup>118</sup>—which I will not repeat here—there is some evidence that a number of non-state governing institutions in the social and environmental area are arising that increasingly blur these boundaries.

One can observe two pressures that may make a more symbiotic relationship the norm. One pressure stems from existing international law or guidelines, such as those found in the TBT annexes and reviews cited above<sup>119</sup> or ISO guidelines, that state that international standards must be open to input from all interested states.<sup>120</sup> Although states have so far largely stayed out of direct input into NSMD systems, the more they strive to become international standards, as opposed to standards for niche markets, the more one might expect states to become involved in the creation and support of their rules. Still, one might want to ask even under those circumstances whether states are a party like other parts of the broader political community (rooted in global supply chains and affected communities), or have become a required basis of authority. A second pressure stems from the proliferation of such systems in response to policy or program goals of international institutions, or to international agreements where standards are needed to aid implementation or compliance. For example, one can observe the World Bank working closely with some non-state standard setters in the area of forest certification to promote sustainable forestry practices.<sup>121</sup> The Bank, in this case, is working with the World Wildlife Fund to create guidelines for NSMD

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<sup>115</sup> See *supra* Part III.

<sup>116</sup> See *supra* Part III.

<sup>117</sup> See *supra* Part III.

<sup>118</sup> See *supra* Part V.A.

<sup>119</sup> See *supra* Part V.B.

<sup>120</sup> See *supra* Part V.B.

<sup>121</sup> See, e.g., WORLD BANK, ROOTS FOR GOOD FOREST OUTCOMES: AN ANALYTICAL FRAMEWORK FOR GOVERNANCE REFORMS (2009), available at <http://siteresources.worldbank.org/INTARD/214578-1253636075552/22322823/ForestGovernanceReforms.pdf>; WWF/WORLD BANK GLOBAL FOREST ALLIANCE, A FRAMEWORK FOR ASSESSING CREDIBLE FOREST CERTIFICATION SYSTEMS/SCHEMES (July 2006), available at [http://siteresources.worldbank.org/EXTFORESTS/Resources/FCAG\\_WB\\_English.pdf](http://siteresources.worldbank.org/EXTFORESTS/Resources/FCAG_WB_English.pdf).

systems and support for the adoption of such standards.<sup>122</sup> Another example is the Gold Standard certification scheme for carbon offsets, which was designed in the context of the Clean Development Mechanism of the Kyoto Protocol—a mechanism established through interstate agreement.<sup>123</sup> That case suggests an even more explicit symbiotic relationship, where the standard could become authoritative in terms of what counts as legitimate emission reductions that can be counted by the mechanism. Such a shift, nonetheless, arguably signals more complexity in global authority relationships, not a diminution of non-state authority.<sup>124</sup>

Taking such an objection to its logical extreme, it may also be that at some deeper level, global society and markets only exist by virtue of a secure and regulated social structure rooted in state authority. However, that argument takes us into ontological issues of whether states themselves rest on an underlying normative structure. Even granting that states provide stability and security to any global interaction, if there are cases where authority arises through the interaction of groups or processes largely independent of the purposeful steering of states, one could still speak of non-state global governance in a meaningful way.

A second objection is that non-state governance systems in the marketplace reflect market forces and/or the power of dominant economic classes, and thus do not reflect autonomous political authorities. However, the same objection could, and has been, leveled at states. Ongoing debates in political science concern precisely the relative autonomy of states vis-à-vis markets and economic interests. That interaction, and the appropriate balance between state and market, is one important battleground of state legitimacy and, by extension, the debate over changing configurations of political authority. This is not to dismiss the objection, because the political legitimacy of states is also threatened when it is seen as relinquishing its authority or autonomy to markets to too great a degree. Similarly, it is an empirical question of to what degree non-state governance systems can maintain their relative autonomy from market power and interests, and whether they can maintain authority if the balance tips too far in the direction of markets. The focus on “good” governance suggests that governance that does not reflect sufficient autonomy from market power or special interests (as opposed to some way of achieving the general interest or “will,” or an overlapping consensus of its political community, to use the formulations of prominent political philosophers) will be unsustainable.

In sum, the bar should be set high in evaluating non-state activities and institutions as truly governance so as not to delude ourselves into seeing authority where it does not exist. Nonetheless, it is equally important to recognize that such governing authority can and does exist. We should not dismiss it by objections,

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<sup>122</sup> See WORLD BANK, *supra* note 121; WWF/WORLD BANK GLOBAL FOREST ALLIANCE; *supra* note 121.

<sup>123</sup> Kelly Levin et al., *Can Non-State Certification Systems Bolster State-Centered Efforts to Promote Sustainable Development Through the Clean Development Mechanism?*, 44 WAKE FOREST L. REV. 777, 783 (2009).

<sup>124</sup> *Id.*

which, if applied to states, would suggest they also do not count as governing institutions or locations of political authority. In recognizing that non-state governance can exist, this Article also suggests the need to continue to ask difficult questions about non-state governance systems, including their prospects and limits for addressing global problems, their legitimacy, and their implications for understanding the changing configurations of political authority.

SPEECH  
RELIGION AND NON-STATE GOVERNANCE: WARREN JEFFS  
AND THE FLDS

Mark Shurtleff\*

I'm happy to be able to address you today on this issue. You know, if I was giving a talk about the BCS, we probably could have over-filled this auditorium. I have never seen anything like this. You know with all the things we've done, amber alerts, saving kids from predators, and all the stuff we've advertised in the AG's office, all the great successes we're proud of, there's been nothing like the BCS. I go into 7-11, and the homeless guy is like, "Shurtleff go get 'em at the BCS." Unbelievable; but that's a topic for another day.

I've labeled my comments "Religion and Non-State Governance: Warren Jeffs and the FLDS." I hope, having not been here today, that I am not redundant in my introductory comments with regard to religion, in particular, and the history of theocratic government. When you put non-state governance and religion together, I assume you have a theocracy. Theocracy, of course, directly translated from Greek is "the rule by God," or "by a human incarnation of God." That is going to be particularly interesting when we talk about Warren Jeffs, so remember that—human incarnation of God.

Theocracy was first coined by Josephus back in the first century A.D. He really wanted to distinguish what the Jews were practicing from the Greek recognition of just three types of government, which were monarchy, aristocracy, and anarchy. He said there was a fourth term and came up with this concept of a theocracy, where God is the sovereign law and controls all functions.

Theocracy was first recorded in English back in 1622, when they referenced a sacerdotal government under divine inspiration, referencing the biblical Israel back under the judges, before the rise of the King. It was a theocracy or sacerdotal-type government under divine inspiration. It was also spoken of in 1825 as a priestly or religious body wielding political and civil power. I started thinking, as you wield more civil power by a theocratic or religious body, it no longer becomes non-state governance. Instead, it becomes the state, as we had in the papal states and so forth throughout history, where the head of the dominant religion was also the head of the official church. There was a co-mingling. One example is the papists. Another is the Byzantine emperor. Other regimes also existed over time. So the definition of theocracy actually started to change a little. It was no longer God himself or an incarnation of God in control of the government. Instead, under the new definition,

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there were religious leaders who had responsibilities both in the civil government and the religious government. At this time, the word ecclesiocracy came into play.

As I mentioned above, pure theocracy is outside the realm of non-state governance because, in a pure theocracy, a theocratic government controls things. Throughout history there have been different epochs in different religions which have practiced certain theocracies. For example, in Islam, specifically in Medina and Mecca, Muhammad established theocratic reign—he was the voice of God. Perhaps a more current example is the Taliban in Afghanistan. Now, I've been on national television calling the FLDS<sup>1</sup> a Taliban-like organization. I think that when I go through some of the information about the FLDS situation, you'll see that this is an apt description.

There are current theocracies. Take, for example, the Dali Lamas who ruled Tibet. Tibet was and is religiously run—the Dali Lama still exercises complete theocratic rule. However, his is non-state governance because, as you know, he is no longer in power. So he tries to exert his influence in a non-state-type situation through religious persuasion through his followers in order to get things done, despite the fact that if he goes back there, he'll probably be killed.

Of course, in addition to the Catholic theocracies—the Papal States—there were Protestant theocracies back in Geneva under John Calvin. Even the Puritan's Massachusetts Bay Colony had many characteristics of a Protestant theocracy. But what I want to lead up to is one that we are all very familiar with that has been spoken of by others here today, or written of by others. That is the modern-day theocracy in what was the state of Deseret. That theocracy began in 1847 in a territory that actually belonged to Mexico when the Mormon pioneers came out here and, with Brigham Young in charge, created a state of Deseret. The state was not a recognized, clearly legal state of the country. Rather, it was theocratic—or at least ecclesiocratic—under the direction of Brigham Young, who was its leader. The so-called government was run through the Melchizedek Priesthood.

Of course, we know that as a result of things that happened leading up to our statehood here, that all changed. In fact, it wasn't long after the Treaty of Guadalupe-Hildago, when Deseret became a part of the territory of the U.S., that Brigham had to be appointed, initially, by the federal government and recognized as the governor of the territory until the Utah War. Then he fell out of favor, and the federal government picked non-religious leaders to be the governors out here. And, of course, then, as we prepared for statehood, certain laws were passed—Reynolds, Edmunds, Edmunds-Tucker—that criminalized bigamous cohabitation. As you may know, the Republicans in their 1856 convention said that they had a disdain for both slavery and polygamy, calling both twin relics of barbarism. With all the pressure and with things changing, the Manifesto was issued by the head of the Mormon or LDS church in 1890. Ultimately, over time, the dominant Church of Jesus Christ of Latter-day Saints began the practice of excommunicating members who practiced polygamy. But there were those who believed that the

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<sup>1</sup> The Fundamentalist Church of Jesus Christ of Latter Day Saints.

LDS church had gone wrong and that the most important principle of celestial salvation was the practice of polygamy.

Some forty or fifty years after the fact, some writings claimed that in John Taylor's closing days he met with a group of men. According to these writings, he had a visit from Joseph Smith and Jesus Christ, an all-night visit, and he brought him these men, and they were told—John Taylor was told, as were the others—that the mainstream LDS church was going to go wrong and was going to fall away because they would no longer practice the principle (polygamy). The blessing was given to certain men by John Taylor that when the time came they would be the true priesthood and hence fundamentalist polygamist types of organizations were started in the state of Utah. Over time, these organizations continued to splinter into dozens of different groups, the largest of which, and which really all others kind of grew out of, was and has been referred to for many years by some as the Fundamentalist Church of Jesus Christ of Latter Day Saints.

Over the last couple of days, I have been reading a stack of Warren Jeffs's priesthood journals, which I had just received. Jeffs dictated every single day lengthy, lengthy journals as he traveled the country. He went to all of the "lower" forty-eight states, beginning in about 2004 as I started to crack down and our office started to crack down on the child-bride marriages and other crimes committed within other polygamous sects. Starting before he was charged and while he was on the ten most-wanted list, he was visiting every state capital in the country, where he would perform what he considered a priesthood ordinance of shaking the dust off his feet, which would then condemn that city and that state to the punishments and wrath of God to be ultimately wiped out and destroyed. He went to every single state capital. I did not know that until today after reading his journals, but that's a lot of what he'd been doing over time.

So let me talk about what the Fundamentalist Church was. They moved their main headquarters down to what was then called the Short Creek area on the border of Utah and Arizona. They're kind of halfway between Juab County and Washington County. They wanted to be isolated in a way where they could practice their religion and kind of be left alone and unmolested. They did have members here in Salt Lake and other places. In fact, there was a branch of the FLDS Church here in Salt Lake, and there was a bishop here. And that bishop was Warren Jeffs's father, Rulon Jeffs.

In the late 1970s, the prophet started to fail. Since he was the first counselor and the bishop of Salt Lake, Rulon Jeffs was to be the next prophet. He was moved down to the headquarters to become the prophet, and he became the prophet and was the leader for many years until he started to fail. At that time, his son Warren was in Salt Lake City as the principal of Alta Academy at the mouth of Little Cottonwood Canyon. That school was where all the local FLDS kids went.<sup>2</sup>

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<sup>2</sup> I actually went to junior high with some of these kids at Butler Junior High—Hyrum Steed and some others—who I knew were polygamists. I didn't know anything about which sect they belonged to, but since have learned Hyrum belonged to the FLDS. They moved him into the academy when they took him out of public schools.

Rulon got older, in his late eighties, and started to fail; his health started to fail. At the time, Warren wasn't in line for the presidency. In fact, Warren wasn't even a bishop because they no longer had a branch in Salt Lake. It had been prophesied that in the year 2000 Jesus Christ would return and that these people would be raised up. For this reason, as the year 2000 approached, they had to close down their organization in Salt Lake City, and everybody was supposed to move down there. Warren did, with all his wives. He decided that, close to his father, he wanted to be the person who would become the next prophet, despite the fact he wasn't in the organization as far as first counselors. Everybody assumed Fred Jessop, the beloved Uncle Fred, would become the next prophet after Rulon died. Rulon had some strokes in early 2000 and 2001; he became mostly incapacitated. Warren would claim that Rulon lacked the ability to really communicate and that he would therefore communicate through his son. Warren began telling people how things were going and set up himself to be in position of power. Warren took over in late 2001 or early 2002, not long after I became attorney general of the State of Utah.

There is, I think, no greater example of pure theocracy in perhaps world history than the FLDS, especially after Warren Jeffs took over. As Warren took over, he began to, first of all, eliminate all opposition to his reign, to those people like Uncle Fred and others who might have a claim to the presidency. He began to use the power he had as the prophet, and he began to actually call himself not just the spokesman of God, but God on Earth, and put himself in that absolute supreme power and authority. He also further continued to isolate the people. They were geographically isolated, but he also continued to clamp down even further. For example, they were never for twenty years really supposed to be able to watch TV. Their rights of freedom of the press were denied by the leaders of this church, so all information came through one source, and that was through Warren Jeffs and his supporters.

He used his "Godsquad," his private police, in connection with the official police, who were also members of the FLDS church, and the chief of police and several of the other police officers that were also polygamists. They claimed that they were a democracy like any other city in America, that they had free elections. But there was always only one person who ran, and it was the person who Warren Jeffs or the prophet said would be the candidate for mayor, city council, school board, and so on and so forth. They pretended to be state actors, and they looked like state actors; their community looked like a local government subject to our laws. They participated in politics. They were active Republicans. They became delegates. They attended the Washington County convention as delegates to the convention.

I first met some of them at the Washington County convention when I was running for attorney general back in 2000. They came and approached me and invited me over to see their city. They said they were good people and that they should be left alone. "We won't bother you. Come see us; we'll give you the tour. In fact, Orrin Hatch came and played the organ in our church, and you are certainly welcome to come down and conduct the music or whatever if you don't play the

organ.” I declined. Not long after I was in office, I found out through the Tom Green prosecution that the practice of child-bride marriages was widespread. Tom Green got his twelve-year-old bride from the FLDS in the Hilldale/Colorado City area.

So we began looking into it, finding out what this organization was like, who they were, how they functioned. Let me just kind of run through an example of the way they did things. In addition to the fact that they were committing crimes against children with forced child-bride marriages, they completely deprived their members of civil rights. There were cases of domestic violence that were going unreported. I think in a fifteen-year span they had three reported cases of domestic violence in a population of 10,000, which just didn’t seem right, didn’t seem accurate. Now we know it wasn’t.

In other words, they were pretending to be a true state government, government actors, but really it was the religion that was controlling everything. Women’s civil rights were violated. For example, women were not, unless of a select few, allowed to move much beyond the fifth grade. All kids were denied a science education. They were all taught that dinosaurs weren’t real, that the man on the moon never happened, it was all faked, and so forth. They were only taught revisionist history as taught by Warren Jeffs.

There was a group of boys called the Sons of Helaman, named after a group of stripling warriors in a Book of Mormon story. The job of the Sons of Helaman was to go in and spy on people. If they saw a magazine, a newspaper, an iPod, a cell phone, a TV, a radio, any of these things, they were to report it, and those people would be punished. Many of the Sons of Helaman would use subterfuge in order to kick other males out of town because, for mathematical purposes, if you’re marrying a lot of different girls to the same man, as a man, it increases your chances if you can get rid of the competition.

Warren Jeffs started to really push the fact that wives don’t belong to their husbands. Instead, they belonged to Jeffs, as the priesthood leader, as God on Earth. If Jeffs believed a woman’s husband had somehow done something wrong, he would excommunicate him, cast him away, and reassign his wives. The wives couldn’t go to the celestial kingdom unless they were with a man. Jeffs would tell them who their next husband was going to be and, if need be, move them from house to house.

Members were denied personal property rights under the theory that, in a religious practice patterned after united order, everything is owned by the church through a trust; jobs, businesses, personal property, community property, is all owned. Jeffs could use the trustee power to reassign people to other places, take away their home, take away their business. In this way, Warren Jeffs had absolute, authoritarian control over people’s lives. If you crossed the prophet, you were gone, no questions asked. You could vote, but you voted for whom Jeffs told you to, so they really denied people their voting rights as well as free practice of democracy.

It became something where people were being victimized. So the question became, What do we do, how do we get involved? The question is, What is

appropriate? Are we going to be limiting their freedom of religion if we intervene because the members of those communities are at risk? What is the role of the state in going in?

I think you've heard what we've done. We decided it wasn't going to be about religion. We didn't want to have a religious quest against these people. We decided that it was improper for the government of Utah to go in and tell them what their religious organization ought to be as far as handling their tithing, or their money, or what they want to do with their homes, if they wanted to give them to their prophet or if they wanted to share them with each other. We didn't have that right. But we did have a right under common law, since they put this all into a charitable trust, and Warren Jeffs violated his duty to his beneficiaries of the trust. For this reason, he could be removed. So we did go to the court and ask the court to remove him, and she did appoint a new fiduciary so he could no longer use his power.

Now, was that meddling with their religious practice and religious beliefs? I don't know, but we are trying to finally settle this because we know we can't go forever controlling their trust properties and their personal properties. I think we've got the FLDS now that they've come out of the woodwork and decided that they need to stand up to the public eye and since the Texas raid was seen so poorly from a public relations standpoint for Texas and so positively for the FLDS. Now they are going to come out and have Web sites, the Truth Unveiled. Now they have a Web site where you can buy the clothing and learn how to do the hair that they do down at the FLDS. They are very active now and very well aware of public relations, whereas before they remained isolated.

When I initially went down in 2002, I spoke in a church of a group that had broken off from the FLDS some fifteen years prior, a group that calls themselves The Work. We refer to them as "Centennial Park." They're down the road a little bit from the main FLDS group. These folks wanted to still practice polygamy but believed women have rights to jobs and to education. They believe in personal property ownership and all these other rights guaranteed by this great free country in which we live. They invited me in. I talked to them, and I told them that the biggest problem when you have groups like this in isolation, your biggest problem is as you hide. As you go behind the gates, close the gates, and you stay isolated from the rest of the world, we are all going to suspect that something horrible is going on. If we suspect it and we ignore it, as we did, unfortunately, in the states of Utah and Arizona for fifty years after the problem with the '53 raid (in which the governor of Arizona and others were voted out of office after people felt like they were heavy handed in their intervention), a criminal leader who has absolute control will violate people's rights and commit crimes with impunity.

We're encouraged. There's been an awakening, and these organizations have really become active non-state-governance-type organizations. Now all the polygamists sects, the independents, and other sects are showing up at the capitol. I'm speaking next week to a whole rally on how to get involved in politics, how to be involved, be civically engaged. Come out, talk about what you're doing. In Utah, we remain firm that it's not about religion. I don't have the resources to put you all in prison and take away all your kids, thousands and thousands of children.

Texas couldn't handle five hundred; we couldn't handle tens of thousands. But you cannot commit crimes against women and children, or we will prosecute you.

Warren Jeffs is facing twenty-five years to life for his crime of first degree felony rape as an accomplice. He's been charged in Arizona; he's been charged federally; now he's been charged in Texas, and I don't think he's ever going to get out of prison. But I believe that our efforts have never been about religion, they've never been about trying to stop someone in their religious practice except to the extent that it harms other kids, other people, or otherwise violates laws that protect kids from sexual assault.

Thanks.

## THE NCAA AND RELIGION: INSIGHTS ABOUT NON-STATE GOVERNANCE FROM SUNDAY PLAY AND END ZONE CELEBRATIONS

Kevin J Worthen\*

One way of addressing the subject of religion and non-state governance is to consider the many questions that arise when religious groups perform the governance role.<sup>1</sup> The primary focus would be on the degree to which religious entities do—and should be allowed to—govern the conduct of their members. Corollary questions would address such things as the ease (both legally and practically) with which members of the group may exit the religion; the extent to which noncompulsory or nontraditional governmental enforcement tools, such as persuasion and shaming, are effective; and the kinds of norms and enforcement tools that traditional state government entities will (and should) allow non-state organizations to employ. That approach would be both enlightening and worthwhile.

However, this Essay addresses the topic of religion and non-state governance from a different standpoint, considering not how religious entities govern as non-state governance actors, but rather how non-state governance actors address religious issues within their jurisdictional spheres. It does so using the experience of a particular (and some would think, peculiar) non-state governance entity—the National Collegiate Athletic Association (NCAA).

The Essay describes the NCAA, establishing its bona-fides as a non-state governance entity. It then examines two situations in which the NCAA has addressed religion in the past fifteen years—one involving Sunday play for religiously affiliated universities, and the other involving an effort to penalize prayer celebrations in football games. Finally, the essay offers a few tentative insights from the NCAA's experience with religion, concerning the manner in

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<sup>1</sup> See, e.g., Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 507 (2005) (noting that "religious institutions . . . and a myriad of other 'norm-generating communities' may at various times exert tremendous power over our actions even though they are not part of an 'official' state-based system." (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983))); see also *id.* at 508–09 n.88 (noting that the relationship between church and state is the "*locus classicus* of thinking about the multiplicity of normative orders" (citing Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 28–34 (1981) (internal quotations omitted))).

which non-state governance entities do (and should be allowed to) address religious liberty issues.

### I. THE NCAA AS A NON-STATE GOVERNANCE ENTITY

The NCAA is an unincorporated<sup>2</sup> voluntary association of “members who have adopted a constitution and bylaws that specify the agreements among the members and the rules under which they agree to operate.”<sup>3</sup> As its name suggests, the NCAA focuses on intercollegiate athletics. It began in 1906 when a group of representatives from 39 colleges adopted a constitution, largely aimed at establishing safety rules for college football games, which had experienced a number of deaths in the immediately preceding years.<sup>4</sup> Today, it has more than 1,250 members whose collective primary purpose is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>5</sup>

Although the NCAA is focused on differentiating intercollegiate athletics from professional sports, intercollegiate athletics is itself a multibillion-dollar-per-year enterprise. In 2007-08, the NCAA distributed more than \$358 million in revenue to its more than 300 Division I<sup>6</sup> members,<sup>7</sup> and the athletics departments

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<sup>2</sup> Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 183 (1988).

<sup>3</sup> John Kitchin, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL'Y 71, 71 (1996).

<sup>4</sup> In 1905, in response to growing concerns about injuries and deaths in college football, President Theodore Roosevelt convened a meeting of college athletics leaders to discuss reforms. Nat'l Collegiate Athletic Ass'n, *The History of the NCAA*, <http://www.ncaa.org/> (follow “About the NCAA” hyperlink; then follow the “Overview” hyperlink; then follow the “History of the NCAA” hyperlink) (last visited Mar. 1, 2010). The group formed the Intercollegiate Association of the United States on March 31, 1906. *Id.* It took its present name, the NCAA, in 1910. *Id.*

<sup>5</sup> NCAA CONST. § 1.3.1, *reprinted in* 2008-09 NCAA DIVISION I MANUAL 1 (2008) [hereinafter *NCAA Manual*].

<sup>6</sup> NCAA institutional membership is available in three divisions, depending on the number of sports the institution wishes to sponsor and the level of support given to the various sports. *See* Nat'l Collegiate Athletic Ass'n, *What's the Difference Between Divisions I, II, and III?*, <http://www.ncaa.org/> (follow “About the NCAA” hyperlink; then follow the “Membership” hyperlink; then follow the “The Differences Between Divisions I, II and III” hyperlink) (last visited Mar. 1, 2010). Division I membership requires the highest level of athletic support. For a current list of Division I members, *see* Nat'l Collegiate Athletic Ass'n, *NCAA Members By Division*, <http://www.ncaa.org/> (select “Division I”; then select “Run Report”) (last visited Mar. 1, 2010).

<sup>7</sup> Nat'l Collegiate Athletic Ass'n, *NCAA Division I Total Revenue Distribution Information By Conference 2007–2008* (Aug. 22, 2008) (unpublished table, Nat'l Collegiate Athletic Ass'n) (on file with *Utah Law Review*).



of at least three individual member universities have generated more than \$100 million in one year in additional revenue for their institutions.<sup>8</sup>

Even though its principal focus is athletics, the NCAA significantly influences a host of institutional and individual conduct that occurs off the field of competition. The Division 1 Manual consists of more than 400 pages of regulations, very few of which address the rules of the game for any sport. As a condition of membership, universities agree to abide by NCAA legislation involving core academic concerns such as admissions criteria<sup>9</sup> and financial aid,<sup>10</sup> as well as detailed minutia such as the size and shape of laundry labels on the outside of team uniforms.<sup>11</sup>

Even though they are not formally members of the association, more than 400,000<sup>12</sup> students who participate in intercollegiate athletics at member institutions find their daily lives regulated by NCAA rules.<sup>13</sup> To maintain their eligibility for athletic competition, students must comply with a host of NCAA rules regulating academic decisions such as when they select their majors<sup>14</sup> and how often, and under what conditions, they can repeat a class.<sup>15</sup> The rules restrict the kinds of employment student athletes can take,<sup>16</sup> the kinds of contracts they can enter into,<sup>17</sup> the things they can say in certain situations,<sup>18</sup> and who can buy them

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<sup>8</sup> Jeff Ostrowski, *For UF Athletic Programs, Blue + Orange = Green*, PALM BEACH POST, Dec. 16, 2007, at 1A, available at 2007 WLNR 24845995 (indicating athletic revenue of \$109.4 million for The Ohio State University, \$107.8 million for the University of Florida, and \$105 million for the University of Texas at Austin).

<sup>9</sup> See NCAA Bylaws, art. 14, reprinted in NCAA MANUAL, *supra* note 5, at 127–166. Those student-athletes who do not meet the initial academic qualifications established by the NCAA are classified as “non-qualifiers,” and they cannot receive athletics financial aid or compete or practice their freshman year in college. See NCAA Bylaws, art. 14.3.2, reprinted in NCAA MANUAL, *supra* note 5, at 146–47.

<sup>10</sup> See NCAA Bylaws, art. 15, reprinted in NCAA MANUAL, *supra* note 5, at 169–81. NCAA regulations control not only the conditions under which athletics-related financial aid can be given, but also the amount of financial aid the school can provide to a student-athlete from any source, including academic scholarships. See NCAA Bylaws, art. 15.01.5, reprinted in NCAA MANUAL, *supra* note 5, at 169–70; *id.* art. 15.01.6, reprinted in NCAA MANUAL, *supra* note 5, at 170; *id.* art. 15.1, reprinted in NCAA MANUAL, *supra* note 5, at 172.

<sup>11</sup> NCAA Bylaws, art. 12.5.4.1, reprinted in NCAA MANUAL, *supra* note 5, at 75.

<sup>12</sup> A study by the NCAA concluded that approximately 412,000 student-athletes participated in NCAA sports in 2007–08. 1981–82–2007–08 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT at 8, available at <http://www.ncaapublications.com>.

<sup>13</sup> Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHNS L. REV. 183, 191–92 (2008).

<sup>14</sup> NCAA Bylaws, art. 14.4.3.1.6, reprinted in NCAA MANUAL, *supra* note 5, at 149 (requiring student-athletes to designate degree program by the third year of enrollment).

<sup>15</sup> *Id.* art. 14.4.3.4.6, reprinted in NCAA MANUAL, *supra* note 5, at 152.

<sup>16</sup> *Id.* art. 12.4, reprinted in NCAA MANUAL, *supra* note 5, at 69–70.

<sup>17</sup> See, e.g., *id.* art. 12.3, reprinted in NCAA MANUAL, *supra* note 5, at 68–69 (regulating oral and written agreements with lawyers).

lunch.<sup>19</sup> They must also consent to drug testing.<sup>20</sup> Furthermore, NCAA standards affect the academic life of student athletes even before their enrollment in college, as initial eligibility standards dictate the kinds of high school courses the student must take to compete athletically at a university that is an NCAA member.<sup>21</sup>

It is clear, therefore, that the NCAA regulates a considerable amount of the conduct of a considerable number of persons and institutions—a clear example of governance.<sup>22</sup> The only question is whether that governance is non-state governance. The legal response to that question was provided by the United States Supreme Court in 1988. In *NCAA v. Tarkanian*, the Court by a 5-4 vote concluded that even though a substantial percentage of its members are state-sponsored universities, the NCAA's actions are not "state action," and the NCAA is, therefore, free from the constitutional constraints that limit traditional American governmental units.<sup>23</sup> In reaching that decision, the Court emphasized that the NCAA has "no power . . . to assert sovereign authority over any individual" and that "[i]ts greatest authority [is] to threaten sanctions against [its members] with the ultimate sanction being expulsion . . . from membership."<sup>24</sup>

The NCAA thus seems to fit the classic definition of a non-state governance entity<sup>25</sup>—it is an organization that has a profound impact on the way in which more than a thousand of the nation's universities carry out a considerable portion

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<sup>18</sup> See, e.g., *id.* art 12.5.3, reprinted in NCAA MANUAL, *supra* note 5, at 74 (allowing student-athletes to appear on television shows and in other forms of media, but prohibiting them from endorsing any commercial products or services).

<sup>19</sup> See, e.g., *id.* art. 16.11.2.2.1, reprinted in NCAA MANUAL, *supra* note 5, at 207 (prohibiting restaurants from providing free or reduced-cost meals to student-athletes); *id.* art. 16.10.1.6, reprinted in NCAA MANUAL, *supra* note 5, at 204 (allowing booster club or civic organization to pay for student-athlete's meal at luncheon meeting if the meeting occurs within a thirty-mile radius of campus and no tangible award is given).

<sup>20</sup> *Id.* art. 14.1.4.1, reprinted in NCAA MANUAL, *supra* note 5, at 130.

<sup>21</sup> *Id.* art. 14.3.1.1, reprinted in NCAA MANUAL, *supra* note 5, at 143.

<sup>22</sup> "Governance may be defined as organized efforts to manage the course of events in a social system. Governance is about how people exercise power to achieve the ends they desire, so disputes about ends are tied inextricably to assessments of governance means." Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 3 (2008).

<sup>23</sup> 488 U.S. 179, 179 (1988).

<sup>24</sup> *Id.* at 197.

<sup>25</sup> Two scholars have identified the following as characteristics of one set of international non-state governance systems: "They aim to be *authoritative* in the sense of creating rules with a sufficient 'pull toward compliance'—to borrow Thomas Franck's useful understanding of legitimacy—to create an obligation to comply on the part of firms who sign on. Institutionally they are notable for establishing their own governing systems, largely independent of state governments, with regulatory capacity to back up those obligations with enforceable rules." Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575, 576 (2008) (quoting THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (New York: Oxford University Press 1990)).

of their business, and it regulates the manner in which more than 400,000 students shape their daily lives and choose their careers; at the same time it is not a state-governmental unit, and it is not bound by the constitutional strictures that apply to such governments in the U.S. legal system.

## II. THE NCAA AND RELIGION: ACCOMMODATING BELIEFS AND PRACTICES

How has the NCAA's use of its non-state governance powers affected religion? The answer can be discerned from a review of two specific disputes that have arisen in the past two decades. The first involved a conflict between NCAA rules requiring that certain contests be played on Sundays and the doctrinal teachings of religiously-affiliated member institutions proscribing Sunday play. The second dealt with a conflict between NCAA rules prohibiting excessive celebration on the football field and the religiously-motivated practice of some players to express their gratitude to God following successful plays.

### A. *Never on Sunday*

Controversy first arose concerning an NCAA member's refusal to play on Sundays in 1958, when the Brigham Young University (BYU) baseball team won the District Seven championship and qualified to participate in the College World Series, the NCAA tournament that determines the national champion in college baseball.<sup>26</sup> Unfortunately for the BYU team, the College World Series schedule that year required teams to play games on Sunday, while the university, consistent with the teachings of its sponsoring institution, the Church of Jesus Christ of Latter-day Saints, had—and continues to have—a policy prohibiting its teams from Sunday play.<sup>27</sup> Citing its religious beliefs, BYU requested that the NCAA adjust the College World Series schedule to allow it to play its games on days other than Sunday.<sup>28</sup> When the NCAA denied that request, the members of the baseball team voted unanimously to forgo participation in the tournament, thereby forfeiting the opportunity to compete for the national championship.<sup>29</sup>

Three years later, BYU's baseball team was undefeated in league play and had a twenty-four-game winning streak.<sup>30</sup> Yet, the team was not invited to the

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<sup>26</sup> Ralph Zobell, *Never on Sunday*, <http://www.byucougars.com/Filing.jsp?ID=11243> (last visited Mar. 1, 2010).

<sup>27</sup> *Id.* (noting that “BYU has never played on a Sunday and never will”). In 1977, the BYU football team won the Western Athletic Conference championship and thereby qualified to participate in the Fiesta Bowl. However, the game was played on Sunday, and the Cougars did not participate, choosing instead to play in the Japan Bowl. *Id.*

<sup>28</sup> In a letter to the NCAA, BYU President Ernest L. Wilkinson asserted, “Your schedule of games has been arranged so that we would be required to play on Sunday . . . . This is a violation of Christian principles which motivate us as a Christian institution of higher learning.” *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

regional playoffs leading to the College World Series because of the team's refusal to play on Sundays.<sup>31</sup> Likely realizing that the issue would continue to arise in baseball and other sports, the NCAA Executive Committee later that year voted to preclude scheduling of NCAA tournaments on Sundays in some instances,<sup>32</sup> and in 1963 the NCAA formally adopted legislation requiring that championship schedules be "adjusted to accommodate" institutions with "a policy against Sunday competition."<sup>33</sup>

The "BYU" rule (as it came to be known)<sup>34</sup> remained in effect until 1998, at which time only two of the more than 300 Division I schools in the NCAA—BYU and Campbell University, a Baptist-sponsored university in North Carolina<sup>35</sup>—had written policies prohibiting Sunday athletic play. Stating that the "NCAA wasn't legally required to respect the wishes of Brigham Young and Campbell,"<sup>36</sup> the NCAA's Board of Directors voted in April 1998 to eliminate the rule.<sup>37</sup> The chairman of the board noted that the board was "sensitive" to the "legitimate institutional issues" of the two schools in avoiding Sunday play.<sup>38</sup> However, the board concluded that the need for increased television exposure and the ability to get better airfares (made possible by scheduling trips to include a stay over Saturday night) outweighed the interests of the two schools.<sup>39</sup>

As allowed by NCAA procedures,<sup>40</sup> the two schools initiated a process to suspend the legislation, and ninety-nine schools filed forms with the NCAA within the requisite time period.<sup>41</sup> This was one short of the one hundred required to suspend the legislation.<sup>42</sup> However, under the NCAA rules,<sup>43</sup> the objection of thirty schools was enough to require the board to review the decision,<sup>44</sup> and in August the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Todd Beaste, *Never on a Sunday: NCAA Rescinds the 'BYU Rule,'* 1 FOR THE RECORD ONLINE, July 1998, <http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=215#byu> (last visited Mar. 1, 2010).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting Greg Beacham, *NCAA to Review 'Sunday' Rule*, AP ONLINE, July 7, 1998, 1998 WL 6691686).

<sup>37</sup> *See id.*

<sup>38</sup> *Id.* (quoting Joe Baird, *NCAA to Play on Sunday, But Y. Won't*, SALT LAKE TRIB., April 23, 1998, at A1).

<sup>39</sup> *Id.*

<sup>40</sup> NCAA Bylaws, art. 5.3.2.3.1, 2, reprinted in NCAA MANUAL, *supra* note 5, at 34–35.

<sup>41</sup> *See* Beaste, *supra* note 33.

<sup>42</sup> One school, Boise State University, would have been the one-hundredth, but it filed its form forty-five minutes after the deadline. *Id.*

<sup>43</sup> NCAA Bylaws, art. 5.3.2.3.1, 2, reprinted in NCAA MANUAL, *supra* note 5, at 34.

<sup>44</sup> Beaste, *supra* note 33.

board adopted a new rule, one which both broadened and narrowed the BYU rule adopted in 1963.<sup>45</sup>

The new rule expanded the scope of the exception to require accommodation not just for schools with policies against Sunday competition, but also for those with policies prohibiting competition on any specific day for religious reasons.<sup>46</sup> At the same time, however, the rule allowed individual sports committees to petition for a waiver from the no-play policy if such accommodation would “unduly disrupt the orderly competition of a championship.”<sup>47</sup>

The following summer, the women’s soccer and women’s basketball sports committees, which had for years scheduled their national championship games on Sundays, successfully requested waivers from the accommodation rule.<sup>48</sup> The effect was that BYU’s teams in those sports would not be eligible for participation in the NCAA tournaments leading up to the championship game. However, responding to lobbying efforts by BYU and others, the NCAA soon reversed field and revoked the waivers,<sup>49</sup> thereby reinstating the accommodation rule for those two sports. In October 1999, the NCAA adopted an expanded version of the original BYU rule, which required all sports to adjust their championship schedule to accommodate institutions with a “written policy against competition on a particular day for religious reasons.”<sup>50</sup> That rule remains in effect.<sup>51</sup>

Thus, in response to the internal lobbying efforts of its own members, the NCAA currently provides an accommodation for the religious practices of two of its more than one thousand institutional members.<sup>52</sup> It does so even at the risk of

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<sup>45</sup> See *The ‘BYU Rule’ is Back*, BYU MAG., Fall 1998, available at <http://magazine.byu.edu/?act=view&a=288>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Jeff Call, *NCAA to Review Play on Sunday*, DESERET NEWS, Aug. 6, 1999, at D01, available at <http://www.deseretnews.com/article/711180/NCAA-to-review-play-on-Sunday.html>.

<sup>49</sup> Jeff Call, *BYU Teams Will Be Able to Play—And Not on Sunday*, Sept. 20, 1999, <http://www.themwc.com/genrel/092099aad.html>.

<sup>50</sup> NCAA Bylaws, art. 31.1.4.1, reprinted in NCAA MANUAL, *supra* note 5, at 375.

<sup>51</sup> Interestingly, in 2003, through an apparent oversight, BYU’s men’s basketball team was placed in a NCAA tournament bracket that would have required it to play on a Sunday after two victories in the tournament. See Steve Wieberg, *Slip-Up Creates Bib Bracket Headache*, USA TODAY, Mar. 18, 2003, at C8, available at 2003 WLNR 6117331. BYU lost in the opening round to Connecticut, thereby mooting the issue. See Brian Hamilton, *BYU Comes Up Short: Cougars’ Loss Saves Face For NCAA Tournament Officials*, ST. PAUL PIONEER PRESS, Mar. 21, 2003, at B10, available at 2003 WLNR 14719755.

<sup>52</sup> The current rule also requires accommodation for some athletes participating in individual championship competition (in sports such as cross country and track and field), but does so in ways that raise a new set of religious liberty questions by limiting the exception to those whose institutions have a policy against Sunday competition. See NCAA Bylaws, art. 31.1.4.2, reprinted in NCAA MANUAL, *supra* note 5, at 375 (“an athlete must compete according to the institution’s policy regarding Sunday competition (if the institution has no policy against Sunday competition, the athlete shall compete on Sunday

substantial disruption of NCAA championship events,<sup>53</sup> events that generate a substantial amount of national prominence, television exposure, and revenue for the association.<sup>54</sup> This is quite a generous accommodation of religious beliefs, one that—as noted below—goes beyond what a traditional state government would have been constitutionally compelled to provide.<sup>55</sup>

### *B. Prayers in the End Zone*

The second incident involving the NCAA and religion grew out of a rule adopted in 1991 by the NCAA football rules committee.<sup>56</sup> The rule, which was enacted to eliminate the increasingly widespread practice of choreographed end zone celebrations following a touchdown,<sup>57</sup> defined “any delayed, excessive or prolonged act by which a player attempts to focus attention on himself,” as unsportsmanlike conduct, subject to a fifteen-yard penalty.<sup>58</sup> Four years after the

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if required by the schedule).”) Thus, Latter-day Saint or Baptist student-athletes who attend a university other than BYU or Campbell are not entitled to any individual accommodation even if their personal religious beliefs were more deep-seated than student athletes attending those institutions. Similarly, a Jewish or Seventh-day Adventist student athlete would not be entitled to an individual accommodation for her religious beliefs concerning days of worship, regardless of where she attended school.

<sup>53</sup> In 2008, the schedule for the NCAA women’s softball championship tournament was adjusted to enable the BYU women’s softball team to compete in the North Carolina Regional so that the team could avoid Sunday play. Campbell University’s women’s softball team competed in the same regional for the same reason. *See* Zobell, *supra* note 26.

<sup>54</sup> In 2006, the NCAA distributed to its members more than \$300 million in revenue generated by its men’s championship basketball tournament. Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 518 (2008) (referring to the 2006 NCAA Membership Report).

<sup>55</sup> *See infra* notes 80–89 and accompanying text.

<sup>56</sup> *See* Jeffrey C. True, *The NCAA Celebration Rule: A First Amendment Analysis*, 7 SETON HALL J. SPORT L. 129, 130 (1997).

<sup>57</sup> *See id.* at 133.

<sup>58</sup> In relevant part, the rule provided:

ARTICLE 1: There shall be no unsportsmanlike conduct or any act that interferes with orderly game administration on the part of the players, substitutes, coaches, authorized attendants or any other persons subject to the rules, before the game, during the game or between periods.

a. Specifically prohibited acts and conduct include:

1. No player, substitute, coach or other person subject to the rules shall use obscene or vulgar language or gestures or engage in acts that provoke ill will or are demeaning to an opponent, to game officials or to the image of the game, including:

- (a) Pointing the finger(s), hand(s), arm(s) or ball at an opponent.
- (b) Baiting or insulting an opponent verbally.
- (c) Inciting an opponent or spectators in any other way.

rule was adopted, the football rules committee made its enforcement an area of particular focus, creating a video with detailed explanations of appropriate interpretations of the rule.<sup>59</sup> Among the examples of conduct that violated the rule, the video showed a player dropping to one knee and crossing himself after scoring a touchdown.<sup>60</sup> When the video reached Liberty University, a Christian school founded by Jerry Falwell,<sup>61</sup> the reaction was outrage.<sup>62</sup> Head coach Sam Rutigliano expressed the feelings of the team when he observed, "I never thought . . . that someone would flag me for praying."<sup>63</sup> A short—but lively and extensive—media discussion about the ban on end zone prayer quickly ensued,<sup>64</sup> and when Falwell received a call from the Rutherford Institute offering to represent the university in

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(d) Any delayed, excessive or prolonged act by which a player attempts to focus attention upon himself.

(e) Removal of a player's helmet before he is in the team area (Exceptions: Team, media or injury timeouts; equipment adjustment; through play; and between periods)

. . . .

3. After a score or any other play, the player in possession immediately must return the ball to an official or leave it near the dead-ball spot. This prohibits:

(a) Kicking or throwing the ball any distance that requires an official to retrieve it.

(b) Spiking the ball to the ground [Exception: A forward pass to conserve time (rule 7-3-2-e)].

(c) Throwing the ball high into the air.

(d) Any other unsportsmanlike act or actions that delay the game.

Comment, Amanda N. Luftman, *Does the NCAA's Football Rule 9-2 Impede the Free Exercise of Religion on the Playing Field?*, 16 LOY. L.A. ENT. L.J. 445, 445–46 n.3 (1995).

<sup>59</sup> *Id.* at 447.

<sup>60</sup> Michael Dobie, *Faith and Liberty Baptist College's Crusade is Salvation of TD Prayer*, *NEWSDAY*, Sept. 29, 1995, at A87, available at 1995 WLNR 520927.

<sup>61</sup> *Id.*

<sup>62</sup> "We were all sort of shocked at first," wide receiver Kris Bouslough said. "It seemed so ludicrous when the referee said you couldn't differentiate between celebration and prayer. We were all kind of upset." *Id.* "Since when did prayer become hot-dogging," Liberty quarterback Antwan Chiles asserted. *Id.*

<sup>63</sup> John Lindsay, *Angry With Gator Fans Fun on Football Field? Not a Prayer with NCAA in Charge*, *DENVER ROCKY MOUNTAIN NEWS*, Sept. 10, 1995, at 13B, available at 1995 WLNR 644426. Because a second violation of the rule called for ejection of the offending player, Rutigliano suggested "tongue-in-cheek" that he was thinking of creating a new position, "substitute prayer guy, i.e., a player who would pray on behalf of another player who scored a second touchdown." Dobie, *supra* note 60.

<sup>64</sup> "An online search of computerized news databases at the beginning of the football season (Sept. 11, 1995) resulted in a list of well over two hundred newspaper articles written since July, 1995 discussing the NCAA football rule." Luftman, *supra* note 58, at 450 n.25.

a legal challenge to the rule, he accepted.<sup>65</sup> A lawsuit was filed in federal district court<sup>66</sup> seeking to enjoin the NCAA from enforcing the rule because it would require Liberty to violate Title II of the 1964 Civil Rights Act, which prohibits places of public accommodations from discriminating on the basis of religion.<sup>67</sup> The filing of the lawsuit brought a larger wave of publicity<sup>68</sup> and, within twenty-four hours, a settlement. The NCAA issued a “clarification” of the rule, and Liberty dismissed the lawsuit.<sup>69</sup>

The clarification issued by the NCAA seemed aimed more at ending the public relations outcry than at protecting religious belief.<sup>70</sup> The short-term net

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<sup>65</sup> Dobie, *supra* note 60.

<sup>66</sup> Liberty Univ. v. NCAA, No. 95-0046-L, at 9-11 (W.D. Va. filed Aug. 31, 1995) (dismissed Sept. 1, 1995); *see* Luftman, *supra* note 58, at 453 n.45.

<sup>67</sup> One commentator described the argument in this manner:

Liberty argued that as the owner and operator of a football stadium (a place of public accommodation under section 2000a (b)(3) of Title II), it cannot enforce NCAA rules which violate Title II. Title II provides that all persons are entitled “to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of [that] place of public accommodation . . . without discrimination or segregation on the ground of . . . religion.” A person may neither be deprived of, nor threatened or coerced with, nor punished for exercising the rights set forth in section 2000a. Hence, the NCAA, with its adoption of rule 9-2, has significantly interfered with Title II of the 1964 Civil Rights Act.

Luftman, *supra* note 58, at 454–55 (citing the complaint and statute) (footnotes omitted).

<sup>68</sup> Within twenty-four hours of the filing of a lawsuit by Liberty, “ESPN, CNN and several networks quickly flew to Lynchburg for a news conference and even the BBC requested an interview.” Dobie, *supra* note 60.

<sup>69</sup> Luftman, *supra* note 58, at 455.

<sup>70</sup> The NCAA statement explained:

The committee is concerned about reports it has “banned prayer” from football. It is not the intent of the Football Rules Committee to prohibit prayer, on or off the playing field . . . .

Praying has always been and remains permissible under the rules. However, **overt acts associated with prayer**, such as kneeling, **may not be done in a way that is delayed, excessive, or prolonged in an attempt to draw attention to oneself**. Players may pray or cross themselves **inconspicuously without drawing attention to themselves**. It is also permissible for them to kneel momentarily at the conclusion of a play, **if in the judgment of the official the act is spontaneous and not in the nature of a pose**.

. . . .

In considering this issue, the committee decided that it would be **impracticable to construct an exclusion from the rule for prayer-related activities**. Such an exclusion would open a window for a variety of attention-drawing displays under the guise of prayer.



effect was that the wording of the rule remained unaltered (which was not surprising because it was not a change in the wording of the rule that provoked the controversy in the first place), and the burden of applying its ambiguous terms to real life situations was shifted to the individual game officials,<sup>71</sup> who were left to determine for themselves whether the player kneeling was praying or celebrating.<sup>72</sup> However, the rule was never enforced against a player who claimed to be praying,<sup>73</sup> and the issue disappeared from the public's radar screen. Thus, the NCAA once again accommodated (though to a lesser degree) the religious conduct at issue, this time responding to external, rather than internal, pressure.

### III. TENTATIVE INSIGHTS FROM THE NCAA EXPERIENCE

In the last two decades, NCAA regulations have directly conflicted with the religious practices and beliefs of those it governs in at least two separate situations. In both situations, the NCAA eventually altered its rules (or in the case of end zone celebrations, the application of those rules) to accommodate the religious practices—once in response to internal lobbying of its own members and once in response to the threat of litigation and adverse publicity. At least four tentative insights into the relationship between non-state governance entities and religion can be gained from this experience.

The first, and most obvious, is that non-state governance entities can have a profound impact on religious groups and that there are more of these conflicts than many may at first realize. In one respect, this should not be surprising. Because the actions of non-state governance entities increasingly influence and sometimes directly regulate the daily lives of individuals and institutions, and because the daily lives of many institutions and individuals are shaped by religious beliefs, an increase in such conflicts would be predictable. Evidence that they occur is not limited to the U.S. college athletic arena. For example, there have been conflicts between transnational corporations<sup>74</sup> (which are often identified as classic non-

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Luftman, *supra* note 58, at 455 (quoting Memorandum from Vince J. Dooley, NCAA management, to the members of the NCAA (Sept. 1, 1995) (emphasis added)).

<sup>71</sup> In the words of one columnist, "Petrified at the prospects of being dragged into a First Amendment controversy, NCAA backed off as Liberty dropped its suit after the NCAA 'clarified' the rule, pretty much dumping even more of the burden of enforcing an ill-conceived rule on beleaguered game officials." Lindsay, *supra* note 63, at 13B.

<sup>72</sup> As another columnist suggested, "If I were a referee, I'd be looking for new work" because officials were being asked to decide if someone's prayer is sincere, and "[i]n most circles, that decision's up to God." Jennifer Graham, *Praying in the End Zone*, COLUM. STATE, Sept. 9, 1995, at D7.

<sup>73</sup> In its first football game after the NCAA's clarification, Liberty scored ten touchdowns. "[A]fter four of them, the player who scored prayed in the end zone. No penalties were assessed." David Teel, *NCAA Rescinds Idea to Prey on Players' Prayers*, DAILY PRESS, Sept. 5, 1995, at D1.

<sup>74</sup> In its draft Norms of the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the United Nations Sub-Commission on the Promotion and Protection of Human Rights defined a transnational corporation as

state governance entities)<sup>75</sup> and the religious beliefs of indigenous peoples,<sup>76</sup> as well as the religious beliefs and practices of their own employees.<sup>77</sup> There also

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“an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.” U.N. ESCOR, 55th Sess., 22d mtg. at Agenda Item 4, U.N. Doc. E/CN.4/Sub2/2003/12/Rev.2 (Aug. 13, 2003), available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> [hereinafter “U.N. ESCOR”].

<sup>75</sup> See, e.g., Burris, Kempa & Shearing, *supra* note 22, at 19 (“The most influential and powerful agencies involved in contemporary governance are without a doubt those representing corporate power at the local, national, and inter/supranational levels.”). Recognizing the profound influence that transnational corporations often wield, as well as the potential abuses that the possession of such governing power can create, the United Nations Sub-Commission on the Promotion and Protection of Human Rights issued draft norms attempting to delineate the obligations such corporations have to respect and protect certain human rights. See U.N. ESCOR, *supra* note 74, at pmb1. (stating that one of its goals is to recognize that “transnational corporations and other business enterprises . . . are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights”); see also David Weisbrodt & Muria Kruger, *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 901 (2003) (“The Norms represent a landmark step in holding businesses accountable for their human rights abuses . . . .”); Troy Rule, *Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in Through the Back Door?*, 5 CHI. J. INT’L L. 325, 329 (2004) (noting that “[m]any human rights advocates see the Norms as a valuable tool for broadening the human rights obligations of [transnational corporations]”). Among other things, the draft norms would have required transnational corporations to “ensure equality of opportunity and treatment . . . for the purpose of eliminating discrimination based on . . . religion . . . .” U.N. ESCOR, *supra* note 74, section B. However, the U.N. Human Rights Commission rejected the draft norms. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 288 n.2 (2005) (“The Norms were effectively abandoned in early 2005, and efforts to formally regulate transnational corporations have been transferred to other United Nations offices.”).

<sup>76</sup> One such conflict occurred when the Empresa Nacional de Electricidad, S.A. [National Electric Enterprise] (“ENDESA”) announced plans to build the Ralco Dam on the Bio-Bio River in central Chile as part of a larger hydroelectric-generating system. See James Langman, *Indigenous Fight to Keep Land in Chile; Firm Wants River for Electricity*, WASH. TIMES, Feb. 11, 2003, at A17. ENDESA is a Spanish company that acquired what had at one time been a Chilean state-owned energy company, a classic multinational corporation. See José Alwyn, *The Ralco Dam and the Pehuenche People in Chile: Lessons From an Etho-Environmental Conflict*, Paper Presented at the Conference at the Centre for the Study of Global Issues, University of British Columbia, Sept. 25–27, 2002, at 5–6, 9–10, 12, available at [http://www.historiaecologica.cl/Ralco%20\(Aylwin\).pdf](http://www.historiaecologica.cl/Ralco%20(Aylwin).pdf). The land to be inundated by the dam belonged to the Pehuenche peoples. The Pehuenche are a part of the Mapuche culture. See *id.* at 8. The Mapuche is the largest indigenous group in Chile. See Milka Castro Lucic, *Challenges in Chilean Intercultural*

have been concerns about the way in which activities funded by the World Bank (another oft-identified non-state governance entity)<sup>78</sup> will adversely affect the religious beliefs and practices of persons in the project area.<sup>79</sup>

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*Policies: Indigenous Rights and Economic Development*, 28 POL. & LEGAL ANTHROPOLOGY REV. 112, 115 (Table 1) (2005). The religious culture of the Pehuenche (or “people of the pine nut”) revolves around both the Araucaria Araucana, large, ancient pine trees that grow in the Upper Bio-Bío region, and the nut that is the fruit of those trees. Lorenzo Nesti, *The Mapuche-Pehuenche and the Ralco Dam on the BioBío River: The Challenge of Protecting Indigenous Rights*, 9 INT’L J. ON MINORITY & GROUP RTS. 1, 6–7, (2002); see also Alwyn, *supra* note 76, at 8 (noting that “[t]he Araucaria and its fruits are important sacred elements in Pehuenche’s culture”). One study concluded that “[a]ny kind of resettlement [of the Pehuenche people in the affected area] would . . . represent a breach of the spiritual relationship that the Pehuenche have with the river, their land, their cemeteries and their ancestors.” Nesti, *supra* note 76, at 15 (citing T.R. Berger & C. Katz, *Los Mapuche-Pehuenche y el Proyecto Hidroeléctrico de Ralco: Un Pueblo Amenazado*, International Federation of Human Rights (1998)).

After making unsuccessful attempts to stop the development in the Chilean courts and political system, several Mapuche women filed a complaint with the Inter-American Commission for Human Rights, alleging, among other things, that their removal from the land violated their right to freedom of conscience and religion guaranteed by Article 12 of the American Convention on Human Rights. See Lila Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile’s Mapuche Peoples and the Right to Water*, 11 ANN. SURV. INT’L & COMP. L. 1, 17–18 (2005). The complaint was resolved by an Amicable Agreement between Chile and the petitioners. *Id.* at 18; see also *infra* notes 91–96 and accompanying text.

<sup>77</sup> See, e.g., *Trans World Airlines v. Hardison*, 432 U.S. 63, 67–69 (1977) (describing conflict between an employee and Trans World Airline over the employee’s refusal to work on Saturdays for religious reasons); *Yott v. N. Am. Rockwell Corp.*, 602 F.2d 904, 906–07 (9th Cir. 1979) (describing conflict between an employee and North American Rockwell Corp. over the employee’s religion-based refusal to join labor union).

<sup>78</sup> See, e.g., Burris, Kempa & Shearing, *supra* note 22, at 37 (identifying the World Bank as an example of new non-state institutions of governance).

<sup>79</sup> In 1999, the International Campaign for Tibet (a United States-based non-governmental organization) complained that a World Bank-financed project to reduce poverty in western China would create religious unrest because it contemplated the resettlement of mostly Christian or Muslim Chinese into an area populated primarily by Buddhists. See E. Tammy Kim, Note, *Unlikely Formation: Contesting and Advancing Asian/African “Indigeness” at the World Bank Inspection Panel*, 41 N.Y.U. J. INT’L L. & POL. 131, 141–42 (2008). The complaint was made in the form of a request to the World Bank’s Inspection Panel, which was established to respond to public requests for investigation of World Bank projects to determine compliance with the Bank’s own internal operational policies. See *id.* at 136–37. The organization’s request asserted that “the introduction of approximately 58,000 settlers, who would outnumber the total Tibetan and Mongol populations . . . by approximately two and a half to one, would create further strains on Tibetan and Mongol culture, language, religion and way of life.” *Id.* at 142 (quoting JOHN ACKERLY & BHUCHUNG TSERING, INT’L CAMPAIGN FOR TIBET, REQUEST FOR INSPECTION, CHINA WESTERN POVERTY REDUCTION PROJECT, June 18, 1999, at 5,

Although the existence of such conflicts is not unanticipated, it is a bit surprising that the manner in which those conflicts arise, as well as the framework and the processes by which they are addressed, seem to be largely underdeveloped topics, at least in the traditional mainstream U.S. legal academic literature. The NCAA's experience demonstrates that the raw material for more in-depth examination of that issue may be abundantly available, as interaction between religion and non-state governance entities can be found in sometimes unexpected places.

Second, although there is justifiable concern over the lack of accountability of non-state governance entities because they are not subject to the constitutional and other constraints that limit traditional state government actors,<sup>80</sup> the NCAA experience shows that such entities may, at times, be more solicitous of the basic rights—including freedom of religion—than would be the case if the constitutional constraints that regulate the activities of traditional state governments were to apply. If *Tarkanian* were to be overruled, and the NCAA were thereby to become subject to the limitations of the First Amendment, it is highly unlikely that it would constitutionally be required to accommodate the religious conduct in the way that it did in either the Sunday play or the end zone celebration situation. *Employment Division v. Smith*,<sup>81</sup> the governing decision, would not seem to require that a state actor provide a religious exemption from its policy of allowing championship

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available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChinaRequest.pdf>.

The Panel determined that the Bank had not complied with the requirements of the then-applicable Operational Directive on Indigenous Peoples (since replaced), which was designed to, among other things, “ensure that the development process fosters full respect for the[] dignity, human rights, and cultural uniqueness” of indigenous peoples. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL DIRECTIVE 4.20, Para. 6 (1991), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_IndigPeoples/\\$FILE/OD420\\_IndigenousPeoples.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_IndigPeoples/$FILE/OD420_IndigenousPeoples.pdf); see also Kim, *supra* 79 at 142 (“The Panel determined that...[t]he unique ethnic lifestyles and ways of life of the local Tibetan and Mongol groups, specifically their pastoralist subsistence strategy, was [sic] not sufficiently taken into account while considering the Project.”). The project was eventually canceled. See *id.* at 143.

<sup>80</sup> See, e.g., Daniel D. Bradlow, *Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF*, 94 AM. SOC'Y INT'L L. PROC. 152, 155 (2000) (contending that the IMF governance structure vests power in decision makers “with accountability to people who do not have to live with the consequences of their decisions but without accountability to those most affected by their decisions”); Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 353 (2006) (asserting that the World Bank and IMF fail to recognize the human rights consequences of their actions and deny responsibility for the same); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT'L AFF. 83, 83 (2001) (asserting that the IMF and World Bank are “secretive, unaccountable, and ineffective”).

<sup>81</sup> 494 U.S. 872 (1990).

sports competitions to be scheduled on any day of the week.<sup>82</sup> The policy would likely be considered a generally applicable law,<sup>83</sup> not aimed at religion in general or at any religious practice in particular.<sup>84</sup> Under *Smith*, such a rule would be constitutional as long as it was rationally related to some legitimate NCAA interest. The NCAA's desire to increase television exposure or decrease missed class time by scheduling events on non-school days would appear to be sufficient justification for such a generally applicable rule.<sup>85</sup>

The same analysis would seem to apply to the excessive celebration rule: the written rule prohibits general conduct—any excessive celebration—from which Liberty sought a religious exemption. Although the enforcement video used kneeling and crossing oneself as examples of conduct that would be penalized, that was only one of forty-four examples of excessive celebration contained in the video,<sup>86</sup> and there are no exemptions from the rule—other than the one that the NCAA may have created de facto by its somewhat amorphous clarification.<sup>87</sup> Indeed, to the extent that the NCAA created such an exception, application of constitutional standards may have precluded the NCAA from accommodating as much as it did, as such a preference for religious conduct might run afoul of the Establishment Clause.<sup>88</sup> Thus, the NCAA experience with religion suggests that, at

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<sup>82</sup> The general rule to which the BYU rule is an exception is that “NCAA championships competition may be scheduled or conducted on any day . . . .” NCAA Bylaws, art. 31.1.4, NCAA MANUAL, *supra* note 5, at 375.

<sup>83</sup> See *Smith*, 494 U.S. at 878. The NCAA rule recognizes only one possible exception—that for institutions with a written policy against competition on a particular day for religious purposes. NCAA Bylaws, art. 31.1.4, NCAA MANUAL, *supra* note 5, at 375.

<sup>84</sup> See *Smith*, 494 U.S. at 879.

<sup>85</sup> The rule also does not seem to fit into the category under which the Court has found a religious exemption compelled by the constitution when the nature of the state's inquiry “len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct,” such that the state “may not refuse to extend [an exception] to cases of ‘religious hardship’ without compelling reason.” *Id.* at 884. Indeed, consideration of the individual situation of every team in making scheduling decisions would likely create a logistical nightmare. It is also difficult to think that there would be any hybrid rights involved since there is no constitutional right to participate in college athletics.

<sup>86</sup> Andrew Bagnato, *NCAA Sued over Ban on End Zone Prayers*, CHICAGO TRIB., Sept. 1, 1995, at 7.

<sup>87</sup> The NCAA's clarification arguably may have been required by the individualized consideration exception to *Smith*'s general rule. See *Smith*, 494 U.S. at 884 (discussed *supra* note 83). To the extent that the NCAA had intended the rule to be a per se ban on prayer-like celebration no matter how long or spontaneous, it could have been covered by the individualized-consideration exception because the rule would have been precluding for religious celebrations the very kind of individualized assessments it was requiring officials to make with respect to other celebrations.

<sup>88</sup> Some have questioned the constitutionality of any state efforts to provide religious accommodations from generally applicable laws. See Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 *passim* (1991). But see *Zorach v. Clauson*,

times, non-state governance entities may be willing to accommodate religious beliefs and practices to a degree not required of traditional governmental entities.

Third, while many have recognized (and often lamented) the manner in which non-state governance actors have been able to influence conduct (including the conduct of traditional state governments) through their “capacity to mobilize and shape public opinion,”<sup>89</sup> the NCAA experience shows that those tools may be used in the opposite direction. Those who are governed by non-state governance entities may use persuasion (both internally with other members of the group, as in the case of the Sunday play rule, and externally, as was the case with the end zone celebration rule) to influence the policies and regulations of the non-state governance entities. The NCAA experience thus provides some evidence that non-state governance entities not only employ what is sometimes called “soft law,” they are also subject to it—at times from their own members—who may accomplish their ends better through this means than through traditional legal remedies.

Indeed, in some circumstance, non-state governance entities can themselves be used by religious adherents to apply pressure on other non-state governance entities (and even traditional state governments<sup>90</sup>) to encourage them to be more solicitous of individual rights than they would otherwise be required to be under the requirements of domestic law. When the Pehuenche indigenous people of Chile objected to the construction of two hydroelectric dams by a transnational corporation on the ground, among others, that it would unduly infringe on their culture and thereby interfere with their religious life,<sup>91</sup> they first sought recourse in the domestic Chilean judicial and political arena.<sup>92</sup> This effort to use the traditional legal organs of the state to protect the religious interests at stake proved unavailing.<sup>93</sup> However, the second dam was subsequently delayed for some period because of the World Bank’s concerns about the project’s failure to meet the requirements of its own directives.<sup>94</sup> While the dam was eventually completed<sup>95</sup>

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343 U.S. 306, 314–15 (1952) (upholding state school’s willingness to allow religious students “released time” from school to attend to religious classes).

<sup>89</sup> Burris, Kempa & Shearing, *supra* note 22, at 20; see Joanne Csete, *Lessons Not Learned: Human Rights Abuses and HIV/AIDS in the Russian Federation*, HUM. RTS. WATCH, Apr. 2004, at 1, 31.

<sup>90</sup> See discussion *supra* note 79 (describing the International Campaign for Tibet’s successful efforts to use the World Bank to stop a state development project that would have adversely affected the Buddhist population of an area of Western China).

<sup>91</sup> See discussion *supra* note 76.

<sup>92</sup> See Barrera-Hernández, *supra* note 76, at 14–17; Nesti, *supra* note 76, at 11–13; Aylwyn, *supra* note 76, at 14–16.

<sup>93</sup> See Barrera-Hernández, *supra* note 76, at 17 (“The numerous recourses and court cases did not stop the project’s progress.”).

<sup>94</sup> See Nesti, *supra* note 76, at 9. The complaint filed with the World Bank’s Inspection Panel to request investigation into whether the Bank’s involvement in the project violated the Operational Directive on Indigenous Peoples was rejected on the ground that the funds came from the International Finance Corp. (IFC), which was determined to be outside the Inspection Panel’s jurisdiction. *Id.* However, the World Bank

when the Pehuenche and the nation of Chile entered into an amicable agreement to resolve a petition filed by the Pehuenche with the Inter-American Commission for Human Rights,<sup>96</sup> this experience suggests that, in some situations, those seeking to advance the cause of religious liberty may be able to enlist the aid of non-state governance entities, thereby transforming those entities from a potential roadblock hindering the creation of a free society into a tool for achieving that end.

This third point leads to a final insight. The experience of domestic non-state governance entities, like the NCAA, may have some significance in the international context in which the majority of the non-state governance discussion seems to be taking place. With respect to religion, the NCAA may be like other “voluntary groups” such as the World Bank in that it lacks formal governing authority, but the need to belong is so great that as a practical matter most everyone is a member.<sup>97</sup> As with the NCAA, religious freedom may not be a top priority for such international groups, but that issue may be a high priority for some of their members. As is the case with the NCAA, religious liberty may also be important for some actors in the larger context in which these international groups operate, thereby leaving them open to the pull of public opinion and other forms of soft law. Given the considerable influence that some of these international governance organizations have on the policies of their members and those with whom they interact, those interested in religious freedom might do well to consider the ways in which their aims can be achieved by efforts directed at the non-state governance entities, rather than relying solely on attempts to persuade the traditional governments that are more typically the target of lobbying efforts.

The experience of the World Bank indicates how this might happen. As an institution created primarily to provide financing for major development projects,<sup>98</sup> the World Bank traditionally focused mainly on the economic effects of its activities.<sup>99</sup> Religious liberty and other human rights were not high on its list of priorities. However, over time, the World Bank has, as a result of a variety of

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requested a study to determine whether the IFC’s actions were consistent with the Bank’s Operational Directives. *Id.* at 9–10. That report, along with another expert report raised serious doubts as to whether funding complied with the Bank’s policies. *Id.* at 10; Barrera-Hernández, *supra* note 76, at 15 n.55; Aylwyn, *supra* note 76, at 16–17. Thus, the World Bank called for a halt to funding for the project. Nesti, *supra* note 76, at 16–17; *Power in Latin America*, BUS. CONF. & MGMT. REP., Jan. 17, 2003, at 9, 9, available at 2003 WLNR 12390229 (“[T]he World Bank ... ha[s] clearly stated that Ralco’s progress must remain completely stalled for the time being.”).

<sup>95</sup> See Gustavo Gonzalez, *Chile: Ralco Dam—A Dark Story Behind the Biggest Source of Light*, INTER PRESS SERV., Sept. 29, 2004, available in Westlaw, NewsRoom, INTERPS database (describing the inauguration of the Ralco Dam).

<sup>96</sup> See Barrera-Hernández, *supra* note 76, at 18–22.

<sup>97</sup> See SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* 1 (2001) (“A large majority of the world’s nations are members of the World Bank . . .”).

<sup>98</sup> *Id.* at 15.

<sup>99</sup> See Wahi, *supra* note 80, at 339–41; SKOGLY, *supra* note 97, at 17–19.

internal and external pressures,<sup>100</sup> adopted policies that require it to evaluate other effects of the projects it funds, including effects that concern human rights.<sup>101</sup> Although none of these policies requires the World Bank to directly consider the religious liberty interests of those affected by a funded project, the Operational Directive on Indigenous Peoples<sup>102</sup> does require the borrower “to evaluate the project’s potential positive and adverse effects on the Indigenous Peoples,”<sup>103</sup> and provides financing for initiatives to “document their culture . . . and . . . religious beliefs,” as part of that process.<sup>104</sup> Thus, these directives could be used to secure some protection for the religious beliefs and practices of indigenous peoples affected by World Bank financed projects.<sup>105</sup> More important, the development of these directives by a non-state governance entity whose focus has been far removed from human rights issues indicates that there is potential for non-state governance entities to be used to advance the cause of human rights like religious liberty.

The NCAA’s experience with religious issues demonstrates the growing influence of non-state governance entities in modern society, an influence that increasingly impacts religious believers. That experience also provides some basis for considering the possibility that, contrary to the fears of many, the actions of non-state governance entities are not necessarily inimical to the protection of religious liberty rights. It shows that as the object of soft-law pressures, both from its own members and from outside influences, non-state governance entities may, in some situations, be positive contributors to the development of norms that promote the freedom to practice one’s religious beliefs. Finally, the NCAA experience clearly demonstrates that we are only beginning to understand the ways in which non-state governance entities do, and should be allowed, to affect religious liberty. As the number and influence of non-state governance entities expand, the need to increase that understanding will become more important, and symposia such as this one will become more essential.

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<sup>100</sup> See SKOGLY, *supra* note 97, at 36, 39–40.

<sup>101</sup> See *id.* at 40–41.

<sup>102</sup> World Bank Operational Policy 4.10 (Jul. 2005), available at <http://go.worldbank.org/TE769PDWN0>. Operational Directive 4.10 replaced Operational Directive 4.20. *Id.* (Introductory Statement). For an examination of the development of the various World Bank policies toward Indigenous Peoples, see generally John W. Head, *Protecting and Supporting Indigenous Peoples in Latin America: Evaluating the Recent World Bank and IDB Policy Initiatives*, 14 MICH. ST. J. INT’L L. 383 (2006) (discussing the effectiveness of the World Bank’s financial policies toward indigenous people).

<sup>103</sup> World Bank Operational Policy 4.10, *supra* note 102, at para. 9.

<sup>104</sup> *Id.* at para. 22(e).

<sup>105</sup> See, e.g., discussion *supra* note 79.



# ASSESSING THE CONSTITUTIONAL AUTONOMY OF SUCH NON-STATE INSTITUTIONS AS THE PRESS AND ACADEMIA

Patrick M. Garry\*

## I. INTRODUCTION

Law and government are just one way in which American society is governed. As a large and complex society, America has many non-governmental social institutions that shape and influence the state of society, as well as the individuals living within society.<sup>1</sup> Indeed, with as large a private sector as the United States possesses, the most significant influencers of social behavior and governance may well come from the non-governmental sectors. Three such sectors are religion, the press, and higher education. These sectors possess a substantial degree of independence from the state, not only because of the nature and specialty of the sectors, but also because of the dictates of the First Amendment. In addition, each sector has varying rights and powers to further its institutional goals and functions.

The institutions of the press, religion and higher education may be referred to as First Amendment institutions, with varying degrees of constitutionally conferred rights and autonomy from governmental interference.<sup>2</sup> Religious organizations

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<sup>1</sup> Autonomous, non-state institutions are needed so as to provide social mediating structures, without which society is left only with the government on one hand and the great throng of isolated individuals on the other. PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* 4 (1977). Such institutions reflect the array of human activity, such as religious exercise, education, and public discourse, with each institution serving a different purpose and function. See Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 111 (2009). Under this approach, First Amendment institutions should be treated as sovereign within their respective spheres; they should exist separately from the state, serving such First Amendment goals as the development of a religious community and the development of public discourse. *Id.* at 114.

<sup>2</sup> According to the political philosopher Abraham Kuyper, certain First Amendment entities like religious organizations and universities should be seen as sovereign spheres or as non-state institutions possessing an authority independent and autonomous of that of the state. See Horowitz, *supra* note 1, at 79 (citing ABRAHAM KUYPER, *LECTURES ON CALVINISM* 96 (1931)). According to Kuyper's theories, such non-state institutions should possess significant legal autonomy to carry out their designated purposes; consequently the government should have limited authority to intrude in such autonomies. *Id.* The notion of sphere sovereignty relates to the view that human life is "differentiated into distinct spheres," each featuring "institutions with authority structures specific to those spheres." *Id.* at 83 (quoting Nicholas Wolterstoff, Abraham Kuyper on the Limited Authority of Church and State, Presentation at Federalist Society Conference: The Things That Are Not

have been given perhaps the highest constitutional protections of autonomy.<sup>3</sup> Because of this autonomy, religious organizations are free to conduct their

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Caesar's: Religious Organizations as a Check on the Authoritarian Pretensions of the State 7 (Mar. 14, 2008)). Such institutions are not only sovereign within their own spheres, but also "serve as a counterweight to the state, ensuring that it 'may never become an octopus, which stifles the whole of life.'" *Id.* at 83 (quoting ABRAHAM KUYPER, LECTURES ON CALVINISM 96 (1931)). The autonomy of First Amendment institutions such as the media, universities, and religious organizations, stem from the fact that each of those institutions serves a fundamental role in the nation's system of free speech. *Id.* at 87.

<sup>3</sup> Professor Douglas Laycock describes the doctrine of religious autonomy as follows:

A church autonomy claim is a claim to autonomous management of a religious organization's internal affairs. The essence of church autonomy is that the Catholic Church should be run by duly constituted Catholic authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law.

Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 254 (2009). According to Professor Laycock, church autonomy is protected specifically in areas such as conscientious objection and in the ministerial exception to employment lawsuits. *Id.* at 260; *see also* *Rweyemamu v. Cote*, 520 F.3d 198, 204–10 (2d Cir. 2008) (holding that religious organizations have the right to choose their leaders without government interference). On numerous occasions, the Supreme Court has issued decisions prohibiting certain types of government intrusion in internal church disputes. *See, e.g.*, *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 708–25 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445–52 (1969); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 120–21 (1952). In *Milivojevic*, the Court emphasized that the First Amendment prevents courts from intruding into matters of religious governance because it mandates "that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." 426 U.S. at 709. Thus, courts should not disturb the resolution by religious organizations of internal disputes within that organization.

The courts have dismissed claims by clergy against their religious employers alleging violations of federal discrimination statutes. *See, e.g.*, *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (alleging age discrimination); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (alleging sex discrimination). Courts also have dismissed claims against religious organizations involving violations of federal minimum wage laws and various state laws governing employment. *See* *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008) (alleging minimum wage violations); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (alleging state wrongful termination claim). According to Professor Thomas Berg, religious autonomy is all about the "substantive freedom to make core organizational decisions." Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 175 (2009). And according to the court in *Colorado Christian Univ. v.*

religious life and govern their religious organizations free of state intrusion. Indeed, because of the First Amendment, religious organizations have rights not possessed by any other social institutions.<sup>4</sup> For instance, religious organizations are free to discriminate in their ecclesiastical personnel decisions,<sup>5</sup> as reflected in the ability of the Catholic Church to operate an all-male priesthood.<sup>6</sup>

The press and university institutions do not possess the kind of constitutional rights that religious organizations possess, even though the press and academia enjoy various First Amendment freedoms. Both the press and academia serve democratic society in unique and valuable ways, and the First Amendment protections applicable to these institutions vary according to the Court's perceptions of the needs and functions of each institution. Although the First Amendment protects the press, and although courts recognize the press as serving vital First Amendment functions, the press has never been given the kind of special rights or protections that religious organizations possess. In the realm of higher education, the university community enjoys the right of constitutional academic freedom, which derives from the First Amendment. The constitutional right of academic freedom has two components: an individual rights component and an institutional autonomy component. This special right of academic freedom exists because of the First Amendment values served by higher education.<sup>7</sup>

This Article focuses on the institutions of the press and higher education. It analyzes the ways in which courts have interpreted the First Amendment in

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*Weaver*, the church autonomy doctrine “protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices.” 534 F.3d 1245, 1261 (10th Cir. 2008).

<sup>4</sup> For further discussion on the special ways in which religion is treated under the First Amendment, see Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 662 (1992) (stating that preservation of religious institutional autonomy is mandated by the Constitution); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). For further discussion on the church autonomy doctrine as “our day’s most pressing religious freedom challenge,” see Richard Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 521 (2006–2007); see also Gerard V. Bradley, *Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057, 1061 (1989) (arguing that church autonomy is “the flagship issue of church and state”).

<sup>5</sup> See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding religious exemption from anti-discrimination statute).

<sup>6</sup> See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 795 (9th Cir. 2005) (holding that “a church may hire, fire, promote, refuse to promote, and prescribe the duties of its ministers, free from judicial scrutiny under Title VII”).

<sup>7</sup> However, giving special rights to a particular profession or institution “creates understandable skepticism, especially given the accurate perception that citizens have rights to equal protection under the first amendment.” David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 246 (1990).

relation to those institutions. The Article will explore how much constitutional autonomy has been given to the press and academia, as well as what special First Amendment rights or freedoms have been conferred on those institutions. It will examine the justifications for why courts should, pursuant to the First Amendment, defer to the decision-making autonomy of these institutions. One such justification lies in the existence of professional standards and non-state regulatory systems that have developed within the professions of journalism and academia. Furthermore, many of the professional and institutional decisions made within the press and higher education require a particular kind of expertise that courts do not possess. Yet despite all these reasons for judicial deference, courts are quite undecided and confused about how much autonomy and how many rights to grant to the respective institutions.

## II. THE INSTITUTIONAL AUTONOMY AND RIGHTS OF THE PRESS

### A. *The Press's Quest for Special Rights*

The press is protected by both the speech and press clauses of the First Amendment. With respect to certain issues, the press has sought special rights under the press clause that are not available to the general public. This quest has been conducted under the argument that the press, because of its unique First Amendment role in investigating government abuses and educating a democratic society, deserves its own special rights and freedoms. To analyze this claim, this Article focuses on the issue of whether the press has a special right to protect the confidentiality of its sources in the face of governmental subpoenas.<sup>8</sup> Clearly, the public has no right to resist a subpoena; therefore, if the press is able to maintain the confidentiality of its sources in the face of a government subpoena, it will enjoy rights not possessed by the general public. How courts examine and resolve this issue sheds light on what kind of institutional autonomy and privileges the press has been given.

In *Branzburg v. Hayes*, the Supreme Court declined to grant journalists an absolute First Amendment privilege to refuse disclosing confidential sources to a grand jury investigating criminal behavior.<sup>9</sup> The Court's decision in *Branzburg* stemmed from a consolidation of four cases, all of which involved journalists who, after being subpoenaed by grand juries, claimed a constitutional immunity from having to disclose their confidential sources.<sup>10</sup> In a single opinion governing all

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<sup>8</sup> For a more expansive discussion of this issue, see Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579, 581–96 (2005).

<sup>9</sup> 408 U.S. 665, 690–91, 708 (1972).

<sup>10</sup> The first two cases were *Branzburg v. Pount*, 461 S.W. 2d 345 (Ky. 1970) and *Branzburg v. Meigs*, 503 S.W. 2d 748 (Ky. 1971). These two cases involved a Louisville, Kentucky, reporter who wrote a story about local drug use and manufacture. See *Branzburg v. Hayes*, 408 U.S. at 676, 669. The reporter gained access to the information by promising confidentiality to the persons who let him observe their activities. *Id.* at 667–68. After the story was published, the reporter was subpoenaed by a grand jury but refused to reveal the

four cases, the Court denied granting such a constitutional privilege to the press.<sup>11</sup> Even though the Court recognized for the first time that news gathering possesses some undefined constitutional protection,<sup>12</sup> it concluded that no such protection existed in the *Branzburg* cases.<sup>13</sup> Because the confidential sources sought to be protected in *Branzburg* were either members of an allegedly violent, politically dissident group, or involved in the use of illegal drugs, the Court concluded that “the preference for anonymity of those . . . involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution” and that such a preference “is hardly deserving of constitutional protection.”<sup>14</sup> Generally speaking, courts have declined to give special First Amendment rights to journalists beyond those available to the general public. This refusal to grant special rights to the press was motivated in part by the Court’s worry about how to determine who qualifies as a journalist.<sup>15</sup>

Contrary to the journalists’ claims in *Branzburg*, Justice White described as “uncertain” any newsgathering burdens caused by requiring reporters to reveal their confidential sources to grand juries.<sup>16</sup> The Court depicted the relationship between reporters and their sources as “a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena.”<sup>17</sup> Because confidential informants tend to be “members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public,” the Court reasoned that subjecting journalists to the subpoena power of

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identities of his sources, the drug manufacturers. *Id.* The reporter’s motion to quash the subpoena served as the foundation of the appeal that went to the Supreme Court. *In re Pappas*, 266 N.E. 2d 297 (Mass. 1971), the third consolidated case, involved a reporter who gained access to a Black Panther headquarters on the ground that he not reveal the identities of any of the people he saw inside. *See Branzburg v. Hayes*, 408 U.S. at 672. When the reporter was summoned before a grand jury looking at civil disorders, he refused to reveal any identities and later moved to quash the subpoena. *Id.* at 672–73. The fourth case, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), also involved a reporter subpoenaed to testify on members of the Black Panthers who were suspected of criminal activity. *Id.* at 1084. The reporter refused to testify and similarly moved to quash the subpoena. *Id.*

<sup>11</sup> *Branzburg v. Hayes*, 408 U.S. at 708.

<sup>12</sup> *Id.* at 707 (recognizing that “news gathering is not without its First Amendment protections”).

<sup>13</sup> *Id.* at 690–91.

<sup>14</sup> *Id.* at 691. As the Court stated, the “crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.” *Id.* at 692. Moreover, the Court refused to release subpoenaed reporters from the same testimonial obligations owed by any other citizen. *Id.* at 686–88.

<sup>15</sup> *Id.* at 703–04.

<sup>16</sup> *Id.* at 690. Justice White also noted that “we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury.” *Id.* at 693.

<sup>17</sup> *Id.* at 694.

grand juries would not have “a significant constriction of the flow of news to the public.”<sup>18</sup>

In his concurring opinion, however, Justice Powell emphasized the limited nature of the Court’s ruling, stating that: “The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”<sup>19</sup> This left the door open for journalists to claim, on a case-by-case basis, that it was more important to protect their confidential sources than to do the prosecutor’s work. Justice Powell also left open the question of whether the ruling applied only to grand jury subpoenas issued in criminal investigations or whether it also applied to civil proceedings.<sup>20</sup>

Because of these open questions, *Branzburg* has spawned an undefined and fluctuating progeny.<sup>21</sup> For its part, the press argues that a privilege of confidentiality is a vital ingredient to its First Amendment rights. The press claims that it can “serve as a conduit of information to the public” only if it is completely free to acquire this information, and that the “freedom to disseminate news would remain an empty liberty without the corollary freedom to gather news.”<sup>22</sup> Because confidential informants provide information that might otherwise go undiscoverable, the press has argued that an informed public is dependent on such sources.<sup>23</sup>

### *B. The Development of a Qualified Privilege of Confidentiality*

Since *Branzburg*, the Supreme Court has not ruled on the nature of a reporter’s constitutional privilege to keep sources confidential. Consequently, *Branzburg* has been the guiding beacon for lower courts, which in turn have adopted various interpretations of its recognition of newsgathering rights.<sup>24</sup> Those

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<sup>18</sup> *Id.* at 693–95.

<sup>19</sup> *Id.* at 710.

<sup>20</sup> See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980) (stating that “[w]hether or not such a privilege is available to a defendant in a civil defamation case where the plaintiff is not a public figure is a question left open by recent Supreme Court precedent”).

<sup>21</sup> See Garry, *supra* note 8, at 583.

<sup>22</sup> Brian M. Cullen, *Circumventing Branzburg: Absolute Protection for Confidential News*, 18 SUFFOLK U. L. REV. 615, 618–19 (1984).

<sup>23</sup> See generally Vincent Blasi, *The Newsmen’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 245–53 (1971) (discussing survey results of newspaper reporters’ reliance on confidential sources).

<sup>24</sup> See, e.g., *Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974) (finding no privilege in the context of grand jury investigations of criminal conduct); *Tribune Co. v. Huffstetler*, 489 So.2d 722 (Fla. 1986) (finding the privilege in the context of a state attorney’s investigation). Courts also have adopted a *Branzburg* approach in defamation cases. See *Taylor v. Miskovsky*, 640 P.2d 959 (Okla. 1981) (stating that *Branzburg* mandates a qualified privilege in defamation cases); *Caldero v. Tribune Publishing Co.*, 562 P.2d 791,

courts often have used *Branzburg* to support some kind of qualified privilege against compelled disclosure of anonymous sources.<sup>25</sup> This support stems from both the *Branzburg* majority opinion and Justice Powell's concurring opinion, which stated that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."<sup>26</sup>

The qualified privilege that has arisen in the case law generally employs the three-part test articulated in the *Branzburg* dissent.<sup>27</sup> This test requires that before ordering the disclosure of confidential information, a court must find (1) that the information sought is clearly relevant, (2) that it cannot be obtained by alternative means, and (3) that there is a compelling need for the information.<sup>28</sup> The outcomes of this test can vary from one jurisdiction to another because courts apply the test

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797 (Idaho 1977) (stating that *Branzburg* conferred no privilege, either absolute or qualified, no matter what the context).

According to one observer, the *Branzburg* decision has subsequently been given almost as many interpretations as there have been lower courts construing it. PATRICK M. GARRY, *SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT* 80 (1994). Such interpretations include that *Branzburg* precludes creation of a journalist's privilege, that the holding allows lower courts to devise such a privilege, and that *Branzburg* itself recognizes a privilege. *Id.*

<sup>25</sup> See, e.g., *Bruno & Stillman, Inc., v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977). This qualified privilege has even been applied to civil libel cases. See, e.g., *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974).

<sup>26</sup> *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring); see also *Silkwood*, 563 F.2d at 437 (stating that "the Court's discussion[s] in both the majority opinion of Justice White and the concurring opinion of Justice Powell recogniz[e] a privilege which protects information given in confidence to a reporter").

<sup>27</sup> See *Branzburg*, 408 U.S. at 744-45 (Stewart, J., dissenting); see also *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999) (employing the three-part test).

<sup>28</sup> See *Miller*, 621 F.2d at 726 (applying the three-part test); *Riley v. City of Chester*, 612 F.2d 708, 716-17 (3d Cir. 1979) (also applying the three-part balancing test articulated in the *Branzburg* dissent). In *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir. 1986), the Fourth Circuit employed the following test: "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information." *Id.* at 1139. As another court put it in a slightly different context, the balancing of interests will tip in favor of disclosure where: "1) the information sought is material, relevant and necessary; 2) there is a strong showing that it cannot be obtained by alternative means; and 3) the information is crucial to the party's case." *Kitzmiller v. Dover Area Sch. Dist.*, 379 F. Supp. 2d 680, 685 (M.D. Pa. 2005). This same test was used in *Shoen v. Shoen*, 48 F.3d 412, 415 (9th Cir. 1995), and *Bauer v. Gannett Co.*, 557 N.W.2d 608, 611 (Minn. Ct. App. 1997), where the court added an additional factor to this case-by-case balancing test: whether the reporter or news organization is a party to the litigation. "When the reporter is a party to the litigation, the balance may tip more in favor of disclosure than when the reporter is not a party." *Bauer*, 557 N.W.2d at 611.

on a case-by-case basis, “weighing the need for the testimony in question against the claims of the newsman that the public’s right to know is impaired.”<sup>29</sup>

In *Shoen v. Shoen*, the Ninth Circuit acknowledged that the journalist’s qualified privilege against compelled disclosure reflected “society’s interest in protecting the integrity of the newsgathering process.”<sup>30</sup> Likewise, in *Bauer v. Gannett Co.*, the court stated that the media’s qualified privilege “is rooted in the desire to promote effective newsgathering” and that compelling the disclosure of confidential sources “may significantly interfere with the press’s ability to gather news.”<sup>31</sup>

During the first couple of decades following *Branzburg*, lower courts proved to be rather hospitable to journalistic privileges. However, this somewhat favorable trend for press privileges, according to some commentators, has recently been reversed.<sup>32</sup> That reversal was instigated by Judge Posner when he warned that courts relying on *Branzburg* to create a privilege of confidentiality “may be skating on thin ice.”<sup>33</sup> Following Judge Posner’s opinion, federal courts began increasingly denying reporters’ privileges.<sup>34</sup> For instance, the First Circuit stated that *Branzburg*

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<sup>29</sup> *Carey*, 492 F.2d at 636. In *Silkwood*, the court held that First Amendment interests outweigh the need for disclosure in the absence of a paramount interest favoring disclosure. The court used the following criteria: whether the party seeking disclosure had independently attempted to obtain this information elsewhere; whether this information went to the heart of the matter; whether the information was relevant; and the type of controversy. *Silkwood*, 563 F.2d at 438. See also *Rancho Publ’ns v. Superior Court*, 81 Cal. Rptr. 2d 274, 281 (1999) (stating that the “qualified privilege is decided on a case-by-case basis,” with courts balancing “the ‘compelling’ public need to disclose against the confidentiality interests to withhold”).

<sup>30</sup> 48 F.3d at 414.

<sup>31</sup> 557 N.W.2d at 610 (reversing lower court’s order to disclose confidential sources). Another way in which courts have expanded the qualified privilege was to apply it both “where the subpoenaed reporter is not a party to the litigation, as well as in those cases in which he or his media employer are parties.” *Gadsden County Times, Inc. v. Horne*, 426 So. 2d 1234, 1240 (Fla. 1983). Of course, yet another way in which reporters’ promises of confidentiality can be enforced is through state shield laws. In 2001, more than thirty states had conferred statutory protection for confidentiality of sources. The Reporters Committee for Freedom of the Press, *Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 2001*, <http://www.rcfp.org/agents/shieldlaws.html> (last visited Mar. 1, 2010).

<sup>32</sup> See Lucy A. Dalglish & Casey Murray, *Déjà Vu All over Again: How a Generation of Gains in Federal Reporter’s Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13, 36 (2006).

<sup>33</sup> *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (involving a reporter’s claim to keep a terrorism informant confidential).

<sup>34</sup> See Dalglish & Murray, *supra* note 32, at 37. In recent years, “the media has lost much of the ground it gained since *Branzburg*.” *Id.* at 39.



“flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources.”<sup>35</sup>

### C. The Argument for Special Privileges for the Press

The demand for a journalist’s privilege regarding confidential sources arose out of a larger constitutional theory of the First Amendment press clause that was beginning to take hold in the 1960s and 1970s. In *First National Bank of Boston v. Bellotti*, for instance, Justice Powell described “the special and constitutionally recognized role” of the press as “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>36</sup> Justice Stewart advocated a special constitutional protection for the press because of its watchdog role, alerting the public to government abuses that would otherwise be kept from public view.<sup>37</sup> In promoting a constitutional theory constructed primarily upon this watchdog value, Justice Stewart saw the primary purpose of the press clause as creating a “fourth [estate] outside the government” that would serve “as an additional check on the three official branches.”<sup>38</sup> Justice Douglas also expressed this view when he stated that “[t]he function of the press is to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work.”<sup>39</sup>

To create a watchdog press capable of investigating government, fourth-estate theorists argue that the institutional press should have certain newsgathering rights and powers that are not possessed by the general public.<sup>40</sup> This argument was made in *Pell v. Procunier*<sup>41</sup> and *Saxbe v. Washington Post Co.*,<sup>42</sup> companion cases rejecting the press’s claim to a special constitutional right of access to prisons or

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<sup>35</sup> *In re* Special Proceedings, 373 F.3d 37, 44 (1st Cir. 2004) (involving a journalist who claimed a privilege to maintain the confidentiality of the source who leaked FBI video tape).

<sup>36</sup> 435 U.S. 765, 781 (1978).

<sup>37</sup> Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634–37 (1975) (arguing for a preferred constitutional position for the institution of the press).

<sup>38</sup> *Id.* at 634.

<sup>39</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 722 (1972).

<sup>40</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 591–611. For other First Amendment theorists adopting a fourth-estate theory of the press, see generally Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977) (analyzing the developing theory that freedom of the press affords protection beyond free speech); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225 (discussing the standard the Supreme Court uses to determine freedom of the press); Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?* 26 HASTINGS L.J. 639 (1975) (analyzing the connection between free speech and free press).

<sup>41</sup> 417 U.S. 817, 834 (1974).

<sup>42</sup> 417 U.S. 843, 856–57 (1974).

prison inmates.<sup>43</sup> Expanding on his concurring opinion in *Branzburg*,<sup>44</sup> Justice Powell's dissent argued that the restrictions on access in *Pell* and *Saxbe* were unconstitutional because they "restrain[ed] the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government."<sup>45</sup> *Branzburg*, according to Justice Powell, reflected the Court's recognition that "[n]o individual can obtain for himself the information needed for intelligent discharge of his political responsibilities. . . . [The press] is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."<sup>46</sup> The Court has recognized the special institutional role of the press in a sequence of cases starting with *Richmond Newspapers, Inc. v. Virginia*.<sup>47</sup> In these cases, the Supreme Court articulated a general constitutional right of access to certain judicial proceedings.<sup>48</sup> But, even though the Court seemed to give recognition to the press's special institutional role in a democracy, it did not give the press special rights beyond those First Amendment rights enjoyed by the public at large.<sup>49</sup> Even though the Court articulated a rationale for special constitutional rights for the press, it did not use that rationale to create specific rights unique to the press.

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<sup>43</sup> The fourth-estate view was asserted in *Pell*, 417 U.S. at 821, and *Saxbe*, 417 U.S. at 845, argued that the press should be able to obtain access to state and federal prisons, an access not available to the public.

<sup>44</sup> 408 U.S. at 710 (Powell, J., concurring).

<sup>45</sup> *Pell*, 417 U.S. at 835 (Powell, J., concurring in part and dissenting in part).

<sup>46</sup> *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

<sup>47</sup> 448 U.S. 555 (1980); see also *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1 (1986) (upholding a constitutional right of access to certain hearings); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984) (acknowledging a constitutional right of access to jury voir dire in criminal cases); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (overruling an automatic prohibition on access to certain parts of criminal trials).

<sup>48</sup> See *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring) (stating that "never before" has the Supreme Court "squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection"). In *Richmond Newspapers*, the Court explained that in understanding its holding "[i]t is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access,' or a 'right to gather information,' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" *Id.* at 576 (citations omitted); see also *Maressa v. N.J. Monthly*, 445 A.2d 376, 380 (N.J. 1982) (recognizing that *Richmond Newspapers* "reinforced the newsperson's right to gather information" from unnamed sources).

<sup>49</sup> See *Saxbe*, 417 U.S. at 849; *Pell*, 417 U.S. at 841. However, even though the press and the public had equal access rights to criminal trials, Chief Justice Burger did note separate press rights such as special seating and priority of entry to criminal trials. *Richmond Newspapers*, 448 U.S. at 572–73.

*D. Judicial Denial of Press Decision-Making Autonomy*

The Court has issued somewhat conflicting opinions regarding the institutional, self-governing autonomy of the press. In *Miami Herald v. Tornillo*, the Court overturned a right of reply statute, ruling that such a statute infringed on the editorial autonomy of the press.<sup>50</sup> Although *Tornillo* upheld institutional autonomy of the press, in other decisions the Court has failed to confer any special institutional protections for press entities.<sup>51</sup> One such failure occurred in the case of *Cohen v. Cowles Media Co.*<sup>52</sup>

In *Cohen*, the press argued that under the First Amendment it should have the freedom to reveal source identities even after it had promised confidentiality to those sources.<sup>53</sup> Rejecting this argument, the Supreme Court found the media defendants liable for publishing the identity of an informant who was promised anonymity.<sup>54</sup>

At trial, the testimony revealed that during the 1982 Minnesota gubernatorial campaign, Dan Cohen, who was associated with one party's campaign, provided two newspapers with documents regarding criminal charges against the other party's candidate for lieutenant governor.<sup>55</sup> Cohen furnished these records on the condition that his identity not be disclosed as the source of the information.<sup>56</sup> After receiving the records, however, the newspapers decided to publish his name,<sup>57</sup> believing that the identity of the source was highly newsworthy because it suggested a smear campaign.<sup>58</sup> Ruling in favor of Cohen's breach of contract action, the Supreme Court relied on the neutrality doctrine, under which the press can receive no special constitutional immunity from general laws applicable to the public at large.<sup>59</sup>

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<sup>50</sup> 418 U.S. 241, 257–58 (1974).

<sup>51</sup> Furthermore, the *Tornillo* rule, granting autonomy to the print press, has not been extended to the broadcast media. For a discussion on the different constitutional treatments of the print and broadcast media, see GARRY, *supra* note 24, at 138–40.

<sup>52</sup> 501 U.S. 663, 665 (1991).

<sup>53</sup> *Id.* at 668. This argument presented somewhat of a contradiction to the argument made in *Branzburg v. Hayes*, 408 U.S. 665, 670–71 (1972). In *Branzburg*, the press argued that only a constitutionally protected confidence would ensure that sources wishing to remain anonymous would come forward with important information. *Id.* at 679–80.

<sup>54</sup> *Cohen*, 501 U.S. at 665.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 666.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* at 669. According to the neutrality doctrine, such “laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Id.* The majority in *Cohen* declared that “[t]he publisher of a newspaper has no special immunity from the application of general laws [and] has no special privilege to invade the rights and liberties of others.” *Id.* at 670 (first alteration in original) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)).

Another Court decision that went against the institutional autonomy of the press occurred in *Herbert v. Lando*.<sup>60</sup> There, the Court ruled against the media's claim that in a libel action, the thoughts and editorial processes of the press should be immune from examination.<sup>61</sup> Thus, the Court denied the press a constitutional privilege that would effectively shield from inquiry all internal communications occurring during the editorial process.<sup>62</sup> According to the Court, such a privilege "would substantially enhance the burden of proving actual malice."<sup>63</sup> In so ruling, the Court dismissed media arguments that disclosure of editorial conversations would "have an intolerable chilling effect" on freedom of the press.<sup>64</sup>

*E. Professional Governing Norms and Standards  
Within the Journalism Profession*

The journalism profession is governed by several systems of standards and ethics. "In 1922, the American Society of Newspaper Editors introduced the first ethical guidelines, called the 'Canons of Journalism.'"<sup>65</sup> The Society of Professional Journalists has also promulgated a code of ethics.<sup>66</sup> In addition, many press organizations have created their own internal policies, which often are variations of professional codes from such associations as the "Associated Press Managing Editors, the Society of Professional Journalists, and the Radio-Television News Directors Association."<sup>67</sup>

With respect to promises of confidentiality, the Society of Professional Journalists' Code of Ethics requires reporters to constantly question "sources' motives before promising anonymity" and to clarify any "conditions attached to any promise made in exchange for information."<sup>68</sup> Guidelines adopted by the American Newspaper Guild advise journalists to refuse to reveal confidential sources to any court or investigative entity.<sup>69</sup>

Because anonymity of sources poses countless opportunities for abuse, "most major news organizations have policies discouraging the practice."<sup>70</sup> Courts have also warned the media about the use of anonymous sources. Many courts have found that unnamed sources are so unreliable that "[r]eckless disregard [of the

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<sup>60</sup> 441 U.S. 153 (1979).

<sup>61</sup> *See id.* at 160, 165.

<sup>62</sup> *Id.* at 169.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 171.

<sup>65</sup> Liz Harper, *Seeking Ethical Standards*, ONLINE NEWSHOUR, Dec. 10, 2004, [http://www.pbs.org/newshour/media/media\\_ethics/standard.php](http://www.pbs.org/newshour/media/media_ethics/standard.php).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), available at <http://www.spj.org/pdf/ethicscode.pdf>.

<sup>69</sup> AMERICAN NEWSPAPER GUILD, CODE OF ETHICS, Canon 5 (1934).

<sup>70</sup> Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609, 692 (1991).

truth] may be found ‘where a story is . . . based *wholly* on an unverified anonymous’” source.<sup>71</sup> In *Braden v. News World Communications, Inc.*, the court warned that confidential sources should not be used without obtaining authority from a senior editor.<sup>72</sup> This, of course, presumes the existence of a professional, objective-minded editor; but such editors are rarely present in the rapidly expanding blogosphere.<sup>73</sup>

Because of a string of press blunders regarding the use of confidential sources—including the 2003 Jason Blair plagiarism scandal at *The New York Times*, the *60 Minutes* program on President George W. Bush’s national guard history, and a 2005 story in *Newsweek* about a Koran desecration at Guantanamo Bay that relied on one anonymous source and which was quickly retracted—most of the nation’s major press organizations have adopted heightened internal policies on confidential sources.<sup>74</sup> For example, *The New York Times* tightened its anonymous-sources rule, requiring at least one editor to know the identity of every unnamed source.<sup>75</sup> In addition, *USA Today* now requires that a managing editor approve the use of each confidential source, and it has curtailed the use of such sources by an estimated 75 percent.<sup>76</sup>

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<sup>71</sup> *Burns v. Rice*, 813 N.E.2d 25, 35 (Ohio Ct. App. 2004) (internal quotations omitted) (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1293 (1995); *see also* *Lohrenz v. Donnelly*, 350 F.3d 1272, 1283 (D.C. Cir. 2003) (noting that stories that are probably “based wholly on . . . unverified” information may support a finding of actual malice); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1512–13 (D.C. Cir. 1996) (explaining that a story “based wholly” on information the author had “obvious reasons to doubt” may establish actual malice); *Harris v. Quadracci*, 48 F.3d 247, 252 (7th Cir. 1995) (“Probative evidence of recklessness includes a publisher’s . . . failure to independently investigate.”).

<sup>72</sup> No. CA-10689’89, 1991 WL 161497, at \*13 (D.C. Super. Mar. 1, 1991).

<sup>73</sup> If there are problems with the mainstream press’s use of anonymous sources, there are bound to be even more problems with the use of such sources by the new media, which lacks institutional safeguards like editors and in-house counsel. “One of the most interesting and complex questions of privilege application involves whether to extend the protection to include so-called ‘Internet journalists.’” Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 124 (2002). Courts have held that the medium does not determine the existence of the privilege. *See In re Madden*, 151 F.3d 125, 128–31 (3d Cir. 1998) (stating that for individuals to claim protection of the journalist’s privilege they must demonstrate three elements: “1) [they] are engaged in investigative reporting; 2) [they] are gathering news; and 3) [they] possess the intent at the inception of the newsgathering process to disseminate this news to the public”). Moreover, a number of courts have applied the reporter’s privilege of confidentiality to employees of trade or commercial newsletters. *See In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 370 (E.D. Pa. 1992).

<sup>74</sup> Joe Strupp, *Losing Confidence*, EDITOR & PUBLISHER, Jul. 2005, at 32, 32–39.

<sup>75</sup> Rachel Smolkin, *A Source of Encouragement*, AM. JOURNALISM REV., Aug./Sept. 2005, at 30, available at [http://www.ajr.org/article\\_printable.asp?id=3909](http://www.ajr.org/article_printable.asp?id=3909).

<sup>76</sup> *Id.*; *Poll Finds Many Newspapers Bar Anonymous Sourcing*, FIRST AMENDMENT CENTER, June 11, 2005, <http://www.firstamendmentcenter.org/news.aspx?id=15417>

### III. THE INSTITUTIONAL AUTONOMY AND RIGHTS OF ACADEMIA

#### A. *Constitutional Academic Freedom*

Academic freedom as a constitutional right seeks to protect scholarship and teaching in higher education from outside political interference.<sup>77</sup> As a First Amendment right, academic freedom

embodies the academic values and systems of professional speech within higher education rather than the rights of expression elaborated by the Court for citizens generally against the broad sweep of government power. Thus, it protects indigenous academic speech values, to which the justifications for its applications should be traced, rather than the more familiar civic values of free speech relied on generally by courts . . . and elaborated by first amendment scholars.<sup>78</sup>

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(“Many papers require information from one anonymous source to be corroborated by at least one additional source. Many require that at least one senior editor be told the source’s name and, in some cases, require an editor to speak with the source.”).

<sup>77</sup> J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the Four Freedoms of a University*, 77 U. COLO. L. REV. 929, 930 (2006) [hereinafter Byrne, *Academic Freedom After Grutter*]. In this Article, the discussion of academic freedom will be confined to the higher education setting. Moreover, institutions of higher education will be considered as institutions or areas of social life separate from government. This will be so even though many institutions of higher education are state universities. But in connection with the issue of academic freedom, this assertion involves the question of whether it makes sense to think of educational institutions as enjoying constitutional rights even if those institutions are state-funded or state-operated. See Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1526 (2007). As Professor Byrne argues, “A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.” J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 300 (1989) [hereinafter Byrne, *A Special Concern*]. However, given the traditional understanding of state entities, the identification of a state university as an entity with First Amendment rights against the government conflicts somewhat with typical notions about the limited or nonexistent nature of First Amendment rights for state actors. Horwitz, *supra* note 77, at 1526–27. The Supreme Court has never definitely addressed this issue and has left open the question of state actors’ First Amendment rights against higher government authorities in some circumstances. *Id.* at 1527; see, e.g., *City of Madison v. Wis. Employment Relations Comm’n*, 429 U.S. 167, 175 n.7 (1976) (stating the Court “need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees”). Thus, as it currently exists, case law does not yield an automatic conclusion that “state actors can never claim First Amendment rights against other governmental entities.” Horwitz, *supra* note 77, at 1528.

<sup>78</sup> Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 930; see generally Byrne, *A Special Concern*, *supra* note 77, at 259–60 (discussing the “commitment to truth”

Under the case law, academic freedom entails two components or considerations. In one respect, it is treated as a matter of individual freedom, involving the right of individual academicians to speak or write about matters of academic interests without threat to their jobs.<sup>79</sup> A second component or consideration of academic freedom involves a more institutional application, namely the protection of the decision-making autonomy of the university or college as an institution of higher education.<sup>80</sup>

As Professor Van Alstyne notes, academic freedom is a “subset of first amendment rights.”<sup>81</sup> However, the development of constitutional academic freedom in the United States began not with the courts but with the academic profession. In 1940, the American Association of University Professors (“AAUP”) and the Association of American Colleges issued a Statement of Principles on

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as the justification for First Amendment protection of academic speech in contrast to the more general justifications for the protection of civic speech). Professor Larry Alexander, on the other hand, defines academic freedom as “that freedom from fear of job reprisals that is necessary for academics to function as academics.” Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883, 884 (2006). However, because of the politicization of the humanities and social sciences, Alexander argues many academics are not fulfilling their responsibilities as academics, “basing judgments on political rather than academic criteria.” *Id.* at 886. Thus, in this environment, “the case for academic freedom vanishes.” *Id.* at 896.

For a detailed discussion of how the academic profession defines academic freedom, see Walter Metzger, *Profession and Constitution*, 66 TEX. L. REV. 1265, 1267–85 (1988).

<sup>79</sup> William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 L. & CONTEMPORARY PROBS. 79, 81 (1990). As Professor McConnell notes, “[t]he term ‘academic freedom’ is used to express two different concepts, which are sometimes in harmony and sometimes in discord.” Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 SUM. L. & CONTEMPORARY PROBS. 303, 305 (1990). Academic freedom encompasses the right of the individual faculty member “to teach and research without interference (except for the requirement of adherence to professional norms, which is judged by fellow scholars in the discipline) and to the freedom of the academic institution . . . [to have] exclusive authority to govern academic matters within its walls.” *Id.*

<sup>80</sup> See Van Alstyne, *supra* note 79, at 81–82. David Rabban also thinks the Court has defined constitutional academic freedom both in institutional and individual rights terms. See Rabban, *supra* note 7, at 230. Although Courts have recognized both forms of academic freedom, they have not addressed or resolved the tensions between them. *Id.*

<sup>81</sup> Van Alstyne, *supra* note 79, at 132. Professor Van Alstyne traces the constitutional development of the principle of academic freedom, demonstrating how the principle has been derived from “the *core* of first amendment concerns.” *Id.* at 114. Given the differences and overlap between academic free speech and civic free speech, there is some confusion relating to the connection between academic freedom and the First Amendment. As Professor Byrne argues, “[N]othing has confused understanding of constitutional academic freedom as much as misguided attempts to derive its content from general First Amendment principles.” Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 930.

Academic Freedom and Tenure.<sup>82</sup> This Statement of Principles has become widely influential and observed in American higher education.<sup>83</sup> It has been incorporated into many faculty handbooks in American universities and is now the general norm of academic practice in the United States.<sup>84</sup>

Post-WWII and in the midst of the McCarthy period, the Supreme Court began fashioning constitutional academic freedom as a way to protect academic and intellectual work from outside political interference.<sup>85</sup> This constitutional development of academic freedom did not arise simply out of legal principles; it evolved out of more than a century of debate and discussion within the academy itself.<sup>86</sup> The parameters of academic freedom had long been internalized by the institutions of higher education and “incorporated into a framework of norms and practices driven by universities as corporate entities, and by the demands of the scholarly disciplines that form the body of departments within the university.”<sup>87</sup>

Even though the Supreme Court has been addressing academic freedom since the 1950s, one prominent scholar argues that “it is far from clear that the Court’s often off-handed pronouncements about the existence and value of a right to academic freedom should be taken entirely at face value.”<sup>88</sup> Some scholars argue that the Court’s recognition of academic freedom, at least as it applies to individual

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<sup>82</sup> 1940 Statement of Principles on Academic Freedom and Tenure, in *POLICY DOCUMENTS & REPORTS* 3 (AAUP, 1984).

<sup>83</sup> Van Alstyne, *supra* note 79, at 79. Although the 1940 Statement has no legal force of its own, “it has been adopted by most accrediting agencies, whose determinations *do* have legal effect.” McConnell, *supra* note 79, at 306–07 (footnote omitted).

<sup>84</sup> Van Alstyne, *supra* note 79, at 79. Along with this Statement, a body of AAUP decisions interpreting and applying its principles on academic freedom has arisen. This informal case law provides specific clarification and application of the 1940 Statement and has provided a guide to what academic freedom means, at least within the university setting. *See id.* at 80–81. A large portion of this “soft law” on academic freedom has found a “niche in the hard law of the Constitution through the usages of academic freedom in the Supreme Court.” *Id.* at 81; *see also* Metzger, *supra* note 78, at 1266 (stating that AAUP guidelines on academic freedom are incorporated into the handbooks and bylaws of most universities). Through such incorporation, these guidelines can then become an implied provision in a faculty employment contract. *See* Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 *HAMLIN L. REV.* 467, 490–93 (1999).

<sup>85</sup> Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 931–32. Academic freedom attracted constitutional attention during the 1950s when the Court began reviewing government investigations of alleged Communist conspiracies. *See* Rabban, *supra* note 7, at 235.

<sup>86</sup> *See* Byrne, *A Special Concern*, *supra* note 77.

<sup>87</sup> Horwitz, *supra* note 77, at 1542 (footnote omitted); *see also* J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 *J.C. & U.L.* 79, 91 (2004) (arguing that “[t]he Constitution does not create the speech norms of academic freedom; they have been created by the values and practical needs of organized scholarship and advanced teaching”).

<sup>88</sup> Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907, 908 (2006).



academicians, may not have conferred a distinct individual academic freedom right that is more expansive than the general individual right of free speech.<sup>89</sup> However, even if the Supreme Court decisions provide little support for a distinct individual right to academic freedom, the traces of such a right, albeit a very limited right, may well exist in lower court decisions.<sup>90</sup> As Professor Schauer argues, under current judicial doctrine, there is a trace of an individual right held by higher education faculty “to resist instructions about how to perform one’s job . . . that appears not to exist for other public employees . . . .”<sup>91</sup>

### *B. Academic Freedom and the Private University*

Although the professional definition of academic freedom may apply equally in public and private universities, the constitutional definition does not apply equally because of the state action requirement.<sup>92</sup> Because they are not state actors, private universities are freer to govern the speech and academic activities of their faculty members. Thus, if not protected by contract, the individual right component of academic freedom may be less enforceable at private universities. However, “under state constitutional law, some courts have already erased some of the distinctions between public and private universities.”<sup>93</sup> But some scholars object to treating public and private universities alike because such a uniform approach would deprive private institutions of their “ability to define their missions” as well as the ability to define themselves.<sup>94</sup>

Many private, religiously-affiliated colleges and universities have freely adopted the academic freedom rules and standards used by secular universities.<sup>95</sup> Many others have “adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school.”<sup>96</sup> Professor McConnell, however, argues

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<sup>89</sup> *Id.* at 908–09. According to Professor Schauer, academics are given essentially the same rights as non-academic public employees; consequently, any academic freedom rights enjoyed by academics are really equivalent to the speech rights of non-academic public employees. *Id.* at 909–10.

<sup>90</sup> *Id.* at 910.

<sup>91</sup> *Id.* at 911–12 (citation omitted). Thus, according to Professor Schauer, “[t]he individual right to academic freedom that now exists, therefore, turns out to be far less grounded in Supreme Court doctrine than is often maintained, and significantly more limited than is commonly understood and even more commonly promoted.” *Id.* at 912–13 (footnote omitted).

<sup>92</sup> Rabban, *supra* note 7, at 231. “Private universities are generally thought of as enjoying greater freedom to regulate speech taking place on campus than are public universities.” Horwitz, *supra* note 77, at 1524 (footnote omitted).

<sup>93</sup> Horwitz, *supra* note 77, at 1524.

<sup>94</sup> Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1623 (1998) (internal quotation marks omitted).

<sup>95</sup> McConnell, *supra* note 79, at 308.

<sup>96</sup> *Id.*

against the indiscriminate judicial extension of a uniform set of academic freedom norms to religious universities.<sup>97</sup> According to McConnell, “[t]he effect of forcing religious schools to disregard religion in the hiring, tenuring, and disciplining of faculty would be to destroy the distinctive character of these intellectual communities.”<sup>98</sup>

### *C. The Individual Right Component of Academic Freedom*

The individual right to academic freedom can be seen in *Sweezy v. New Hampshire*.<sup>99</sup> In *Sweezy*, the New Hampshire attorney general, pursuant to the New Hampshire Subversive Activities Act, subpoenaed faculty member Paul Sweezy to testify relating to certain lectures he had given at the University of New Hampshire.<sup>100</sup> During the investigative hearings at which he testified, Sweezy described himself as a Marxist and socialist; however, when he refused to describe the content of lectures he had given at the university, he was cited for contempt.<sup>101</sup> In overturning that citation, the Supreme Court noted that because of the questions Sweezy was being forced to answer, “there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression.”<sup>102</sup> However, it was Justice Frankfurter’s concurring opinion that provided the strongest statement of academic freedom: “Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.”<sup>103</sup>

In *Keyishian v. Board of Regents*, the Court struck down as unconstitutional a law that required state university professors to take loyalty oaths.<sup>104</sup> Writing for the Court, Justice Brennan held that academic freedom was a core First Amendment concern that “does not tolerate laws that cast a pall of orthodoxy over the classroom,” acting as a “marketplace of ideas.”<sup>105</sup> As in *Sweezy*, the Court’s First Amendment analysis in *Keyishian* focused on the law’s restrictive impact on faculty members. However, even though the two opinions cited academic freedom, they could have been decided on straight free speech grounds. If so, the theory of

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<sup>97</sup> *Id.* at 303.

<sup>98</sup> *Id.*

<sup>99</sup> 354 U.S. 234 (1957). In *Sweezy*, the Court first “incorporated academic freedom within the [F]irst [A]mendment.” Rabban, *supra* note 7, at 236. An individual right of academic freedom has been linked to the First Amendment freedoms of speech and assembly, as well as the Fourteenth Amendment’s due process clause. Metzger, *supra* note 78, at 1318.

<sup>100</sup> 354 U.S. at 257–59.

<sup>101</sup> *Id.* at 243–45, 258–59.

<sup>102</sup> *Id.* at 249–250.

<sup>103</sup> *Id.* at 262.

<sup>104</sup> 385 U.S. 589, 592–93 (1967).

<sup>105</sup> *Id.* at 603.

academic freedom articulated in the opinions did not actually confer on academics any additional speech rights that the general public does not have.<sup>106</sup>

A conflict, however, has developed in the case law on academic freedom. This conflict is between the two components of academic freedom: the individual academic freedom right versus the institutional rights of academic freedom. In fact, the institutional autonomy component of higher education entities is the one most often recognized in the scholarly literature on the constitutional principle of academic freedom.<sup>107</sup> Obviously, if academic freedom is cast in purely institutional terms, it may contradict a notion of academic freedom as involving the rights of individual faculty members against interference by their institutional employers. Indeed, as Professor Schauer recognizes, if individual academics are granted enforceable rights against their academic supervisors, such rights would inevitably restrict the academic autonomy of the institution itself.<sup>108</sup>

#### *D. The Institutional Component of Academic Freedom*

Given the conflict between the institutional and individual sides of academic freedom, most scholars seem to favor the former view.<sup>109</sup> Some scholars who perceive such a conflict argue that constitutional academic freedom should be confined to an institutional protection of the university from governmental interference.<sup>110</sup> According to Professor Byrne, a court's review of faculty-administrator disputes can result in undue governmental intrusion into academic freedom.<sup>111</sup> As Professor Schauer writes, "[A]n institutional understanding of academic freedom, even if it comes at the expense of an individual understanding, is both more faithful to the best account of what academic freedom is all about and more compatible with larger and emerging themes in First Amendment doctrine generally."<sup>112</sup> If, for instance, the institutional view of academic freedom is

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<sup>106</sup> The argument in support of academics possessing such special rights is that "academic speech, in which not every citizen may participate, has a particular, beneficial relationship to the search for truth that justifies a distinct form of First Amendment protection." Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 947 (footnote omitted).

<sup>107</sup> See Horwitz, *supra* note 77, at 1545.

<sup>108</sup> Schauer, *supra* note 88, at 919. ("[T]here is no avoiding the conflict between a view of academic freedom that views individual academics as its primary and direct beneficiaries, and a contrasting view that locates the right in academic institutions, even if doing so limits the individual rights of the employees of those institutions.").

<sup>109</sup> Judge Posner noted that the freedom of the individual faculty member to work without interference by her superiors is in conflict with the freedom of the university to function without interference from the state. See *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629–30 (7th Cir. 1985).

<sup>110</sup> See Byrne, *A Special Concern*, *supra* note 77, at 255.

<sup>111</sup> See *id.* at 306.

<sup>112</sup> Schauer, *supra* note 88, at 919. By an institutional understanding of academic freedom, Professor Schauer means the constitutional guarantee for an academic institution

adopted over the individual view, then a university may well have the right to make certain content-based or even viewpoint-based academic decisions that, if made by any other state entity, would be constitutionally problematic.<sup>113</sup>

An institutional interpretation of academic freedom can be viewed in terms of a general principle of deference to the “genuinely academic decisions” of university officials.<sup>114</sup> Under such a principle, colleges and universities would be “granted significant presumptive autonomy to act, and courts would defer substantially to actions taken by those institutions within their respective spheres of autonomy.”<sup>115</sup> This institutional approach would mandate a judicial deference to the vital self-government functions of academic institutions, allowing those institutions to set their own norms and practices rather than be governed by rules or values imposed by the courts from the outside.<sup>116</sup>

An example of the Court’s recognition of an institutional principle of academic freedom appeared in *Grutter v. Bollinger*, which upheld the University of Michigan Law School’s race-conscious admissions program against an equal

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“to have an enforceable right to be protected from external political or bureaucratic inference . . . .” *Id.* at 920.

<sup>113</sup> *Id.* at 923–24. According to Professor Schauer, it is “important to emphasize, however, that recognizing this First Amendment-based autonomy of academic *institutions* may also be consistent with the absence of academic freedom rights of individual academics against their academic supervisors. Indeed, recognizing the constitutional dimensions of the institutional autonomy of academic institutions may even *require* limiting the scope and strength of individual academic freedom rights, for it is a necessary component of such rights that they are typically enforced by a judicial evaluation of, and potential interference with, an academic judgment by an academic institution.” *Id.* at 925.

Professor Byrne has likewise recognized this conflict between individual and institutional rights in the academic freedom setting, arguing that “[t]he problem that constitutional academic freedom poses to the civil free speech rights of faculty is that it creates a presumption against judicial involvement in deciding the contours of individual free speech against the university because courts are precluded from displacing the system of speech operating within academia.” Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 933.

<sup>114</sup> Horwitz, *supra* note 77, at 1501 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (internal quotations omitted)). Of the two aspects of academic freedom—individual and institutional—the Supreme Court “has tended to emphasize institutional academic freedom.” McConnell, *supra* note 79, at 305.

<sup>115</sup> Horwitz, *supra* note 77, at 1510. Private universities can use institutional academic freedom “as a defense to judicial review of faculty claims that the university violated its contractual commitments to academic freedom.” Rabban, *supra* note 7, at 231.

<sup>116</sup> See Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 578–79 (2005) [hereinafter Horwitz, *Grutter’s First Amendment*] (stating that courts should “lay down a general procedural requirement—for example, is this a legitimate *academic* decisions . . . ?—while permitting the institutions substantial latitude to operate within these minimal standards”). Under the institutional view of academic freedom, courts should defer to universities’ interpretation of their own academic mission, as well as their own sense of what academic freedom entails. See Horwitz, *supra* note 77, at 1547–48.

protection challenge.<sup>117</sup> In *Grutter*, the Court deferred to the law school's decision on how to achieve diversity in its student body.<sup>118</sup> According to numerous commentators, the *Grutter* decision "clarified that academic freedom is a real constitutional right and that it primarily protects the autonomy of university governance on core matters relating to scholarship and teaching . . . ."<sup>119</sup> Thus, under *Grutter*, university officials are now free to make some use of race in their university admissions policies.

In an array of cases, the Supreme Court has protected the institutional autonomy of higher education. In *Sweezy*, the Court struck down "governmental intrusion into the intellectual life of a university . . . ."<sup>120</sup> The Court later struck down a New York law preventing the employment of disloyal faculty by mandating removal for certain seditious acts or utterances.<sup>121</sup> Courts also have given universities a great degree of deference in such academic decisions as to whether to grant or deny tenure to a professor or whether to accommodate disabled students.<sup>122</sup> In *Regents of University of Michigan v. Ewing*, the Court heard an

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<sup>117</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003). Previously, in *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978), the Court acknowledged the notion that academic judgments about admissions trigger First Amendment concerns. In his concurrence, Justice Powell states that a university's ability to "make its own judgments as to education" is a fundamental component of academic freedom. *Id.* A university should be able "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (internal quotations omitted)).

<sup>118</sup> 539 U.S. at 328. Because of the special role of universities in the constitutional tradition of the First Amendment, the Court in *Grutter* deferred to the school's admissions policy as one of those "complex educational judgments." *Id.*

<sup>119</sup> Byrne, *Academic Freedom After Grutter*, *supra* note 77, at 934. As Professor Byrne argues, "[a]fter *Grutter*, no lower court can reasonably question that constitutional academic freedom is a right protected by the First Amendment, and lower courts since *Grutter* consistently have so read it." *Id.* at 936. Professor Horwitz likewise claims that the *Grutter* decision reflects the kind of deference due to a university under the principles of constitutional academic freedom. See Horwitz, *Universities as First Amendment Institutions*, *supra* note 77, at 1553–54.

<sup>120</sup> 354 U.S. at 261 (1957) (Frankfurter, J., concurring). In *Sweezy*, the Court stated that academic function required independence of both professors and universities from state interference. Rabban, *supra* note 7, at 256. According to Professor Rabban, cases like *Sweezy* and *Keyishian* recognized academic freedom as both an individual and institutional right, despite some scholars' claim that the First Amendment only protects institutional academic freedom. *Id.* at 280.

<sup>121</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 597–99, 610 (1967).

<sup>122</sup> See *Toledo v. Sanchez*, 454 F.3d 24, 39–40 (1st Cir. 2006) (stating that universities do not have to accommodate disabled students if the accommodation would significantly lower academic standards and that courts should give deference to the judgment of university officials on these matters); *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 975–76 (8th Cir. 1991) (stating that courts should defer to university tenure decisions).

appeal from a student's dismissal from the University of Michigan medical school after having failed a major written examination, the successful completion of which was required for graduation.<sup>123</sup> In upholding the medical school's decision, the Supreme Court issued a strongly worded defense of academic freedom. According to the Court:

When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.<sup>124</sup>

Justice Stevens's opinion for a unanimous Court stated that judges should show "great respect for the faculty's professional judgment" on a "genuinely academic decision."<sup>125</sup>

However, there also have been instances in which the courts have not deferred to the judgment of academic institutions. For instance, in *University of Pennsylvania v. EEOC*, the Court denied a university's academic freedom claim to protect the confidentiality of peer review materials used to evaluate a faculty member's tenure application.<sup>126</sup> Thus, the court refused to recognize a qualified privilege against the discovery of promotion and tenure records—a privilege that is relevant to the institutional autonomy of a university.<sup>127</sup> Furthermore, in *Bob Jones University v. United States*, the Court refused to let a university that used a racially discriminatory admissions policy retain its tax exempt status under the tax code.<sup>128</sup> Courts also have consistently struck down university speech codes directed at racial insults or sexual harassment.<sup>129</sup>

In *Healy v. James*, a student group challenged the university's denial of a Students for a Democratic Society chapter's application for official recognition as a student organization.<sup>130</sup> The Supreme Court unanimously sided with the free speech rights of the student group and against the university, stating that "[a]t the outset we note that state colleges and universities are not enclaves immune from

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<sup>123</sup> 474 U.S. 214, 215–16 (1985).

<sup>124</sup> *Id.* at 225.

<sup>125</sup> *Id.* Academic freedom thrives on "autonomous decision-making by the academy itself." *Id.* at 226 n.12. Justice Stevens wrote that courts, lacking the needed expertise, are not well suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members . . ." *Id.* at 226.

<sup>126</sup> 493 U.S. 182, 199 (1990).

<sup>127</sup> See Schauer, *supra* note 88, at 921–22.

<sup>128</sup> 461 U.S. 574, 605 (1983).

<sup>129</sup> See *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996); *UMW Post, Inc. v. Bd. of Regents of the Univ. of Wisconsin*, 774 F. Supp. 1163, 1173 (E.D. Wis. 1991).

<sup>130</sup> 408 U.S. 169, 176–77 (1972).

the sweep of the First Amendment.”<sup>131</sup> Thus, as demonstrated by *Healy*, the Court seems reluctant to give deference to the academic freedom of higher education institutions when such deference would directly clash with the free speech rights of students.<sup>132</sup> According to the Court in *Healy*, the university had not met its burden of justifying its denial of the group’s application and had not proved that the group posed any risk of violence or disruption to the students or the campus.<sup>133</sup>

### *E. Justifications for Academic Autonomy*

Judicial deference to academic decision-making autonomy is justified on numerous grounds.<sup>134</sup> First, universities are seen as embodying and promoting First Amendment values.<sup>135</sup> Under this view, courts should recognize and support the unique role played by universities in contributing to the enlightened public discourse of a democracy.<sup>136</sup> A second justification for judicial deference to educational autonomy stems from the argument that courts are ill equipped to deal with “the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information and are not readily adapted to the procedural tools of

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<sup>131</sup> *Id.* at 180.

<sup>132</sup> This same inclination exists in connection with the decisions of public high school administrators. *See, e.g., Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 513–14 (1969).

<sup>133</sup> 408 U.S. at 187, 190–91. In *Widmar v. Vincent*, involving the right of a student religious group to meet in university facilities, the Court struck down a university’s prohibition on the use of its facilities by religious groups, despite the university’s mission of providing a “secular education.” 454 U.S. 263, 268 (1981). The court struck down the university’s prohibition even though it recognized that a university’s educational mission can justify “reasonable regulations compatible with that mission upon the use of its campus and facilities.” *Id.* at 267 n.5.

<sup>134</sup> The special values and functions of academic life help explain why constitutional academic freedom is not “simply synonymous with the free speech clause.” Rabban, *supra* note 7, at 241. Because of the nature of academic work, the professor needs a kind of freedom from employer control that is not necessary for a typical employee. *Id.* at 242. As Professor Rabban argues, “If academic freedom has a special meaning under the first amendment, it must be distinguished from the general free speech clause.” *Id.* at 244.

<sup>135</sup> *See* Horwitz, *Grutter’s First Amendment*, *supra* note 116, at 589.

<sup>136</sup> *Id.* According to the AAUP’s 1915 Declaration of Principles, education and knowledge are vital to a civilized society. AAUP, *Declaration of Principles*, at 297 (1915). The university “should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.” *Id.* As the Court in *Keyishian* stated, the future of the nation “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’” 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

judicial or administrative decision making.”<sup>137</sup> Yet another reason why courts should respect academic autonomy is that universities have highly developed and long-established governing procedures themselves. University faculty, for instance, must abide by an array of disciplinary constraints and norms.<sup>138</sup> Their scholarship is governed by “widely shared standards, methodologies and norms,” and “[t]o be fully accepted within a discipline, a scholar must ultimately ‘be certified by her peers as competent to engage in scholarly exchange.’”<sup>139</sup> Thus, the university by itself is a highly self-regulated institution, and its faculty members are governed by a complex system of rules and standards. Moreover, because of the peer review process and faculty participation in university governance, it is argued that universities do a very good job of protecting the academic freedom of professors—and that the state actually poses the biggest threat to academic freedom.<sup>140</sup> For these reasons, and because the university environment is a highly specialized one, the argument is that courts should defer to the decision-making autonomy of universities, much as they give deference to the decision-making autonomy of administrative agencies acting within their areas of expertise.<sup>141</sup>

#### IV. CONCLUSION

##### A. *A Comparison of Press and Higher Education Institutions*

###### 1. *Nature of the Institutions*

Both journalism and academia are long-established professions. As both an institution and a profession, academia has a longer and more identifiable history. However, neither academia nor journalism has the kind of defined and enduring history as religion.

Of the three institutions, the press has the least number of participants and the least diverse participants. The press, as a First Amendment institution, is made up

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<sup>137</sup> See *Ewing*, 474 U.S. at 226 (quoting *Bd. of Curators Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978)). Courts should give broad deference to universities because “[a]cademic decisions are necessarily subjective and beyond the competence of judges.” Rabban, *supra* note 7, at 287.

<sup>138</sup> See Emily M. Calhoun, *Academic Freedom: Disciplinary Lessons from Hogwarts*, 77 U. COLO. L. REV. 843, 844 (2006). Within the university, there are a host of structural and procedural protections for academic freedom. These include peer review, the tenure process, and faculty participation in university governance. The system of peer review, according to Professor Byrne, is a vital protection of the freedom of professors from interference by administrators. Byrne, *A Special Concern*, *supra* note 77, at 306–08, 319. The tenure process includes procedural protections for academic freedom, such as notice, access to information, and right to appeal. Rabban, *supra* note 7, at 297.

<sup>139</sup> Horwitz, *supra* note 77, at 1515 (quoting Byrne, *A Special Concern*, *supra* note 77, at 258–59).

<sup>140</sup> See Byrne, *A Special Concern*, *supra* note 77, at 324.

<sup>141</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).



almost solely of journalists. Higher education, on the other hand, encompasses thousands of institutions across the country, including administrators, faculty members from all types of disciplines, and a vast diversity of students from every part of American society. However, higher education does not have the number or diversity of participants as does organized religion. Religion encompasses not only the employees and ministerial staffs of religious organizations, but also includes individuals who adhere to or follow the religious belief.

Thus, it is probably easiest to identify a religious institution. Most religions have a defined set of doctrinal beliefs that their followers are expected to hold. Religions also have physical locations, such as churches and synagogues, at which their followers gather to practice their religious beliefs and conduct their religious rituals. Indeed, a person's religious affiliation is frequently a social label used to identify or characterize that person.

It is also easy to identify or draw boundaries around the institutions of higher education. Colleges and universities have specific campuses; they hire faculty members to teach identifiable courses; and they enroll students who pay tuition and receive graded transcripts. It is not so easy, however, to identify or draw boundaries around the institution of the press. This is particularly so with the Internet, where almost anyone can set up a Web site and begin functioning like a journalist.

In comparing the three institutions in terms of the specialized knowledge required to participate in or understand the work of those institutions, the press again can probably be categorized as having the least amount of specialized knowledge or expertise. Indeed, this can be illustrated in the amount of training required of journalists. Although a college degree is sufficient for a person to qualify as a journalist, even that may not be required if the individual has mastered the general skills of writing and research. Higher education obviously is a field of much more specialized knowledge, as is religion. Indeed, philosophy and theology are intricate disciplines and bodies of thought that have developed over thousands of years. In addition, each religion has its own complex set of doctrinal beliefs and institutional rules. These beliefs and rules gave rise to the church autonomy doctrine, which holds that courts should not interfere in church religious disputes because courts are not competent to resolve such disputes.

Because of these doctrinal beliefs and organizational rules, religious institutions have complicated self-governing structures. These structures and rules can be every bit as complex and detailed as society's civil legal structure. Not only are the leaders and officers of religious organizations bound to this governing structure, but the followers and adherents of any religion also must obey a large body of rules. Likewise, the institutions of higher education have complex governing structures. These structures govern how the institutions are run, how faculty is to be hired and expected to perform, and what students will be admitted and what will be taught to them. The self-governing structure of any university not only has to lay out the institutional organization and governance system, but it also must address disputes arising among administrators, faculty, and students.

In contrast with religion and higher education, the press clearly has the least complex and authoritative self-governing structure. Although journalists do have voluntary codes of ethics and professional behavior, they are essentially governed within their institutions just as any employee of any other business would be governed.

## 2. *The Constitutional Autonomy of Each Institution*

Religion has been given the highest degree of constitutional autonomy by the courts. Any religious or doctrinal dispute is off limits to the courts, even disputes regarding church property. Religious organizations can even discriminate in their hiring practices, giving favoritism to individuals who hold similar beliefs or who profess to certain values.

Academia also has been given a degree of institutional autonomy by the courts. Such autonomy can be seen in the *Grutter* decision, where the Court deferred to a university's race-conscious admissions program. Judicial deference is also given in such academic matters as student grading and faculty evaluation. However, there are also a number of instances in which courts have not granted autonomy to university decision making. Even though the tenure application process is an intricate one involving a great deal of specialized knowledge, the courts have not allowed universities to keep their tenure documents or processes confidential. The courts have not deferred to university implementation of speech codes. Nor have courts generally deferred to university sanctioning or restriction of student speech rights outside the classroom.

Of the three institutions, the press probably has been given the least amount of autonomy. In *Tornillo*, the Court did respect the institutional decision making of the press, refusing to uphold a law requiring editors to print certain material. However, this deference regarding content has not been given to the broadcast press. Furthermore, it could be argued that *Tornillo* was decided on the basis of free speech rights enjoyed by the public at large, rather than on any specific rights enjoyed uniquely by the press. Moreover, as reflected in *Cohen*, the Court refused to give editors the right to review and overrule their reporters' decisions on confidentiality. And in general, the courts have declined to give any special rights of confidentiality to the press, even despite the press's claim that such confidentiality is vital to its newsgathering activities.

## 3. *Special Rights Accorded to the Institutions*

Religious organizations and practitioners, because of the First Amendment religion clause, have been given a host of rights not enjoyed by the non-religious. The academic community also has been given special rights, although not as significant and well-defined as those given to religious believers and organizations. The *Grutter* decision, in giving higher education a certain equal protection immunity for race-conscious admissions programs, clearly amounts to a special right given to academia. In addition, faculty members, with respect to their speech

activities in the context of their employment, have academic freedom rights that other public employees do not.

The institution with the least amount of special rights is the press. Although a constitutional right of academic freedom suggests a special First Amendment right available only to universities and faculty members, the Court has given no greater rights to journalists than those possessed by the general public, notwithstanding the press clause.<sup>142</sup> In *Richmond Newspapers*, Chief Justice Burger saw the press as serving vital First Amendment values such as informing the public, but he still refused to give the press more First Amendment rights than those enjoyed by the public. In *Houchins*, the Court likewise refused to grant the press any rights of access beyond those given to the public generally.

#### 4. Individual Rights Accorded Within Each Profession

Within their profession, faculty members have significant rights. First, they have professional academic freedom rights, which usually also are incorporated into faculty handbooks and university governance structures. Second, faculty members have constitutional academic freedom rights against university administrators, including trustees. The individual rights component of academic freedom protects faculty members from reprisals or sanctions regarding teaching or research activities. (For many individual faculty members, academic freedom and tenure confer double protections.)

Journalists, on the other hand, have virtually no rights within their profession. Any rights they have are basically those of any other employee: those granted by an employment contract. In fact, most journalist rights have been granted from outside the profession. If a journalist, for instance, makes a promise of confidentiality to a source, under *Cohen* that promise must be enforced. However, there is nothing to prevent that journalist from being fired for making such a promise. A journalist, just like any other citizen, is protected under the free speech clause from any government reprisals regarding any speech he or she makes in connection with his or her journalistic activities. However, once again, that journalist still may be fired if a supervisor disagrees with the content or methods of investigation surrounding that speech. In *The Florida Star v. B.J.F.*, the Supreme Court held that the press could not be sanctioned for publishing any lawfully obtained information.<sup>143</sup> The Court held no sanction even if a statute forbade publication of that information, even if governmental policies prohibited release of that information, and even if the individual press entity's own internal policies prohibited publication of that information.<sup>144</sup> In other words, if a journalist lawfully comes across the name of a rape victim, that journalist may constitutionally publish that information even if the journalist's own newspaper has a policy against publishing such information, and even if there are government policies that

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<sup>142</sup> Rabban, *supra* note 7, at 238.

<sup>143</sup> 491 U.S. 524, 527 (1989).

<sup>144</sup> *See id.* at 537.

forbid release of that information. But again, there is nothing to prevent the journalist from being fired for publishing that information if his or her superiors wish to enforce their own internal policy.

### 5. Summary

This Article has attempted to lay out the constitutional boundaries for the institutional autonomy of the press and higher education. In so doing, certain patterns of deference can be seen. These patterns involve various factors on which constitutional protection of the functions and roles of First Amendment social institutions depend.

In comparing the institutions of religion, the press, and higher education, a few observations can be made regarding the amount of constitutional autonomy given to each institution to govern itself, outside of the dictates of the state.<sup>145</sup> First, the more longstanding the institution is, and the greater numbers and diversity of the participants in that institution, the more likely that institution will be given more freedom to self-govern. Second, the more the institution deals with a very specialized body of knowledge, the more the courts will give deference to the decisions of that institution. Third, the more complex and all-encompassing the institution's self-governing structure, the less that courts will intrude into the institution's decision-making process. Fourth, the more easily identifiable the institutions and its members are, the more self-governing autonomy will be given to that institution. And finally, the more the institution does not infringe on the First Amendment rights of others, the more deference it will be given. Social groups and institutions, even First Amendment institutions, can be subject to governmental regulation whenever they threaten the rights of individual outsiders.

An argument for judicial deference that applies equally to the institutional autonomy of the press, religion, and higher education is that each of these institutions serves to check the power of government and to criticize governmental activities from different perspectives. Each of the institutions acts, though again from different points of view, as a power-challenging or government-challenging institution. Thus, the presence and functions of these institutions serve as a kind of

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<sup>145</sup> In offering an institutional approach to the First Amendment, Frederick Schauer suggests that the level of judicial deference to the speech freedoms or regulations within an institution should depend on the institution's importance to the social, economic, and political life of the nation, as well as the importance of the speech freedoms or regulations to the workings of that institution. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1275 (2005). With respect to such First Amendment institutions as universities, for instance, "the argument would be that the virtues of special autonomy—special immunity from regulation—would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural home within the boundaries of the First Amendment." *Id.* at 1274–75. For Schauer, the question is about the kinds of institutions that might qualify as First Amendment institutions and as the focal point of First Amendment analysis. *Id.* at 1277.

inherent, built-in social regulator of government—and as such, serve as protectors of liberty.

These institutions also serve a pre-political role in society. They help form ideas, alliances, and social agendas that later become injected into the political process. They act as opinion makers and as seedbeds for social and political activism. They also play mediating roles, insofar as individuals feeling alienated by governmental action can still find a welcoming home within these institutions—a home that allows such individuals to continue the social or political quest that has yet to find fulfillment at the state level.

The danger of judicial non-deference arises not just at the point of interference—at the time when the courts intrude into the institutional autonomy of the particular entity; it continues to prevail thereafter. This is because when the state steps in it rarely steps back out when the specific issue giving rise to the intervention passes. A common justification for judicial intrusion is that courts should step in when social institutions fail to fully incorporate the governing norms of classical liberalism, or when they fail to abide by such prominent legalistic norms as impartiality, objectivity, and nondiscrimination. This argument applies especially to religious groups. But, of course, most social groups behave illiberally in this respect, insofar as they hold very specific beliefs and are anything but impartial toward those beliefs. In fact, they exist primarily to advance a very particular, one-sided agenda.

The American legal system is based on an individualistic political philosophy. Indeed, such an individualistic system of law may be the only kind of system possible in a nation like the United States, where political sovereignty rests in the individual rather than in the group. However, the individualism on which the legal system is based turns out to be somewhat antagonistic to evaluating the non-state self-governance of social institutions. There is an inverse relationship between a belief in individualism and non-state governance. If the individual is the sole or primary focus, then the state is left as the only possible regulator of social behavior. A more communal view of the individual—recognizing the social needs and identity of the individual—in turn, takes a more receptive view of the governing autonomy of non-state social institutions.

Finally, the institutional autonomy of social groups and institutions within American society generally can be recognized and valued if seen through the lens of federalism. Federalism, of course, refers to the vertical structure of American governance—the power and jurisdictional relationships between local, state, and federal governments. Although federalism, as a defining feature of American governance, has significantly deteriorated with the phenomenal growth and authority of the federal government during the second half of the twentieth century, its value continues to be recognized.<sup>146</sup> As a historic feature of the U.S.

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<sup>146</sup> For a discussion on the meaning of federalism, the decline of federalism during the latter half of the twentieth century, and a revival of the recognition of the value of federalism by the Rehnquist Court, see Patrick M. Garry, *A One-Sided Federalism*

political system, federalism serves a number of roles and values. Federalism allows for the accommodation of diverse constituencies that might be minorities in the context of the nation as a whole; for the increased opportunities for individual participation in smaller governmental units; for varied social and political identities available through different governmental units; and for an increased responsiveness and accountability available in smaller, more localized government entities. But all these values also are available through the vast array of non-state social institutions and groups permeating American society. Thus, a recognition and promotion of the institutional, self-governing autonomy of these groups may well provide the roles and values that an eroding federalism no longer provides, and hence compensate for a disappearing federalism. In addition, a strong and functioning social quilt of non-state groups, like a federalist system of political governance, protects individual liberty by supplying a structure of institutions that can check and remedy government abuses more easily than can individuals acting on their own.

# THE RESPONSIBILITIES OF THE LIBERAL STATE: COMPREHENSIVE VS. POLITICAL LIBERALISM

Bruce M. Landesman<sup>\*</sup>

## I. INTRODUCTION

The modern state has many responsibilities, but there are many things for which individuals or groups—rather than the state—are responsible. Many of the most difficult political questions in a society like ours center on determining the appropriate extent and limits of the state’s role in contrast to the role of individuals and groups. As John Stuart Mill put it over one hundred-fifty years ago, “the practical question where to place the limit—how to make the fitting adjustment between individual independence and social control—is a subject on which nearly everything remains to be done.”<sup>1</sup>

We may have made some progress since Mill’s time both in law and in political theory, but we will forever be confronted by issues in which that fitting adjustment between liberty and authority must be determined. My aim in this short Essay is not to give a general theory of the state’s responsibility as opposed to that of non-state actors. That discussion would raise all the deepest questions of political philosophy and philosophy of law, and would get us into detailed discussions of justice, rights, equality, liberty, property, efficiency, desert, tolerance, diversity, and much more. My narrower aim is to examine a current controversy among political philosophers and theorists about the nature of the *liberal* state. Although I wish to contribute to that controversy, my main aim is to see how that debate bears on one limited but important issue about the liberal state’s responsibilities—that state’s responsibilities when private associations or groups wish to engage in behavior perceived to be highly illiberal. To what extent does respect for freedom and diversity require the state to allow such practices? To what extent do respect for human rights and other features of the liberal state provide reasons for prohibiting them?

A famous and very useful example is that of the evangelical families in *Mozert v. Hawkins* who wanted their children, who were attending a public school, to be excused from certain reading assignments that emphasized the diverse ways that human beings live.<sup>2</sup> Such assignments can help children gain an understanding

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<sup>1</sup> JOHN STUART MILL, ON LIBERTY 5 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859).

<sup>2</sup> See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1059–62 (6th Cir. 1987). The assignments included topics like mental telepathy, magic, and evolution. See *id.*

of human difference and develop the important liberal virtue of tolerance. The parents, however, believed that exposure to the reading would make it more difficult for them to raise their children with the beliefs they felt necessary for salvation.<sup>3</sup> Does respect for religious freedom and diversity mean that they should get their way? Or does the liberal commitment to the value and importance of diversity and tolerance mean that their request goes beyond what the liberal state should allow?

To help answer this question, I will first explain two accounts of the nature of liberalism and of a liberal society currently being debated among political and legal philosophers. Both accounts agree that a liberal society is committed to a certain set of values and to having institutions that conform to them. Those values include, among others, liberty, equality, democracy, tolerance, the rule of law, equal opportunity and nondiscrimination, and the protection of private possessions.<sup>4</sup> The views disagree, however, on the grounds for justifying and promoting those values, and that disagreement appears to justify different answers to questions raised by cases like *Mozert*.

I will first explain a conception of liberalism that has come to be called Comprehensive Liberalism. John Rawls clarified this form of liberalism in numerous academic articles<sup>5</sup> subsequent to writing his important modern classic, *A Theory of Justice*, published in 1971.<sup>6</sup> I will explain some of the main elements of Rawls's theory, both with respect to his earlier work on justice and his later work on liberalism. Using that, I will then go on to explain an alternative account of liberalism, which Rawls calls Political Liberalism.<sup>7</sup> I will then test both versions of liberalism against cases like *Mozert*.

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For an illuminating discussion of *Mozert*, see Stephen Macedo, *Liberal Civil Education and Religious Fundamentalism: The Case of God vs. John Rawls?*, 105 ETHICS 468, 468–96 (1995).

<sup>3</sup> See Macedo, *supra* note 2, at 470–71.

<sup>4</sup> I should note here that when I talk about “Liberalism,” I do not mean liberalism as currently used in political discourse where it is opposed to “conservativism.” I mean “Liberalism” (with a big “L”) as a synonym for the distinctive Western political tradition. Modern liberals and conservatives operate within that tradition and disagree about certain facts (e.g., the efficiency of highly unregulated free markets) and on the interpretation of liberal values. But their dispute is best understood as a dispute among fellow members of a distinctive tradition. The best antonym for the big “L” Liberalism that I have in mind is authoritarianism, which rejects liberal values. It comes in many versions.

<sup>5</sup> See John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) [hereinafter Rawls, *Justice as Fairness*]. Both of these articles are reprinted, along with other relevant essays by Rawls, in JOHN RAWLS: COLLECTED PAPERS, 303–58, 388–414 (Samuel Freeman ed., 1999) [hereinafter RAWLS, COLLECTED PAPERS]. Rawls's series of essays on liberalism led to his book *Political Liberalism*. JOHN RAWLS, POLITICAL LIBERALISM (Columbia University Press 1993).

<sup>6</sup> JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 1971).

<sup>7</sup> See RAWLS, POLITICAL LIBERALISM, *supra* note 5.



## II. COMPREHENSIVE LIBERALISM

A. *Mill and Kant*

Comprehensive Liberalism was introduced by historical thinkers who believed that society was best served when individuals led autonomous and self-directed lives.<sup>8</sup> John Stuart Mill argued that people who developed their individual talents and capacity for reasoning and deliberation, rather than simply going along with the crowd, lived the most fulfilled lives.<sup>9</sup> As Mill trenchantly elaborated: “He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision.”<sup>10</sup> For Mill, widespread liberty, especially freedom of expression, is necessary for the development of these human capacities.<sup>11</sup>

Mill thus offered a conception of the “good life”—of the sort of life that, Mill says, brings humans “nearer to the best thing they can be.”<sup>12</sup> The liberal commitment to freedom, tolerance, etc., is justified because a society with such values helps produce excellence in human life.<sup>13</sup> (According to Mill, Liberalism is also justified in promoting these values because a liberal society’s survival and flourishing depend on having deliberative, thoughtful, and tolerant citizens—a point I will return to later). Mill is famous for the assertion that “[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”<sup>14</sup> In saying this, Mill was making clear his conception of the good life as the examined and chosen life.

Immanuel Kant, too, emphasized acting autonomously as central to the good life; freedom and the development of rationality are essential for reflective self-

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<sup>8</sup> See, e.g., MILL, *supra* note 1, at 56. This proposition is also attributed to Immanuel Kant, who asserted that morality is ultimately founded on individual reason. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797); IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 9 (James W. Ellington trans., Hackett Publ’g Co. 2d ed. 1983) (1785) [hereinafter KANT, *GROUNDING*].

<sup>9</sup> See MILL, *supra* note 1, at 53–71.

<sup>10</sup> *Id.* at 56.

<sup>11</sup> *Id.* at 50.

<sup>12</sup> *Id.* at 61.

<sup>13</sup> Additionally, Mill argues that people with such capacities are likely to make wise decisions that contribute to the overall well-being of society, thus producing “the greatest happiness for the greatest number.” See *id.* at 62–64; see also JOHN STUART MILL, *UTILITARIANISM* 7 (George Sher ed., Hackett Publ’g Co. 1979) (1861) (“[T]he ‘greatest happiness principle’ holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.”).

<sup>14</sup> MILL, *UTILITARIANISM*, *supra* note 13, at 10.

direction.<sup>15</sup> The liberal, democratic state is justified, at least partly, on the ground that it moves people to develop their rational faculties. And because for Kant the development of rationality is a condition for people being most sensitive to moral requirements, the liberal state helps produce morally better human beings.<sup>16</sup>

*B. John Rawls's Theory of Justice*

As I have noted, this form of liberalism is often called Comprehensive Liberalism. As I mentioned above, that terminology comes from John Rawls.<sup>17</sup> I now turn to a brief account of some important elements of Rawls's account of justice in his 1971 book, *A Theory of Justice*, because it will help us better understand the differences between Comprehensive and Political Liberalism.

In *A Theory of Justice*, Rawls notes that each person has a plan of life, a set of goals and aspirations that informs his or her decision making.<sup>18</sup> He calls this plan of life a person's "Conception of the Good."<sup>19</sup> It is a person's idea of what makes his or her life go well or badly, of what elements constitute the good life for that person.<sup>20</sup>

People, of course, have different conceptions of the good. Rawls argues, however, that there are certain things that are important for everyone's conception of the good, independent of its content.<sup>21</sup> He calls these things primary goods; they include income and wealth, liberty, opportunities, rights, and the social bases of self-respect.<sup>22</sup> With this framework, Rawls clarifies and defends a theory of justice couched in terms of the distribution of primary goods among the members of a society.<sup>23</sup> His theory of justice involves two principles. The first singles out one primary good, liberty, and requires that each person have the most extensive liberty compatible with a like liberty for all.<sup>24</sup> According to Rawls, equal liberty is fundamental for a just society.<sup>25</sup>

The second principle has two parts. The first allows social and economic inequalities so long as the inequalities make everyone better off than they would be

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<sup>15</sup> Kant's point comes through in many places. *See, e.g.,* KANT, GROUNDING, *supra* note 8, at 19–48 (introducing and discussing Kant's "categorical imperative").

<sup>16</sup> Kant does not say this in so many words, but it is hard to avoid this implication. A person's act has genuine moral worth only when it is done out of a sense of duty, and acting out of duty (to make a long story short) is acting on what reason and rationality demands. Thus promoting the conditions for rationality promotes the development of moral human beings.

<sup>17</sup> *See* RAWLS, COLLECTED PAPERS, *supra* note 5, at 303–58, 388–414.

<sup>18</sup> RAWLS, *supra* note 6, at 407–16.

<sup>19</sup> *Id.* at 90–95, 136–42.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 90–95.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 60–65.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

under equality, and makes the situation of the worst off persons as best as it can be.<sup>26</sup> As it is often put, the idea is to allow inequalities so long as they maximize the minimum.<sup>27</sup> Rawls calls this “The Difference Principle.”<sup>28</sup> He accepts inequalities largely because he believes that inequalities have incentive effects. They promote productivity, which, if suitably regulated and taxed, can make everyone better off.<sup>29</sup>

The second part of the second principle requires that all have a fair opportunity to achieve the highest positions.<sup>30</sup> This requires not only that people not be denied favored positions, jobs, and university admission on discriminatory grounds, but also that everyone has the kind of education that enables them to develop whatever talents and capabilities they have within them. In such a case, each has a fair chance of leading the best life available to him or her. The second part of this second principle is thus a “Principle of Fair Equality of Opportunity.”<sup>31</sup>

Rawls argued, famously, that principles of justice should be justified by examining whether they would be accepted by people required to make a choice about the basic principles governing their society in a situation in which they are equal, free, rational, and unbiased.<sup>32</sup> Put in a slightly different way, valid principles of justice are those that would be chosen by all in a situation that is fair to all. Further, they are principles that can be justified to all, to each and every last person, regardless of their actual talents or social position. They are principles that all reasonable persons can accept, or in T.M. Scanlon’s interpretation, “no one could reasonably reject as a basis for informed, unforced general agreement.”<sup>33</sup>

Thus, we have a shorthand name for Rawls’s theory—“Justice as Fairness.” Rawls constructed an elaborate theoretical device—the “Original Position”—to develop these ideas.<sup>34</sup>

It was important to Rawls’s view that his principles of justice not simply be supported by philosophical arguments and attain some kind of theoretical “truth.”<sup>35</sup> Rather, Rawls hoped that they could have a practical effect—that they could be the object of agreement in the real world among the bulk of the members of a liberal society.<sup>36</sup> They could be the source of a stable and unified society.<sup>37</sup> To clarify this, he spoke of a “well-ordered society” as a society in which (1) principles of justice

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<sup>26</sup> *Id.* at 302–03.

<sup>27</sup> *Id.* at 152–57.

<sup>28</sup> *Id.* at 75.

<sup>29</sup> *Id.* at 11–17.

<sup>30</sup> *Id.* at 65–75.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 136–42.

<sup>33</sup> T.M. Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* 103, 110 (Amartya Sen & Bernard Williams eds., 1982).

<sup>34</sup> See RAWLS, *supra* note 6, at 17–22 (explaining the justification for the “original position”), 195–258.

<sup>35</sup> Rawls, *Justice as Fairness*, *supra* note 5, at 223.

<sup>36</sup> *Id.* at 223–26.

<sup>37</sup> RAWLS, *supra* note 6, at 4–5.

are accepted by almost everyone, (2) society's institutions operate in accord with the principles, and (3) people in general are deeply motivated to live in accord with the principles.<sup>38</sup> The principles would be an accepted charter for a flourishing and stable liberal society.

I will not dwell further on Rawls's well-known principles of justice. As I noted, my main concern is with Rawls's idea of a conception of the good and, especially, its development in his later writings. The theory of justice is important for us, however, because Rawls's further development of his ideas about the good were, he felt, necessary for the adequacy of his account of justice as a practical possibility.<sup>39</sup> He saw a serious problem that I will now try to explain.

### III. FROM COMPREHENSIVE LIBERALISM TO POLITICAL LIBERALISM

#### A. *Problems with Comprehensive Liberalism*

We have already noted that people have different conceptions of the good. That is, people may live very different but equally satisfactory lives. It is difficult to give persuasive reasons that any one form of life is superior to others.<sup>40</sup> Reflective self-deliberation is good, but a life lacking this can also be good. One among many examples is a life centered on family and friends and shaped by the demands of a religion or of a tradition one identifies with.

Given this, it is implausible to think that there is *one* correct conception of the good life, or even a small number of such conceptions. This has not prevented moral philosophers from antiquity through the early modern era from attempting to come up such a conception.<sup>41</sup> Moral philosophy was long dominated by the search for the good (or rather, *The Good*). Such attempts still exist in certain kinds of authoritarian regimes, especially those dominated by various forms of religious fundamentalism or a strong communal tradition among a homogeneous population.

Consider then, as a contrast to this, Thomas Hobbes's famous remark:

[W]hatsoever is the object of any man's Appetite or Desire; that is it, which he for his part calleth *Good*: and the object of his Hate, and Aversion, *Evill* . . . these words of Good, Evill and Contemptible, are

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<sup>38</sup> *Id.* at 313.

<sup>39</sup> For a succinct summary of Rawls's worries, see Samuel Freeman, *Introduction*, in THE CAMBRIDGE COMPANION TO RAWLS 1, 28–32 (Samuel Freeman ed., 2003) (providing a summary of the problem); Samuel Freeman, *Congruence and the Good of Justice*, in THE CAMBRIDGE COMPANION TO RAWLS 277 (providing an in-depth discussion of the problem) (Samuel Freeman ed., 2003).

<sup>40</sup> I am ruling out lives in which people achieve their good by intentionally causing harm to others.

<sup>41</sup> It may be an overstatement to say that, in their writings about ethics, Plato, Aristotle, Aquinas, and many others were mainly attempting to formulate the correct conception of the good life, but there is an important element of truth in it.

ever used with relation to the person that useth them: There being nothing simply and absolutely so . . . .<sup>42</sup>

This assertion (in 1651) came at the beginning of a revolution about the good and individual conceptions of the good. It is a mark of a liberal regime that a person may determine and act on his or her own conception of the good, so long as his acts do not harm others.<sup>43</sup> The development of liberalism arose with the idea that equally reasonable people can have very different notions of a good life, and none can claim obvious superiority over the others. Imposing one conception on everyone through the power of the state is thus illegitimate. This is the kernel idea of toleration. Rawls expressed this as the idea that in a society in which people are genuinely free, they will naturally develop different and opposed conceptions of the good.<sup>44</sup> Rawls calls this the “fact of pluralism.”<sup>45</sup> A political theory that neglects to give appropriate recognition to the fact of pluralism cannot be a liberal view.

After *A Theory of Justice*, Rawls came to worry that his *own* theory of justice might be construed as resting on a controversial and contestable account of the good.<sup>46</sup> His attempt to avoid this implication led him to clarify a conception of liberalism that differs from the Comprehensive Liberalism I discussed earlier. To understand his new view, Political Liberalism, we should start with the fact that Rawls came to emphasize the idea that a person’s conception of the good is not just his plan of life, but also involves his general ideas about the nature of reality. These general ideas underlie a person’s sense of what gives life value and makes it go well or poorly.<sup>47</sup> Someone who is devoutly religious will have a view of the world that demands certain duties and rituals and which are absent from other religious views (which have their own demands) and from nonreligious views. People’s views about the facts, about how things “work,” will also affect their ideas of value. A conception of the good that includes these underlying elements came to be called by Rawls (and others) a “Comprehensive Conception or Doctrine of the Good.”<sup>48</sup> Because Comprehensive Liberalism justifies liberalism as leading to a reflective and self-directed form of life, that form of liberalism presupposes a comprehensive conception of the good.

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<sup>42</sup> THOMAS HOBBS, *LEVIATHAN* 39 (Richard Tuck ed., Cambridge University Press 1991) (1651).

<sup>43</sup> This is a very oversimplified statement of the claim defended in John Stuart Mill’s *On Liberty*. See MILL, *supra* note 1, at 53.

<sup>44</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at Lecture I.

<sup>45</sup> *Id.* at Lecture I, § 6.

<sup>46</sup> See Ondra O’Neill, *Constructivism in Rawls and Kant*, in *THE CAMBRIDGE COMPANION TO RAWLS* 347, 352 (Samuel Freeman ed., 2003).

<sup>47</sup> Rawls, *Justice as Fairness*, *supra* note 5, at 233.

<sup>48</sup> *Id.*

*B. Political Liberalism*

The main objection to Comprehensive Liberalism is that not everyone agrees on thoughtful self-direction as essential to the good life. Not everyone thinks the “examined life” is the only life worth living. Many are happy if they have a decent job, a decent salary, a stable family, and access to satisfying means of entertainment and leisure. In addition, as I have noted, participation in a tradition of thought and practice such as a religious, national, or ethnic tradition, can give meaning to life, even when this participation is not chosen or a result of reflection.

Comprehensive Liberalism thus looks like a partisan doctrine that many could reject because they do not accept its notion of the good life. As I noted, Rawls came to worry that his own theory of justice depended on such a conception.<sup>49</sup> I cannot go deeply into the reasons for his worry, other than to note that he came to feel that he had based his philosophical view on a conception of the person that involves a deep commitment to moral autonomy or individual self-direction.<sup>50</sup> This appears to base his view on a comprehensive view of the good not all need to accept. This concern led him to develop a different account of liberalism, Political Liberalism, to which I now turn.

Political Liberalism does not ground liberal theory or practice on a comprehensive notion of the good life. It grounds it in another way, which I will now explain. We should note as a start that although there are many different comprehensive conceptions of the good, some of these can be especially troubling. They may contain views that reject the fundamental equality of human beings and embrace racist or sexist ideas. They may reject the notion that there can be many “reasonable” conceptions of the good and believe that government can impose the “right” view on its citizens. These views have intolerance built into them. Rawls claims that such conceptions of the good are not *reasonable* conceptions.<sup>51</sup> A conception of the good is *reasonable* when those who hold it are willing to admit that reasonable and decent people can hold contrary conceptions.<sup>52</sup> Reasonableness, however, does not mean that you hold your view as a mere preference.<sup>53</sup> You may well think it contains the truth—the whole truth. But you recognize that not all reasonable persons need to see things the same way you see them. Your view may be correct, but it does not have the sort of authority that would allow you to see others as unreasonable and impose your view on them.

One reason for this is what Rawls calls “the burdens of judgment.”<sup>54</sup> He notes that reasonable people may disagree on fundamental things.<sup>55</sup> The sources of their differences are “the burdens of judgment.”<sup>56</sup> They include the fact that evidence

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<sup>49</sup> See O’Neill, *supra* note 46, at 352.

<sup>50</sup> See SAMUEL FREEMAN, *Introduction*, *supra* note 46, at 1, 30.

<sup>51</sup> RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at Lecture I, § 3.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at Lecture II, § 3.

<sup>54</sup> *Id.* at Lecture II, § 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

may be conflicting; even when we agree about evidence, we may disagree about its weight vis-à-vis contrary evidence; moral and political concepts are general and require interpretation, another source of disagreement; and the way we assess evidence and moral and political values is “shaped by our total experience, our whole course of life up to now; and our total experiences must always differ.”<sup>57</sup> Acknowledging this, the ideal in a liberal society is to attain a state of mind in which one has confidence in the truth of one’s conception of the good but is willing and able to allow that other reasonable people are entitled to the same confidence about different and opposing conceptions of the good. This frame of mind arguably underlies the sort of tolerance necessary to live peacefully in a diverse society.

Rawls claims that racist, sexist, and other authoritarian conceptions of the good are not reasonable conceptions in a liberal society.<sup>58</sup> There will always be people who hold such conceptions, but liberal society need not satisfy them because the satisfaction of their aims is incompatible with liberal values and liberal notions about justice. Given this, the important fact about liberal society for Rawls is not the fact that people have opposed conceptions of the good (*the fact of pluralism*) but the fact that they have opposed reasonable conceptions of the good—which he calls *the fact of reasonable pluralism*.<sup>59</sup> A liberal society must accept reasonable pluralism and be justifiable to anyone with a reasonable conception of the good.<sup>60</sup> How can this be done?

Rawls suggests that a liberal society can attain stability without an agreed upon comprehensive conception of the good if it can produce agreement on principles of right and justice, and on liberal values, independently of people’s different comprehensive conceptions of the good. Such an agreement is possible when people with different reasonable conceptions agree, each for their own reasons, on the general political principles that society should follow. They achieve what Rawls calls an “overlapping consensus” on liberal values and principles.<sup>61</sup>

Thus, suppose that A and B have very different conceptions of the good life. Nonetheless, they each agree on the basis of their own conceptions, on the same liberal values and principles of justice. Rawls calls this common conception, divorced from any particular conception of the good, a “political conception of justice.”<sup>62</sup> It is a view of right and justice that people accept *for political purposes*, although their own conception of the good life may involve commitment to private associations that reject liberal values.<sup>63</sup> For example, they may embrace a religion based on authority, or follow a tradition based on time-hallowed conventions that

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at Lecture II, § 3.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> The idea of an overlapping consensus is first proposed in Rawls, *Justice as Fairness*, *supra* note 5, at 246, and is fully developed in John Rawls, *On the Idea of Overlapping Consensus*, 7 OXFORD J. FOR LEGAL STUD. 1, 1–25 (1987).

<sup>62</sup> See Rawls, *Justice as Fairness*, *supra* note 5, at 225.

<sup>63</sup> *Id.*

may not be questioned, but still accept liberal values for the public governance of society.<sup>64</sup> Liberal dissent is lacking from elements of one's personal life but is nevertheless a central part of the political conception one embraces.

Again, it is a mark of liberalism on this view that one can "split" one's values, discriminating those applicable to private life from those that apply in the public sphere. Political Liberalism is thus based on an overlapping consensus on a political conception of right and justice and presupposes no particular reasonable comprehensive conception of the good.<sup>65</sup>

One more feature of Political Liberalism is worth emphasizing. The overlapping consensus on liberal values goes along with the idea of using modes of argument that can be accepted by all. Rawls's refers to this as "Public Reason."<sup>66</sup> Public reason allows the justification of policies by such values as basic rights, liberty, the common good, economic efficiency, equal opportunity, and more.<sup>67</sup> It disallows, for example, appeals to God's will.<sup>68</sup> We thus conduct our joint affairs through the use of reasons acceptable to all, regardless of our ultimate sense of reality and the good. On this view, argumentation based on the values of a single sect plays havoc with our ability to solve common problems. This is true even if the single "sect" is founded on standard liberal ideas such as reasoning, self-reflection, and autonomy.

#### IV. COMPREHENSIVE LIBERALISM AND POLITICAL LIBERALISM APPLIED TO *MOZERT*

With this background in place, consider now *Mozert v. Hawkins*.<sup>69</sup> How would the two accounts of liberalism decide that issue? It seems obvious that Comprehensive Liberalism would find the parent's desire to opt out of the reading lesson highly problematic. It would hinder personal attempts toward self-direction

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<sup>64</sup> *Id.* at 241.

<sup>65</sup> There have been many books and articles defending Political Liberalism. Among the most important are: WILLIAM A. GALSTON, *LIBERAL PLURALISM* (2002); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990); Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599 (1999); Macedo, *supra* note 2.

For a strong defense of Comprehensive Liberalism, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369–429 (1986); Brian Barry, *How Not to Defend Liberal Institutions*, in *LIBERALISM AND THE GOOD* 44 (R. Bruce Douglass et al. eds., 1990); Joseph Raz, *Liberalism, Autonomy and the Politics of Neutral Concern*, 7 *MIDWEST STUD. PHIL.* 89 (1982).

<sup>66</sup> See RAWLS, *POLITICAL LIBERALISM*, *supra* note 5, at Lecture VI.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987) (concerning a parent who objected to certain school texts on religious grounds).



and also hinder society's interest in producing citizens tolerant of different ways of life. A comprehensive liberal thus seems to be committed to arguing against the evangelical parents and siding with the School Board.

What about Political Liberalism? One might think it obvious that it would come down on the other side. It would object to attempts to privilege the self-directional mode of life and thus should allow the parents the right to withdraw their children from the classroom assignment.

There is something to be said for this, but it is not the end of the story. Political Liberalism must also be committed to the development in citizens of liberal societies of the character traits needed to enable such a society to function. Tolerance is, of course, one of the central liberal virtues. Thus political liberals also have a strong argument for siding with the school board.

Thus there are reasons for both sides to come down in favor of the school board and against the parents. This may seem like a disappointing conclusion in that the two views of liberalism do not necessarily disagree, and thus it is not promising to think we can solve these difficult issues by deciding which view is more plausible. There is, however, a very important lesson to be learned from our exploration. Comprehensive Liberalism focuses on a certain way of justifying liberal values (in terms of a comprehensive conception of the good); Political Liberalism focuses on how a structure of divergent ideas can produce consensus on a liberal outcome. Neither gives sufficient emphasis to the importance of character.<sup>70</sup>

However it is understood, a liberal society, to be stable and to flourish, must contain sufficient numbers of people who have what we can call *liberal virtues*. Among these we must include a respect for liberty, equality, and the rule of law; tolerance of diversity; a commitment to democratic rule; and, perhaps most important, a willingness to lose out in a political battle, accept the result, and try again another day. I think one cannot overestimate the importance of this. As we have learned through recent events, there are societies so divided that one group's triumph is another group's disaster in such a way that the loser's only hope is a call to arms.<sup>71</sup> Liberal societies cannot work like that.

We can conclude, then, that character and liberal virtues need to be given a central place. If so, the issue of what to do about illiberal tendencies may hinge on the question of how much of a threat they are to the development of liberal virtues. It may be thought that the plaintiffs in *Mozert* wanted only a minor exception and that respect for their freedom should move us to allow it. But the case cannot be taken as isolated. The court ruled against the parents.<sup>72</sup> Had it ruled in their favor, many other cases would come to the fore since there are many groups who wish to

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<sup>70</sup> I need to exempt Stephen Macedo from this criticism. His book, *LIBERAL VIRTUES*, see *supra* note 65, is quite clear on the importance of character, and that is a central theme of his important article, *Liberal Civil Education and Religious Fundamentalism: The Case of God v. John Rawls?* See source cited *supra* note 3.

<sup>71</sup> Consider the fighting between Sunnis and Shiites in Iraq after the American invasion of 2003.

<sup>72</sup> *Mozert*, 827 F.2d at 1070.

insulate themselves from the surrounding liberal context. Those most in need of education in tolerance would be prevented from learning about its importance. The *Mozert* decision can then be seen as justified because of the large threat it implies to important liberal values.

By contrast, take the well-known case of the Old Amish in *Wisconsin v. Yoder*.<sup>73</sup> Amish students and their parents wanted to be excused from attending school after eighth grade.<sup>74</sup> Again the parent's argument was that additional schooling would interfere with their desire to raise their children in accord with their traditions.<sup>75</sup> In this case, the Supreme Court sided with the Amish.<sup>76</sup> The best argument for this outcome is that the Amish constitute no threat. They are a small group, politically uninvolved. They are not a growing movement whose preference for old ways of life is in danger of catching on. Thus it may make sense to rule in their favor out of respect for diversity, as the court did, because doing so produces so little threat to liberal values.

## V. CONCLUSION

My conclusion, then, is that while the dispute between Comprehensive and Political Liberalism does not help us in deciding some of the most difficult cases, it does help us see the main factor at issue—the importance of maintaining and promoting the virtues necessary for a liberal society to flourish. The importance of sustaining liberal values can serve as an important criterion for dealing with these hard cases.

I realize that much more needs to be said and more cases examined for a full defense of this conclusion. I also want to point out that this is not a conclusion about what the law is. I write as a political and moral philosopher trying to figure out the best reasons for deciding some difficult issues. The law must take into account past law and precedent. The moral philosopher, for better or worse, is freed from that constraint.

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<sup>73</sup> 406 U.S. 205 (1972).

<sup>74</sup> *Id.* at 207–09.

<sup>75</sup> *Id.* at 209.

<sup>76</sup> *Id.* at 235–36.

# FROM THE BCS TO THE BS: WHY “CHAMPIONSHIP” MUST BE REMOVED FROM THE BOWL CHAMPIONSHIP SERIES

Parker Allred\*

## I. INTRODUCTION

Among the myriad values that shape the great American landscape, equal opportunity and fair play stand as fundamental. The Bowl Championship Series’ (“BCS”) method of determining college football’s national champion undermines these core principles. Formed in 1998, the BCS’s objective was to improve the system of crowning college football’s national champion.<sup>1</sup> In pursuit of its goal, however, the BCS has failed; rather, it has done nothing but create yearly controversy. This acrimony transcends universities, conferences, fan bases, and even political parties, and there is a needed “change” to which opposite ends of the political spectrum can agree.<sup>2</sup>

Many argue that the BCS’s method of determining a national champion is unfair and only favorable to big-name, big-money programs.<sup>3</sup> Collegiate teams playing in the Mountain West and Western Athletic conferences exemplify these complaints—just ask the University of Utah or Boise State University.<sup>4</sup> From a legal standpoint, scholars primarily argue that the BCS is competitively unfair and violates antitrust laws.<sup>5</sup> The antitrust theory has support; however, it is only one of the BCS’s many possible legal violations.

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<sup>1</sup> Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219, 229 (2007).

<sup>2</sup> See Editorial, *Political Football*, L.A. TIMES, Jan. 1, 2010, at A30 (discussing President Obama’s and Representative Barton’s shared view that the BCS system needs to change); Matt Canham, *Hatch: Boise Deserves White House Invite*, S.L. TRIB., Jan. 14, 2010, at 1 (discussing Senator Hatch’s and President Obama’s displeasure with the BCS).

<sup>3</sup> Schmit, *supra* note 1, at 226; see Joseph Martinich, *College Football Rankings: Do the Computers Know Best?*, INTERFACES (SPECIAL ISSUE), Sept.–Oct. 2002 at 85, 85–86C; Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 285–86 (2008).

<sup>4</sup> Boise State University had undefeated seasons in both 2006 and 2009; likewise, the University of Utah had unblemished records in 2004 and 2008. ESPN, NCAA FBS (Division I-A) Football Standings–2009, <http://espn.go.com/college-football/standings> (select Season 2008 and Season 2004) (last visited Mar. 1, 2010).

<sup>5</sup> See, e.g., Schmit, *supra* note 1, at 221.

The purpose of this Note is to explore another possible legal conflict involving the BCS: specifically, whether the BCS violates deceptive and unfair trade practices. This Note suggests that the BCS does indeed violate unfair and deceptive trade practice laws through staging a “*national championship game*,” which excludes eligible undefeated teams from the competition.<sup>6</sup>

There are different methods through which consumers victimized by deceptive trade practices can pursue legal recourse, and this Note examines which route would likely be most successful against the BCS. Part II of this Note briefly discusses the BCS’s history and the background of consumer protection laws. Part III analyzes the scope of the Utah Consumer Sales Practices Act and how the BCS violates the Act through deceptive and misleading advertising. Part IV and Part V will discuss available judicial remedies and briefly conclude with how the BCS must change to comply with consumer protection laws.

## II. HISTORY OF THE BCS AND CONSUMER PROTECTION LAWS

### A. *The Bowl Championship Series*

Division I-A college football’s postseason is unlike any other at the collegiate level. Rather than a playoff system, bowl games are played in a postseason to determine a national champion.<sup>7</sup> The first postseason bowl game was the Rose Bowl, played in 1902, and many more bowls began thereafter.<sup>8</sup> The longstanding tradition of these bowl games provides one justification of why a playoff system has not yet been implemented.<sup>9</sup> Even early on, conflicts often arose concerning who was the national champion because the bowl system was structured in such a way that often prevented the two best teams from competing against each other.<sup>10</sup> In fact, prior to 1998, two prominent polls were responsible for ranking and choosing a national champion, which at times resulted in co-champions due to a split opinion between the polls.<sup>11</sup>

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<sup>6</sup> See Memorandum from Christopher Peterson, Professor, S.J. Quinney College of Law, University of Utah, to Paul Cassell, Professor, S.J. Quinney College of Law, University of Utah 1 (Jan. 16, 2009) (on file with author).

<sup>7</sup> Rogers III, *supra* note 3, at 286–87.

<sup>8</sup> *Id.* at 287; see JAMES QUIRK, THE ULTIMATE GUIDE TO COLLEGE FOOTBALL 449 (2004).

<sup>9</sup> Rogers III, *supra* note 3, at 286–87.

<sup>10</sup> See College Football Data Warehouse, Recognized National Championships by Year, [http://www.cfbdatawarehouse.com/data/national\\_championships/nchamps\\_year.php](http://www.cfbdatawarehouse.com/data/national_championships/nchamps_year.php) (last visited Mar. 1, 2010). There have been many years where at least two teams were selected as national champion, including four teams in 1919. See *id.*

<sup>11</sup> As recently as 1997, Michigan and Nebraska were both crowned national champion due to a split opinion in the voting polls. See College Football Data Warehouse, AP and Coaches Final Season Polls, [http://www.cfbdatawarehouse.com/data/national\\_championships/poll\\_results.php?year=1995](http://www.cfbdatawarehouse.com/data/national_championships/poll_results.php?year=1995) (last visited Mar. 1, 2010).

In hopes of improving the system of selecting a national champion, the Bowl Championship Series was established in 1998. Initially, there were four BCS Bowls: the Fiesta, Orange, Sugar, and Rose.<sup>12</sup> Since 2006, the BCS has added a fifth bowl game—the “BCS National Championship Game”—played roughly one week after the other four BCS bowls.<sup>13</sup> This bowl was designed to create a matchup between the two best teams<sup>14</sup>—whether it has accomplished this goal will be further analyzed later in this Note. Currently, eleven conferences are part of the BCS agreement (in addition to Notre Dame) and are eligible to participate in the BCS bowls.<sup>15</sup> Of these conferences, only six have a guaranteed spot to compete in a BCS bowl.<sup>16</sup>

The methodology used in determining who plays in the BCS bowls changes frequently, but has most recently consisted of three equally weighted components: a coaches’ poll, a media poll, and a computer poll.<sup>17</sup> This methodology—arduous to understand at best—sparks controversy every year in determining who plays in the BCS National Championship Game.<sup>18</sup> Controversy arises because many spectators and analysts alike often disagree about who is, and who should be ranked among the top two teams to play in the final bowl.

### B. Consumer Protection Laws

In ensuring that the marketplace contains the most accurate information, three main sources of false advertising law exist in the United States. The first two, both federal statutes, are the Lanham Act and the Federal Trade Commission Act. The third source is state law often patterned after the Federal Trade Commission Act and known as the “Little FTC Acts.”<sup>19</sup> This Section discusses the origins, features, and key differences among these three remedial sources.

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<sup>12</sup> Bowl Championship Series, All-time Results, <http://www.bcsfootball.org/news/story?id=4809856> (last visited Mar. 1, 2010).

<sup>13</sup> Rogers, *supra* note 3, at 289.

<sup>14</sup> *Id.* at 291.

<sup>15</sup> Bowl Championship Series, The BCS Is . . . , <http://www.bcsfootball.org/news/story?id=4809716> (last visited Mar. 1, 2010).

<sup>16</sup> *Id.* The six Conferences with guaranteed spots in a BCS bowl are the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10, and Southeastern; the remaining conferences not guaranteed a BCS bowl are Conference USA, Mid-American, Mountain West, Sun Belt, and Western Athletic. *See id.*

<sup>17</sup> Susan Buchman & Joseph B. Kadane, *Reweighting the Bowl Championship Series*, 4 J. OF QUANTITATIVE ANALYSIS IN SPORTS 3, art. 2, 1 (2008).

<sup>18</sup> Perhaps the one exception was in 2006, when the only two undefeated teams squared off. Rogers, *supra* note 3, at 291. The methodology will be discussed in more detail later in this Note.

<sup>19</sup> Jon Mize, *Fencing Off the Path of Least Resistance: Re-examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 654 (2005); *see generally*, CAROLYN L. CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (7th ed. 2008) (discussing alternatives to UDAP claims and FTC actions, including federal Racketeer Influenced and Corrupt Organizations Act claims).

### 1. *The Lanham Act*

Passed in 1946, the Lanham Act aimed to protect business and prevent injury to the public interest. Although focused primarily on trademark protections,<sup>20</sup> section 43(a) of the Act specifically targeted deceptive trade practices and was designed to protect commercial interests from false or misleading advertising. Section 43(a) states:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by *any person* who believes that he or she is or is likely to be damaged by such act.<sup>21</sup>

Consumers have attempted to challenge fraudulent advertisements under section 43(a) because the phrase “any person” appears to create a private cause of action for a consumer who is victimized by any false or misleading advertisement.<sup>22</sup> However, there have been varying interpretations of how “any person” should be construed. The first court to deal with “consumer standing for a false advertising claim” under the Lanham Act was the Second Circuit Court of Appeals in *Colligan v. Activities Club of New York, Ltd.*<sup>23</sup>

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<sup>20</sup> Jonathan D. Baker, *Correcting a Chromatic Aberration: Qualitex Co. v. Jacobson Products Co.*, 9 HARV. J.L. & TECH 547, 550 (1996).

<sup>21</sup> 15 U.S.C. § 1125(a) (2006) (emphasis added).

<sup>22</sup> Mize, *supra* note 19, at 654; *see also* Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 513–14 (8th Cir. 1996) (false advertising claim alleging that competing prescription drugs are completely bioequivalent); Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1173–74 (6th Cir. 1995); Telebrands Corp. v. Media Group, Inc., No. 97 Civ. 6768(RPP), 1997 WL 790576, at \*2 (S.D.N.Y. Dec. 24, 1997) (consumer challenging the marketing claims that a can opener does not leave sharp edges).

<sup>23</sup> 442 F.2d 686 (2d Cir. 1971); *see also* Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 294–95 (2007).

In *Colligan*, a group of high school students brought suit against the defendant for advertising a ski tour that allegedly did not live up to the standard as advertized.<sup>24</sup> The court was forced to rule on what was implied by the phrase “any person”; thus, helping define who had standing to bring suit under section 43(a).<sup>25</sup> Ultimately, the court determined that the Lanham Act was intended to protect people engaged in commerce against unfair competition.<sup>26</sup> Therefore, despite the statutory language in section 43(a), the standing requirements for a false advertising claim required a competitive injury; i.e., an injury to a competitor or a consumer with substantial commercial interests.<sup>27</sup> As a result, an average consumer is limited under the Lanham Act unless he has a competitive interest through which standing may be granted.

## 2. *The Federal Trade Commission Act*

In the early part of the twentieth century, Congress was under pressure from the public to provide more oversight of business practices in the marketplace.<sup>28</sup> To accommodate public demand, Congress adopted the Federal Trade Commission Act (“FTC Act”) in 1914.<sup>29</sup> Initially, the FTC Act focused on unlawful and unfair methods of competition, eventually expanding to prohibit unfair and deceptive acts.<sup>30</sup> In 15 U.S.C. § 45, Congress adopted the language “unfair or deceptive acts or practices in or affecting commerce”<sup>31</sup> and gave discretion to the Federal Trade Commission and courts on how broadly to construe the terms.<sup>32</sup> The FTC Act makes it a violation to “disseminate, or cause to be disseminated, any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce.”<sup>33</sup>

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<sup>24</sup> 442 F.2d at 687–88.

<sup>25</sup> *Id.* at 689.

<sup>26</sup> *Id.* at 690–92. *But see* *Thorn v. Reliance Van Co.*, 736 F.2d 929, 932 (3d Cir. 1984) (rejecting the rule in *Colligan* on the grounds that it goes against the “plain meaning” rule set out by the Supreme Court).

<sup>27</sup> *See* Lemley, *supra* note 23, at 295.

<sup>28</sup> Mary Ellen Zuckerman, *The Federal Trade Commission in Historical Perspective: The First Fifty Years*, in *MARKETING AND ADVERTISING REGULATION: THE FEDERAL TRADE COMMISSION IN THE 1990S* 169, 170 (Patrick E. Murphy & William L. Wilkie eds., 1990).

<sup>29</sup> 15 U.S.C. §§ 41–58 (2006).

<sup>30</sup> Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111. This Act amended the original legislation and gave the Commission authorization to protect consumers from deceptive and unfair practices. *Id.*; *see* Legislation, *The Federal Trade Commission Act of 1938*, 39 COLUM. L. REV. 259, 259–61 (1939); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 440 (1991).

<sup>31</sup> 15 U.S.C. § 45(a)(1) (2006).

<sup>32</sup> *See* Sovern, *supra* note 30, at 440.

<sup>33</sup> 15 U.S.C. § 52(a) (2006).

The FTC Act provides no private cause of action; thus, the Commission is the only party able to litigate an infraction. This is problematic because consumers have no recourse through 15 U.S.C. § 45, except to hope that their claims filed with the FTC will lead to an action.<sup>34</sup>

To succeed in an FTC action, the Commission bears the burden of meeting a three-part test. It must prove “first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”<sup>35</sup> In applying this standard, the FTC looks at (1) claims conveyed in the advertisement, (2) claims that could be misleading or fraudulent, and (3) claims that are material to prospective buyers.<sup>36</sup> The Commission is only required to prove these elements and can rely on its own viewing of the ad along with extrinsic evidence.<sup>37</sup> This approach gives the FTC broad discretion and deference in succeeding to impose penalties. And those found to be in violation of the FTC Act are usually enjoined in a cease and desist order and often fined for each violation.<sup>38</sup>

From afar, one would assume that the Commission is quite successful in finding and deterring those who participate in deceptive practices. However, its resources are scarce, requiring them to be selective in targeting deceptive trade practices.<sup>39</sup> Because of these limitations, several consumer claims remain unaddressed, causing many to criticize the FTC as ineffective.<sup>40</sup>

### 3. *The Little FTC Acts*

In the 1960s and 1970s, all fifty states and the District of Columbia enacted at least one statute to provide consumer protection against fraudulent and misleading trade practices.<sup>41</sup> A majority of these “Unfair and Deceptive Acts or Practices” (“UDAP”) statutes are patterned after the FTC Act and prohibit false or misleading information.<sup>42</sup> Because of the state acts’ likeness with the FTC Act, commentators often call the statutes “Little FTC Acts” or “UDAP statutes.”<sup>43</sup> Unlike the federal

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<sup>34</sup> See 15 U.S.C. § 45(b) (2006).

<sup>35</sup> *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (quoting the FTC’s criteria stated in *In re Cliffdale Assocs., Inc.*, 103 FTC 110, 164–65 (1984)); see Mize, *supra* note 19, at 657.

<sup>36</sup> *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992) (holding that this standard of review was valid and that the Commission could rely on its own analysis as well as extrinsic evidence if desired to determine whether advertisements violated the FTC Act).

<sup>37</sup> See *id.* at 318.

<sup>38</sup> 15 U.S.C. § 45(m) (2006).

<sup>39</sup> See Sovern, *supra* note 30, at 440–42 (arguing that key limitations include politics, scarce resources, and the ability to bring only proceedings that “would be to the interest of the public”).

<sup>40</sup> *Id.* at 442.

<sup>41</sup> CARTER ET AL., *supra* note 19.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



statutes however, all UDAP statutes—except for Iowa’s—provide consumers with a private cause of action for deceptive practices.<sup>44</sup>

Another benefit of UDAP statutes is their broad and flexible characteristics, through which consumers can sue to deter unfair, unconscionable, or deceptive advertising and trade practices.<sup>45</sup> This expansive nature enables UDAP statutes to stretch as necessary in providing all-purpose remedies to consumers victimized by abusive business practices.<sup>46</sup> Therefore, an action lacking characteristics for a contract or tort claim can come under a UDAP statute as a cause of action.<sup>47</sup> Before a consumer can successfully litigate a claim, however, the claim must first fall within the state’s UDAP statute’s scope.<sup>48</sup> If a UDAP statute is applicable, recovery can vary from state to state.<sup>49</sup> Many states offer treble damages, punitive damages, statutory minimum damages, and attorney’s fees.<sup>50</sup> In addition, all fifty states have UDAP statutes, and most sanction cease and desist orders to stop merchants from engaging in deceptive practices.<sup>51</sup> Although there are different methods of forcing companies to comply with fair trade practices, Little FTC Acts are likely the only and best route through which average consumers can take on deceptive and misleading marketing schemes.

### III. WHY THE BCS SHOULD BE THE BS

Because the consumer has the burden of proving that a UDAP statute applies, UDAP statutes generally are and should be construed in a light most favorably to protect the public.<sup>52</sup> Most UDAP statutes are broadly worded and generally apply to “virtually all economic activity.”<sup>53</sup> Although virtually every state UDAP statute could apply to the BCS, the following will analyze why the BCS violates Utah’s UDAP statute.

#### A. *The Scope of Utah’s UDAP Statute*

Enacted in 1973, the Utah Consumer Sales Practices Act (the “UCSPA”) was intended to be:

*construed liberally* to promote the following policies:

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<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.* at 1–2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.* at 9.

<sup>49</sup> See Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 461 (1984).

<sup>50</sup> Sovern, *supra* note 30, at 448–49.

<sup>51</sup> CARTER ET AL., *supra* note 41, at 10–11.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 11.

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to *protect consumers* from *suppliers* who *commit deceptive and unconscionable sales practices*;
- (3) to encourage the development of fair consumer sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection . . . .<sup>54</sup>

Thus, most notably, the UCSPA is to be “construed liberally” to “protect consumers” from those who “commit deceptive and unconscionable sales practices.”<sup>55</sup> Moreover, it requires deference to federal regulations and court decisions, creating a hybrid federal-state jurisprudence to help curb fraudulent and misleading advertising.<sup>56</sup> Consistent with legislative intent, Utah’s Supreme Court has encouraged a liberal interpretation of the UCSPA, while also comporting with federal jurisprudence against deceptive trade practices.<sup>57</sup>

The UCSPA expressly prohibits “a deceptive act or practice by a supplier in connection with a consumer transaction . . . before, during, or after the transaction.”<sup>58</sup> Therefore, to litigate a claim successfully, there must be a *supplier* who uses *deceptive acts* at some time before, during, or after a *consumer transaction*.<sup>59</sup> The question to be analyzed is thus whether the Bowl Championship Series is a supplier who uses deceptive acts while engaging in consumer transactions. The following sections will analyze the terms “supplier,” “consumer transaction,” and “deceptive acts” in turn.

### 1. The BCS Acts as a Supplier

According to the Utah Code, “[s]upplier” means a *seller*, lessor, assignor, *offeror*, *broker*, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.”<sup>60</sup> If the term is construed liberally, as the Utah Supreme Court suggests, the scope of who can be a supplier is vast.<sup>61</sup> In fact, the U.S. Court of Appeals for the Tenth Circuit Court has upheld a lower court finding that attorneys who regularly engage

<sup>54</sup> UTAH CODE ANN. § 13-11-2(1)–(4) (2009) (emphasis added).

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* § 13-11-2(4); Peterson, *supra* note 6, at 2.

<sup>57</sup> *See* Wade v. Jobe, 818 P.2d 1006, 1015 (Utah 1991). Here, the Supreme Court stated that “the legislature has mandated a liberal construction of the Act.” *Id.*; *see also* State v. B & H Auto, 701 F. Supp. 201, 204 (D. Utah 1988) (construing the term “any person” broadly so that the concept of privity cannot be used to bar a plaintiff’s claim).

<sup>58</sup> UTAH CODE ANN. § 13-11-4(1) (2009).

<sup>59</sup> *Id.* (emphasis added).

<sup>60</sup> *Id.* § 13-11-3(6) (emphasis added).

<sup>61</sup> *Id.* § 13-11-2; Wade, 818 P.2d at 1015.

in collecting consumers' debt are suppliers.<sup>62</sup> Likewise, the BCS fits among the broad definition of a supplier. The strongest argument perhaps lies with the words "seller" and "offeror."<sup>63</sup>

The BCS acts as an offeror and seller because it offers goods for sale. For example, on the "Official Online Store of the Bowl Championship Series," many products are advertised to be sold, such as individual NCAA teams' sweatshirts, hats, T-shirts, and DVDs.<sup>64</sup> Moreover, there are watches, flags, game programs from prior bowls, and even different types of furniture offered for purchase.<sup>65</sup> Soliciting business with these types of products from its online store, the BCS is acting as both an offeror and seller. Thus, acting in this capacity and using these types of practices, the BCS by definition under the UCSPA is considered a supplier.

Furthermore, the BCS frequently advertises and solicits consumers to attend BCS games or watch them televised, including the BCS National Championship Game. The BCS invites several universities to participate in its bowl games<sup>66</sup> and provides many festivities throughout the week of the game for players and spectators. In offering bowl opportunities, the BCS negotiates with universities and gives them bids to play in specific bowls. Hence, the BCS acts as a *broker* for college football games by inviting universities, including their staff, students, and alumni, to participate in its bowl events.<sup>67</sup> Thus, not only is the BCS acting in the capacity of an offeror or seller, but also as a brokering agent—any one of which constitutes a supplier under the UCSPA.

Even if the BCS does not directly interact or engage in contractual relations with universities or consumers, the UCSPA still applies because a supplier does not have to deal directly with the consumer.<sup>68</sup> Because the BCS brokers games for universities, offers goods for sale, and provides means of purchasing sport apparel, paraphernalia, and furniture, it falls within the scope of the term supplier under the UCSPA.

## 2. *The BCS Engages in Consumer Transactions*

The UCSPA defines a "consumer transaction" as "a *sale*, lease, assignment, award by chance, or other written or oral transfer or disposition of *goods, services*, or other property, both tangible and intangible (except securities and insurance),"

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<sup>62</sup> *Heard v. Bonneville Billing and Collections*, No. 99-4092, slip op. at 1-5 (10th Cir. June 26, 2000); see *Brown v. Constantino*, No. 2:09CV00357DAK, 2009 WL 3617692, at \*2 (D. Utah Oct. 27, 2009) (referencing *Heard v. Bonneville Billing and Collections*).

<sup>63</sup> UTAH CODE ANN. § 13-11-3(6) (2009).

<sup>64</sup> BCS Official Online Store, <http://bcsfootball.teamfanshop.com/> (last visited March 1, 2010).

<sup>65</sup> *Id.*

<sup>66</sup> BCS Selection Procedures, <http://www.bcsfootball.org/news/story?id=4819597> (last visited Mar. 1, 2010).

<sup>67</sup> See Peterson, *supra* note 6, at 3.

<sup>68</sup> UTAH CODE ANN. § 13-11-3(6) (2009).

and it includes “an offer; a solicitation; an agreement; or performance of an agreement.”<sup>69</sup> The language of the statute that particularly stands out is “goods, services, or other property, both tangible and intangible.”<sup>70</sup> The Utah Supreme Court has applied this language to a broad range of transactions—even residential leases and real estate.<sup>71</sup>

Considering the liberal interpretation of Utah’s UDAP statute, the BCS engages in consumer transactions. As mentioned in the “supplier” analysis, the BCS sells hats, sweatshirts, T-shirts, DVDs, helmets, photographs, watches, key chains, and other sports paraphernalia.<sup>72</sup> Moreover, the Web site has a store through which consumers can make an online credit card payment to effectuate a transaction.<sup>73</sup> Thus, a consumer transaction occurs each time a tangible good is sold through the BCS Web site.

In addition, the UCSPA defines consumer transaction as an “expenditure of money or property” for the “purposes that relate to a business opportunity.”<sup>74</sup> The BCS spends massive amounts of money to build its brand and gain exposure. For instance, the BCS maintains an active, year-long marketing campaign, particularly during football season.<sup>75</sup> It maintains an updated Web site with news and highlights as a resource for the public.<sup>76</sup> These expenditures are used for a business opportunity because more exposure translates into more business.

Moreover, the BCS has agreements with eleven conferences and Notre Dame through which it arranges the five BCS bowls.<sup>77</sup> Each bowl has different sponsorship agreements, which generate a large amount of revenue.<sup>78</sup> Many criticize this aspect of the BCS, alleging that the business of the BCS is not to determine a true national champion or to encourage collegiate athletics, but to only make money.<sup>79</sup> This argument has merit. For instance, in the 2008–09 season, the BCS paid out more than \$228 million to colleges and expects to pay more than

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<sup>69</sup> *Id.* § 13-11-3(2) (emphasis added).

<sup>70</sup> *Id.*

<sup>71</sup> *Wade v. Jobe*, 818 P.2d 1006, 1014–15 (Utah 1991). The court construed the terms liberally to promote public policies; as such, residential leases are considered a consumer transaction in light of the UCSPA. *Id.*

<sup>72</sup> See source cited *supra* note 64.

<sup>73</sup> *Id.*

<sup>74</sup> UTAH CODE ANN. § 13-11-3(2)(a)(ii)(A) (2009).

<sup>75</sup> The BCS even uses common social networking sites like Twitter and Facebook to connect with people. See BCS: News, Highlights, and Insights into the Bowl Championship Series, <http://www.bcsfootball.org/> (last visited on Mar. 1, 2010).

<sup>76</sup> *Id.*

<sup>77</sup> See source cited *supra* note 15.

<sup>78</sup> See Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 SPORTS LAW. J. 43, 43 (2005); see also Rogers, *supra* note 3, at 286 (noting that the payout to a team receiving a BCS bowl birth is between \$14 million and \$17 million, half of which goes to the team with the other half going to universities within the conference).

<sup>79</sup> Guruli, *supra* note 78, at 44.

\$2.5 billion over the next decade.<sup>80</sup> Attendance at the five BCS bowls totaled nearly 400,000 people,<sup>81</sup> and every person who attended the bowl games either purchased or were given tickets. A large part of the BCS's revenue is a result of its business expenditures to market itself to a larger and more diverse audience. Such expenditures are unequivocally related to a business opportunity, which under the UCSPA is considered a consumer transaction.

The BCS is involved in the distribution of myriad goods and services, which are sold, freely given away, or transferred in one way or another. It expends money year-round in advertisements to promote its brand, which has become a huge money-making machine. Moreover, goods are advertised by commercials and can be purchased through its Web site using a credit card. These examples, taken both individually and collectively, constitute consumer transactions. Therefore, the scope of the UCSPA's term "consumer transaction" most definitely encompasses the BCS's actions.

### 3. *The BCS Uses Deceptive Trade Practices*

Under the UCSPA, a supplier commits a deceptive act or practice in connection with a consumer transaction if it "knowingly or intentionally . . . indicates that the subject of a consumer transaction has sponsorship, approval, *performance characteristics*, accessories, uses, or benefits, if it has not,"<sup>82</sup> or "indicates that the subject . . . is of a *particular standard, quality*, grade, style, or model, if it is not."<sup>83</sup> The scope of the terms "performance characteristics," "particular standard," and "quality" has broad applicability.<sup>84</sup>

Utah's UDAP statute uses the language "knowingly or intentionally."<sup>85</sup> In states that have this type of statutory language, a liberal standard is generally applied.<sup>86</sup> There is little Utah jurisprudence on what "knowledge" requires under the UCSPA; however, other states have satisfied the element through circumstantial evidence<sup>87</sup> or a showing that the seller should have known of the

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<sup>80</sup> Bowls Background, <http://www.bcsfootball.org/news/story?id=4819399> (last visited Mar. 1, 2010).

<sup>81</sup> All-Time Results, <http://www.bcsfootball.org/news/story?id=4809856> (last visited Mar. 1, 2010). In 2009, BCS bowls had the following number of people in attendance: BCS National Championship Game, 78,468; Rose Bowl, 93,293; Orange Bowl, 73,602; Sugar Bowl, 71,872; Fiesta Bowl, 72,047. *Id.*

<sup>82</sup> UTAH CODE ANN. § 13-11-4(2)(a) (2009) (emphasis added).

<sup>83</sup> *Id.* § 13-11-4(2)(b) (emphasis added).

<sup>84</sup> CARTER ET AL., *supra* note 19, at 286.

<sup>85</sup> UTAH CODE ANN. § 13-11-4(2) (2009).

<sup>86</sup> CARTER ET AL., *supra* note 19, at 198.

<sup>87</sup> *Etheridge v. Oak Creek Mobile Homes, Inc.*, 989 S.W.2d 412, 418 (Tex. App. 1999) (having awareness of actual intent can be inferred from conduct).

statement's falsity.<sup>88</sup> Moreover, in some jurisdictions, negligence or conscious ignorance can also satisfy the liberal standard.<sup>89</sup> Therefore, under the UCSPA, "knowingly and intentionally" likely refers to the act of advertising a product or service, not actual knowledge or intent to deceive the consumer.

Among other states with similar UDAP statutes, violations have been found when a seller misrepresents a product's nature or characteristic. For example, in car sales, courts have found violations where a car was alleged to be an identical model to an earlier one,<sup>90</sup> or where the condition, mileage, and warranty were misrepresented.<sup>91</sup> Other violations include false representations pertaining to performance characteristics of appliances,<sup>92</sup> claims that hearing aids help those with irreversible hearing problems,<sup>93</sup> false promises of well-functioning sewer systems,<sup>94</sup> misrepresentations of a franchise's earning potential<sup>95</sup> or the layout of a condominium terrace,<sup>96</sup> and even unfulfilled promises made by a record company to an aspiring singer.<sup>97</sup> These examples illustrate that courts use broad discretion in finding deceptive representations of a product's characteristics.<sup>98</sup> In addition to characteristics, courts have broadly applied UDAP statutes to misrepresentations of a product's quality, style, and nature.<sup>99</sup>

The BCS represents that its final bowl game of the season has the *performance characteristics* of determining a national champion.<sup>100</sup> Furthermore, the *quality* and *nature* of the BCS National Championship Game, as proposed by

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<sup>88</sup> *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003) (having knowledge of an untruth or reckless disregard satisfies the scienter element).

<sup>89</sup> *State ex rel. Redden v. Discount Fabrics*, 615 P.2d 1034, 1039 (Or. 1980).

<sup>90</sup> *Mercedes-Benz of N. Am., Inc. v. Garten*, 618 A.2d 233 (Md. Ct. Spec. App. 1993).

<sup>91</sup> *See, e.g., Attaway v. Tom's Auto Sales, Inc.*, 242 S.E.2d 740, 743 (Ga. Ct. App. 1978) (finding that a motion for summary judgment for defendant was inappropriate where plaintiffs alleged fraudulent misrepresentations); *Briggs v. Carol Cars, Inc.*, 553 N.E.2d 930, 933 (Mass. 1990) (misrepresenting a car as having low-mileage and being in good condition constitutes a UDAP violation).

<sup>92</sup> *Whirlpool Corp. v. Texical, Inc.*, 649 S.W.2d 55 (Tex. App. 1982) (holding remedy appropriate where refrigerators did not work as specified).

<sup>93</sup> *Commonwealth v. Hush-Tone Indus., Inc.*, 1971 WL 13030, at \*25 (Pa. Commw. Ct. Dec. 22, 1971).

<sup>94</sup> *Woods v. Littleton*, 554 S.W.2d 662, 672 (Tex. 1977).

<sup>95</sup> *Woo v. Great Sw. Acceptance Corp.*, 565 S.W.2d 290, 298 (Tex. Civ. App. 1978).

<sup>96</sup> *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 674 A.2d 106, 112 (Md. Ct. Spec. App. 1996).

<sup>97</sup> *See Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 591 (Tenn. Ct. App. 1980).

<sup>98</sup> *CARTER ET AL.*, *supra* note 19, at 286–88.

<sup>99</sup> *See, e.g., Manufactured Hous. Mgmt. Corp. v. Tubb*, 643 S.W.2d 483, 486–87 (Tex. App. 1982); *Jim Walter Homes Inc. v. Chapa*, 614 S.W.2d 838, 841–42 (Tex. Civ. App. 1981).

<sup>100</sup> *See source cited supra* note 75; *Peterson, supra* note 6, at 4.

the BCS's advertising efforts, suggest that the game establishes the national champion, i.e., the best among all NCAA Division-I football teams. It is no secret, however, that the national champion discussion brings controversy every year. At best, the BCS negligently and consciously disregards the public's interest and view of how a champion should be determined, thus deceiving the public.<sup>101</sup>

There appears to be little existing jurisprudence of the terms "champion," "national champion," or "national championship."<sup>102</sup> According to *The New Oxford American Dictionary*, champion entails "a person who has *defeated or surpassed all rivals in a competition*."<sup>103</sup> Other definitions include "a person who has *defeated all opponents in a competition* or series of competitions, so as to hold first place,"<sup>104</sup> and "a person or thing *defeating all opponents*."<sup>105</sup> The common feature shared among these definitions, and likely those shared by spectators and the courts,<sup>106</sup> requires that a champion defeat "all willing competitors."<sup>107</sup>

According to the BCS, "[t]he BCS was implemented beginning with the 1998 season to determine the national champion for college football while maintaining and enhancing the bowl system that's nearly 100 years old."<sup>108</sup> On occasion, perhaps the BCS accomplishes its goal of determining an undisputed national champion, i.e., one who defeats all willing competitors.<sup>109</sup> However, the success of the BCS's goal is an exception to the rule.

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<sup>101</sup> In 2005, 65 percent of college football fans were of the opinion that the BCS bowls should be replaced with a playoff. Gallup, Football, <http://www.gallup.com/poll/1705/Football.aspx#2> (last visited Mar. 1, 2010).

<sup>102</sup> The Supreme Court did not disagree that a boxer becomes a "world champion" by "defeating the existing champion or by eliminating all contenders." *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 246 (1955).

<sup>103</sup> *THE NEW OXFORD AMERICAN DICTIONARY* 284 (1st ed. 2001) (emphasis added).

<sup>104</sup> *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 344 (2d ed. 1987) (emphasis added).

<sup>105</sup> *RANDOM HOUSE WEBSTER'S DICTIONARY OF AMERICAN ENGLISH* 125 (1997) (emphasis added).

<sup>106</sup> See *Int'l Boxing Club of N.Y.*, 348 U.S. at 246 (noting that the complaint defined a world champion as one who "gains his title by . . . eliminating all contenders").

<sup>107</sup> Peterson, *supra* note 6, at 4–5.

<sup>108</sup> Bowl Championship Series, Tournament of Roses, <http://www.tournamentofroses.com/bcs/> (last visited Mar. 1, 2010); see also Peterson, *supra* note 6, at 4–5 (arguing that the BCS's method of determining its national champion is misleading).

<sup>109</sup> For instance, in 2006 the BCS National Championship Game was between the University of Southern California (USC) and the University of Texas, who were the only two undefeated teams remaining in college football. See Mike Downey, *Young Longhorns Give USC the Hook*, CHICAGO TRIBUNE, Jan. 5, 2006, at 1; ESPN, *supra* note 4 (indicating USC's only loss occurred in the BCS championship game). This matchup succeeded in finding a final national champion—one defeating all willing competitors—because the team that won was the only remaining undefeated team. Downey, *supra* note 109; ESPN, *supra* note 4.

Recently, the BCS system has selected a national champion who has lost one or more games, while other teams have remained undefeated.<sup>110</sup> For example, in the 2008–09 season, the BCS invited two teams to the national championship game, the University of Florida and the University of Oklahoma, both of whom had lost respectively to the University of Texas and the University of Mississippi in the regular season.<sup>111</sup> Conversely, the University of Utah and Boise State University were undefeated going into the BCS selection process.<sup>112</sup> After the bowl games had been played, and the smoke cleared, the University of Utah was the only remaining undefeated team at the end of the season.<sup>113</sup> Nevertheless, the University of Florida won the national championship game and was crowned champion.<sup>114</sup> Given the common meaning of the word “champion”—one who defeats all willing competitors—it seems misleading and indeed, deceptive, to crown a champion when the crowned has been defeated while others have not.<sup>115</sup>

In addition, claims that have implicit messages in an advertisement can also violate UDAP statutes if they are misleading.<sup>116</sup> When the BCS uses the term “national champion,” it implies that the team has defeated all willing competitors and is even perhaps the nation’s best team. This implication is deceptive, and it misleads the public into believing that the winner of the BCS National Championship Game has defeated all viable competitors.

Many implied claims have been found misleading. For instance, in *Kraft, Inc. v. Federal Trade Commission*, Kraft claimed that a brand of cheese was highly concentrated with as much calcium as five ounces of milk.<sup>117</sup> The ad also contained a footnote stating the cheese had 70 percent of the calcium contained in five ounces of milk.<sup>118</sup> The court analyzed the implications of the advertisements and found the advertising was misleading because consumers would assume that a cheese slice had the same amount of calcium as five ounces of milk, when in fact it did not.<sup>119</sup>

A statement can convey many messages, and if there is more than one reasonable meaning, it can violate UDAP statutes “if one of those meanings is deceptive.”<sup>120</sup> As in *Kraft*, consumers should have a UDAP claim against the BCS

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<sup>110</sup> LSU was selected to play in the BCS National Championship Game after having two losses in the regular season. Thayer Evans & Pete Thamel, *L.S.U. Reaches Title Game, But the Grumbling Has Begun*, N.Y. TIMES, Dec. 3, 2007, at D1.

<sup>111</sup> See ESPN, 2008 NCAA College Football Standings, [http://espn.go.com/college-football/standings/\\_/year/2008](http://espn.go.com/college-football/standings/_/year/2008) (last visited March 1, 2010); Peterson, *supra* note 6, at 5.

<sup>112</sup> See Dick Harmon, *Group Looking to Put End to BCS Mess*, DESERET NEWS, Dec. 9, 2008, at D1.

<sup>113</sup> ESPN, *supra* note 111.

<sup>114</sup> *Utah Says It's No. 1*, N.Y. TIMES, Jan. 10, 2009, at D6.

<sup>115</sup> See Peterson, *supra* note 6, at 5.

<sup>116</sup> CARTER ET AL., *supra* note 19, § 4.2.13, at 218.

<sup>117</sup> *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 314 (7th Cir. 1992).

<sup>118</sup> *Id.* at 315.

<sup>119</sup> *Id.* at 326–27.

<sup>120</sup> CARTER ET AL., *supra* note 19, § 4.2.13, at 219.



because it misleads the public by implying that its national champion has defeated all willing opponents and is the nation's best team, when in reality, it may not be.

#### 4. *The Deceptive Methodology of the BCS*

The BCS would likely defend itself from a UDAP claim by asserting that the final game is between the two highest-ranked teams in the country. This may be true. Nevertheless, it is unfair and misleading for the BCS to assert this when the method employed to determine rankings is so controversial. In fact, the methodology is a veneer of pseudoscientific mumbo jumbo consisting of a media poll, coaches' poll, and computer poll.<sup>121</sup> Among the three ranking systems, there are often considerable variations and disagreements.<sup>122</sup> In fact, even computers, which one would think to be objective and reasonable, run algorithms that disagree and rank teams in incomprehensible orders.<sup>123</sup> For example, in 2006, five computers agreed to have Ohio State University ranked fourth, while another computer ranked it ninth.<sup>124</sup> Likewise, Auburn University had rankings that varied from fifth to as low as fifteenth.<sup>125</sup> The human polls have even greater disparities in their rankings. These disparities are often the result of regional and conference biases, late-season losses, losses or wins on the road, and big-name programs that have large amounts of national television exposure.<sup>126</sup>

Taking the 2008 season as an example, Texas Tech University, the University of Texas, the University of Oklahoma, Penn State University, the University of Southern California, and the University of Florida each had one loss on its record before the bowl games. Utah's and Boise State's records, on the other hand, remained unblemished.<sup>127</sup> The methodological problem in selecting which teams played for the BCS National Championship Game in this scenario was huge because each team had a legitimate claim. Also, there were millions of dollars to be gained or lost by these universities from the selection. Nevertheless, Florida and Oklahoma were selected to compete in the BCS National Championship Game because they ended up first and second through the BCS's methodological rankings prior to the bowl selections.<sup>128</sup>

The methodology systematically favors teams that have bigger fan bases, more national exposure, and a history of program success.<sup>129</sup> Many statisticians point out these flaws in the BCS's methodology.<sup>130</sup> The consequences of these

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<sup>121</sup> Buchman & Kadane, *supra* note 17, at 1.

<sup>122</sup> H.S. Stern, *In Favor of a Quantitative Boycott of the Bowl Championship Series*, 2 J. OF QUANTITATIVE ANALYSIS IN SPORTS, issue 1, art. 4, at 2 (2006).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See Peterson, *supra* note 6, at 5.

<sup>127</sup> ESPN, *supra* note 4.

<sup>128</sup> *Id.*

<sup>129</sup> See Peterson, *supra* note 6, at 5.

<sup>130</sup> See Stern, *supra* note 122, at 2.

methodological errors turn the competition for a slot in the national championship game into a popularity contest or a random game of chance.<sup>131</sup> And a national championship should be objective, not left to biases, flaws, and random chance that ultimately benefit big-name programs.

Like the term “national champion,” the BCS’s methodological system runs afoul of Utah’s and other states’ UDAP statutes because it alleges that the national championship game matches the two top teams in competition.<sup>132</sup> This is misleading because the *quality* of this championship may not be a championship quality atmosphere due to the flawed methodology in determining which teams stand as the two best teams in the final BCS poll.<sup>133</sup> As a result, the national championship becomes meaningless and misleading because methodological flaws and biases in determining the rankings deceive the public into believing that the two best teams are competing when the two best teams may not be. Therefore, this practice is deceptive because it purports to be something that it is not—an unbiased national championship between the two best teams in college football.

#### IV. REMEDIES

It is necessary to discuss what remedial measures can and should be brought against the BCS for violating the UCSPA. According to the UCSPA, consumers can bring actions for “actual damages or \$2,000, whichever is greater, plus court costs.”<sup>134</sup> It also allows the court to award attorney fees to the “prevailing party.”<sup>135</sup> In addition to monetary penalties, the UCSPA and every other state allow government enforcement officials to seek cease and desist orders or injunctions to prevent merchants from engaging in deceptive practices.<sup>136</sup>

The standard used for issuing cease and desist orders and injunctions is whether the order or injunction is in the public’s interest.<sup>137</sup> Injunctions are used to remedy and control both current and future behaviors.<sup>138</sup> Because it is likely the BCS would challenge any UDAP claim, a preliminary injunction is appropriate and necessary. It is appropriate because the BCS continually misleads and deceives the public by using the terms “national champion” and “national championship.” It is in the public’s best interest to limit this deceit.

A court would need to decide how broadly the injunctive order should be. It would need to be broad enough to stop the BCS’s misleading behavior, yet not too wide-ranging as to impair the BCS’s right to run an honest operation. Thus, the

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<sup>131</sup> Peterson, *supra* note 6, at 5.

<sup>132</sup> See source cited *supra* note 15.

<sup>133</sup> UTAH CODE ANN. § 13-11-4(2) (2009).

<sup>134</sup> *Id.* § 13-11-19(2).

<sup>135</sup> *Id.* § 13-11-19(5).

<sup>136</sup> *Id.* § 13-11-19(1); See also CARTER ET AL., *supra* note 19, § 15.5.1.1, at 1011 (noting every state’s UDAP statute provides for cease and desist orders).

<sup>137</sup> CARTER ET AL., *supra* note 19, § 15.5.1.1, at 1011.

<sup>138</sup> See *id.*

order against the BCS would delineate the specific acts and practices to be prohibited, likely resulting in two options.

First, an injunction could be granted prohibiting the BCS from using the terms, “national champion/s” or “national championship/s,” or any other phrase that could be interpreted as one who defeats all willing opponents. Thus, rather than the Bowl Championship Series (i.e., the “BCS”), it could be referred to as only the Bowl Series (i.e., the “BS”). The second possibility could order the BCS to change its methodology and the system by which it establishes a national champion. Instead of using bowls determined by biased and inconsistent polls, a playoff system could be implemented through a series of single-elimination games—perhaps one modeled after the NCAA’s post-season basketball tournament, but on a smaller scale. Clearly, this change would require great analysis, and its implementation would be much easier said than done. However, until the BCS is forced to change its methodology of crowning one champion, the status quo will remain.

## V. CONCLUSION

Consumer protection laws exist to keep sellers honest and to encourage a free flow of veracious ideas. When people and institutions attempt to mislead and deceive consumers, they should and must be held accountable. The Bowl Championship Series is no exception. For years, the BCS has deceived the public through its advertising and marketing. The term “national champion” implies one who has defeated all willing participants—one who is the best. Unfortunately, the BCS deceptively crowns one team as the best while others remain undefeated. The BCS has hijacked the term for its financial gain at the expense of the public interest. UDAP statutes exist to tackle the problem of businesses that utilize unfair and deceptive trade practices. Thus, a claim against the BCS under Utah’s UDAP statute—or most any other UDAP statute—should be brought because it likely would be successful and would bring the BCS’s misleading behavior within UDAP and Federal Trade Commission standards around the country.

# UTAH'S OPEN COURTS: WILL HIKES IN CIVIL FILING FEES RESTRICT ACCESS TO JUSTICE?

Erin K. Burke<sup>\*</sup>

## I. INTRODUCTION

During the 2009 General Legislative Session, the Utah Legislature approved measures to increase the civil filing fees of the Utah State Courts. Because of the judiciary's budget strains and expanding workload, the state's leadership deemed the fee increase necessary to ensure that the courts continued to function adequately for the adjudication of disputes. The increased revenue generated from the higher fees may ensure broader access to justice in one sense. However, raising filing fees may also place access to justice beyond the reach of some of the less fortunate in society. These higher fees could have the greatest impact on the working poor and the lower middle class, for whom dollars are dear.

Part II of this Note addresses the context surrounding the decision to raise civil filing fees. Part III explores the federal constitutional implications of requiring fees of all litigants, especially the poor, as a prerequisite to accessing the justice system. Part IV revisits and assesses the adequacy of Utah's accommodations for indigent litigants. Finally, Part V proposes revisions to the Utah Code that may simplify the system and encourage poor people to bring their meritorious claims to court. These revisions may also better protect the most vulnerable of litigants. The proposed revisions and current law are then compared in light of the Utah Constitution's guarantees.

## II. BACKGROUND

The Open Courts Provision<sup>1</sup> of the Utah State Constitution, included among article I's "Declaration of Rights," provides:

All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any

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<sup>1</sup> Thirty-seven states have similar constitutional provisions. *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 674 (Utah 1985).

tribunal in this State, by himself or counsel, any civil cause to which he is a party.<sup>2</sup>

However, although the doors of Utah's justice system are theoretically open to all without precondition, practicality requires that litigants pay court fees in advance to secure access to justice. This Part explains the economic circumstances that justified the fee increase and its anticipated effects.

### *A. Crisis for the Courts*

In January 2009, Utah Supreme Court Chief Justice Christine M. Durham reported to the Utah Legislature that Utah's state judiciary faced "enormous challenges . . . stemming from a troubled economy and related losses in state revenue."<sup>3</sup> Noting that state courts conduct more than 95 percent of the judicial business of this country, Chief Justice Durham emphasized the job of the courts in "perform[ing] core functions of government in American society."<sup>4</sup> Apart from their role in the criminal justice system, the courts also are responsible for "[resolving] contract and property disputes, employment and labor issues, tax and regulatory cases, debt collections and property repossessions, state and local government disputes, divorce, child custody and family support cases, domestic violence claims, child welfare cases . . . [and] juvenile delinquency cases."<sup>5</sup>

Chief Justice Durham also reported that the Utah Judicial Council had already taken steps to cut the budget in response to the economic downturn.<sup>6</sup> In September 2008, the Utah Judicial Council "implemented a hiring freeze" and "determined to hold open all judicial vacancies for the foreseeable future."<sup>7</sup> The third branch also eliminated in-house court reporters and moved to "full-time reliance on audio recording."<sup>8</sup> In addition, the judiciary "eliminated service contracts, closed programs, canceled travel and training, and identified every opportunity . . . for creative funding and re-engineering of [its] operations."<sup>9</sup>

Despite these adjustments, the judiciary still faced a 7.5 percent budget reduction for 2009.<sup>10</sup> Chief Justice Durham anticipated that the "only way" to "accomplish such a large reduction is to furlough every one of [the judiciary's] thousand employees" for "more than five full work weeks" before June 30, 2009.<sup>11</sup>

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<sup>2</sup> UTAH CONST. art. I, § 11.

<sup>3</sup> Chief Justice Christine M. Durham, Utah Supreme Court, 2009 State of the Judiciary 1 (Jan. 26, 2009), available at <http://www.utcourts.gov/resources/reports/>.

<sup>4</sup> *Id.* at 2–3.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

To meet the projected 2010 budget and its 15 percent cuts, the courts “would have to permanently eliminate two hundred and eighty three court employees.”<sup>12</sup> Unlike in the private sector, where reductions in the work force often reflect a reduced workload, an economic downturn increases the court’s workload.<sup>13</sup> Chief Justice Durham reported that for the first half of the fiscal year the courts had seen “a completely unprecedented increase in court filings” and “civil case filings statewide were up twenty two percent.”<sup>14</sup> She further pointed out that “[i]f this were an ordinary year, the filing increases in the first half of this year would justify a request for three new trial judges and over forty new court clerks.”<sup>15</sup>

However, the reality is that the potential furlough and reduced staffing would affect the “ability of the courts to do the public’s business,”<sup>16</sup> and the judiciary’s “capacity to do [its] work at even a minimally acceptable level would be gravely threatened.”<sup>17</sup> The “combination of increased demand and decreased resources is profoundly affecting [the judiciary’s] ability to hear cases at all levels of court,” and the resulting “delays in the resolution of legal disputes have profound human and economic costs.”<sup>18</sup> The cutbacks also would require some courthouse closures, delays, and the prioritization of criminal cases over civil and domestic cases.<sup>19</sup>

To avoid “drastic personnel reductions” and the attendant consequences, Chief Justice Durham proposed to the legislature that an “equitable” solution would be to raise civil filing fees.<sup>20</sup> Many other states also are planning to revisit their court filing fees this year, and compared to neighboring states, Utah is on the low end of civil filing fees.<sup>21</sup> Chief Justice Durham concluded by asking the legislature to “preserve” the judiciary’s ability “to serve the people of Utah efficiently and effectively.”<sup>22</sup>

### *B. The Utah Legislature’s Response*

During the 2009 General Legislative Session, the Utah Legislature responded to Chief Justice Durham’s call. Senator Gregory S. Bell sponsored Senate Bill 184

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<sup>12</sup> *Id.* at 7.

<sup>13</sup> *See id.* at 5.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> Linda Thomson, *Financial Outlook Dark for Utah Courts*, DESERET NEWS, Feb. 11, 2009, at A1.

<sup>20</sup> Durham, *supra* note 3, at 8.

<sup>21</sup> *Id.*; Stephen Hunt, *Senate to Consider Higher Filing Fees*, SALT LAKE TRIB., Feb. 14, 2009, at A6; *see also* NAT’L CTR. FOR STATE COURTS, CIVIL FILING FEES IN STATE TRIAL COURTS, 2009 (providing list of civil filing fees for multiple state courts), *available at* <http://www.ncsconline.org/WC/Budget/fines.asp>.

<sup>22</sup> Durham, *supra* note 3, at 9.

(“S.B. 184”) to increase the civil filing fees of the courts of record.<sup>23</sup> The legislature passed S.B. 184, and Governor Jon M. Huntsman, Jr., signed the bill on March 23, 2009.<sup>24</sup> The law became effective on May 12, 2009.<sup>25</sup> For claims with damages amounts of \$2,000 or less, the fee for filing any civil complaint has been raised from \$50 to \$75.<sup>26</sup> For damages claims greater than \$2,000 but less than \$10,000, the filing fee moved from \$95 to \$185.<sup>27</sup> If the claim for damages is for \$10,000 or more, the filing fee rose from \$155 to \$360.<sup>28</sup> Thus, the new law approximately doubled the previous civil filing fees and raised other court fees.<sup>29</sup>

This recent increase in civil filing fees is expected to raise more than \$11 million in additional revenue during 2010.<sup>30</sup> Two other bills passed during the 2009 General Legislative Session were expected to raise \$3 million annually.<sup>31</sup> As a result, the furloughs for court employees were no longer needed.<sup>32</sup> However, by June 2009, the courts still planned to cut fifty-two staff positions and to discharge eighteen state-employed court reporters.<sup>33</sup>

S.B. 184 faced some opposition from the debt collection industry, which expressed concern for future harm to small businesses and the state’s economy.<sup>34</sup> On the other hand, Senator Scott D. McCoy, who voted in favor of the bill, explained that “[j]ustice cannot grind to a halt.”<sup>35</sup>

### III. FEDERAL LAW GOVERNING THOSE WHO CANNOT AFFORD COURT FEES

Because the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws,”<sup>36</sup> charging court fees of all litigants, including those who cannot afford to pay, can raise constitutional issues. As detailed below, the United States Supreme Court’s jurisprudence regarding “access

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<sup>23</sup> S.B. 184, 2009 General Sess. (Utah 2009).

<sup>24</sup> S.B. 184 Substitute, 2009 General Sess. (Utah 2009).

<sup>25</sup> *Id.*

<sup>26</sup> UTAH CODE ANN. § 78A-2-301(1)(b)(i) (West 2009).

<sup>27</sup> *Id.* § 78A-2-301(1)(b)(ii).

<sup>28</sup> *Id.* § 78A-2-301(1)(b)(iii).

<sup>29</sup> *See id.* § 78A-2-301.

<sup>30</sup> Stephen Hunt, *No Furloughs for Court Employees; Judicial Hiring Freeze to End*, SALT LAKE TRIB., Mar. 17, 2009, at B4.

<sup>31</sup> *Id.* One of those two bills raised filing fees for small-claims lawsuits, and the other added a “security surcharge to all criminal convictions and juvenile delinquency judgments.” *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Hunt, *supra* note 10.

<sup>35</sup> Stephen Hunt, *Bill Raising Court Filing Fees Passes Out of Committee*, SALT LAKE TRIB., Feb. 14, 2009, available at PROQUEST, Document Id. 1645197631.

<sup>36</sup> U.S. CONST. amend. XIV, § 1.

to judicial processes . . . reflect[s] both equal protection and due process concerns.”<sup>37</sup> Furthermore, the Court’s cases “make[] clear that ordinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”<sup>38</sup>

#### A. *Proceeding In Forma Pauperis*

Indigents may seek to disregard filing fees and court costs when suing *in forma pauperis*, the Latin phrase for “in the manner of a pauper.”<sup>39</sup> However, regarding filing fees and other court-related costs, the U.S. Supreme Court has never held that states must waive costs in all cases.<sup>40</sup> In general, indigent defendants facing criminal prosecution are entitled to greater constitutional protections than indigent civil litigants.<sup>41</sup> For example, the legal system “must provide attorneys at no cost to indigent criminal defendants,” but as Utah State Bar President Stephen W. Owens accurately notes, no similar mandate applies to civil litigation.<sup>42</sup>

Although an indigent civil litigant may not have legal representation, he may still pursue his claim because a person does not need to be “absolutely destitute to enjoy the benefit of the [federal *in forma pauperis* statute].”<sup>43</sup> An affidavit is sufficient if stating that “one cannot because of his poverty ‘pay or give security for the costs and still be able to provide’ himself and dependents ‘with the necessities of life.’”<sup>44</sup> The *in forma pauperis* statute ought to avoid “forc[ing] a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution.”<sup>45</sup>

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<sup>37</sup> M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

<sup>38</sup> Tennessee v. Lane, 541 U.S. 509, 533 (2004).

<sup>39</sup> BLACK’S LAW DICTIONARY 849 (9th ed. 2009); *see also* 28 U.S.C. § 1915 (2006) (providing for proceedings *in forma pauperis* in federal courts).

<sup>40</sup> 9 WEST’S FED. ADMIN. PRAC. § 11292 (3d. ed. 2000).

<sup>41</sup> *See* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (finding that the Sixth Amendment requires federal and state governments to provide criminal defendants with assistance of counsel when defendants cannot otherwise afford it and noting that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”); Webster v. Jones, 587 P.2d 528, 530 (Utah 1978) (finding that article 1, section 12 of the Utah Constitution assures that if a criminal defendant “is indigent and unable to obtain counsel, he is entitled to a court-appointed attorney”).

<sup>42</sup> Stephen Hunt, *Rookie Lawyers ‘Learn the Ropes,’* SALT LAKE TRIB., Aug. 3, 2009, at A1.

<sup>43</sup> Adkins v. E.I. Du Pont De Nemours & Co., 335 U.S. 331, 339 (1948).

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 340.



*B. The U.S. Supreme Court Cases: Federal Equal Protection  
and Federal Due Process*

The U.S. Supreme Court has expressed the concern that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>46</sup> In the cases related to the inability of poor litigants to pay court fees, the “due process concern homes in on the essential fairness of the . . . proceedings.”<sup>47</sup> The “equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs.”<sup>48</sup>

In *Boddie v. Connecticut*, due process did not permit the state to deny access to the courts to individuals seeking divorces based solely on their inability to pay court fees.<sup>49</sup> The Court explained that “due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”<sup>50</sup> The state’s asserted justification for its fee requirement was judicial “resource allocation and cost recoupment.”<sup>51</sup> But because the state’s courts were the “sole means” for obtaining a divorce, the state was effectively “denying [individuals] an opportunity to be heard” without a sufficient justification.<sup>52</sup> Emphasizing that the Court “[went] no further than necessary to dispose of the case,” the Court declined to reach the issue of whether “access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause . . . so that its exercise may not be placed beyond the reach of any individual.”<sup>53</sup> The key feature of the *Boddie* case was that the state could not “pre-empt the right to dissolve [a] legal relationship without affording all citizens access to the means it [had] prescribed for doing so.”<sup>54</sup>

A minority of the *Boddie* Court found that Connecticut’s fee requirement violated the Equal Protection Clause.<sup>55</sup> Justice Brennan explained that “[w]here money . . . determines . . . whether . . . [a man] gets into court at all, the great principle of equal protection becomes a mockery.”<sup>56</sup> In his view, “[a] State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee.”<sup>57</sup> Justice Brennan also criticized the majority’s reliance on the fact that only the state could grant a divorce since a “[s]tate has an

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<sup>46</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

<sup>47</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996).

<sup>48</sup> *Id.*

<sup>49</sup> *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

<sup>50</sup> *Id.* at 377.

<sup>51</sup> *Id.* at 382.

<sup>52</sup> *Id.* at 380–81.

<sup>53</sup> *Id.* at 382–83.

<sup>54</sup> *Id.* at 383.

<sup>55</sup> *Id.* at 385–89.

<sup>56</sup> *Id.* at 389 (Brennan, J., concurring).

<sup>57</sup> *Id.*

ultimate monopoly of all judicial processes and attendant enforcement machinery.”<sup>58</sup> Furthermore, “if disputes cannot be successfully settled between parties, the court system is usually ‘the only forum effectively empowered to settle their dispute.’”<sup>59</sup> “Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.”<sup>60</sup>

Since *Boddie*, the Court has narrowed and limited the scope of the civil filing fees that may not be required of indigents because of due process.<sup>61</sup> In *United States v. Kras*, the Court upheld court fee requirements as a precondition to a discharge in voluntary bankruptcy.<sup>62</sup> The Court distinguished *Boddie*, where the “appellants’ inability to dissolve their marriages seriously impaired their freedom to pursue other associational activities,” because “Kras’ alleged interest in the elimination of his debt burden . . . although important . . . [did] not rise to the same constitutional level.”<sup>63</sup> The Court found that “no fundamental interest is gained or lost depending on the availability of a discharge in bankruptcy.”<sup>64</sup> Moreover, “[r]esort to the court . . . is not Kras’ sole path to relief.”<sup>65</sup>

The Court has never held that requiring court fees of indigents violates equal protection.<sup>66</sup> In addition, wealth classifications alone are not sufficient to trigger strict scrutiny and are only subject to rational basis review.<sup>67</sup> One rationale is that “[n]o scheme of taxation . . . has yet been devised which is free of all discriminatory impact,” and if the Court “impose[d] too rigorous a standard of scrutiny . . . all local fiscal schemes [would] become subjects of criticism under the Equal Protection Clause.”<sup>68</sup>

Overall, the U.S. Supreme Court has been more willing to require court fee waivers for criminal defendants and prisoners.<sup>69</sup> Civil filing fees will be waived in much narrower circumstances.<sup>70</sup> Under federal constitutional law, requiring civil

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<sup>58</sup> *Id.* at 387.

<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> *Id.* (citation omitted).

<sup>61</sup> See *United States v. Kras*, 409 U.S. 434, 448 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (holding that filing fee waivers are not required when welfare recipients seek to appeal welfare decisions).

<sup>62</sup> *Kras*, 409 U.S. at 448.

<sup>63</sup> *Id.* at 444–45.

<sup>64</sup> *Id.* at 445.

<sup>65</sup> *Id.* at 446.

<sup>66</sup> See *id.*

<sup>67</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

<sup>68</sup> *Id.* at 41.

<sup>69</sup> See *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (involving writs of habeas corpus); *Burns v. Ohio*, 360 U.S. 252, 258 (1959); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

<sup>70</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 113–16 (1996); *Kras*, 409 U.S. at 446; *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

filing fees of indigents rarely violates equal protection and only violates due process when some fundamental interest is at stake.<sup>71</sup>

#### IV. UTAH'S ACCOMMODATIONS FOR INDIGENT LITIGANTS

Utah law does provide for indigent litigants to pursue their cause(s) of action without prepayment of fees, but the applicable provisions of Utah Code have not been substantively revised since 1996.<sup>72</sup> Considering the recent economic troubles and filing fees increase, these provisions now deserve a second look. This Part explains how a poor person pursues a claim as an impecunious litigant, how that person is deemed indigent, how the law guards against abuses, and how a person would challenge the denial of a fee waiver application. This Part also addresses the costs that indigent litigants face at the conclusion of litigation.

##### A. *Filing as an Impecunious Litigant*

Currently, Utah Code provides for impecunious litigants<sup>73</sup> by stating that “any person may institute, prosecute, defend and appeal any cause in any court in this state without prepayment of fees and costs or security, by taking and subscribing . . . an affidavit<sup>74</sup> of impecuniosity demonstrating financial inability<sup>75</sup> to pay fees and costs or give security.”<sup>76</sup> After filing the oath or affirmation by a non-prisoner,<sup>77</sup> impecunious litigant, the “court shall review the affidavit and make an independent determination based on the information provided whether court costs and fees should be waived entirely or in part.”<sup>78</sup> The Utah Code then instructs that “[n]otwithstanding the party’s statement of inability to pay court costs, the court shall require a partial or full filing fee where the financial information provided

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<sup>71</sup> See *M.L.B.*, 519 U.S. at 113–16; *Kras*, 409 U.S. at 446; *Boddie*, 401 U.S. at 382–83.

<sup>72</sup> See UTAH CODE ANN. § 78A-2-302(2) (West 2009); 1996 Utah Laws 505-06.

<sup>73</sup> Utah’s Cohabitant Abuse Act also provides a fee exemption for the victims of domestic abuse or violence. See *id.* § 78B-7-105(3).

<sup>74</sup> The affidavit also “shall state the following: I, A B, do solemnly swear or affirm that due to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence or the appeal which I am about to take, and that I believe I am entitled to the relief sought by the action, legal proceedings, or appeal.” *Id.* § 78A-2-302(5).

<sup>75</sup> The affidavit “shall contain complete information on the party’s: (a) identity and residence; (b) amount of income, including government financial support, alimony, child support; (c) assets owned, including real and personal property; (d) business interests; (e) accounts receivable; (f) securities, checking and saving account balances; (g) debts; and (h) monthly expenses.” *Id.* § 78A-2-302(3).

<sup>76</sup> *Id.* § 78A-2-302(2).

<sup>77</sup> Utah’s procedure regarding impecunious prisoners filing for a fee waiver is governed by section 78A-2-305.

<sup>78</sup> UTAH CODE ANN. § 78A-2-304(1) (West 2009).

demonstrates an ability to pay a fee.”<sup>79</sup> Thus, the decision whether a particular litigant is granted a partial or full filing fee waiver is not mandatory and lies within the trial judge’s discretion.<sup>80</sup> As further detailed, once the impecunious affidavit is filed, the judge “shall question the person . . . at the time of hearing the cause as to [the person’s] ability to pay.”<sup>81</sup> When the “judge opines that the person is reasonably able to pay the costs, the judge shall direct the judgment . . . not be entered in favor of that person until the costs are paid. The order may be cancelled later upon petition if the facts warrant cancellation.”<sup>82</sup> When the judge makes the opposite determination and “where the fees or costs are completely waived, the court shall immediately file any complaint or papers on appeal and do what is necessary or proper as promptly as if the litigant had fully paid all regular fees.”<sup>83</sup> In addition, the “constable or sheriff shall immediately serve any summonses, writs, process and subpoenas, and papers necessary or proper in the prosecution or defense of the cause, for the impecunious person as if all the necessary fees and costs had been fully paid.”<sup>84</sup>

### *B. The Determination of Indigency*

Noting that indigency is “not a concept that has been clearly defined,” the Utah Supreme Court has declined to explain with “factual specificity as to what constitutes legal ‘indigency.’”<sup>85</sup> For a judge to find that a plaintiff is indigent, the person may be “reasonably unable to bear the costs of the action” without being “completely destitute.”<sup>86</sup> Relevant factors in examining a person’s alleged impecunious status include the person’s “employment status and earning capacity; financial aid from family or friends; financial assistance from state and federal programs; [the person’s] necessary living expenses and liabilities; [the person’s] unencumbered assets, or any disposition thereof, and [the person’s] borrowing capacity; and, the relative amount of court costs to be waived.”<sup>87</sup> In *Kelsey*, the Utah Court of Appeals found that the trial judge erred when he refused to accept the plaintiff’s allegations of impecuniosity based “solely on the ground that she paid an attorney \$100 to prepare the divorce decree papers.”<sup>88</sup> At least in the criminal context, the trial court “must conduct an in-depth inquiry into each defendant’s unique financial situation, ‘balancing the assets and income against

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<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* § 78A-2-304(3).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* § 78A-2-304(2).

<sup>84</sup> *Id.*

<sup>85</sup> *State v. Vincent*, 883 P.2d 278, 282 (Utah 1994).

<sup>86</sup> *Kelsey v. Hanson*, 818 P.2d 590, 592 (Utah Ct. App. 1991) (citing *Adkins v. E.I. Du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948)).

<sup>87</sup> *Id.* at 591–92.

<sup>88</sup> *Id.* at 591.

liabilities and other related factors.”<sup>89</sup> Moreover, the “defendants bear the initial burden of establishing their indigency.”<sup>90</sup> Thus, determining indigency is “by its nature, highly fact-specific”<sup>91</sup> and requires the consideration of a number of factors.<sup>92</sup>

Even though the resulting increased revenue may keep the wheels of justice moving for most, the recent filing fee increase likely affects potential litigants who are poor, but not poor enough to qualify as indigent. For those persons, the higher fees required to commence a lawsuit might be enough to convince them to abandon the pursuit of judicial remedies to their potential claims.

In clarifying the proper standard of appellate review of trial courts’ indigency determinations,<sup>93</sup> the Utah Supreme Court explained that the “underlying empirical facts regarding the claim of indigency are reviewable for clear error . . . .”<sup>94</sup> At the other end of the spectrum, the “conclusion as to whether those facts qualify the [litigant] as indigent is reviewable for correctness.”<sup>95</sup> By “loosely defin[ing] indigency,” trial court judges have rather broad discretion when “applying the law of indigency to the facts before them.”<sup>96</sup>

### C. The Consequences of Filing a False Affidavit

Many years ago, the U.S. Supreme Court recognized the value of requiring an affidavit of poverty when a person requests to proceed *in forma pauperis* because “the importance that he . . . should be required to expose himself to the pains of

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<sup>89</sup> *Vincent*, 845 P.2d at 259 (citing *State v. Dale*, 439 N.W.2d 112, 115 (S.D. 1989)).

<sup>90</sup> *Id.* at 283.

<sup>91</sup> *Id.* at 258 (citing *Kelsey*, 818 P.2d at 591–92).

<sup>92</sup> The factors explained in *Kelsey* include many of the details that a litigant is required to state in the affidavit of impecuniosity. *Compare Kelsey*, 818 P.2d at 591–92 (noting that, in addition to whether a party paid someone to prepare legal documents, “other factors relevant to [the party’s] ability to pay . . . include, for example, [the party’s] employment status and earning capacity; financial aid from family or friends; financial assistance from state and federal programs; [the party’s] necessary living expenses and liabilities; [the party’s] unencumbered assets, or any disposition thereof, and her borrowing capacity; and, the relative amount of court costs to be waived.”), *with* UTAH CODE ANN. § 78A-2-302(3) (West 2009) (“The affidavit shall contain complete information on the party’s (a) identity and residence; (b) amount of income, including government financial support, alimony, child support; (c) assets owned, including real and personal property; (d) business interests; (e) accounts receivable; (f) securities, checking and savings account balances; (g) debts; and (h) monthly expenses.”).

<sup>93</sup> *See Kelsey*, 818 P.2d at 591 (applying an abuse of discretion standard in the Court of Appeals); *Vincent*, 845 P.2d at 257–58 (struggling to identify the appropriate standard of review on appeal).

<sup>94</sup> *Vincent*, 883 P.2d at 282.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

perjury in a case of bad faith is plain.”<sup>97</sup> Penalties for false affidavits also serve “as a means for conserving the time of courts and protecting parties from frivolous litigation . . . .”<sup>98</sup> Thus, requiring impecunious litigants to sign an affidavit and oath is one mechanism of guarding against people taking unfair advantage of these provisions designed to protect those truly unable to pay court fees.

As detailed, the Utah Code also allows a person to challenge by affidavit the original affidavit of impecuniosity as either “(a) false; (b) frivolous or without merit; or (c) malicious.”<sup>99</sup> If such an affidavit is filed, the court may notify the impecunious person to appear and show cause why he “should not be required to . . . post a bond for the costs” or “pay the legal fees of the action or appeal.”<sup>100</sup> Subsequently, the court may dismiss the action if “(a) the [person] does not appear; (b) the [person] appears and the court determines that the affidavit [of impecuniosity] is false, frivolous, without merit, or malicious; or (c) the court orders the [person] to post a bond or pay the legal fees and [he] fails to do so.”<sup>101</sup>

Thus, the consequences of filing false or frivolous claims serve to deter the filing of meritless claims and the exploitation of these accommodations. These mechanisms all serve to ensure that individuals truly in need and with meritorious claims have access to the courts while preventing those persons merely unwilling or reluctant to pay the filing fees from taking advantage of these provisions. This system seems to be an equitable way of protecting the public from swallowing the costs of meritless and frivolous lawsuits.

#### *D. Challenging the Denial of Indigency Status*

Once the court has assessed the initial filing fee and determined not to grant a full fee waiver, the court “shall immediately notify the litigant of: (a) the initial filing fee required as a prerequisite<sup>102</sup> to proceeding with the action; [and] (b) the procedure available to challenge the initial filing fee assessment.”<sup>103</sup> Within ten days of receiving the court notice of its decision to require an initial filing fee, “the litigant may contest the fee assessment by filing a memorandum and supporting documentation . . . demonstrating inability to pay the fee.”<sup>104</sup> After reviewing the filings for facial validity, “[t]he court may reduce the initial filing fee, authorize service of process, or otherwise proceed with the action without prepayment of

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<sup>97</sup> *Pothier v. Rodman*, 261 U.S. 307, 309 (1923).

<sup>98</sup> *Boddie v. Connecticut*, 401 U.S. 371, 381–82 (1971).

<sup>99</sup> UTAH CODE ANN. § 78A-2-303(1) (West 2009).

<sup>100</sup> *Id.* § 78A-2-303(2)(a)–(c).

<sup>101</sup> *Id.* § 78A-2-303(2).

<sup>102</sup> This prerequisite is stated in the statute: “The court may not authorize service of process or otherwise proceed with the action . . . until the initial filing fee has been completely paid to the clerk of the court.” *Id.* § 78A-2-306(2).

<sup>103</sup> *Id.* § 78A-2-306(1)(a)–(b).

<sup>104</sup> *Id.* § 78A-2-307(1).

costs and fees.”<sup>105</sup> However, the court may authorize these actions only if the litigant’s memorandum shows that he “(a) has lost his source of income; (b) has unaccounted nondiscretionary expenses limiting his ability to pay; (c) will suffer immediate irreparable harm if the action is unnecessarily delayed; or (d) will otherwise lose the cause of action by unnecessary delays associated with securing funds necessary to satisfy the assessed filing fee.”<sup>106</sup> Thus, to have a chance of winning a challenge to the trial court’s initial findings about his ability to pay, the litigant must be able to show one of the four aforementioned circumstances is present.<sup>107</sup> Even if he is authorized to move forward without the prepayment of fees, the litigant still may not be relieved “from the ongoing obligation of monthly payments until the filing fee is paid in full.”<sup>108</sup> In addition, the impecunious litigant must challenge the initial fee assessment at the trial court level in accordance with Utah Code § 78A-2-306 before he may seek appellate review.<sup>109</sup> The initial “denial of the fee waiver is not a final, appealable order.”<sup>110</sup>

*E. The Fee Waiver Effectively Is a Deferral of Fees*

Although Utah Code has arrangements for indigents to obtain a fee waiver,<sup>111</sup> those provisions are followed by a caveat titled “Liability for fees if successful in litigation.”<sup>112</sup> This section provides that “[n]othing in this part shall prevent a justice court judge, clerk, constable, or sheriff from collecting his or her regular fees for all services rendered for the impecunious person, in the event the person is successful in litigation,”<sup>113</sup> and “[a]ll fees and costs shall be regularly taxed and included in any judgment recovered by the person.”<sup>114</sup> Therefore, if an impecunious person wins a lawsuit on the merits, that person shall be liable for the fees and costs that may have been waived at the beginning of the lawsuit. For the successful impecunious litigant, the original fee waiver is effectively revoked with favorable judgment. Any fairness of this provision lies in the assumption that the successful indigent litigant is awarded a monetary judgment sufficient to cover fees and costs incurred.

More strikingly, Utah Code further provides that “[i]f the person *fails* in the action or appeal, then the costs of the action or appeal *shall* be adjudged against the person.”<sup>115</sup> According to this provision, an impecunious litigant shall be liable for

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<sup>105</sup> *Id.* § 78A-2-307(3).

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* § 78A-2-307(4).

<sup>109</sup> *See* Zions First Nat’l Bank v. Brockbank, 2008 UT App 121U.

<sup>110</sup> *Id.*

<sup>111</sup> *See* UTAH CODE ANN. §§ 78A-2-302, –304 (West 2009).

<sup>112</sup> *Id.* § 78A-2-309.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (emphasis added).

the costs of her lawsuit even when she ultimately loses her case on the merits.<sup>116</sup> Unlike section 78A-2-302, which states “any person *may* institute, prosecute, defend, and appeal any cause in any court in this state without prepayment of fees and costs,”<sup>117</sup> section 78A-2-309 states that “the costs of the action . . . *shall* be adjudged against the person.”<sup>118</sup> The use of the word “shall” in section 78A-2-309 indicates that the judgment of the costs to the losing impecunious litigant is mandatory.<sup>119</sup> In other words, the trial court judge has less discretion regarding the decision to impose costs than in the initial decision to allow the impecunious defendant to proceed without prepayment.

Even if an impecunious litigant is initially granted a fee waiver and access to the courts for the adjudication of her claims, she may face a larger financial burden if she loses her case and must pay the costs incurred. Consequently, she may be in a worse position when the lawsuit ends than when it first began. Compared with an average litigant, a judgment for costs would likely be a significant liability and a greater burden for a person who was already in an impecunious condition when the suit commenced. Unless costs are adjudged against all losing litigants, the mandatory imposition of costs on impecunious litigants acts as a penalty, and the law effectively treats penniless litigants less favorably.

If indigent litigants knew they could face liability for a lawsuit, win or lose, that knowledge may deter them from pursuing and filing potentially meritorious claims in the first place. This knowledge might make indigents more likely to resolve problems themselves, which would defeat the overall purpose of these provisions by driving indigents away from the courts. On the other hand, if indigents do not know of their potential liability and pursue claims in good faith, then section 78A-2-309 stings unfairly, and a litigant with a good-faith claim may unexpectedly find himself in a worse position than before he pursued justice in the court system.

For the unsuccessful, impecunious litigant, the “costs of the action . . . shall be adjudged against the person.”<sup>120</sup> Perhaps the use of the word “costs” in this sentence is not meant to encompass the original court filing fees. However, the present ambiguity holds open the possibility that a losing party could also be liable for the filing fees even after being granted a fee waiver. Even if the losing impecunious litigant is only liable for the costs subsequent to the initial filing fee,

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<sup>116</sup> Interestingly, an earlier version of this section in the 1917 Compiled Laws of Utah provided that “in the event that said poor person fails in his action or appeal, then the costs of said action and appeal shall *not* be adjudged against him.” 1917 Utah Laws § 2579 (emphasis added). By 1933, the section read that “[i]n the event such poor person fails in his action . . . the costs . . . shall be adjudged against him.” UTAH REV. STAT. ANN. § 28-7-6 (1933).

<sup>117</sup> UTAH CODE ANN. § 78A-2-302(2) (West 2009) (emphasis added).

<sup>118</sup> *Id.* § 78A-2-309 (emphasis added).

<sup>119</sup> See *State v. Wallace*, 2006 UT 86, ¶ 10, 150 P.3d 540, 542 (explaining that a statute uses “the permissive term ‘may’ in contrast to the compulsory term ‘shall’”).

<sup>120</sup> *Id.*



that person may still find herself in an even worse financial position than before she sought a judicial solution to a problem.

V. PROPOSED REVISIONS TO UTAH CODE TO ENSURE BETTER ACCESS  
TO JUDICIAL REMEDIES

To encourage indigents to bring meritorious claims to court, Utah law should: (a) provide clear and broad standards for the determination of indigency, and (b) repeal or revise section 78A-2-309. These proposed revisions would be more consistent with state equal protection and due process guarantees and Utah's Open Courts Provision. In addition, these revisions would be wise as a matter of public policy.

*A. Standards for Indigency: A Balance of Discretion and Evenhanded Application*

As Utah law stands today, trial judges have broad discretion when assessing an impecunious litigant's asserted inability to pay. Although the discretion to make case-by-case determinations is appropriate, more specific guidance for judges would result in evenhanded application of section 78A-2-302. As a result, potential litigants may be more informed about their chances of obtaining a fee waiver and access to the courts.

In Washington State, a proposed court rule would establish several categories of persons who may qualify for filing fee waivers while still allowing for case-by-case determinations.<sup>121</sup> For example, persons who would qualify for a fee waiver include those receiving assistance under a needs-based assistance program, such as federal poverty-related veterans' benefits or the Food Stamp Program.<sup>122</sup> Other eligible persons would include those who are represented by qualified legal services providers and those whose household income is at or below 125 percent of the federal poverty guidelines.<sup>123</sup> In addition to furnishing some degree of uniformity to determining how one qualifies as an impecunious litigant, similar standards and categories would streamline the process for judges, lawyers, and litigants in Utah by adding simplicity, predictability, and efficiency.

Although Utah law explains that one need not be "completely destitute" to qualify for a fee waiver,<sup>124</sup> Utah should adopt more specific standards to make it clear that fee waivers may be more broadly available than may otherwise be apparent. The proposed rule in Washington offers another advantage here by clarifying that those receiving certain subsidies, legal services, or falling within

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<sup>121</sup> See WASH. CT. R. GR 34 (proposed new rule), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=231](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=231) (follow "Proposed New Rule GR 34" hyperlink) (proposed Dec. 2008).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Kelsey v. Hanson*, 818 P.2d 590, 592 (Utah Ct. App. 1991).

certain income levels qualify for fee waivers.<sup>125</sup> Moreover, Utah law should make it readily apparent that poor litigants, not merely the destitute, can obtain a fee waiver and pursue legal claims.

*B. Section 78A-2-309 Should Be Revised, If Not Repealed*

As Utah law stands today, the granting of an initial fee waiver is not a true fee waiver. Instead, the payment of fees is merely deferred, with no promise that the impecunious litigant would be in a position to pay fees and costs at the end of litigation. Because the state essentially reserves the right to collect against the impecunious litigant regardless of the outcome, the current rule is harsh and exacts a heavy toll on those litigants least able to bear it. As a matter of fairness, if the state has allowed for the initial fee waiver, the state should follow through on that promise to the impecunious litigant.

At minimum, section 78A-2-309 should be revised so that the successful impecunious litigant is not charged for fees and costs. Instead, the fees and costs should be adjudged against the opposing party as a ramification of losing the case to the impecunious litigant. This scheme would be consistent with many typical cases where the losing party often ends up paying costs. This rewriting would also correct many of the aforementioned defects of section 78A-2-309 and guarantee that the initial fee waiver is final and irrevocable.

The last sentence of section 78A-2-309 explains that “[i]f the person fails in the action . . . then the costs of the action . . . shall be adjudged against the person.”<sup>126</sup> This line should be stricken from the rule. Unlike other litigants, a losing impecunious litigant likely would not be able to handle that burden, given his impecunious status prior to litigation. Striking this sentence would also guarantee that the initial fee waiver was final.

Alternatively, section 78A-2-309 could be amended so that “shall” becomes “may.” This revision would leave the possible liability for costs at the discretion of the court. The judge would then be free to determine what would be appropriate in each case. In addition, section 78A-2-309 could be changed so that the initial fee waiver is not deducted from a final judgment, thus ensuring that initial fee waiver is final.

*C. A Comparison of Current Law and the Proposed Revisions  
Under State Equal Protection and Due Process*

The Utah Constitution includes its own guarantees of equal protection and due process. Article I, section 24 states, “All laws of a general nature shall have

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<sup>125</sup> See WASH. CT. R. GR 34, *supra* note 121.

<sup>126</sup> UTAH CODE ANN. § 78A-2-309 (West 2009).

uniform operation.”<sup>127</sup> Article I, section 7 assures that “[n]o person shall be deprived of life, liberty or property, without due process of law.”<sup>128</sup> To a large degree, federal jurisprudence in these areas has informed and influenced the Utah Supreme Court’s interpretation of these provisions.<sup>129</sup>

Of course, states are free to interpret “provisions of their own constitutions to expand constitutional protection beyond that mandated by the United States Supreme Court.”<sup>130</sup> Moreover, the Utah Supreme Court has shown a “willingness to independently interpret Utah’s constitution,”<sup>131</sup> and the Utah Supreme Court “will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state’s citizens.”<sup>132</sup> Indeed, “our state constitution may, under some circumstances, provide greater protections for our citizens than are required under the federal constitution.”<sup>133</sup> Thus, even though the federal due process and equal protection clauses do not require states to waive civil filing fees for indigents in most circumstances, the Utah Supreme Court would be free to interpret Utah’s equal protection and due process guarantees as more expansive than the federal analogues.

Should a litigant challenge the current fee waiver laws or their application, a “heightened-scrutiny standard governs the manner in which article I, section 24 is applied when article I, section 11 rights are implicated . . . .”<sup>134</sup> “Sustaining legislation against an article I, section 24 challenge alleging that one’s rights under the Open Courts Clause are constitutionally discriminated against requires the court to find that the challenged legislation ‘(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal.’”<sup>135</sup>

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<sup>127</sup> UTAH CONST. art. I, § 24. “Although [the] language is dissimilar,” this section “incorporates the same general fundamental principles as are incorporated in the Equal Protection Clause . . . .” *Malan v. Lewis*, 693 P.2d 661, 669–70 (Utah 1984). Article I, section 2 states, “All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit . . . .” UTAH CONST. art. I, § 2. The Utah Supreme Court has also cited to this section as a “source of state equal protection principles,” but while “relevant to the construction” of the uniform operation of laws provision, this section is “more a statement of a purpose of government than a legal standard that can be used to measure the legality of governmental action.” *Malan*, 693 P.2d at 669, n.13.

<sup>128</sup> UTAH CONST. art. I, § 7.

<sup>129</sup> See *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶¶ 29–35, 67 P.3d 436.

<sup>130</sup> *State v. Earl*, 716 P.2d 803, 805 (Utah 1986).

<sup>131</sup> *Id.* at 806.

<sup>132</sup> *State v. DeBooy*, 2000 UT 32, ¶ 12, 996 P.2d 546.

<sup>133</sup> *Wood*, 2002 UT 134, ¶ 29.

<sup>134</sup> *Lee v. Gaufin*, 867 P.2d 572, 583 (Utah 1993).

<sup>135</sup> *Judd v. Drezga*, 2004 UT 91, ¶ 19, 103 P.3d 135, 141 (citing *Lee*, 867 P.2d at 583).

Instead of addressing equal protection issues, the Utah Supreme Court could choose to expand the rights of indigents on due process grounds. Arguably, the combination for the higher filing fees and the inadequacies of sections 78A-2-302 to -09 could be deemed a violation of due process if the state could not provide an adequate rationale for both. As it stands, section 78A-2-309 discourages impecunious litigants from coming to court and can effectively deny them procedural due process. “When ensuring litigants have received due process of law, [the Utah Supreme Court’s] policy is to ‘resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.’”<sup>136</sup>

In addition, substantive due process rights are also at risk if indigent litigants never have their day in court and their claims for relief are relinquished. “Generally, [the court] appl[ies] a rational basis test in substantive due process cases . . . [but a more stringent test applies when] the rights impacted by the legislation are deemed to be ‘fundamental.’”<sup>137</sup> “However, because article I, section 11 rights are not properly characterized as ‘fundamental,’” the court applies the rational basis test.<sup>138</sup>

While the Utah Legislature may not make laws that run afoul of federal and state constitutional guarantees, the legislature is free to delineate more protections or more rights than are constitutionally required.<sup>139</sup> Therefore, without offending constitutional rights, the legislature could potentially adopt the proposed revisions and provide more protections for poor litigants than they would otherwise have under constitutional case law.

#### *D. A Comparison of Current Law and the Proposed Revisions Under Utah’s Open Courts Provision*

Section 78A-2-309, as it stands, illustrates that granting fee waivers to impecunious litigants does not necessarily result in free access to the courts. In practice, section 78A-2-309 seems inconsistent with the promise of the Open Courts Provision that “[a]ll courts shall be open, and every person . . . shall have remedy by due course of law . . . .”<sup>140</sup> The Open Courts Provision is included among the Utah Constitution’s “Declaration of Rights” that “contains affirmative guarantees of specific individual rights that are . . . fundamental.”<sup>141</sup> Furthermore,

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<sup>136</sup> Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 41, 44 P.3d 663, 674 (citation omitted).

<sup>137</sup> Judd, 2004 UT 91, ¶ 30 (citation omitted).

<sup>138</sup> Id. (citation omitted).

<sup>139</sup> See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (noting that Supreme Court decisions do not “limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

<sup>140</sup> UTAH CONST. art. I, § 11.

<sup>141</sup> Wood v. Univ. of Utah Med. Ctr., 2002 UT 134, ¶ 43, 67 P.3d 436, 450 (Durham, C.J., dissenting). Although the Utah Supreme Court has “declin[ed] to . . . characterize

the “clear language of the section guarantees access to the courts and a judicial procedure that is based on fairness and equality.”<sup>142</sup> “A plain reading of section 11 also establishes that the framers of the Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights.”<sup>143</sup> Thus, the Utah Supreme Court has interpreted the provision as providing both procedural and substantive protections.<sup>144</sup> As with due process,<sup>145</sup> both procedural and substantive rights are implicated here.

When parties claim that their substantive rights have been violated under the Open Courts Provision, the Utah Supreme Court has fashioned a two-part test:

First, section 11 is satisfied if the law provides an injured person an effective and reasonable alternative remedy “by due course of law” for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one’s person, property, or reputation, although the form of the substitute may be different.

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article I, section 11’s guarantee” as “fundamental,” that choice likely was not “intended to denigrate the importance of the rights protected . . . .” *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 366–67 (Utah 1989) (Zimmerman, J., concurring). Rather, the court “simply avoided being bound into the analytical straightjacket that has been fashioned out of the federal equal protection clause for ‘fundamental’ rights and the tempting parallel construction of the Utah Constitution’s uniform-operation-of-the-laws provision.” *Id.* (citation omitted).

<sup>142</sup> *Berry ex. rel. Berry v. Beach Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

<sup>143</sup> *Id.*

<sup>144</sup> *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 13, 116 P.3d 295, 299 (“[T]he open courts clause provides more than procedural protections; it also secures substantive rights, thereby restricting the legislature’s ability to abrogate remedies provided by law.”); *Berry*, 717 P.2d at 667, n.4 (“Section 11 protects remedies by due course of law for injuries done to the substantive interests of person, property, and reputation. What section 11 is primarily concerned with is not particular, identifiable causes of action as such, but with the availability of legal remedies for vindicating the great interest that individuals in a civilized society have in the integrity of their persons, property, and reputations.”).

<sup>145</sup> The inclusion of both provisions supports the view that article I, section 11 also serves as a substantive limit on the Utah Legislature because if the Open Courts Provision protected only procedural rights then “section 11 is redundant and mere surplusage—it has no constitutional role or function that is not already performed by section 7.” *Laney v. Fairview City*, 2002 UT 79, ¶¶ 37–38, 57 P.3d 1007, 1018. Moreover, “section 11 is not duplicative” because it is “concerned with the availability of remedies to vindicate ‘civil’ injuries inflicted by one individual on another’s vital interests.” *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 41, n.5, 974 P.2d 1194, 1206 (Stewart, J., concurring). Meanwhile, the “due process clause is directed more to arbitrary government action and government’s relationship to individuals.” *Id.*

Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.<sup>146</sup>

The Open Courts case law thus far has involved caps on recoveries, governmental immunity, and statutes of repose.<sup>147</sup> While this test continues to be applied, the Utah Supreme Court recently “recognize[d] an obligation of deference to legislative judgments in a *Berry* review . . . .”<sup>148</sup> Thus, the test has been diluted, and whether a legislative act would offend the Open Courts Provision might depend upon the rigor applied to this analysis.<sup>149</sup>

The “constitutional guarantee of access to the courthouse was not intended by the founders to be an empty gesture,” and it prevents the “[arbitrary deprivation] of effective remedies designed to protect basic individual rights.”<sup>150</sup> The provision “imposes limits on the legislature to protect injured persons who are isolated in society and lack political influence by guaranteeing them access to the courts.”<sup>151</sup> Notably, the Open Courts Provision does not say that the courts are open to every person who can afford to sue in them. Rather, the courts are open to every person regardless of income.

Unfortunately, section 78A-2-309 today is not in harmony with the Open Courts Provision. That the courts can effectively revoke fee waivers makes the promise of a fee waiver itself an “empty gesture.” This potential liability may prevent an impecunious person from pursuing potentially meritorious claims in the first place. If the justice system were that person’s last resort for resolving his disputes, then that person did not have access to the courts nor a remedy by due course of law.

On the other hand, more specific guidelines defining indigency status and modifications to section 78A-2-309 would follow through on the promise of the

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<sup>146</sup> *Berry*, 717 P.2d at 680 (citations omitted).

<sup>147</sup> See, e.g., *Judd v. Drezga*, 2004 UT 91, ¶¶ 16–18, 103 P.3d 135, 140–41 (concluding that a cap on quality of life damages does not violate the Open Courts Provision); *Laney*, 2002 UT 79, ¶ 1 (finding part of the Utah Governmental Immunity Act unconstitutional as applied to municipalities operating electrical power systems); *Berry*, 717 P.2d at 683 (determining that one statute of repose violated the rights protected by article I, section 11).

<sup>148</sup> *Judd*, 2004 UT 91, ¶ 11.

<sup>149</sup> See Gordon L. Roberts & Sharrieff Shah, *What Is Left of Berry v. Beech—The Utah Open Courts Jurisprudence?*, 2005 UTAH L. REV. 667, 693 (concluding that “*Berry* and its progeny . . . [have] little predictable value as precedent” and “any real ‘strict’ or even ‘intermediate’ scrutiny of legislative action seems to be gone.”).

<sup>150</sup> *Berry*, 717 P.2d at 675.

<sup>151</sup> *Wood v. Univ. of Utah Med. Ctr.*, 2002 UT 134, ¶ 45, 67 P.3d 436, 451 (Durham, C.J., dissenting) (citing *Berry*, 717 P.2d at 676).

Open Courts Provision and ensure that access to the courts is not an empty gesture. Furthermore, by allowing the poor to have broader access to the courts for the resolution of their disputes, these proposals would better protect a politically powerless group from the arbitrary deprivation of rights.

### *E. Policy Implications of the Proposed Revisions*

Even if broadening the access of the poor to fee waivers and modifying section 78A-2-309 increases the cost to the courts of “facilitating the filing of claims by persons of limited means, the cost of our judicial system should not be borne on the backs of those who are least able to pay those costs . . . .”<sup>152</sup> Moreover, the costs to the justice system may be higher if “the alternative to resolution of disputes through the courts . . . [is] illegal forms of dispute resolution . . . [such as] self-help or street justice.”<sup>153</sup> Indeed, the Open Courts Provision itself “seeks to secure a basic principle of justice that will, in the end, deter persons wronged by others from resorting to self-help and the inevitable violence that ensues when people take the law into their own hands rather than seeking judicial remedies.”<sup>154</sup> We ought to remember that “access to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society.”<sup>155</sup> Therefore, while Utah courts and the state have had budget problems recently, the costs of the proposed solutions in this Note would be worth bearing and would be consistent with our purported value of equal justice under law.

## VI. CONCLUSION

Although federal constitutional law does not require states to waive civil filing fees for indigent litigants, Utah law provides procedures for impecunious litigants to proceed with their actions without prepayment. However, Utah law is defective because it imposes fees and costs on the impecunious litigant at the conclusion of litigation. Thus, the so-called waiver of fees is merely a deferral of fees. The Utah Legislature would be wise to revisit the law regarding impecunious litigants to better ensure that impecunious persons have access to the courts and a fair forum for the adjudication of their disputes. Revisions of these laws have the potential to fulfill Utah’s constitutional promise that “[a]ll courts shall be open, and *every person* . . . shall have remedy by due course of law . . . .”<sup>156</sup>

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<sup>152</sup> Letter from Andrew Guy, Attorney, Stoel Rives LLP, to Justice Charles Johnson, Washington Supreme Court Rules Committee Chair (Apr. 30, 2008), *available at* [http://www.courts.wa.gov/court\\_Rules/proposed/2007Nov/GR34/Stoel,%20Rives.pdf](http://www.courts.wa.gov/court_Rules/proposed/2007Nov/GR34/Stoel,%20Rives.pdf).

<sup>153</sup> *Id.*

<sup>154</sup> *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 67, 974 P.2d 1194, 1213–14 (Stewart, J., concurring).

<sup>155</sup> *Interstate Excavating, Inc. v. Agla Dev. Corp.*, 611 P.2d 369, 371 (Utah 1980).

<sup>156</sup> UTAH CONST. art. I, § 11 (emphasis added).