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## PATRICIA M. WALD

The Honorable Patricia M. Wald received her B.A. from Connecticut College in 1948 and earned her J.D. from Yale Law School in 1951. After law school, she clerked for the Honorable Jerome Frank on the United States Court of Appeals for the Second Circuit. Following her clerkship, she joined the Washington, D.C. law firm of Arnold & Porter.

Judge Wald served for twenty years on the United States Court of Appeals for the District of Columbia (1979–1999), including five years as Chief Judge (1986–1991). Prior to serving on the United States Court of Appeals for the District of Columbia, Judge Wald was the Assistant Attorney General for Legislative Affairs at the U.S. Department of Justice (1977–1979).

Following her retirement from the Court of Appeals in 1999, Judge Wald served as the U.S. representative to the International Criminal Tribunal for the former Yugoslavia. She is a member of the American Law Institute (1973–present), and was elected to its council (1978–present), served as a vice president (1988–1993 and 1993–1998), and is an advisor to the Model Penal Code, Sentencing Project (2001–present).

Judge Wald currently chairs the board of directors of the Open Society Justice Initiative and is a member of the board of directors for Mental Disability Rights International. Judge Wald is a member of the global council of the California International Law Center at the University of California, Davis School of Law.

In 2004, Judge Wald was appointed to the Iraq Intelligence Commission, an independent panel tasked with investigating U.S. intelligence surrounding the 2003 U.S. invasion of Iraq and Iraq's weapons of mass destruction.

Judge Wald has authored numerous books and articles, including *Doing Right by our Kids: A Case Study in the Perils of Making Policy on Television Violence* (1994), *Women in Criminal Justice* (1983), and *Law and Poverty* (1965).

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\* In memoriam

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## TRIBUTE TO HON. PATRICIA M. WALD

RICHARD REVESZ\*

Welcome to this really special event for the law school community. Every year the *NYU Annual Survey of American Law*, which is an honorary student-edited journal, honors a distinguished jurist, scholar, political figure, or legal practitioner who has made a significant contribution to the legal field, by dedicating their forthcoming volume to that honoree. The *Survey* chooses the honoree. They have shown remarkable good judgment in making their choices; the last three honorees have been: Ron Dworkin on our faculty,<sup>1</sup> Justice Steven Breyer,<sup>2</sup> and [Professor] Anthony Amsterdam.<sup>3</sup> And this year the *Annual Survey* has chosen to dedicate its sixty-sixth volume to the Honorable Patricia Wald, and we are delighted that they did.

Judge Patricia Wald is a remarkable individual. As you know, NYU law school is very focused on public service; public service plays a big role here. It is a big part of our institutional DNA, and it is hard to imagine anyone who has had a greater impact in public service than Judge Wald. First, in the not-for-profit sector, you hear a lot about that; then in the government as Assistant Attorney General for Legislative Affairs in the Carter Administration; then as a judge in the United States Court of Appeals for the District of Columbia Circuit. And, we also are a global law school and take great pride in Judge Wald's service on the International Criminal Tribunal for the Former Yugoslavia. There are not a lot of international judges there; there are very few people who have been judges in our federal system and also in the international system, and Judge Wald has done both of these. She is now on the Board of Directors of the Open Society Institute Justice Initiative.<sup>4</sup> Judge Wald has

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\* Dean, New York University School of Law; Member, Counsel on Foreign Relations, 2008; Lawrence King Professor of Law, 2002; Faculty Director, Program on Environmental Regulation, 1996; Law Clerk, Justice Thurgood Marshall, United States Supreme Court; Law Clerk, Chief Judge Wilfred Feinberg, Second Circuit Court of Appeals; J.D., Yale Law School.

1. See Dedication to Ronald Dworkin, 63 ANN. SURV. AM. L. vii (2007).

2. See Dedication to Justice Stephen G. Breyer, 64 ANN. SURV. AM. L. iii (2008).

3. See Dedication to Prof. Anthony G. Amsterdam, 65 ANN. SURV. AM. L. iii (2009).

4. Open Society Justice Initiative Board Members (2009), <http://www.soros.org/initiatives/justice/about/members> (last visited Apr. 4, 2010).

been a role model for generations of public interest lawyers. She has played key roles in professional associations, national commissions, and legal reform efforts in the US and overseas. She has gotten scores of honorary degrees and has been recognized by countless organizations for her dedication, leadership, and inspiration as a champion of justice around the globe.

## TRIBUTE TO HON. PATRICIA M. WALD

*HON. HARRY T. EDWARDS\**

During the past forty-four years, my professional career has included time as a practicing attorney, law professor, Chairman of the Board of Amtrak, and federal appellate judge. During this time, I have never worked with anyone who is smarter than Patricia M. Wald, nor have I ever engaged with a more thoughtful, insightful, or humorous person.

I first came to know Judge Wald in 1979, when we were both being considered for appointments to the U.S. Court of Appeals for the D.C. Circuit, along with Abner Mikva and Ruth Bader Ginsburg. Judge Wald joined the court in 1979, and I followed a few months later in 1980. I then had the good fortune to work with Judge Wald for almost twenty years, until she retired from the court in 1999. During her stint on the D.C. Circuit, Judge Wald issued over 800 opinions and served as our Chief Judge between 1986 and 1991. She was revered as a great jurist by both her judicial colleagues and members of the bar. Why? Certainly Judge Wald's intellectual acuity, productivity, and unfailing commitment to her professional work can be cited. But Judge Wald's sterling reputation also has been built on her willingness to share her great gifts with the members of our profession—she is always open and engaging; tough-minded, but not haughty; probing, but never disagreeable in her inquiries; funny, but never offensive. You want to hear what Pat Wald has to say because it is bound to clear your head and improve your thinking, and often she is likely to make you laugh as well.

After retiring from the court, Judge Wald accepted an appointment to serve on the fourteen-member panel of judges of the International Criminal Tribunal in The Hague, where she spent two years hearing cases on wartime atrocities in the former Yugoslavia. This was not an easy assignment because the tribunal judges faced serious language barriers in their deliberations, and they initially

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\* Senior Circuit Judge, Chief Judge Emeritus, U.S. Court of Appeals for the D.C. Circuit; Visiting Professor of Law, New York University School of Law. B.S., Cornell 1962; J.D., Michigan 1965. Judge Edwards was a faculty member at the University of Michigan Law School from 1970 to 1975 and from 1977 to 1980, and at Harvard Law School from 1975 to 1977, earning tenure at both schools. During the past thirty years, he has continued to teach part-time, serving as an Adjunct Professor of Law at Michigan, Pennsylvania, Duke, Georgetown, and Harvard, and Visiting Professor of Law at NYU, where he has taught for the past twenty years.

worked with no uniform set of rules. Unsurprisingly, Judge Wald became a leader of the tribunal and helped to establish a standard for fairness and the rule of law. Upon her return to the United States, she served as a member and chair of the Open Society Institute's Justice Initiative Board and then was appointed a Member of the President's Commission on U.S. Intelligence Capabilities Regarding Weapons of Mass Destruction.

Last year, Judge Wald added a new role to her impressive resume: campaigning door-to-door for Barack Obama in his successful bid to become President. Her endorsement of Mr. Obama—which was issued in a powerful and pithy statement, entitled “Why This Older Woman is for Obama”—traveled around the world on Internet blogs. In her statement, Judge Wald, in her inimitable style, reported:

I have spent more than 40 years of my near-80 in public service as a federal judge, international judge, Justice Department official, and public interest lawyer. . . . [Now, with] a troop of wonderfully gritty older women, I [have] spent 8 days on the icy streets of Cedar Rapids, Iowa—with a return to the hustings in Delaware last week—campaigning for Senator Obama.<sup>1</sup>

One of my law clerks last year was a young woman from Iowa. She was utterly astonished when she learned that Judge Wald had been campaigning door-to-door in Iowa, in bitter cold and snowy weather. When I later asked Pat about this, she admitted that it was “very cold,” but she explained that she wore a heavy coat, scarf, and some snow boots and then “had a ball” seeking votes for her candidate.

As I reflect on our many years together on the D.C. Circuit, some things about Judge Wald were obvious: She was a brilliant lawyer and jurist; she was lightning fast in her work; she had an incredible memory; she missed no nuance in an argument; she was an extraordinary (and tenacious) advocate of a position once she had analyzed competing arguments; she was fair-minded; and she was gracious on the bench. The problem for some appellate lawyers was that they could not handle Judge Wald's brilliance, coupled with her tenacity, iced with her graciousness. The net result was that Judge Wald nearly killed lawyers with her kindness. During oral arguments, Judge Wald was known to offer detailed analyses of the issues and then say to counsel, very politely: “I am not saying

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1. Sam Graham-Felsen, Judge Patricia M. Wald: ‘Why this Older Woman is for Obama,’ Organizing for America, <http://my.barackobama.com/page/community/post/samgrahamfelsen/Cyfd> (Feb. 9, 2008) (quoting Patricia M. Wald).

that this view is the correct answer, but you might want to think about it.” In one case, counsel was so taken aback by Judge Wald’s gracious summary of the issues that he passed out and dropped to the floor before a packed courtroom. He was then carried out on a stretcher. The Deputy Marshal thought that Judge Wald had killed the attorney with her polite questions. Fortunately, the attorney recovered, but I am not sure that he ever appeared before Judge Wald again.

Judge Wald is also known for her sharp wit, a trait that was aptly put on display during the 1988 D.C. Circuit Judicial Conference. Judge Wald, who was then the Circuit Chief, introduced Justice Antonin Scalia who was our banquet speaker that year. Here are a few snippets from Judge Wald’s introduction of Justice Scalia:

CHIEF JUDGE WALD: We are very pleased that our former colleague and present Associate Justice of the United States Supreme Court Antonin Scalia has consented to share some remarks with us tonight. I am especially grateful—in light of what goes on [at the Supreme Court during] oral argument—to get a word in edgewise before he begins. As an old parochial school graduate myself, I’m not so naive as to buy that line on the PBS show that “the devil makes him do it.” In my days the nuns and a bar of soap were a match for the devil any time. . . . On the Circuit, we came to relish or to dread—depending on which side we were on—Nino’s sharp but friendly salvos in conference. His legendary Ninograms often set the stage for months of combat. In a burst of nostalgia I leafed through a few of the 1985–86 term opinions when we disagreed so amiably together. In one he accused me of “suck[ing the APA] dry of its content.”<sup>2</sup> I countered by charging him with perpetrating “rank judicial interference with a reasonable statutory interpretation . . . .”<sup>3</sup> So intimidated was Congress by our jousting that they mooted the case by passing a new law. In another sentimental exchange [of opinions], Judge Scalia lamented that [one of the points made in my opinion] was “a promise kept to the ear but broken to the heart;” worse still, he accused me of “fragmenting a unitary claim”<sup>4</sup> (He really knew how to hurt a girl!). Thus, we became friends . . . . Even his consistent reversals of our opinions now

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2. *Gott v. Walters*, 756 F.2d 902, 910 n.8 (D.C. Cir. 1985).

3. *Id.* at 929 (Wald, J., dissenting).

4. *Beattie v. United States*, 756 F.2d 91, 120 (D.C. Cir. 1984) (Scalia, J., dissenting).

cannot entirely erase those fond memories . . . . Welcome Justice Scalia.

Justice Scalia then took the podium and said: “Thank you, Pat. That was really gutsy.”

Apart from her sense of humor, Judge Wald is a woman of great substance. I will only offer two examples from her extraordinary resume of work. Her ninety-nine-page, 540-footnote opinion in *Sierra Club v. Costle*,<sup>5</sup> is a *tour de force*, surely one of the greatest administrative law opinions ever issued by the D.C. Circuit. And her article on judicial opinion writing, published by the *Chicago Law Review* in 1995, is a stunningly good discourse on the subject.<sup>6</sup> The article is not just insightful; it is also fluid. Each time I read the piece I remain amazed at Judge Wald’s ability to decipher and describe all of the nuances of our work without trivializing or overstating any of it, and in a way that even uninitiated readers will understand what we do.

One of Judge Wald’s greatest accomplishments has been to achieve stardom as a mother, spouse, and professional. I often talk with my law clerks about the difficulties of raising a family in a two-career family when both the wife and husband are highly motivated to reach the highest ranks of professional success. That is no mean feat. Yet long before it was fashionable to even try, Pat and Bob Wald set off on a course to make it happen. After graduating from Yale Law School and then clerking for Judge Jerome Frank, Judge Wald worked at the Arnold & Porter law firm in Washington, D.C. She left the firm when she was eight months pregnant because she wanted to be with her husband who was in the Navy and stationed in Norfolk, Virginia. Judge Wald says that it was not difficult to leave the firm because she and her husband wanted to have more children—they have five—and she did not want to rush back to work. Asked if she enjoyed motherhood, Judge Wald said:

Yes, I really wanted to be a mother. I wanted to be the person who had responsibility for the children. I can’t say that every moment brought unmitigated joy, but being with the children when they were young was a priority well worth making. I’m glad I don’t have to look back and regret not having been there.

When asked how she reentered the legal profession after having five children, Judge Wald explained that:

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5. 657 F.2d 298 (D.C. Cir. 1981).

6. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

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## TRIBUTE

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When the youngest child started going to kindergarten so that all five of them were in school, I began working part-time in a series of jobs that allowed for a flexible schedule. I had a consultant's contract with the Justice Department, and I worked on the Kerner Commission Report, the Report on the Causes and Prevention of Violence, on the President's Commission on Crime in the District of Columbia, and I was co-director of the Ford Foundation's Drug Abuse Research Project. Then in 1968 I joined Neighborhood Legal Services as a litigating attorney. That was when I began taking on full-time responsibilities again.

Judge Wald's ascendancy in our professional ranks upon her return to practice is now history. No one has done it better.

I always have been inspired by Judge Wald. She has reigned as a model of the very best that the legal profession has to offer. And she has worn her crown with dignity and humility. It is an honor for me to pay tribute to my esteemed colleague and friend.



## TRIBUTE TO HON. PATRICIA M. WALD

NANCY MORAWETZ\*

Thank you, and welcome everyone; and a particularly warm welcome to Judge Wald. It is a great pleasure for me today to speak about Judge Wald. I first met Judge Wald back in 1980 when Jimmy Carter was President and I was applying for a clerkship. It may be hard to believe today, but back then the D.C. Circuit, where Judge Wald sat as a new judge, was considered a liberal court. Public interest lawyers used to fall all over themselves to get into the D.C. Circuit, which was very different from what happened later on. And judges there had an enormous amount of work to do. The regulatory state was then more robust than it is today, and the reign of the more extreme plain language ideas about how to read a statute had not taken hold<sup>1</sup>—*Chevron*<sup>2</sup> had not yet been decided. So for a court with a heavy docket of statutory and administrative law cases involving important public issues in which Congress had deliberated at length, and for which agencies had conducted significant hearings and conducted extensive deliberations, there was a lot of judging to do. Each case required careful review of the agency record and the legislative history.

By the time I started clerking in the fall of 1981, some of this had already started to change. Ronald Reagan was President, and later changes in the composition of the court were on the horizon. Some of the stalwart center judges of the court had taken senior status. There was a sense that things were changing, but at that time the basic work of the court really had not changed at all. We faced very complex cases from a wide range of agencies with immense and complex records.

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\* Nancy Morawetz is a Professor of Clinical Law at New York University School of Law. She is a graduate of New York University School of Law, and she clerked for Judge Wald during 1981-82.

1. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted”); *Brogan v. United States*, 522 U.S. 398, 408 (1998) (“While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court’s jurisprudence. Courts may not create their own limits on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language . . . admits of no exception . . . we affirm . . .”).

2. *Chevron v. NRDC*, 467 U.S. 837 (1984).

From the very beginning, I deeply admired Judge Wald. She was a true judge. She approached every case with an open mind and a keen sense that the case affected real people who had real problems. She wanted to understand the complexity of every case. She wanted to understand the details of the legislative history. I have an image in my mind of books and books of hearings with little paper clips attached to the pages (we did not have Post-its). These marking were put in by Judge Wald as she went through the record and sought to understand what Congress or an agency was trying to accomplish. She became an expert on our most frequent party at the time, the Federal Regulatory Energy Commission. And Judge Wald really insisted on understanding all of this.

When Judge Wald was still a relatively new judge, she would sometimes talk about some of the aspects of the job that she did not like as much. She told us that outside chambers she was now limited to talking to people about the latest movies. Here was a person whom you could imagine had a lot to say about a lot of things. But, outside chambers virtually anything you talk about in Washington has to do with somebody's case so she was limited in what she could say. I think, though, that what bothered her most was when she saw poor advocacy in the court.

I remember one particular day in which a lawyer opened oral argument with the words, "It was a dark and stormy night." This was the kind of thing Judge Wald had no patience for, that sort of melodrama, those theatrics; they were not the kinds of things that mattered in cases. And she knew that what clients needed was top-quality legal reasoning and well-developed factual records, and not some melodrama. Similarly it would really bother her when a fancy partner argued a case who was clearly chosen to argue just because of the fanciness of the name, but who was unable to answer questions about the record.

For me, as a future social justice lawyer, these lessons were invaluable. I was taking mental notes all of the time about what truly mattered to courts. After I left my clerkship and went to do class action litigation at the Legal Aid Society, I would hear Judge Wald in my mind as I was thinking about the cases that I was putting together. I would think about her comments about what it takes to do effective advocacy. I would remember, for example, Judge Wald speaking to us about a case in which a lawyer—and this is of course now in 1981 or 1982—trying to pursue a due process argument based solely on *Goldberg v. Kelly*.<sup>3</sup> She would say, "Doesn't this law-

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3. 397 U.S. 254 (1970).

yer realize that the law has developed and that you have to be very attuned to the developments in the case law?" I also learned the importance of creating a powerful record. As a judge she could not fix the records; she could not change that. So while I learned a lot about how a judge looks at a case, I was also always learning about what it takes to be an effective advocate.

Judge Wald was also, as you can imagine, a role model for women clerks of the court. We made up about a third of the clerks, but we were all very aware that we were in what was, in fact, a fairly gendered profession and one that would continue to be gendered. I had grown up in a family of two parents who were pursuing careers, but for many of my co-clerks it was a very new experience to see a woman professional, and certainly one of Judge Wald's stature. People were interested in how she managed it all. One of the things I found very impressive was that unlike a lot of other pioneering women, Judge Wald did not focus on telling the women clerks on the court about how much easier we had it—although we certainly did have it easier in many ways. Instead, she was very sensitive to the things that were very hard for women in our day, in which women were expected to do it all and do it all easily. She listened and was a very sympathetic ear for the women clerks on the court.

Judge Wald was also a lot of fun. The highlight, I think, for the clerks our year was the time when we were out of town with Judge Wald, and we went to a bar and taught her how to play Pac-Man, which was the major videogame of the day. Judge Wald went around incognito; I do not know whose idea it was but we all decided that we would call her Marge so that nobody would know who she was. But she did learn how to play Pac-Man, and to us that said it all. Here was this brilliant, sophisticated judge, who was happy to learn a new game and play along with the ruse. So as one who has had the deep honor to clerk for Judge Wald, I want to thank the *New York University Annual Survey of American Law* for presenting this very fitting honor to this very distinguished and impressive lawyer and judge. Thank you.



## TRIBUTE TO HON. PATRICIA M. WALD

*CYNTHIA ESTLUND\**

It is a great honor for me to be part of this event honoring Judge Wald. I first met both Judge Wald and Nancy Morawetz—and it was a shock to me to realize this—on the day of my clerkship interview twenty-seven years ago. Nancy had the good fortune of attending the NYU School of Law where she had quite a few women law professors, even back in those days. I did not. During my entire law school career at Yale, I had had only one class that was taught—actually co-taught—by a woman professor. So I felt especially fortunate to clerk for Judge Wald. She was, and has continued to be, a role model par excellence, not to mention exceptionally entertaining company.

Since she graduated from law school, Judge Wald has had at least five careers and has accomplished more in each of them than most people accomplish in their entire adult lives. I am certainly including her ten-year career as a full-time mother, during which she produced five thriving, active, and, if we are to believe the stories we heard in chambers, quite mischievous children. But perhaps most remarkable has been Judge Wald's career since leaving the D.C. Circuit.

Those of us fortunate to land a good job with tenure have a tendency to settle in and hold on—I mean to cast no aspersions on Judge Edwards!—but Judge Wald has been more restless. The job of a federal appellate judge seems not to have been big enough to contain her boundless energy. She left the D.C. Circuit at a point in her life when many folks might simply move to Florida, take up golf, and start shuttling around among their ten grandchildren. But instead, Judge Wald moved to The Hague to serve as a U.S. judge on the International Criminal Tribunal for the former Yugoslavia. Nor has she slowed down since returning from The Hague. Judge Edwards stole one of my best stories here, but last winter I heard from another former clerk that she encountered Judge Wald on the snowy streets of Iowa while they were both campaigning for a candidate, who will remain nameless, but who recently moved into a really nice house on Pennsylvania Avenue. I think at that

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\* Catherine A. Rein Professor of Law, NYU School of Law. Professor Estlund clerked for Judge Patricia M. Wald on the U.S. Court of Appeals for the D.C. Circuit during 1983–84.

point Judge Wald was especially glad to be released from the obligations of nonpartisanship that constrained her as a judge.

So Judge Wald would have been a continuing source of inspiration and an extraordinary role model even apart from her being a woman. But the fact that she was a woman—one of the handful in her law school class and the first to be appointed to the D.C. Circuit—was especially important to some of us who worked for her.

I began clerking during the summer of 1983, just one year after Nancy had left, but things had already changed by then. The D.C. Circuit was barely clinging to its longstanding reputation as a relatively liberal court. I seem to remember that the t-shirts for the D.C. Circuit law clerks' softball team were emblazoned with a "0-9" win-loss record in recognition of the nine consecutive reversals the D.C. Circuit had suffered in the previous term of the Supreme Court.

But by 1983, as Judge Edwards has already recalled, the composition of the D.C. Circuit had changed suddenly and dramatically with the arrival of three new Reagan appointees: Judges Robert Bork, Antonin Scalia, and Kenneth Starr. Do any of those names ring a bell? Suddenly there were many more sharply divided panels and many more sharply worded dissents. On a court like this, even a review of the Federal Energy Regulatory Commission's decision on electricity rates and grids could stir up controversy. Even ministerial decisions within the court itself could stir up political passions. I am told that one day Judge Wald came back to the chambers from a conference fuming. She reported that one of her colleagues—I am quite sure it was not Judge Edwards—wanted to order the clerk of the court to stop sending the court's slip opinions to the federal prisons. It was at best a waste of money, he apparently thought, and probably an inducement to frivolous pro se litigation, but for Judge Wald this was about access to justice. Federal prisoners probably had a greater need for those opinions than most of us did. I think she might have won that little battle.

But there were many other battles over cases in those days. Many of them stemmed from Judge Wald's refusal to lose sight of the legitimate claims of the ordinary people who were behind even arcane administrative review petitions: the employees behind an NLRB decision that failed to remedy the consequences of egregious employer coercion, for example;<sup>1</sup> the retirees behind a pension benefit guarantee corporation's decisions denying insurance cover-

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1. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

age;<sup>2</sup> or the farm workers behind the Department of Labor's refusal to issue Field Sanitation Standards requiring employers to provide clean drinking water and toilets.<sup>3</sup>

There was never any question, in these cases or in any others, that the judge was committed to finding and following the law, and to tracing the technical commands of statutes and the factual complexities of voluminous records. But sometimes the most dedicated judge found room for, well, for judgment. Toward the end of her tenure she commented on what went into that judgment—she had quite a significant career in her extrajudicial writing as well. She was commenting on studies, including one by NYU [Law School]'s then-professor Richard Revesz, showing that judges' political predictions, or the party of the President who appointed them, tended to influence their decisions. This is what she said:

After almost 20 years on the D.C. Circuit . . . I register something of a ho-hum reaction to the notion that judges' personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another. Judges would be rudderless ships if we did not steer through uncharted and murky waters by some sense of conscience or some core of personal beliefs.<sup>4</sup>

Judges were guided, she thought, not just by conscious and personal values, but also by their experiences; and Judge Wald's experiences were not always the same as those of her fellow judges.

Judge Wald was once asked whether it made a difference in the legal system to have women judges. She acknowledged the maxim that "a wise man and a wise woman will come to the same conclusions . . ."<sup>5</sup> She thought it a bit simplistic, however. Indeed, she said, "different wise women"—and there were a couple of wise women on the court at that time—"will come to different conclusions."<sup>6</sup> But she went on to say:

Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions. I can

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2. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

3. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (1987).

4. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

5. Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 989 (2005).

6. *Id.*

think of a few cases where being a woman entered into my conscience, but I can think of just as many where having worked in a factory, having been a Legal Services lawyer and having been a government official who dealt with Congress affected my perspective just as much. A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.<sup>7</sup>

The experiences that Judge Wald brought to the bench as a woman, as a working class kid, as the mother of five children, and as a public interest lawyer, certainly enriched the law—in the US and now globally—as well as the lives of her colleagues on the bench, her law clerks, and the litigants and lawyers whose cases she decided. So I am just thrilled to be part of today's recognition of Judge Wald's extraordinary experience in life and in the law.

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7. *Id.*

## TRIBUTE TO HON. PATRICIA M. WALD

*KELLY ASKIN\**

It is such a pleasure to join you here today to recognize Judge Patricia Wald and to celebrate a few of her achievements during a most remarkable career. She personifies everything I love about the law and how it can be a force for good in our world. And she exemplifies why we need more great women in positions of power on domestic and international courts. At the International Criminal Tribunal for the Former Yugoslavia, where she served as a judge after retiring from twenty years of service on the United States Court of Appeals for the D.C. Circuit, Judge Wald was regarded as a trailblazer. She works fast; she works hard; she works competently; and, quite simply, she works with an intellect far superior to most.

Upon arrival at the Yugoslav Tribunal in 1999, Judge Wald was assigned to Trial Chamber 1 to sit with fellow international judges from Portugal and Egypt. Awaiting her first cases, Judge Wald did what she always does: she prepared and then she prepared some more. Before stepping foot in the international courtroom, she had already gone a long way toward mastering the jurisprudence of the tribunal, as well as the history of the conflict and the court's establishment. She learned the rules of procedure and evidence, the elements of crimes, basic international law texts, and other materials needed to perform the unique and complex task assigned to the tribunal in providing justice to tens of thousands of victims of war crimes, crimes against humanity, and genocide committed in the former Yugoslavia. Assigned to sit on both the *Krstic* genocide trial<sup>1</sup> and *Omarska* camp persecution trial,<sup>2</sup> as well as on half a dozen appeals, Judge Wald soon gained a court-wide reputation for fairness, integrity, and efficiency.

With blurring speed and uncanny accuracy, Judge Wald pinpoints the most critical issues and makes decisive and sound decisions. These are wonderful qualities, unless, that is, you happen to be the poor soul who works for her. As but one example, I vividly recall an incident in the fifth week of a six-week consultancy I was doing with Judge Wald in The Hague. We had been working night

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\* Dr. Kelly Dawn Askin, B.S., J.D., Ph.D. (law) is senior legal officer for International Justice in the Open Society Justice Initiative.

1. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

2. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment (Nov. 2, 2001).

and day and functioning on but a few hours of sleep while drafting the *Omarska* judgment after a year-and-a-half-long trial for five individuals accused of war crimes and crimes against humanity. When I walked into Judge Wald's office to hand her the draft, there was not a scrap of paper on her desk, the computer was off, and she had her hands clasped behind her back, pacing back and forth on the carpet. She grabbed the paper out of my hand with scarcely a word. And as I glanced back at her as I was leaving the office, mere seconds after entering, she was already turning over the first page and on to the second, concentration evident on her face.

Exhausted, I headed to the cafeteria, profoundly grateful for a break. I had some coffee and socialized with friends before gradually making my way back to my office, calculating that I still had a good couple of hours to recharge. As I walked into my office, the phone was ringing. My brain registered several emotions in rapid succession, and ended up, logically enough, on denial, since it should not be humanly possible to read, digest, and critique a 250-page document in forty-five minutes. But my gut knew it was the good judge calling. Without bothering to wait for the message, somewhat begrudgingly and a bit awestruck I walked back to her office wondering how, yet again, Judge Wald had managed to surprise me with her ability to work at such a high level of competency at such breathtaking speed.

At the Yugoslav Tribunal, Judge Wald served as a role model for many who were amazed at her accessibility, her pragmatism, and her eagerness to engage in detailed discussions and debate on a range of legal issues. She made her unique mark on an assortment of groundbreaking decisions, most notably the landmark *Krstic* judgment, which was the first time the Yugoslav Tribunal recognized genocide had occurred at Srebrenica for the systematic slaughter of over 7700 men and boys;<sup>3</sup> the highly-regarded *Kupreskic* appeals chamber judgment, which acquitted three individuals who had been convicted by the trial chamber;<sup>4</sup> and the *Kvočka* trial chamber judgment, which set out standards for liability under the enterprise theory of responsibility,<sup>5</sup> and which recognized sexual violence as part of the persecution committed against women at *Omarska* prison camp.<sup>6</sup>

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3. *Kvočka*, Case No. IT-98-30/1-T, ¶ 84.

4. *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeal from Judgment, ¶¶ 246, 304 (Oct. 23, 2001).

5. *Kvočka*, Case No. IT-98-30/1-T, ¶¶ 265–312.

6. *Id.* ¶¶ 98–109.

Since her retirement from the bench, Judge Wald has stayed in high demand and has thrown herself into a slew of good causes. As but a few examples: she has worked on amicus briefs for Guantanamo detainees; given advice on a rape case in Colorado; trained Iraqi judges on Iraq's High Tribunal; served on the Intelligence Commission on Weapons of Mass Destruction; the ASIL's [American Society of International Law] International Criminal Court Task Force; and, my personal favorite, she sits on the board of the Open Society Justice Initiative, where I head the international justice program.

In addition to our time together in The Hague, it has been a richly rewarding experience to travel with Pat Wald to places like Tanzania to assist the International Criminal Tribunal for Rwanda; to Cambodia to work on the Extraordinary Chambers in the Courts of Cambodia, which is trying Khmer Rouge leaders;<sup>7</sup> and hopefully soon to the Democratic Republic of Congo to work on establishing a mobile court for gender justice. We co-taught a course on international courts at Yale Law School, where students lined up to hear from a legend whose pioneering cases they read in other courses at the law school.

It would be difficult to know Pat Wald and not have huge affection for her. Despite having risen from humble beginnings to sit on two of the highest domestic and international courts in the world, she is nonetheless without conceit, without presumption, and without guile. It would be impossible to know Pat Wald and not have enormous respect for her. She does not just have smarts, she has wisdom. More importantly, she has goodness and a deeply ingrained sense of right and wrong. It has been a special treat for me to share some holidays with Pat and Bob Wald, and to also have the opportunity to join them on family vacations at the beach with their five kids and numerous grandkids.

Brilliant but fun, pessimistic yet inspiring, Pat Wald's personal and professional life is lived to the fullest. Whether it has been work or pleasure, whether in a distinguished courtroom or a seedy pool hall, it has been discomfiting to know that somebody thirty-five years my senior can run circles around me. This wonderful and extraordinary woman is an important part of my life, for which I am deeply grateful. If we had more women like Pat Wald, women would rule the world, and the world would be better off for it.

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7. PATRICIA M. WALD, *TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM* 19 (Open Society Institute 2009), *available at* [http://www.soros.org/initiatives/justice/focus/international\\_justice](http://www.soros.org/initiatives/justice/focus/international_justice).



## TRIBUTE TO HON. PATRICIA M. WALD

DAVID TOLBERT\*

It is a true honor for me today to pay tribute to a great judge, lawyer, and friend, Judge Patricia Wald. I must confess to feeling like a bit of an interloper on the *New York University Annual Survey of American Law* as although I suppose I am, *stricto sensu*, an American lawyer, I have spent the bulk of my career working outside the United States, working with international law or some kind of mixture of different legal systems. Thus, while I understand that Judge Wald is a great American lawyer and jurist, I know her as an international judge and lawyer *par excellence* (of course, an international lawyer must throw in the obligatory French or Latin phrase or two).

I vividly remember the first time I met Pat and Bob Wald as they arrived on a dull, cloudy Dutch day in the early hours of the morning in 1999. Pat was coming to Holland to fill out the judicial term of the retiring Gabrielle Kirk McDonald, the only American judge on the International Criminal Tribunal for the former Yugoslavia [ICTY]. McDonald was president of the tribunal at the time, and I was serving as her *chef de cabinet*. While Bob and Pat probably figured Gabby had asked me to meet them at some ungodly early hour, it was actually the other way around, for I knew about Pat Wald. I had read some of her opinions and knew that she was simply one of the top judges in the United States. I had told other judges and staff, who were a little nervous about a new American judge, particularly as McDonald was well regarded and respected, not to worry because this new judge was going to be an intellectual powerhouse and a great judicial mind. If I had any worries in this regard, they were quickly dissipated in the forty-five minute ride from the airport to The Hague, for Pat already knew the ICTY jurisprudence, knew the Geneva Conventions, and had keen insights into the *sui generis* procedure that the tribunal followed. I quickly realized that I actually had undersold her to my colleagues.

From there, Pat quickly became the leading judge on the then fourteen-member court. She was dealt a bad hand in terms of the

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panel that she was assigned to—the only panel that worked more in French than English and with colleagues who lacked both her experience and intellect. Nonetheless, she quickly made her mark both in terms of her reputation and in terms of the jurisprudence that flowed from her pen. While Pat spent only two years at the ICTY, she is still spoken about as the best judge in the tribunal’s history. This is from grizzled prosecutors like Mark Harmon who has tried many of the most difficult cases at the ICTY. From time to time, when I was Deputy Prosecutor, Mark would stop me after a frustrating day in the trenches and say, “David, why can’t we have judges like Judge Wald?” I heard the same from defense counsel and court staff.

However, it was not simply her reputation for the way she handled herself in the courtroom for which she was so admired. She wrote some of the seminal judgments at the ICTY, which in many ways established important landmarks not just in the ICTY, but also for other international tribunals generally, and the International Criminal Court in particular. There were a number of such decisions, but I will mention two in particular that are illustrative of her great contributions. In the *Krstic*<sup>1</sup> case, Pat sat on a trial panel that rendered the first genocide verdict in the history of the ICTY. The case involved the massacre at Srebrenica where 8,000 men and boys were systematically killed over a few days in July 1995. While another judge read out the decision, those of us in the know were fully aware that the judgment was primarily of Judge Wald’s making. It was a groundbreaking and powerful decision. Although it was modified on appeal, it is her judgment that resonated with legal professionals and victims, and the factual findings were subsequently endorsed by the International Court of Justice.

A second decision worthy of special note was the *Kupreskic*<sup>2</sup> case. This case was perhaps not as significant factually as the *Krstic* case, but it was of great importance to the credibility of the ICTY. In that case, the Trial Chamber had convicted individuals of horrendous crimes but had, in essence, relied on the testimony of one eyewitness account. It was a difficult decision as the alleged crimes were appalling, but, as Judge Wald who was the presiding judge on appeal put it in the Appeals Chamber’s summary of its decision:

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1. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001), *aff’d in part, set aside in part*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

2. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 775–84, 801–04 (Jan. 1, 2000), *aff’d in part, rev’d in part*, Case No. IT-95-16-A, Judgment, ¶¶ 218–23 (Oct. 23, 2001).

The Appeals Chamber was guided by two principles. First, “the function of this tribunal is to decide the guilt or innocence of the individual accused according to standards of procedure and evidence that commend themselves to all civilized nations.” Above all, “it has striven to follow the principle laid down by the First Chief Prosecutor at Nuremberg that we must ‘establish incredible events by credible evidence.’”<sup>3</sup>

Thus, Judge Wald found that such evidence was not enough to convict certain defendants. It was a tough decision because of the awful facts; but it was no doubt also awkward in terms of collegiality as, with only fourteen colleagues, she had overturned the decision of respected colleagues who did not take it well. Nonetheless—and I say this as a former prosecutor—it was the right decision, right in the law, and it sent a clear message that the ICTY was a court that would apply the highest international standards.

I mention these two cases, although there were many more, as illustrative of the great and lasting impact that Pat Wald has had on international justice. These early ICTY decisions were formative in the field of international criminal law, establishing norms that will guide the field for many years to come.

I am pleased to say that Pat has continued to keep a hand in international law. She has flown off to Arusha, Tanzania to train the ICTY and the International Criminal Tribunal for Rwanda [ICTR] appeals counsel; and when our appellate lawyers came back and debriefed me, they said that the best and toughest questions always came from Judge Wald. Moreover, Pat continues to help in any way that she can to promote the law and international justice. She has done so at my request a number of times and continues to do great work for the Open Society Justice Initiative, which she chaired for a number of years, among other groups.

It is really this generosity of spirit, even more than her great intellect and considerable legal skills that I find appealing. While her former clerks will all talk about how hard Pat works—I think the term “slave driver” may have been mentioned once or twice—they also speak of how much Pat has supported them and helped them, and I can attest to this as I have both seen it and experienced it.

It is her spirit, her modesty, and her commitment that I truly admire. In the recent presidential campaign, I know she personally

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3. Press Release, Int’l Criminal Tribunal for the former Yugo., Appeals Judgment Rendered in the “Kupreskic & others” Case, P.I.S./629e (Oct. 23, 2001) (emphasis in original), *available at* <http://www.icty.org/sid/7944>.

went and knocked on many doors for Barack Obama, including eight days in freezing Iowa and many more days in other similarly inviting places. She did it without fanfare, and I only know the story because I got notes from a former ICTY staffer who had run into Judge Wald in places like Delaware.

In closing, I have seen Pat's skills up close recently. We have served on a Task Force of the American Society of International Law, looking at the question of what the relationship should be between the ICC and the United States. Somehow, Pat and I found ourselves outnumbered, but as I stewed, Pat skillfully was able to bring about a conclusion that carried the day—or should I say saved the day?—by achieving a consensus that seemed impossible when one looked at the ideological lineup. As part of that process, there was a question that emerged about double jeopardy and the ICC. Pat gave some ideas and referred to a case at the ICTY that set out the relevant principles, and I worked out the details with our staff person. However, when I looked back at the case, there was a dissent that summarized the principles perfectly. It was vintage Pat Wald: brief, rigorous, and to the point. More importantly, from a personal point of view, it was also quintessentially Pat, drawing no attention to herself and letting you figure it out for yourself.

In a world full of self-aggrandizement, self-promotion, and pomposity, it has been an inspiration to know someone of the caliber, both intellectually and personally, of Pat Wald. Many congratulations, Pat, on the receipt of this well-deserved honor.

## INTRODUCTION OF HON. PATRICIA M. WALD

DAVE LAWRENCE

Thank you, and let me take this moment to thank all of the dedicators. I had not planned to talk about campaigning in Iowa, so fortunately I did not get preempted. Today's speakers have brought together a lot of aspects of the judge's career, and they represent what is a really remarkable breadth of impact that she has had on the legal profession both domestically and internationally. And they prove the point that I would like to make today: that though we have dedicated this journal to trailblazers, to great jurists, and also to figures of the international community, we have rarely had a chance to recognize someone who is each of these, as we do today.

We have just heard tributes from a number of great figures in the bar who have a great deal of personal experience with Judge Wald. My role in this ceremony then cannot be to add to their anecdotes and their stories, because as a third-year law student, I could not. Rather, I would like to provide some context for their remarks and to help newcomers here understand the significance of the dedication. The *Annual Survey of American Law* has been dedicating each year's volume to a great jurist since the journal's inception in 1942. We have dedicated sixty-five volumes to Presidents,<sup>1</sup> judges,<sup>2</sup> professors,<sup>3</sup> and international figures.<sup>4</sup> And even a brief look at Judge Wald's career reveals that she is well-placed among them.

Patricia Wald's career in the legal profession began in 1948 when she entered Yale Law School. Most schools, including Harvard, were not yet admitting women, and she was one of only a dozen women in the law school class. Though she was an editor of

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1. *See, e.g.*, Dedication to Herbert Hoover, 1949 N.Y.U. ANN. SURV. AM. L. iii (1950).

2. *See, e.g.*, Dedication to Judith S. Kaye, 1994 N.Y.U. ANN. SURV. AM. L. viii (1995); Dedication to Thurgood Marshall, 1983 N.Y.U. ANN. SURV. AM. L. xviii (1984).

3. *See, e.g.*, Dedication to Ronald Dworkin, 63 N.Y.U. ANN. SURV. AM. L. vii (2007–2008); Dedication to Herbert Peterfreund, 1976 N.Y.U. ANN. SURV. AM. L. xvii (1977).

4. *See e.g.*, Dedication to Desmond M. Tutu & Alexander L. Boraine, 1999 N.Y.U. ANN. SURV. AM. L. viii (2000).

the law review [the Yale Law Journal],<sup>5</sup> she had less opportunity than male members of her class. When she was entering Yale Law in 1948, the *Annual Survey* was dedicating its seventh volume to Arthur T. Vanderbilt,<sup>6</sup> for whom this building is named and who that year became the chief judge of the New Jersey Supreme Court.<sup>7</sup> In 1952, Judge Wald clerked for Jerry Frank of the Second Circuit, during which time Judge Frank decided the appeal of Julius and Ethel Rosenberg.<sup>8</sup> After the stint in private practice at Arnold & Porter, she took a break from the legal profession, as we have heard about. She reentered legal work by doing part-time consulting for the Department of Justice and then in 1968 took on full-time responsibilities with the Neighborhood Legal Services Corporation. In 1968, the *Annual Survey* was honoring Russell D. Niles, both a former dean of NYU Law and the chancellor of the entirety of NYU, and we dedicated that year's volume to him. In 1979, Patricia Wald became *Judge* Patricia Wald when President Jimmy Carter nominated her for the D.C. Circuit, and she was [confirmed] by the Senate.<sup>9</sup> In that same year, the *Annual Survey* dedicated its volume to Judge David Bazelon, who was just then retiring into senior status from the same D.C. Circuit.<sup>10</sup> I think any great dedicatee's description could end right there. I could remark how she took up the judicial mantle and was an exemplary figure on the bench. But as I said at the beginning, her career has had remarkable breadth.

In 1999, she left the D.C. Circuit to become a [United States] representative at the ICTY [International Criminal Tribunal for the Former Yugoslavia], as we have heard about. In 1999, we dedicated our volume to Alexander Boraine and Desmond Tutu,<sup>11</sup> themselves very important figures in the international community. So, just as the judge was moving her career to the international arena, we were turning our attention in the same direction. Since then,

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5. See 60 YALE L. J. (1951), available at <http://www.yalelawjournal.org/images/mastheads/60.pdf> (listed under her maiden name, Patricia McGowan).

6. Dedication to Arthur T. Vanderbilt, 1948 N.Y.U. ANN. SURV. AM. L. iii (1949).

7. 2 JOHN R. VILE, GREAT AMERICAN JUDGES, AN ENCYCLOPEDIA 775 (2003) (entry for Arthur T. Vanderbilt).

8. Patricia Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 981 (2004–2005).

9. Dedication to Russell D. Niles, 1968/69 N.Y.U. ANN. SURV. AM. L. vii (1968).

10. Dedication to David L. Bazelon, 1979 N.Y.U. ANN. SURV. AM. L. xvii (1979).

11. Dedication to Desmond M. Tutu & Alexander L. Boraine, *supra* note 4 at viii.

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Judge Wald has been an important figure in the international community, serving on all manner of commissions and in all manner of advisory capacities that go beyond the description I could give.

That brings me to the point I began with. We have dedicated to trailblazers, we have dedicated to great jurists, and we have dedicated to great international figures. But we have not had the chance to recognize someone who is each of these, and the woman to whom we are about to dedicate the sixty-sixth volume is just that. Judge Wald's career has spanned time, role, and geography in a truly remarkable way. Judge Wald, we are here today to honor you, but at the same time, we here on NYU's *Annual Survey* are very honored ourselves by the opportunity to do so. We are proud to record your achievements, your contributions, and your ongoing legacies. And we will have a great challenge, I am thinking especially of our new Executive Board, to produce a publication befitting your contributions. On behalf of the entire editorial staff, it is my pleasure to take up that challenge and formally dedicate the sixty-sixth volume of the *Annual Survey* to you, Judge Patricia Wald.



## ACKNOWLEDGEMENT

*HON. PATRICIA M. WALD*

Dean Revesz, Judge Edwards, Kelly [Askin], the two Davids [Lawrence and Tolbert], Cindy [Estlund], and Nancy [Morawetz]: It is a great pleasure for me to be up here with all of you and for a few brief moments to delude myself that even a small part of your eloquent tribute is, as we judges like to say in our opinions, “based on evidence in the record.” But I will admit that my life in the law has been an exciting and a satisfying one, ranging from a Second Circuit clerkship with a legendary legal iconoclast, Jerome Frank, who practiced gender equality long ahead of his time; to the defense of victims of McCarthyism in the 1950s; to the civil rights breakthroughs of the 1960s for minorities, women, the disabled, criminal defendants, and the poorest Americans. Contrary to what they tell you, the 1960s were great: the public interest movement of the 1970s; the Carter Justice Department; twenty years on the D.C. Circuit—proudly its first woman member and Chief Judge—and; finally, the American seat on the Yugoslav War Tribunal.

The judicial years were gratifying, often colorful, and, excuse me Judge Edwards, occasionally unsettling. My advent to the D.C. Circuit incidentally was met by strong right-wing opponents who labeled me “an instrument of the devil” for my early advocacy for the rights of children, which was particularly galling since my five kids, one of whom is here today, had to sit stoically through a series of harangues about how bad I was. One of them was approached by a reporter who said: “They called your mother an instrument of the devil, what do you have to say about this?” He was in high school at the time. And he said, “You know, she burns the lamb chops, but otherwise she’s okay.”

On the war crimes tribunal, I heard shattering evidence on the execution of 8000 men and boys in a single week in Srebrenica, within months of the Dayton Accord, which ended the conflict; and I listened to terrible accounts of the torture and abuse of thousands of other Muslims in the infamous Omarska prison camp. For several years, as you have heard numerous times, I have been back home working largely in the NGO [Non-Governmental Organization] sector with the Justice Initiative on domestic and international issues that I care about. And last year, as you heard about, I campaigned not only in Iowa, but in six states, for President Obama. I was an early foot soldier I must say, in the steady, but, still in my

view, incomplete march of women towards their deserved places in the law. The job of transforming cold, legal institutions into family-friendly institutions remains one that we have yet to accomplish.

In my time, legal theories have come and gone with about the same fervor, frequency, and life expectancies as economic theories. States' rights and federal preemption, hard-look judicial review and heightened agency deference, originalism, strict construction and enduring values modes of constitutional interpretation, desegregation, nondiscrimination, affirmative action, and many things that are somehow in between. Most notable today are regulation and deregulation. I note here that the absence or non-execution of the law in our financial regimes has, ironically I think, done more than anything else to demonstrate the value of law.

At the end, I remain convinced that the law is not out there to be discovered by raiders of the lost ark, but rather has to be continually reviewed and often recast in new contexts by successive generations of lawyers, like those being trained here at N.Y.U. [Law School], who will see it as a means to make our society work better. And, I find no contradiction between that view and the vision of what I consider to be that of our essentially pragmatic forefathers.

But, on a more personal note, like others at my stage in life, I am haunted by the question: Did I really make any difference? That has come up already. Did I leave any mark on that giant amoeba-like mass we call the law, which is continually evolving, retracting, changing shape, fed by thousands of judges, lawmakers, commentators, and teachers, periodically bursting over the dams set up by special interests, sometimes propelled by the sheer force of popular demand? No matter how many opinions one writes, or cases one argues, or laws one helps to pass, our internal goads will not let that question lie quiet. So in that quest, I hugely value the award you have given me today. In some ways however, I envy those of you out there, in the beginning and middle stages of lawyering. There are so many problems for the law to solve now and so many opportunities to solve them right this time. As you move center stage in your own careers, I have some very, very brief pieces of advice.

Stay close to the ground where you can see firsthand how the law operates on people's lives. Too many of the spread-sheets and their lawyers fail to do that, I think. Take reasonable risks, keep a healthy degree of skepticism about what works, but stay with your principles not just when your opponents are in power, but more critically, when your friends are. And keep in mind to have a good life in the law. It takes a village of supportive partners, fami-

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lies, friends, teachers, mentors, and for judges, law clerks. I was fortunate to have them all, along with a heavy dose of plain, ordinary good luck. I wish the same to all of you, and again, thank you.



# TOWARD A “MORE ENLIGHTENED AND TOLERANT VIEW”: EDUCATIONAL CHOICE AND THE REGULATION OF RELIGIOUS INSTITUTIONS

STEVEN MENASHI\*

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## INTRODUCTION

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>1</sup>

In the eighty-five years since a unanimous Supreme Court decided *Pierce v. Society of Sisters*, the precedent it established regarding

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1. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (invalidating state law requiring public school attendance); *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . .”).

the family's autonomy from the state has justified judicial solicitude for a range of liberty interests related to personal and family life.<sup>2</sup> Yet the particular interest at issue in *Pierce*, educational pluralism, has been difficult to realize. Whatever constitutional limits the decision placed on the government's use of its regulatory power to promote "standardization"<sup>3</sup> directly, the use of the spending power may indirectly produce the same result: "By taxing everyone, but subsidizing only those who use secular schools, the government creates a powerful disincentive for parents to exercise their constitutionally protected option to send their children to parochial schools."<sup>4</sup> Without any aid for private schools, parents must either accept their children's education in majoritarian norms at a public school or forfeit their right to a publicly financed education.<sup>5</sup>

The same concern for educational pluralism that animated the *Pierce* Court led many to advocate a system of educational choice.<sup>6</sup> Such leading liberal thinkers as Thomas Paine and John Stuart Mill had proposed educational vouchers as a solution.<sup>7</sup> In 1955, econo-

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2. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (consensual sexual conduct); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (right to rear children); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (parental rights); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) (right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (family living arrangements); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (abortion); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (education of children); *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (use of contraception by unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (use of contraception by married persons).

3. See *Pierce*, 268 U.S. at 535 (noting that the state may not "standardize its children by forcing them to accept instruction from public teachers only").

4. Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 132 (1992) [hereinafter McConnell, *Religious Participation in Public Programs*].

5. One may dispute the extent to which the norms prevailing in public schools are "majoritarian," a controversy not addressed here. See generally JONATHAN ZIMMERMAN, *WHOSE AMERICA? CULTURE WARS IN THE PUBLIC SCHOOLS* (2002).

6. Educational choice refers to a program in which parents may choose to send their children to a school other than the one assigned to them by geographic default. In many proposals, the government issues a voucher to a parent or guardian to be used to fund a child's education in either a public or a private school. See *SCHOOL CHOICE: THE MORAL DEBATE* (Alan Wolfe ed., 2003).

7. In *On Liberty*, Mill wrote:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body. An education

mist Milton Friedman proposed a voucher system as a means of improving educational quality.<sup>8</sup> At the same time, others continued to see vouchers primarily as a means of avoiding educational standardization.<sup>9</sup> “Educational choice,” writes Michael McConnell, “would allow families to choose for themselves, among a range of choices that present different philosophical alternatives. That would be far more consistent with our constitutional commitment to pluralism.”<sup>10</sup>

With respect to religious schools, however, the Supreme Court initially suggested that such a program would be impermissible. In effect, the Establishment Clause<sup>11</sup> was held to require states to promote “standardization” through selective funding.<sup>12</sup> The interest in educational pluralism returned in *Zelman v. Simmons-Harris*, in which the Court upheld a school choice program that permits parents to use vouchers at any participating religious or nonreligious school of their choosing.<sup>13</sup> “The program does not force any indi-

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established and controlled by the State should only exist, if it exist at all, as one among many competing experiments.

JOHN STUART MILL, ON LIBERTY 156 (Edward Alexander ed., 1999) (1869); see also THOMAS PAINE, THE RIGHTS OF MAN 252 n.1 (Ernest Rhys ed., 1951) (1791) (“Education, to be useful to the poor, should be on the spot, and the best method, I believe, to accomplish this is to enable the parents to pay the expences themselves.”).

8. Milton Friedman, *The Role of Government in Education*, in EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 12 (George R. LaNoue ed., 1972) (“Governments could require a minimum level of education financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on ‘approved’ educational services. Parents would then be free to spend this sum and any additional sum on purchasing educational services from an ‘approved’ institution of their own choice.”).

9. See, e.g., VIRGIL C. BLUM, FREEDOM OF CHOICE IN EDUCATION 36 (1958) (“Government control over the processes of education is infinitely more objectionable than government control of businesses which supply the physical needs of life. . . . Freedom can survive, to a considerable degree, even if government tells the citizen what brand of food he must eat and what fashion of clothes he must wear. But freedom cannot long survive when government tells him what thoughts he must think.”).

10. Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 851 (1999).

11. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

12. See, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762 (1976) (upholding state aid to religious colleges provided that colleges perform “essentially secular educational functions”); *Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (upholding the state’s provision of textbooks to parochial school students only if they use secular textbooks that are “not unsuitable for use in the public schools.”).

13. 536 U.S. 639 (2002).

vidual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children,” explained Justice Thomas, citing *Pierce*.<sup>14</sup>

No sooner had the Court made this nod to educational pluralism than the standardizers leapt into action. The president of the American Federation of Teachers, Sandra Feldman, promised a dual response: “If this decision brings new efforts to enact voucher legislation, we will fight these efforts,” she said.<sup>15</sup> “But we will also work with local, state, and national policymakers to ensure that private schools that receive public funds are held accountable—just as public schools are.”<sup>16</sup> The Progressive Policy Institute, meanwhile, began promoting its own version of “accountable choice,” which would impose statewide standards on private and parochial schools that participate in school choice programs.<sup>17</sup>

Similarly, some legal scholars argue that religious schools that participate in such programs must promote majoritarian norms. “Publicly subsidized schooling,” writes Martha Minow, “must also advance public values.”<sup>18</sup> She argues that voucher plans should have “public strings attached and enforced through adequate oversight and monitoring.”<sup>19</sup> Thus, the state would ensure that religious schools respect such principles as the individual’s freedom of belief and expression, political neutrality toward religion, fair trials by impartial decision-makers, and nondiscrimination on the basis of race, gender, religion, national origin, and sexual orientation.<sup>20</sup> Moreover, “any religious school receiving public funds or vouchers must engage in educational programming to address the legacies of

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14. *Id.* at 680 (Thomas, J., concurring).

15. Press Release, American Fed’n of Teachers, Statement by Sandra Feldman, President, American Fed’n of Teachers, on the Supreme Court’s Ruling on School Vouchers (June 27, 2002), *available at* <http://archive.aft.org/presscenter/releases/2002/062702.htm>.

16. *Id.*

17. ANDREW J. ROTHERHAM, PROGRESSIVE POL’Y INST., PUTTING VOUCHERS IN PERSPECTIVE: THINKING ABOUT SCHOOL CHOICE AFTER *Zelman v. Simmons-Harris* (July 2, 2002), [http://www.ppionline.org/documents/Ed\\_vouchers\\_702.pdf](http://www.ppionline.org/documents/Ed_vouchers_702.pdf) (proposing that “public accountability, as well as funding, follow[ ] students into new or existing schools of choice—whether operated by government, private, or parochial authorities. But, these schools remain public in the most critical sense—public results and accountability in exchange for public funding.”).

18. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1261 (2003).

19. *Id.*

20. *Id.*; *see also* MARTHA MINOW, PARTNERS, NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD 104 (2002) (“Religious groups should not be exempted from state and local laws against discrimination on the basis of sexual orientation.”).

intergroup hatred and conflict and to promote tolerance and respect among religious, racial, and ethnic groups.”<sup>21</sup>

It is not difficult to see a suspicion of religious belief in such proposals. James Dwyer, for example, advocates using vouchers as a means to standardize education in accordance with majoritarian norms:

The beauty of vouchers, for anyone concerned about the current lack of regulation of private schools, is that vouchers provide a mechanism for states to greatly influence the nature and quality of instruction in religious and other private schools. By offering this large benefit to all private schools willing to comply with state education standards, states can greatly influence the market for private education. In all likelihood, a substantial percentage of parents who send their children to religious schools would be willing to sacrifice some control over their children’s education in order to be relieved of the burden of private school tuition.<sup>22</sup>

According to Dwyer, states ought to “use vouchers as a wedge to open the doors of God’s schools to state regulators, to restrict the freedom of parents and religious groups to educate children in accordance with their deeply held beliefs.”<sup>23</sup> He argues that states should prevent the teaching of doctrines, such as a belief in traditional gender roles, that conflict with modern liberalism.<sup>24</sup> Meanwhile, Stephen Macedo sees educational vouchers as “a vehicle by which public values further ‘colonize’ the private realm, including the religious realm.”<sup>25</sup> State regulation of participating schools will “have the effect of reconstituting private institutions in ways that make them more conformable with public values. They seem likely to alter the nature of many religious schools that receive vouchers—perhaps dampening some forms of religious diversity.”<sup>26</sup>

If vouchers serve to standardize education by undermining the religious diversity of private sectarian schools, school choice programs may prove to be, from the standpoint of their proponents, a

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21. MINOW, *supra* note 20, at 118.

22. James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 994 (2001).

23. *Id.* at 999–1000.

24. *Id.* at 996 (“Even more so than academic curricular requirements, this would go to the content of instruction, targeting specific forms of expression, and so would surely exclude or disadvantage some religious groups.”).

25. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Non-profit Organizations, and Liberal Public Values*, 75 CHI.-KENT. L. REV. 417, 441 (2000).

26. *Id.* at 440–41 (noting further that “altering the nature of religious schools will likely exert pressure on religious communities more broadly”).

self-defeating endeavor. Indeed, many hailed *Zelman* and other decisions by the Rehnquist Court as signaling a new openness toward the participation of religious institutions in public life.<sup>27</sup> But the nature of the new church-state relationship depends on what sorts of conditions the state may place on religious organizations when they participate in public fora. The effect could as easily be to secularize religious institutions as to religionize the public square. The question of state regulation of private schools that accept vouchers is especially pressing in light of the *Zelman* decision because sectarian—even “pervasively sectarian”<sup>28</sup>—schools may now participate in state-funded voucher programs. State regulation of private religious schools may compromise the institutions’ religious missions and raise concerns about establishment and religious liberty under the First Amendment. Yet there is no consensus on the extent to which the state may regulate such schools.<sup>29</sup>

This Article explores obstacles to the regulation of religious schools through school voucher programs following the Supreme Court’s decisions in *Mitchell v. Helms*<sup>30</sup> and *Zelman v. Simmons-Harris*.<sup>31</sup> Part I provides background on the regulations that apply to religious schools participating in the Ohio Pilot Project Scholarship Program and the Milwaukee Parental Choice Program, the two publicly funded, general-admission choice programs that include religious schools,<sup>32</sup> and the legal developments that render such

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27. See, e.g., Bob Egelko, *Rehnquist Dies: Conservative Jurist Helped Steer High Court on Path to the Right*, S.F. CHRON., Sept. 4, 2005, at A1 (noting that Rehnquist Court “lowered barriers to religion in public life”).

28. See *Mitchell v. Helms*, 530 U.S. 793, 826 (2000). The significance of this term is discussed *infra*.

29. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003) (arguing that states have considerable leeway to impose conditions on schools that receive vouchers); Steven Menashi, *The Church-State Tangle: School Choice and Religious Autonomy*, POL’Y REV., Aug.–Sept. 2002, at 37 (arguing that state regulation of religious schools through vouchers faces serious constitutional obstacles); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397 (2003) (describing divergent approaches).

30. 530 U.S. 793 (2000).

31. 536 U.S. 639 (2002).

32. See SchoolChoiceInfo.org: Cleveland Scholarship and Tutoring Program, [http://www.schoolchoiceinfo.org/facts/index.cfm?fl\\_id=2](http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=2) (last visited Mar. 9, 2010) (explaining the Cleveland program); SchoolChoiceInfo.org: Milwaukee Parental Choice Program, [http://www.schoolchoiceinfo.org/facts/index.cfm?fl\\_id=1](http://www.schoolchoiceinfo.org/facts/index.cfm?fl_id=1) (last visited Mar. 9, 2010) (explaining the Milwaukee program). Florida’s McKay Scholarship Program, which provides scholarships that allow students with disabilities to attend private school, also includes religious schools. See Florida Department of Education: McKay Scholarship Program FAQs, <http://www.floridaschool>

regulation constitutionally suspect. Following these legal developments, certain conditions on public funds that were once required are no longer mandated by the Establishment Clause. Part II explains how the religion clauses of the First Amendment establish a right of religious institutions to remain free of government oversight and prohibit the government from involving itself in ecclesiastical questions reserved to religious institutions. Even if a religious institution consents to government oversight, an “excessive entanglement” will nevertheless render such oversight unconstitutional. Part III considers whether a state may regulate a religious school as a condition of its participation in a voucher program. It concludes that if a regulation would violate a school’s First Amendment rights when imposed directly, it is an unconstitutional condition when pressed indirectly. Moreover, because a school choice program that aims to promote educational pluralism resembles a limited public forum, the state may not discriminate on the basis of viewpoint by imposing regulations that exclude certain types of religious belief and practice. Together, these Parts show that while the government need not empower parents to choose educational alternatives, if it does establish such a program it may not police those alternatives in ways that implicate religious expression.

## I.

### RELIGIOUS EDUCATION AND THE STATE

Religious schools that participate in school choice programs in Cleveland and Milwaukee face a number of regulations that implicate religious teaching and institutional autonomy. State legislators imposed these regulations in order to comply with precedents that had prohibited states from using public funds to support religious instruction and required the exclusion of pervasively sectarian schools from public programs.<sup>33</sup> The Supreme Court, however, has abandoned that view. According to the Court, the religious character of a school and the ultimate destination of public funds are not matters of judicial concern so long as the funds are provided on the basis of neutral, secular criteria and directed to religious institutions wholly as a result of individuals’ independent and private choices. In the new constitutional landscape, the state regulation

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choice.org/Information/McKay/faqs.asp, (last visited Mar. 9, 2010). Congress has decided to phase out the Opportunity Scholarship Program in Washington, D.C. See Editorial, *D.C. Vouchers on Life Support*, WASH. POST, Dec. 14, 2009, at A20 (noting that the 2010 spending bill “would continue funding for students currently in the program but close it down for new students.”).

33. See *infra* Part I.A.

of private religious schools that was once thought required by the Establishment Clause is now constitutionally suspect.<sup>34</sup>

#### A. *Regulating Religious Schools*

Even the modest school choice programs now operating in Cleveland and Milwaukee impose some noteworthy restrictions on parochial schools that accept voucher children. Ohio's Pilot Project Scholarship Program precludes participating schools from discriminating on the basis of race, religion, or ethnic background.<sup>35</sup> Schools also may not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>36</sup> While schools may accord preference to siblings of current students or those residing within the local district, the school must make all other admissions decisions by lottery.<sup>37</sup> Milwaukee's Parental Choice Program requires participating private schools to comply with federal antidiscrimination laws,<sup>38</sup> follow health and safety laws that apply to public schools,<sup>39</sup> meet specified academic standards,<sup>40</sup> and undergo annual financial audits.<sup>41</sup> Like the Cleveland program, participating Milwaukee schools must accept children by lottery rather than by selective admission.<sup>42</sup> Thus, the laws in both cities prevent a religious school from favoring students of its own denomination. Unlike the Cleveland program, when the Wisconsin legislature amended the program to include religious schools in 1995, it also added an "opt-out" provision that forbids participating schools from requiring a pupil to participate in "any religious activity" that a parent finds objectionable.<sup>43</sup>

Not all schools could accept such conditions. Most Catholic schools in Milwaukee chose to accept the conditions and admit

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34. *See infra* Part I.B.

35. OHIO REV. CODE ANN. § 3313.976(A)(4).

36. § 3313.976(A)(6).

37. § 3313.977(A)(1)(a)–(d).

38. WIS. STAT. § 119.23(2)(a)(4) (requiring compliance with 42 U.S.C. § 2000d, which prohibits discrimination under federally assisted programs).

39. § 119.23(2)(a)(5).

40. § 119.23(7)(a).

41. § 119.23(7)(am).

42. WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, MILWAUKEE PARENTAL CHOICE PROGRAM FREQUENTLY ASKED QUESTIONS—2010–11 SCHOOL YEAR (2010), [http://dpi.wisconsin.gov/sms/doc/mpcp\\_faq\\_2010\\_01.doc](http://dpi.wisconsin.gov/sms/doc/mpcp_faq_2010_01.doc).

43. WIS. STAT. § 119.23(7)(c); *see also* Maureen E. Cusack, *The Unconstitutionality of School Voucher Programs: The United States Supreme Court's Chance to Revive or Revise Establishment Clause Jurisprudence*, 33 COLUM. J.L. & SOC. PROBS. 85, 97 (1999).

voucher children, for example, while most schools in the Wisconsin Evangelical Lutheran Synod, the second-largest provider of religious schools in Milwaukee, declined to participate in the voucher program.<sup>44</sup> Pervasively sectarian institutions, at which religious faith informs the whole curriculum, are least able to accept the opt-out provision because it imposes an artificial distinction between religious and secular activities that would be impossible to administer without secularizing some elements of the curriculum—in other words, compromising the school’s educational mission and holistic religious environment.<sup>45</sup> Even the simple requirement of nondiscriminatory admissions, which prevents the matching of a student’s family with the school’s religious tradition, could fundamentally alter an institution’s religious mission.<sup>46</sup> The United States Department of Education found that forty-six percent of religious schools, in twenty-two urban areas, would not participate in a school choice program that required an admissions lottery system.<sup>47</sup> The same study revealed that eighty-six percent of religious schools would refuse to join a program that required them to offer exemptions from religious activities.<sup>48</sup> The Lutheran Church-Missouri Synod cited the importance of “maintaining our mission and our spiritual nature which permeates our total school program.”<sup>49</sup> As a result, the Synod would restrict admission to “students from families who wanted Lutheran school education,” not students randomly admitted by lottery.<sup>50</sup>

Because Supreme Court precedents had suggested that the Establishment Clause required an opt-out provision,<sup>51</sup> legislators, at

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44. Joe Loconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, POL’Y REV., Jan.–Feb. 1999, at 30, 34.

45. *See id.*

46. “One suspects that this accommodation of religious schools to public norms could alter the nature of religious schools as communities. . . . The school’s affiliation with the particular sponsoring religious community may be somewhat muted, even attenuated, or at least revised as a consequence.” Macedo, *supra* note 25, at 436–37 (noting further that “religious references in the curriculum may become more ecumenical, or else perhaps robust expressions of sectarianism will tend to be confined to certain voluntary aspects of the curriculum”).

47. LANA MURASKIN & STEPHANIE STULLICH, U.S. DEP’T OF EDUC., BARRIERS, BENEFITS, AND COSTS OF USING PRIVATE SCHOOLS TO ALLEVIATE OVERCROWDING IN PUBLIC SCHOOLS: FINAL REPORT 50 (1998).

48. *Id.* at 51.

49. *Id.*

50. *Id.* at 50. Christian Schools International also explained that “[a]lmost all our schools would not allow the exemption because every class is permeated by a Christian religious viewpoint.” *Id.* at 52.

51. *See supra* note 12; *see also infra* notes 53–59 and accompanying text.

least when the Milwaukee Parental Choice Program was crafted over a decade ago, seemed to face a Hobson's choice: either exclude religious schools from voucher programs or undermine their independence. The Supreme Court's decision in *Zelman*, however, removes any necessary tradeoff between autonomy for religious schools and the constitutionality of the choice program.<sup>52</sup>

### B. *The New Constitutional Landscape*

Wisconsin legislators added the opt-out provision in order to comply with the Establishment Clause.<sup>53</sup> In *Meek v. Pittenger*,<sup>54</sup> the Supreme Court held that a state could not provide aid to religious schools that "from its nature can be diverted to religious purposes."<sup>55</sup> Thus, when the Court allowed state aid to sectarian colleges the following year, in *Roemer v. Board of Public Works*,<sup>56</sup> it did so only because the institutions were "not so permeated by religion that the secular side cannot be separated from the sectarian" and the "aid in fact was extended only to the secular side."<sup>57</sup> By this logic, exempting voucher students from religious activities ensures that public aid supports only those aspects of education "indisputably marked off from the religious function."<sup>58</sup> The opt-out provision, as well as the open admissions policy, guarantees that participating schools will perform "essentially secular educational functions," as did the institutions at issue in *Roemer*.

Unlike the Milwaukee program, the Cleveland program lacked an opt-out provision. As a result, opponents of Cleveland's voucher program emphasized that participating schools featured curricula in which sectarian and secular elements were interwoven; they argued the program was unconstitutional because public funds would unavoidably support religious activities at such pervasively sectarian

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52. See *infra* Part I.B.

53. See Cusack, *supra* note 43, at 95 (describing the Milwaukee Parental Choice Program as "carefully constructed to overcome an inevitable Establishment Clause challenge."); see also U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

54. 421 U.S. 349 (1975).

55. *Id.* at 357 (quoting *Meek v. Pittenger*, 374 F. Supp. 639, 662) (E.D. Pa. 1974)) (internal quotation marks omitted).

56. 426 U.S. 736 (1976).

57. *Id.* at 759 (internal quotation marks omitted).

58. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) (arguing that "[t]he applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson* . . .").

institutions.<sup>59</sup> But in the 2000 case of *Mitchell v. Helms*,<sup>60</sup> the Supreme Court discarded the notion that public aid can never flow to pervasively sectarian institutions.<sup>61</sup>

When the Court decided *Meek* in 1975, Chief Justice Burger looked forward to this development. He hoped the Court would eventually “come to a more enlightened and tolerant view of the First Amendment’s guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools” and adopt “a more realistic view that carefully limited aid to children is not a step toward establishing a state religion.”<sup>62</sup> Twenty-five years later, the *Mitchell* Court formally repudiated *Meek*,<sup>63</sup> holding instead that a school’s religious character is

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59. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (upholding funding because Baptist college had not been shown to be “an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission”); see also *Bowen v. Kendrick*, 487 U.S. 589 (1988) (rejecting a challenge to the Adolescent Family Life Act because the religiously affiliated grant recipients had not been found to be pervasively sectarian); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (invalidating state’s provision of maintenance and repair grants to private schools because “[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions”); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (holding reimbursements to private schools to be impermissible because the religious and nonreligious aspects of the services could not be differentiated); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding grants to colleges because they were not pervasively sectarian); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (finding aid impermissible because the “substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”).

60. 530 U.S. 793 (2000).

61. *Id.* at 829 (plurality opinion) (holding that “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it.”).

62. *Meek*, 421 U.S. at 387 (Burger, C.J., concurring in part and dissenting in part); see also *id.* at 386–87 (“To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children . . . and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.”) (emphasis in original).

63. *Mitchell*, 530 U.S. at 835 (plurality opinion) (“To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.”); *id.* at 837 (O’Connor, J., concurring) (“To the extent our decisions in *Meek v. Pittenger* and *Wolman v. Walter* are inconsistent with the Court’s judgment today, I agree that those decisions should be overruled.”) (citations omitted).

irrelevant as long as the government acts with a secular purpose and distributes aid in a neutral fashion.<sup>64</sup>

“If a program offers permissible aid to the religious (including the pervasively sectarian), the a-religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be,” wrote Justice Thomas for the Court’s plurality.<sup>65</sup> Going further, the Court’s plurality explained that focusing on whether a school is pervasively sectarian necessitates an inquiry into the school’s religious views that “is not only unnecessary but also offensive” because of the well-established principle that “courts should refrain from trolling through a person’s or institution’s religious beliefs.”<sup>66</sup> Thus, the pervasively sectarian nature of an institution no longer justifies unequal treatment by the state.<sup>67</sup> In fact, such unequal treatment is constitutionally suspect.<sup>68</sup>

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64. *Id.* at 827.

65. *Id.* at 827–28 (“The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would . . . reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.”).

66. *Id.* at 828 (“[T]he application of the ‘pervasively sectarian’ factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.”).

67. Though only four Justices joined Justice Thomas’s plurality opinion, Justice O’Connor, joined by Justice Breyer, similarly discarded the “pervasively sectarian” test. She wrote separately to insist on the distinction between a per-capita school-aid program and a true private-choice program. *Id.* at 842–44 (O’Connor, J., concurring). In direct aid cases such as the former, she argued, plaintiffs should be able to establish a First Amendment violation by proving that state aid has been diverted to religious purposes. *Id.* at 857. She declined to adopt, however, a presumption that aid to pervasively sectarian institutions will always be so diverted. *Id.* at 858 (arguing that “presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause” and suggesting that “plaintiffs raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination”).

68. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (rejecting a state university’s authority to “scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that the exclusion of a speaker from public property because of the religious character of his views violates the First Amendment); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (warning that inquiries into the religious significance of words and activities risk greater First Amendment problems than nondiscrimination).

In *Zelman*, the Court confirmed that the Establishment Clause does not require unequal treatment of religious instruction through an opt-out provision or similar regulation. There was no dispute that some of the schools receiving vouchers were pervasively sectarian or that public funds would ultimately support religious instruction.<sup>69</sup> The important question in *Zelman* was whether the program had the forbidden effect of advancing or inhibiting religion—namely, that the aid must not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement between church and state.<sup>70</sup> Because the state provided vouchers on the basis of neutral, secular criteria, there was no financial incentive to undertake religious instruction, so the aid did not constitute a government endorsement of religion.<sup>71</sup> Because the state provided aid only to parents, who then chose where to direct the money, public funds flowed to religious schools only as a result of parents’ own independent and private choices; thus, the aid to religious schools cannot be attributed to government decision-making.<sup>72</sup> Accordingly, the voucher program did not alter the relationship between religious schools and the government, “whose role ends with the disbursement of benefits” to parents.<sup>73</sup> Thus, “the circuit between government and religion was broken, and the Establishment Clause was not implicated.”<sup>74</sup>

As *Zelman* made clear, the Establishment Clause did not require the legislative horse-trading that forced religious schools in Milwaukee to relinquish control of their admissions and curricula. The case for mandating exemptions from religious activities or forbidding religiously selective admissions policies rests on the idea that state aid must not result in “governmental religious indoctrination” or “define its recipients by reference to religion.”<sup>75</sup> But in a

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69. Only the dissenters found the “pervasively sectarian” test relevant. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 709 n.19 (2002) (Souter, J., dissenting); see also *infra* notes 78–79 and accompanying text.

70. 536 U.S. at 649. In other words, the Court applied the “effects” prong of the “*Lemon* test.” See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); see also *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

71. *Zelman*, 536 U.S. at 653.

72. *Id.* at 655 (“[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.”).

73. *Id.* at 652.

74. *Id.*; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witers v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

75. *Agostini*, 521 U.S. at 234.

system of private choice, religious schools are not state actors and their services are not state aid.<sup>76</sup> The only state aid is the initial transfer from the state to parents, who then direct the money as they see fit. It is no different from issuing a paycheck to a government employee, who may then divert the funds to a religious cause.<sup>77</sup> In that case, as in the case of a school voucher, the Establishment Clause does not require that the state monitor its eventual use. Thus, even though the Cleveland program contained no opt-out provision, the Court sustained it against an Establishment Clause challenge.

The nondiscrimination provisions in the Cleveland program, moreover, were thought relevant only by the four *Zelman* dissenters, who worried that enforcing the conditions against private religious schools would occasion an excessive entanglement between religion and government that would itself violate the Establishment Clause.<sup>78</sup> In other words, no Justice opined that the nondiscrimination provisions were necessary, but four thought the provisions might be constitutionally impermissible.<sup>79</sup>

In fact, there is good reason to question the nondiscrimination provisions. Laws that target religious conduct—prohibiting a religious school from requiring “any religious activity,” for example, or disallowing employment and admissions decisions based on religious criteria—implicate the Free Exercise Clause<sup>80</sup> and must be jus-

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76. *Cf. Jackson v. Benson*, 578 N.W.2d 602, 627 (Wis. 1998) (“[T]he mere appropriation of public monies to a private school does not transform that school into a district school . . .”).

77. *Witters*, 474 U.S. at 486–87 (“It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.”); *see also Mitchell v. Helms*, 530 U.S. 793, 841 (2000) (O’Connor, J., concurring) (“This characteristic of both programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.”).

78. *Zelman*, 536 U.S. at 712–15 (Souter, J., dissenting) (calling voucher program a “foot-in-the-door of religious regulation” that will draw courts into disputes over admissions, employment, and curriculum at religious schools); *see also id.* at 728 (Breyer, J., dissenting) (noting “entanglement problems”).

79. This possibility is discussed below. *See infra* Part II.B.

80. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”); *id.* at 546 (“A law that targets religious

tified by a compelling state interest and be narrowly tailored to advance that interest.<sup>81</sup> In *Mitchell*, the Court’s adoption of a more neutral approach to the Establishment Clause rendered the “pervasively sectarian” test—once thought constitutionally required—constitutionally suspect.<sup>82</sup> In the same way, after the Court’s determination in *Zelman* that programs of private choice do not implicate the Establishment Clause, the monitoring of religious organizations to ensure that the program does not support religion—also once thought to be constitutionally required<sup>83</sup>—must similarly be suspect. In other words, state regulation of religious schools cannot be justified by a government interest in preventing public funds from supporting religious instruction; under *Zelman* the Establishment Clause does not mandate such a segregation of funds. Without a rationale based on the Establishment Clause, the regulation appears to be gratuitous government intrusion in the affairs of religious institutions and itself a violation of the Free Exercise Clause. Indeed, judicial action under Milwaukee’s opt-out law, for example, would occasion an inquiry similar to the “pervasively sectarian test”: courts would need to determine which activities are “too religious” and which are “sufficiently secular” to be required.<sup>84</sup>

It makes sense that, as the Court adopts an increasingly neutral attitude toward religion, the regulations that developed to support a previous regime of strict no-aid separationism would become impermissible. In *Rosenberger v. University of Virginia*,<sup>85</sup> for example, the university believed that the Establishment Clause required it to evaluate the content of student publications to avoid funding religious evangelism.<sup>86</sup> But the Court, taking a view that the Establishment Clause required only neutrality, held that the evaluation itself—once thought to be constitutionally required—was impermissible.<sup>87</sup> Similarly, in *Employment Division v. Smith*,<sup>88</sup> the Court

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conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

81. *Id.* at 533 (“Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”) (internal citations omitted).

82. *See supra* notes 60–68 and accompanying text.

83. *See supra* note 55.

84. *Cf. Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“[C]ourts should refrain from trolling through a person’s or institution’s religious beliefs.”).

85. 515 U.S. 819 (1995).

86. *Id.* at 837.

87. *Id.* at 845.

abandoned the compelling-interest balancing test, which required judges to weigh the importance of a burdened religious practice against the state's interest in applying a neutral law that burdens it.<sup>89</sup> Thereafter, the inquiry once thought constitutionally required—to examine the “centrality” of the burdened religious belief in order to apply the compelling-interest test—became constitutionally suspect.<sup>90</sup> “Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims,” said the Court.<sup>91</sup> The more neutral attitude toward Free Exercise claims adopted in *Smith* removed the compelling justification for such an inquiry.

## II. THE FIRST AMENDMENT

Without the state interests once thought compelling, the religion clauses of the First Amendment stand as a bar to state regulations that implicate religious expression, even when religious institutions participate in a publicly established voucher program. The Free Exercise Clause establishes a right of religious institutions to remain free of government oversight and control. Accordingly, regulations that inject a secular state authority into the internal governance of religious institutions violate the First Amendment.<sup>92</sup> The Establishment Clause provides a structural constraint on the power of government to involve itself in ecclesiastical questions reserved to religious institutions. Thus, even if a religious institution consents to government oversight, an “excessive entanglement” between them will nevertheless render such oversight unconstitutional.<sup>93</sup>

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88. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

89. *Id.* at 884–85 (holding the compelling-interest test inapplicable to Free Exercise challenges outside the unemployment compensation context).

90. *Id.* at 886–87 (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”).

91. *Id.* at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”). Following *Smith*, the Court is to uphold neutral laws of general applicability that incidentally inhibit free exercise of religion. *Id.* at 890.

92. See *infra* Part II.A.

93. See *infra* Part II.B.

A. *The Free Exercise Clause and Religious Autonomy*

The First Amendment is not an absolute bar to all regulation. When it first establishes a voucher program, a state may set certification requirements that schools must meet in order to participate, provided those requirements are generally applicable and neutral toward religion.<sup>94</sup> But regulations that target religious activities or involve government in the internal operations of religious associations strike at First Amendment principles. Expressive associations, including those that advance a religious message, traditionally enjoy First Amendment protections from government interference.<sup>95</sup> The Court has recognized that implicit in the guarantees of the First Amendment is the right to associate with others “in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>96</sup> Government infringes this right when it seeks “to impose penalties or withhold benefits from individuals because of their membership in a disfavored group” or tries “to interfere with the internal organization or affairs of the group.”<sup>97</sup> A regulation “that forces the group to accept members it does not desire” clearly creates such interference because “[s]uch a regulation may impair the ability of the original members to express only those views that brought them together.”<sup>98</sup> Freedom of association includes the right not to associate.<sup>99</sup>

Religious associations receive additional constitutional protection from the religion clauses.<sup>100</sup> Well over a century ago, the Court described as “unquestioned” the “right to organize voluntary

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94. *See Smith*, 494 U.S. at 872; *see also* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 304–05 (1985) (upholding minimum wage, overtime, and recordkeeping statutes as applied to nonprofit religious foundation because statutes did not interfere with foundation’s religious exercise or risk government entanglement with religion).

95. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 643 (2000) (holding that New Jersey’s public accommodations law violated the Boy Scouts’ First Amendment right of expressive association).

96. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (noting that the “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” but holding that the Jaycees lack the “distinctive characteristics” that would afford constitutional protection to its decision to exclude women).

97. *Id.* at 622–23.

98. *Id.* at 623.

99. *Id.*; *see also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

100. *See generally* *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (“[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”), *superseded by stat-*

religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers.”<sup>101</sup> So understood, religious liberty includes the right to join with others to practice a religion and to pursue religious objectives, such as education and evangelistic outreach. The Court has recognized that subjecting religious associations to secular oversight would defeat their very purpose and undermine their constitutional protection:

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.<sup>102</sup>

Because state interference in the internal organization of religious communities threatens religious liberty, the First Amendment embraces “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>103</sup> This principle governed the decision in *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America* in which the Court held that New York’s religious corporations law, which sought to transfer control of Russian Orthodox churches in New York from the central governing authority of the Russian Orthodox Church in Moscow to the independent Russian Church of America, unconstitutionally prohibited the free exercise of religion.<sup>104</sup> “This contro-

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ute, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated* by *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

101. *Watson v. Jones*, 80 U.S. 679, 728–29 (1872).

102. *Id.* at 729.

103. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that freedom to select clergy has “federal constitutional protection as a part of the free exercise of religion against state interference”). This principle forms the core of the “church autonomy doctrine.” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002).

104. *Kedroff*, 344 U.S. at 120–21.

versy concerning the right to use St. Nicholas Cathedral is strictly a matter of ecclesiastical government,” said the Court.<sup>105</sup> “Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy . . . prohibits the free exercise of religion.”<sup>106</sup>

The Court applied the same principle in *Gonzalez v. Roman Catholic Archbishop of Manila*,<sup>107</sup> in which the Petitioner claimed he was entitled to a chaplaincy in the Roman Catholic Church.<sup>108</sup> The trial court directed the Archbishop of Manila to appoint him, but the Supreme Court held such an intervention impermissible.<sup>109</sup> “Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them,” Justice Brandeis wrote for the Court.<sup>110</sup> “In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.”<sup>111</sup>

In *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*,<sup>112</sup> the Court discarded even the possibility that the “arbitrariness” of an ecclesiastical decision would be a sufficient justification for interference with religious bodies.<sup>113</sup> In that case, the Court reversed the judgment of the Illinois Supreme Court, which had held that the defrockment of a bishop was invalid under the internal regulations of the Serbian Eastern Orthodox Church and invalidated the church’s division of its North American diocese.<sup>114</sup> As in *Gonzalez*, the Court noted that ecclesiastical decisions are beyond the reach of the courts. “Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or

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105. *Id.* at 115.

106. *Id.* at 107–08.

107. 280 U.S. 1 (1929).

108. *Id.* at 10–11.

109. *Id.* at 16.

110. *Id.*

111. *Id.*

112. 426 U.S. 696 (1976).

113. *Id.* at 713 (“For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits . . .”).

114. *Id.* at 721.

impermissible objectives, are . . . hardly relevant to such matters of ecclesiastical cognizance.”<sup>115</sup>

In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,<sup>116</sup> the Court maintained that civil courts had no role in resolving ecclesiastical questions, even when necessary to resolve property disputes.<sup>117</sup> “If civil courts undertake to resolve such controversies [over religious doctrine and practice] in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”<sup>118</sup>

The concern that state regulation threatens free exercise has led the Court also to uphold exemptions for religious organizations from property taxes and from Title VII’s prohibition on religious discrimination. The need for protection from regulation applies especially to parochial schools. In *NLRB v. Catholic Bishop of Chicago*,<sup>119</sup> for example, the Court addressed a determination by the National Labor Relations Board (NLRB) that church-operated schools violated the National Labor Relations Act by refusing to recognize or to bargain with unions representing lay faculty members at the schools.<sup>120</sup> The NLRB argued that the schools had involved themselves in the secular world when they decided to hire lay teachers and were therefore subject to the Board’s jurisdiction.<sup>121</sup> The NLRB also argued that it could exercise jurisdiction over schools that were only “religiously affiliated” rather than “completely religious.”<sup>122</sup> The Court, however, worried that NLRB oversight could “run afoul of the Religion Clauses and hence preclude jurisdiction

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115. *Id.* at 714–15 (“[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria.”) (internal footnote omitted).

116. 393 U.S. 440 (1969).

117. *Id.* at 449–50.

118. *Id.* at 449 (“Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes; the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”) (internal citation omitted).

119. 440 U.S. 490 (1979).

120. *Id.* at 494.

121. *Id.* at 498 (“In the Board’s view, the Association had chosen to entangle itself with the secular world when it decided to hire lay teachers.”).

122. *Id.* at 499.

on constitutional grounds.”<sup>123</sup> Recognizing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school,”<sup>124</sup> the Court concluded that “[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.”<sup>125</sup> In particular, because several religious schools claimed their religious creeds mandated the challenged practices, resolving the charges would “necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.”<sup>126</sup> Thus, it was not only the Board’s conclusions that threatened rights guaranteed by the religion clauses, “but also the very process of inquiry leading to findings and conclusions.”<sup>127</sup> In this way, the Court suggested that the First Amendment might prohibit a secular regulatory authority from enforcing generally applicable labor laws against religious schools. In the absence of a clear expression of Congress’s intent to bring church-operated schools under the NLRB’s jurisdiction, however, the Court declined to construe the Act to so require.<sup>128</sup>

Out of similar concerns, the Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*<sup>129</sup> unanimously upheld Congress’s decision to exempt all church activities from Title VII’s prohibition on religious discrimination.<sup>130</sup> Previ-

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123. *Id.*

124. *Id.* at 501; *see also* *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“Religious authority necessarily pervades the school system.”); *id.* at 616 (“[P]arochial schools involve substantial religious activity and purpose.”); *id.* at 628 (Douglas, J., concurring) (noting “the admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith”).

125. *Catholic Bishop*, 440 U.S. at 504.

126. *Id.* at 502.

127. *Id.* The Court also noted that the NLRB’s role in determining what are “‘terms and conditions of employment’ and therefore mandatory subjects of bargaining” would involve it in aspects of school administration that would lead to conflicts with clergy-administrators and undermine “the former autonomous position of management.” *Id.* at 502–03.

128. *Id.* at 507 (“[I]n the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”).

129. 483 U.S. 327 (1987).

130. *Id.* at 339 (“It cannot be seriously contended that § 702 [of the Civil Rights Act of 1964] impermissibly entangles church and state; the statute effectu-

ously, only religious activities had been exempt.<sup>131</sup> Exempting only those activities identifiable as “religious” could undermine the free exercise of religion because “it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.”<sup>132</sup> As Justice White wrote for the Court, “[t]he line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”<sup>133</sup> Thus, the broader exemption served the permissible legislative purpose of alleviating “governmental interference with the ability of religious organizations to define and carry out their religious missions.”<sup>134</sup> Under *Amos*, a threat to the free exercise of religion exists when secular courts must police a line between secular and religious activities within a sectarian institution. The Court’s concern mirrors that of Milwaukee educators who worried that an opt-out provision would undermine their schools’ religious missions.<sup>135</sup> Judicial action under the opt-out law would hinge on the distinction between secular and religious activities, so the prospect of litigation would present the same Free Exercise Clause concerns the Court found in *Amos*.

In addition to this concern about a chilling effect on free exercise, religious schools also retain the protections of a “century-old

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ates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.”).

131. *Id.* at 336.

132. *Id.*

133. *Id.* In his concurrence, Justice Brennan elaborated the point:

[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s process of self-definition would be shaped in part by the prospects of litigation.

*Id.* at 343–44 (Brennan, J., concurring) (citation omitted).

134. *Id.* at 335 (majority opinion).

135. See *Loconte*, *supra* note 44, at 34 (noting concern about the prospect of the “religious sterilization of academic courses”).

affirmation of a church’s sovereignty over its own affairs.”<sup>136</sup> Circuit courts have long held that the Free Exercise Clause exempts the selection of clergy from antidiscrimination statutes and precludes civil courts from adjudicating employment discrimination suits by ministerial employees against the religious institutions that employ them.<sup>137</sup> The ministerial exception applies to members of the clergy as well as “to lay employees of religious institutions whose ‘primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.’”<sup>138</sup> If the employee’s duties are “important to the spiritual and pastoral mission of the church,” the exception applies.<sup>139</sup> Indeed, as the Third Circuit has noted, “attempting to forbid religious discrimination against non-minister employees where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden.”<sup>140</sup> Under a reasonable application of this test, the ministerial exception applies to the faculty at parochial schools, thereby granting the schools freedom from judicial oversight in most employment decisions.<sup>141</sup> Beyond personnel, when religious

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136. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right [sic] to Church Autonomy*, 81 COLUM. L. REV. 1373, 1397 (1981) (noting that the Supreme Court has been willing to extend “the right of church autonomy as far as necessary to include the cases before it”).

137. *See Catholic Univ.*, 83 F.3d at 461 (citing cases from the D.C., First, Fifth, Seventh, and Eighth Circuit Courts of Appeals).

138. *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)).

139. *Rayburn*, 772 F.2d at 1169.

140. *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991).

141. *See Clapper v. Chesapeake Conference of Seventh-Day Adventists*, No. 97-2648, 1998 U.S. App. LEXIS 32554, at \*21 (4th Cir. Dec. 29, 1998) (applying ministerial exception to an elementary school teacher because “the Seventh-day Adventist Church relies heavily upon its full-time, elementary school teachers to carry out its sectarian purpose”); *Catholic Univ.*, 83 F.3d at 470 (holding that adjudication of professor’s sex discrimination claim against Catholic university would violate Free Exercise and Establishment Clauses); *Little*, 929 F.2d at 951 (dismissing Title VII claim because parochial school may discharge a teacher who has publicly engaged in conduct regarded by the school as inconsistent with religious principles); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283–84 (5th Cir. 1981) (holding that Title VII cannot be applied to non-ordained faculty or administrative staff at a seminary); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 884, 891 (E.D. Mich. 2008) (noting that the ministerial exception applies to a kindergarten teacher at a Lutheran school offering a “Christ-centered education”); *Stately v. Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 869 (E.D. Wis. 2004) (applying the ministerial exception to an elementary school teacher because the school required the teacher to integrate

organizations make administrative decisions for religious reasons, the civil courts and regulatory agencies may not evaluate those decisions.<sup>142</sup> “In these sensitive areas,” the Fourth Circuit has written,

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Native American culture and religion into her classes, she participated in and sometimes led the school’s religious ceremonies and cultural activities, and she helped develop her students spiritually); *Powell v. Stafford*, 859 F. Supp. 1343, 1345 (D. Colo. 1994) (holding that the Age Discrimination in Employment Act cannot be applied to a teacher in a Catholic high school); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1505 (E.D. Wis. 1986) (holding that sex discrimination claim at Catholic university cannot be adjudicated because “[t]he state, through this court, would involve itself in theological questions . . .”), *aff’d in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc.*, 875 A.2d 669, 677 (D.C. 2005) (applying the ministerial exception to a Catholic elementary school principal whose “many responsibilities—some predominantly ‘secular’ and some predominantly religious—are inextricably intertwined in the school’s mission”); *Porth v. Roman Catholic Diocese of Kalamazoo*, 532 N.W.2d 195, 200 (Mich. Ct. App. 1995) (applying ministerial exception to an elementary school teacher who, by virtue of “the pervasive religious authority in teaching,” was “inexorably intertwined with the primary function of defendants’ school, which is the education of its students consistent with the Catholic faith”); *Coulee Catholic Schs. v. Labor & Indus. Review Comm’n*, 768 N.W.2d 868, 890 (Wis. 2009) (applying ministerial exception to a first-grade teacher because “[s]he was an important instrument in a faith-based organization’s efforts to pass on its faith to the next generation”).

Some courts have declined to apply the ministerial exception to teachers at religious schools whose duties are not inherently religious. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993); *Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 853 (S.D. Ind. 1998) (denying ministerial exception to teacher at religious school who participated in religious activities because “the application of the ministerial exception to non-ministers has been reserved generally for those positions that are . . . close to being exclusively religious based, such as a chaplain or a pastor’s assistant.”); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700, 705–06 (S.D. Ohio 1990) (denying ministerial exception to employees of religious school where there was “no indication that any of the teachers [were] ordained ministers of the churches, nor [performed] sacerdotal functions”). This approach focuses on the teacher’s “primary duties,” but fails to appreciate the importance of those duties “to the spiritual and pastoral mission of the church,” *Rayburn*, 772 F.2d at 1169, which the Supreme Court has recognized. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (recognizing “the critical and unique role of the teacher in fulfilling the mission of a church-operated school”); *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“Religious authority necessarily pervades the school system.”); *id.* at 616 (“[P]arochial schools involve substantial religious activity and purpose.”); *id.* at 628 (Douglas, J., concurring) (noting “the admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith”).

142. *See Rayburn*, 772 F.2d at 1169 (“[T]he free exercise clause of the First Amendment protects the act of a decision rather than a motivation behind it.”).

“the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content.”<sup>143</sup>

As the D.C. Circuit has noted, the ministerial exception stands for two judicial conclusions: “[T]he first is that the imposition of secular standards on a church’s employment of its ministers will burden the free exercise of religion; the second, that the state’s interest in eliminating employment discrimination is outweighed by a church’s constitutional right of autonomy in its own domain.”<sup>144</sup> Religious associations, then, retain broad autonomy from government regulation under the First Amendment that even so compelling a government interest as nondiscrimination cannot trump. If secular oversight of employees who communicate a religious message offends the Free Exercise Clause, a governmental attempt to specify a parochial school’s curriculum or to make certain religious activities optional—which intrudes even more centrally on a school’s religious mission and undermines its ability to maintain a religious community in accordance with its own beliefs—faces the same constitutional barrier.

There remains the question of whether the ministerial exception survived the Supreme Court’s decision in *Smith*, which limited the scope of Free Exercise Clause exemptions from generally applicable laws.<sup>145</sup> The D.C. Circuit, for example, concluded that *Smith* left the exception intact because the new rule affected only the rights of *individuals* to practice their faiths rather than the rights of *churches* to manage their internal affairs.<sup>146</sup> Significantly, the rule established in *Smith* explicitly does not apply to cases where:

[the] application of a neutral, generally applicable law to religiously motivated action [involves] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of

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143. *Id.*

144. *Catholic Univ.*, 83 F.3d at 467.

145. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *see supra* notes 88–91 and accompanying text.

146. *Catholic Univ.*, 83 F.3d at 463 (“We conclude from our review of the Supreme Court’s First Amendment jurisprudence that whereas the Free Exercise Clause guarantees a church’s freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application.”); *see also* Sullivan, *supra* note 29, at 1398 n.4 (“*Smith* did not overrule earlier decisions protecting the autonomy of church organizations over their internal affairs . . .”).

the press, or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.<sup>147</sup>

The opinion also remarks that “it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”<sup>148</sup> Because burdens on the autonomy of religious organizations always implicate both freedom of association and the Free Exercise Clause, religious autonomy falls into this category of hybrid, doubly protected rights. Freedom of speech will also be implicated when a law burdens a religious organization’s ability to express its beliefs, and the freedom of parents to direct their children’s education may be implicated in the case of laws affecting religious schools. Thus, *Smith* acknowledges that the First Amendment may still bar laws that burden religious associations.

### B. *The Establishment Clause and Excessive Entanglements*

But may religious organizations *voluntarily* accept government regulation by choosing to participate in a public program? Presumably, any individual right, such as the free exercise of religion, can be waived.<sup>149</sup> The cases that establish the autonomy of religious organizations in ecclesiastical matters, however, also ground that autonomy in the Establishment Clause.<sup>150</sup> The Establishment Clause, unlike the Free Exercise Clause, is a structural constraint on the government’s power that cannot be waived.<sup>151</sup>

In articulating the religious institutional autonomy principle, the Court has often spoken as if adjudication of religious matters stood outside the courts’ institutional competence and constitu-

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147. *Smith*, 494 U.S. at 881 (internal citations omitted).

148. *Id.* at 882.

149. *See, e.g.*, *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).

150. *See, e.g.*, *Catholic Univ.*, 83 F.3d at 457 (holding that “application of Title VII to [case of religious] employment requires an intrusion by the Federal Government in religious affairs that is forbidden by the Establishment Clause”); *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991) (“Application of Title VII’s prohibition against religious discrimination to the Parish’s decision would also be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause.”).

151. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Constraint on Governmental Power*, 84 IOWA L. REV. 1, 3–4 (1998) (“[T]he Supreme Court’s case law is more easily understood when the Establishment Clause is conceptualized as a structural restraint on the government’s power to act on certain matters pertaining to religion.”).

tional authority.<sup>152</sup> In *Presbyterian Church*, for example, the Court wrote that “[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.”<sup>153</sup> Even if religious organizations had voluntarily consented to a structure that required civil courts to resolve ecclesiastical questions, the courts would still lack the authority to resolve them. In effect, courts lack subject matter jurisdiction when it comes to religious disputes.<sup>154</sup>

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152. See, e.g., *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696, 713 (1976) (noting that “religious controversies are not the proper subject of civil court inquiry”); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes; the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.”) (internal citation omitted). For the rationale behind the institutional autonomy principle and concerns about judicial involvement in religious affairs, see *supra* Part II.A.

153. 393 U.S. at 440; see also *supra* notes 116–18 and accompanying text.

154. See *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988) (noting that a judicial inquiry into the centrality of religious beliefs and practices to certain religions “cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.”); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (observing that “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice”); *Presbyterian Church*, 393 U.S. at 450 (considering an approach that “requires the civil court to determine matters at the very core of a religion” and concluding that “the First Amendment forbids civil courts from playing such a role”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that “the First Amendment precludes” submitting the truth of particular religious beliefs to a jury); see also *Lee v. Weisman*, 505 U.S. 577, 616–17 (1992) (Souter, J., concurring) (“I can hardly imagine a subject less amenable to the competence of the federal judiciary” than for “the courts to engage in comparative theology.”); *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (holding that “[j]udging the centrality of different religious practices” is “unacceptable” and “not within the judicial ken”) (citations omitted), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) (observing that “[t]his Court is ill-equipped to sit as a national theology board” and stating that “I can conceive of no judicial function more antithetical to the First Amendment”); *United States v. Lee*, 455 U.S. 252, 257 (1982) (observing that

When courts are asked to evaluate matters of religious faith and doctrine, they act outside their constitutionally delegated powers.

While the Free Exercise Clause protects the liberty of individuals to practice their faiths, the Establishment Clause aims at maintaining a particular relationship between state and church by withdrawing from government the power to act in religious affairs.<sup>155</sup> The *Presbyterian Church* Court determined that civil courts lack jurisdiction in ecclesiastical matters on precisely this basis.<sup>156</sup> As the Court explained in *Walz v. Tax Commission*, the “establishment” of religion as contemplated by the First Amendment includes any “active involvement of the sovereign in religious activity.”<sup>157</sup>

A law that occasions excessive entanglement of the government with religion runs afoul of the Establishment Clause.<sup>158</sup> Thus, in *Amos*, Justice Brennan worried that the lack of a broad tax exemption not only would inhibit free exercise, but also would “result[] in considerable ongoing government entanglement in religious affairs.”<sup>159</sup> Likewise, in *Catholic Bishop*, the Court objected to NLRB oversight not only because of the possible impact on free exercise, but also because the agency could not avoid “entanglement with the religious mission of the school.”<sup>160</sup> Similarly, in *Walz*, the Court upheld property tax exemptions to religious organizations for properties used solely for religious worship because, inter alia, the lack of such an exemption would lead to greater state involvement in the affairs of religious organizations.<sup>161</sup> It was un-

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it is outside the judicial function and competence “to determine whether appellee or the Government has the proper interpretation of the Amish faith”); *id.* at 263 n.2 (Stevens, J., concurring) (“It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims.”).

155. See generally Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311 (2000).

156. *Presbyterian Church*, 393 U.S. at 449 (“[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes.”).

157. *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

158. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002); *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000); *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (“Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis.”); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Walz*, 397 U.S. at 674 (“We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.”).

159. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring).

160. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

161. *Walz*, 397 U.S. at 674 (“Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property,

necessary to justify the tax exemption by reference to the secular activities of religious groups, such as social welfare services, because “[t]o give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.”<sup>162</sup> In other words, the city could extend the benefit of a tax exemption to religious groups—indeed, such an accommodation of religion was constitutionally preferable—but the attempt to attach public strings to the benefit would be constitutionally suspect.<sup>163</sup>

The Establishment Clause shields religious institutions from public regulation because the purpose of separating religion and government is to protect the integrity of each. “[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere,” the Court has said.<sup>164</sup> If religious organizations and state authorities wanted to enter into an excessively entangling relationship *voluntarily*, the corrosive effects on both religion and government would be no less real because the parties consented to such corrosion. The Establishment Clause aims to preserve a particular institutional arrangement between religion and the state—an arrangement that can be threatened equally by force or by collusion.<sup>165</sup> For this reason, James Madison described free exercise of religion as “in its nature an unalienable right” because:

[W]hat is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: . . . .

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tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”).

162. *Id.*

163. *Id.* (“[T]he use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.”)

164. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

165. *Cf. Aguilar v. Felton*, 473 U.S. 402, 413 (1985) (“The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in [a] way that infringes interests at the heart of the Establishment Clause.”).

[E]very man who becomes a member of any particular Civil Society [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.<sup>166</sup>

The Establishment Clause renders "what is here a right towards men," the free exercise of religion, unalienable by denying government any jurisdiction in religious matters. It does so, moreover, precisely to safeguard the integrity of religious belief by preserving religious obligations as a spiritual duty rather than subjecting them to the claims of civil society.<sup>167</sup>

This view of the Establishment Clause runs contrary to the preferences of those who want to conscript religious schools in the service of majoritarian civic values by attaching "public strings." But this is how the Establishment Clause, through the Court's "excessive entanglement" test, already works. In *Lemon v. Kurtzman*,<sup>168</sup> for example, the Court evaluated state programs that provided salary supplements to parochial school teachers and reimbursement of the costs to teach secular subjects in private schools.<sup>169</sup> To ensure that the subsidized teachers did not inculcate religion, each state conditioned its aid on certain restrictions: subsidized teachers could teach only those subjects offered in the public schools; could use only those textbooks and materials approved for use in the public schools; and had to refrain from religious teaching and worship.<sup>170</sup> The Court held, however, that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state."<sup>171</sup> The monitoring necessary to assure compliance with the restrictions would involve the state too profoundly in the internal operations of

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166. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1973).

167. For a related argument regarding expressive associations generally, see Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION 75, 76 (Amy Gutmann ed., 1998) (arguing that "liberal democracy is consistent with and even requires the incongruence between voluntary groups and public norms that always accompanies freedom of association").

168. 403 U.S. 602 (1971).

169. *Id.* at 606–07.

170. *Id.* at 619, 621.

171. *Id.* at 620–21.

parochial schools,<sup>172</sup> so the Court struck down the aid program altogether. Even if the parochial schools were willing to accept the funds with strings attached, the program would still represent an unconstitutional entanglement of church and state.<sup>173</sup> The *Lemon* Court offered a structuralist reading of the Establishment Clause, writing that “[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.”<sup>174</sup> Those lines may not be redrawn by mutual consent.

Similarly, in *Aguilar v. Felton*,<sup>175</sup> the Court found an excessive entanglement with religion where public employees who taught on religious school premises were to be closely monitored to ensure that they would not inculcate religion.<sup>176</sup> The Court cited the “administrative cooperation” between “personnel of the public and parochial school systems” that would be required to maintain the program as an unconstitutionally excessive entanglement.<sup>177</sup>

Excessive entanglement occurs, then, when regulations require the government to monitor the day-to-day operations of a parochial school; to make determinations regarding ecclesiastical matters; or otherwise to inject itself into the core functions of a religious institution even if the institution consents to such state involvement.<sup>178</sup>

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172. *Id.* at 619 (“A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.”).

173. *Cf. McConnell, Religious Participation in Public Programs, supra* note 4, at 142 (noting that the entanglement prong averted an unconstitutional conditions problem).

174. *Lemon*, 403 U.S. at 625; *see also id.* at 614 (“The objective is to prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other.”).

175. 473 U.S. 402 (1985).

176. *Id.* at 413 (“This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.”). *Agostini*, which overturned *Aguilar*, did not attack this reasoning. *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Rather, the Court held that since *Aguilar* it had “abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.” *Id.* at 223 (internal citations omitted).

177. *Aguilar*, 473 U.S. at 413.

178. *Id.* (“Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a ‘religious symbol’ and thus off limits in a

Entanglement also arises when public authorities, such as regulatory agencies or civil courts, intervene in employment decisions of a pastoral character because such decisions are based on religious criteria.<sup>179</sup> Parochial school teachers may fall into this category.<sup>180</sup>

Because “parochial schools involve substantial religious activity and purpose,” government interference in their operations presents a special risk of excessive entanglement.<sup>181</sup> Thus, in *Bowen v. Kendrick*,<sup>182</sup> in which the Court addressed a First Amendment challenge to the Adolescent Family Life Act (AFLA),<sup>183</sup> the Justices held that although “monitoring of afla grants is necessary to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause,”<sup>184</sup> the Act did not create an excessive entanglement between church and state only because “there is no reason to assume that the religious organizations which may receive grants are ‘pervasively sectarian’ in the same sense as the Court has held *parochial schools* to be.”<sup>185</sup>

Until recently, the distinction of an organization as “pervasively sectarian” meant the government could not become involved with it at all. Unmonitored state aid to such a group would unavoidably support religious activity, thereby creating an establishment.<sup>186</sup> But

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Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.”) (citation omitted).

179. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (“Bureaucratic suggestion in employment decisions of a pastoral character, in contravention of a church’s own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority . . . .”); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996) (holding that “application of Title VII to [case of religious] employment requires an intrusion by the Federal Government in religious affairs that is forbidden by the Establishment Clause”); *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991) (“Application of Title VII’s prohibition against religious discrimination to the Parish’s decision would also be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause.”).

180. See *supra* notes 138–41 and accompanying text.

181. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (“The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.”).

182. 487 U.S. 589 (1988).

183. *Id.* at 593. The AFLA provided grants to religious organizations that offered family counseling services. *Id.*

184. *Id.* at 590.

185. *Id.* at 616 (emphasis added).

186. This would be the result under the “effects” prong of the *Lemon* test. See *Lemon*, 403 U.S. at 612.

attempts to monitor the aid would unavoidably involve the state in religious questions, creating an entanglement.<sup>187</sup> Thus, two elements of the Court’s Establishment Clause test pushed in opposite directions, working to exclude the most deeply religious groups from ostensibly neutral public programs. As Justice Souter explained in his *Zelman* dissent:

[T]he Court saw that the two educational functions [i.e., secular education and religious instruction] were so intertwined in religious primary and secondary schools that aid to secular education could not readily be segregated, and the intrusive monitoring required to enforce the line itself raised Establishment Clause concerns about the entanglement of church and state.<sup>188</sup>

Justice Souter further argued that the constitutional inquiry ought to focus not on who chooses to distribute the funds—the government or the individual parents—but rather “on what the public money bought when it reached the end point of its disbursement.”<sup>189</sup> He chastised the majority for making “no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.”<sup>190</sup> But this argument relies on the discredited doctrines of *Meek v. Pittenger* and the “pervasively sectarian” test.<sup>191</sup>

When, therefore, the four dissenters in *Zelman* argued that the Cleveland program entangled the government with religion by opening parochial schools’ admissions, employment policies, and teachings to secular oversight,<sup>192</sup> they presumably intended to discredit the program as a whole. Following the principles of neutrality and private choice, however, the intermingling of religion and secular education at parochial schools no longer implicates the Establishment Clause.<sup>193</sup> Intrusive state monitoring, on the other hand, still does. So while the private choice of individual parents breaks “the circuit between government and religion,” the govern-

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187. This would be the result under *Lemon*’s “entanglement” prong. See *id.* at 613; see also *supra* notes 168–77 and accompanying text.

188. *Zelman v. Simmons-Harris*, 536 U.S. 639, 691 (2002) (Souter, J., dissenting).

189. *Id.* at 693.

190. *Id.* at 711.

191. See, e.g., *id.* at 708 (citing *Meek*); *id.* at 709 n.19 (invoking “pervasively sectarian” test); cf. Lupu & Tuttle, *supra* note 29, at 951 (“Justice Souter, and the dissenters who join him, seem to us mired in now-antiquated and unpersuasive theories of church-state separation.”).

192. *Zelman*, 536 U.S. at 712–15.

193. See *supra* notes 65–74 and accompanying text.

ment could reactivate the circuit by entering the school to monitor and regulate.<sup>194</sup>

The concerns that Justices Souter, Breyer, Stevens, and Ginsburg embraced in dissent—possible encroachment on religious autonomy and the risk of “corrosive secularism” to sectarian schools—are alive within Establishment Clause jurisprudence and highlight the pitfalls of extensive regulatory conditions.<sup>195</sup> Just as before, an excessive entanglement with religion may doom a public program. The difference, though, is that now the “effects” and “entanglement” principles behind the Establishment Clause no longer contradict each other, but lead in the same direction: the government need not impose the special burden of exclusion on deeply religious communities, nor does it have warrant to intrude in their domain.<sup>196</sup>

### III. BUYING OFF AND PUSHING OUT

A state may not induce a religious institution to surrender its constitutional rights by placing conditions on its participation in a school choice program. The doctrine of unconstitutional conditions prevents the government from achieving a result it could not command directly by bribing a rights holder into surrendering his constitutionally protected rights.<sup>197</sup> Moreover, because a school choice program aims to promote educational pluralism by empowering parents to choose private school, it resembles a limited public forum in which the state may not discriminate on the basis of viewpoint. The state cannot constitutionally exclude certain types of religious institutions from such a program, and it must frame its laws in facially neutral, generally applicable terms that do not target religious belief or practice.<sup>198</sup>

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194. *Zelman*, 536 U.S. at 652.

195. *Id.* at 712.

196. *Cf. McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (“[G]overnment may not as a goal promote ‘safe thinking’ with respect to religion and fence out from political participation those . . . whom it regards as over-involved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.”) (citation omitted).

197. *See infra* Part III.A.

198. *See infra* Part III.B.

### A. *Unconstitutional Conditions*

Even if the Establishment Clause were not an independent barrier to government involvement in a religious school, placing conditions on participation in a voucher program presents a classic unconstitutional conditions problem.<sup>199</sup> As the Court has explained the unconstitutional conditions doctrine, “the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee’s submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.”<sup>200</sup> In this way, the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. . . . This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.”<sup>201</sup> As noted above, even the relatively modest regulations in force in Cleveland and Milwaukee—not to mention the more extensive conditions envisioned by scholars—implicate such constitutional rights, including the free exercise right to religious autonomy; the right of freedom of association to be selective in admissions and employment; and the free speech right to communicate a religious message.<sup>202</sup> As Justice Souter observed in *Zelman*, the Cleveland program’s prohibition on teaching hatred of any person or group on the basis of religion

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199. See generally Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) [hereinafter Sullivan, *Unconstitutional Conditions*].

200. *United States v. Chicago, M., St. P. & P. R.R. Co.*, 282 U.S. 311, 328–29 (1931); see also *Frost v. R.R. Comm’n*, 271 U.S. 583, 593–94 (1926) (“It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . [O]ne of the limitations [of the power of the state] is that it may not impose conditions which require the relinquishment of constitutional rights.”); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“A man may not barter away his life or his freedom, or his substantial rights.”).

201. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal citation and quotation marks omitted); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding that a state may not impose conditions on a tax exemption that “must necessarily produce a result which the State could not command directly” and that “can only result in a deterrence of speech which the Constitution makes free”).

202. See *supra* Part II.

could “prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.”<sup>203</sup> Ohio could not command that result directly.

In its unconstitutional conditions cases, the Court has invalidated conditions that restrict speech when the speaker is “not able to segregate its activities according to the source of its funding.”<sup>204</sup> In *Regan v. Taxation With Representation of Washington*,<sup>205</sup> the Court held that Congress *could* deny tax-exempt status to a nonprofit corporation because it engaged in lobbying activities.<sup>206</sup> The Court reasoned that a nonprofit corporation could easily create two affiliates under the Internal Revenue Code, one to conduct non-lobbying activity using tax-deductible contributions and another to conduct lobbying using other contributions.<sup>207</sup> Thus, Congress had “not infringed any First Amendment rights or regulated any First Amendment activity,” but only declined to subsidize lobbying.<sup>208</sup> In contrast, the Court in *FCC v. League of Women Voters*<sup>209</sup> held that Congress *could not* prohibit a public broadcaster from editorializing as a condition of its receiving government grants.<sup>210</sup> The crucial difference concerned the broadcaster’s inability to segregate editorializing from non-editorializing activity:

In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation*, a noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializ-

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203. *Zelman v. Simmons-Harris*, 536 U.S. 639, 713 (2002) (Souter, J., dissenting) (citing, inter alia, 2 *Corinthians* 6:14 (King James) (“Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?”); THE KORAN 334 (N. Dawood trans., 1974) (“As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them.”)).

204. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

205. 461 U.S. 540 (1983).

206. *Id.* at 546.

207. *Id.* at 544.

208. *Id.* at 546.

209. 468 U.S. 364 (1984).

210. *Id.* at 400.

ing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity.<sup>211</sup>

It is not difficult to see the analogy to religious schools, especially “pervasively sectarian” schools, where by definition secular activities cannot be segregated from religious activities. A state might aim to avoid supporting religious activity in the same way that the FCC aimed to avoid supporting editorial speech—by imposing a condition on the entire school. If, as a condition of participating in the voucher program, a parochial school could not use religious textbooks, hold mandatory devotional services, teach creationism or theology, and so on, the law would act as a penalty on the school’s religious speech rather than a non-subsidy. The school would be barred from using even “wholly private funds” to finance its religious, expressive activity. The law would constrain the school with respect to tuition-paying students as well as voucher students.

The requirement that schools must refrain from discrimination on the basis of religion, as a condition of participating in the program, might function in this way if a school were forced to hire or admit people it would otherwise exclude. If a traditionalist Catholic school, for example, were forced to hire an abortion-rights advocate or an atheist or simply a non-Catholic it would not otherwise hire to a teaching post, there is little doubt that its free exercise and associative rights would be implicated.<sup>212</sup> In such a case, the state would be penalizing the school for maintaining a sectarian religious community rather than simply declining to subsidize religious discrimination. There is no way to segregate the school’s religious and expressive or associative hiring practices from the inclusive hiring that the state wants to subsidize. Surely, too, if Justice Souter is right that Ohio law may be understood to prohibit participating schools from teaching certain articles of faith,<sup>213</sup> then that restriction would also represent a penalty on the school’s speech and free exercise rights.

Conditions such as the opt-out law, which apply to the particular voucher students rather than the entire school, seem to be a different case but may have the same effects. If the right of a student to opt out of “any religious activity” implies that there must be

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211. *Id.*

212. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 712–13 (2002) (Souter, J., dissenting) (“Nor is the State’s religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job.”).

213. *Id.* at 713.

some activities that are “not religious” or “secular,” then the law might require a secularization of the school’s curriculum or other activities. In that case, the law would affect the entire school and act as a penalty rather than a non-subsidy. The broadcaster in *League of Women Voters* was unable to “limit[ ] the use of its federal funds to all noneditorializing activities.”<sup>214</sup> In other words, the broadcaster was “pervasively editorializing”<sup>215</sup> and consequently could not cordon off those activities from its use of federal funds. Likewise, a pervasively sectarian school cannot seal its religious activities away from public monies or voucher students, and forcing it to accept such an artificial segregation compromises significant constitutional principles.

Kathleen Sullivan recognizes a parallel between the no-editorializing condition at issue in *League of Women Voters* and restrictions on religious speech imposed as a condition of receiving public funds.<sup>216</sup> But, she writes, “[t]he asymmetrical treatment is an unavoidable feature of the unique demands of the Establishment Clause,” which “will often require excluding religious organizations from public programs, or will necessitate religion-restrictive conditions on their participation.”<sup>217</sup> Yet the view that the Establishment Clause includes a “constitutional requirement not to support religious teaching with public funds,” as Sullivan puts it,<sup>218</sup> has been rejected in favor of the more neutral, nondiscriminatory Establishment Clause holdings in *Mitchell* and *Zelman*.<sup>219</sup> Indeed, in programs of private choice, the Establishment Clause is not even implicated.<sup>220</sup>

Without a reading of the Establishment Clause that mandates discriminatory treatment of religion, the unconstitutional conditions doctrine would call for greater judicial solicitude for religious associations, especially when they participate in public programs because that is when demands for political involvement in religious

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214. *League of Women Voters*, 468 U.S. at 400.

215. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 211 (1992).

216. *Id.* at 213 (“There can be little doubt that . . . the government’s condition would be a disincentive to the exercise of unfettered choice.”).

217. *Id.* at 211–13 (“[T]he Establishment Clause uniquely privileges the right of conscientious objection to religious activity, speech, or expenditures by government.”).

218. *Id.* at 212.

219. See *supra* Part I.B.

220. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (noting that when “parents were the ones to select a religious school . . . the circuit between government and religion was broken, and the Establishment Clause was not implicated”).

affairs will be loudest. “Preferred constitutional liberties generally declare desirable some realm of autonomy that should remain free from government encroachment,” Sullivan writes.<sup>221</sup> “Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize that realm.”<sup>222</sup> As noted above, the Free Exercise Clause establishes an autonomous realm for religious affairs. While the Establishment Clause withdraws jurisdiction over religious matters from the civil authorities, the Free Exercise Clause guarantees the right to associate to further one’s religious aims in self-governing religious communities.<sup>223</sup> Public benefits, however, bring forth an increased demand for regulatory encroachment and a greater likelihood of religious acquiescence, resulting in a corrosive balance of authority.

Additionally, “an unconstitutional condition can skew the distribution of constitutional rights *among* rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition,” Sullivan argues.<sup>224</sup> “Targeting of benefits can destroy such equality or neutrality as readily as can imposition of harms: for example, government can skew political speech, association, and the system of representation they support whether it jails Democrats or offers cash bounties to Republican converts.”<sup>225</sup> The problem here is with the differences between those schools willing to accept the conditions and those that are unwilling.<sup>226</sup> More liberal and secular denominations are comfortable with an opt-out provision, for example, because they already observe a division between religious and secular activities. Most conservative denominations and pervasively sectarian schools are not, in view of the fact that faith suffuses their entire curriculum.<sup>227</sup>

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221. Sullivan, *Unconstitutional Conditions*, *supra* note 199, at 1490.

222. *Id.*

223. *See supra* Part II.

224. Sullivan, *Unconstitutional Conditions*, *supra* note 199, at 1490 (emphasis in original).

225. *Id.* at 1496.

226. *See supra* Part I.A.

227. *See* Macedo, *supra* note 25, at 440 (“Pressures to do such things can be seen as public influences at odds with the autonomy and integrity of some religious institutions, especially pervasively religious institutions. Catholic and many other church-affiliated schools have accepted the conditions. However, the most conservative Protestant schools—those in which ‘everything is taught with regard to God’s word and how it applies in our lives’—have refused to accept voucher students. They worry that the restrictions will undermine their ability to preserve the sort of religious atmosphere they want.”) (internal citation omitted); Loconte, *supra* note 44, at 34.

In effect, conditions such as Milwaukee's opt-out law reintroduce the "pervasively sectarian test" through the back door, with all the attendant troubles occasioned by state authorities "trolling through a person's or institution's religious beliefs."<sup>228</sup>

"A more discriminatory rule privileging some theological beliefs over others could hardly be devised," writes Carl Esbeck of the "pervasively sectarian" metric.<sup>229</sup> "The inevitable result is that theologically liberal providers of educational services will be deemed 'secular enough' and thus acceptable recipients of government assistance, whereas theologically traditional providers of educational services will be found 'too religious' and thus denied assistance."<sup>230</sup> Or, if assistance comes with conditions that only the most ecumenical can accept, the combination of bribes and strings will reinforce majoritarian norms and undermine epistemic diversity.<sup>231</sup>

Surely, if the state is obligated to permit diverse alternatives to the public schools,<sup>232</sup> there must be a limit to the extent to which it may induce them to homogenize.<sup>233</sup>

### B. Neutrality

The government may restrict expression, however, when the government itself is the speaker or has hired a private party to convey its own message.<sup>234</sup> The Court has held that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps

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228. *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (noting that "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive" and observing that "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity").

229. Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 910 (2001).

230. *Id.* at 909–10; *see also id.* at 910 n.86 ("Meaningful denominational divisions among religions are no longer along the old alignments of Protestant versus Catholic versus Jewish. The realignment is now orthodox (Protestant, Catholic, and Jewish) versus progressive (Protestant, Catholic, and Jewish).").

231. *Id.* ("To exclude from government aid programs those groups that are more sectarian is to punish those religions that resist conformity to culture while favoring those religions willing to evolve and conform to secular culture. Hence, the 'pervasively sectarian' test is discriminatory against the religiously orthodox.").

232. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

233. *See generally* *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927); *State v. Whisner*, 351 N.E.2d 750, 764 (Ohio 1976).

234. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

to ensure that its message is neither garbled nor distorted by the grantee.”<sup>235</sup> But the educational activity of parochial schools cannot constitute a governmental message. (If it were otherwise, the government would impermissibly be mixing religious speech with its own.) The purpose of a voucher program is not to convey a governmental message but to “give[ ] parents a greater choice as to where and in what manner to educate their children.”<sup>236</sup> The schools do not even serve as “grantees” of the government. Rather, money goes to individual parents, who then choose to direct it to a particular school.<sup>237</sup> The government’s role ends with the disbursement of benefits to parents.<sup>238</sup> So it is the individual parent, not the parochial school, who is the grantee of the government. The aim of such a program is to empower parents to choose among educational alternatives for their children, not for the state to hire the parents in order to transmit a governmental message.

Because the school receives no money from the government, it is difficult to see the justification for state-imposed conditions on how it may spend the funds. To be sure, the school derives a benefit from participating in the choice program. But the opening of a school choice program, which aims to facilitate greater access to a diversity of educational options, is more akin to the opening of a “limited public forum”<sup>239</sup> than it is to a government-funded project that furthers a state-approved message.<sup>240</sup> Indeed, the mutual independence of the parochial schools and the state’s expressive conduct is essential to the legality of the program in the first place.<sup>241</sup> In establishing the school choice program, in other words, the state “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers,”<sup>242</sup> in this case the educational pluralism that private schools provide when parents have greater access to them. In such a limited public forum, the state may not discriminate against

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235. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

236. *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring).

237. *Id.* at 652.

238. *Id.* at 653.

239. *Rosenberger*, 515 U.S. at 829.

240. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

241. *Zelman*, 536 U.S. at 652; *see supra* Part I.B.

242. *Rosenberger*, 515 U.S. at 834.

speech on the basis of its viewpoint, including a distinctive religious viewpoint.<sup>243</sup>

At the very least, the state must frame its laws in facially neutral, generally applicable terms.<sup>244</sup> “[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral,” the Court has said, “and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”<sup>245</sup> A law, such as Milwaukee’s opt-out provision, that specifically targets “religious activity” is not neutral.<sup>246</sup> As such, it requires a compelling interest for justification. In a program of private choice, compliance with the Establishment Clause does not provide such an interest,<sup>247</sup> and, in any event, the opt-out provision is not narrowly tailored to prevent tax dollars from supporting religious activity. If the child opts out, tax dollars still support religious activity; that particular child is simply not in the room. A state might also claim it has some interest in preventing indoctrination or protecting freedom of conscience. Yet it is unclear why this interest relates specifically to voucher students rather than students generally, and the state would have to explain why it was targeting only religious conscience rather than conscience generally. Why is there no opt-out provision for mandatory community service projects, for example?<sup>248</sup>

Any law that specifically targets religious conduct is subject to a searching strict scrutiny analysis.<sup>249</sup> In the absence of a need to enforce compliance with the Establishment Clause, however, it would

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243. *Id.* at 829; *see also* *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

244. *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

245. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

246. *See id.* (“[T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”).

247. *See supra* Part I.B.

248. *Cf. Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 457 (2d Cir. 1996) (“The program has no exceptions or ‘opt-out’ provisions for students who object to performing community service.”).

249. *Lukumi Babalu Aye*, 508 U.S. at 546 (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

be difficult to justify discriminatory treatment of religious conduct or speech.<sup>250</sup>

## CONCLUSION

For some time, the Court’s reading of the First Amendment “bristle[d] with hostility to all things religious in public life,” as Chief Justice Rehnquist once fumed to his colleagues.<sup>251</sup> “The Court does not object to a little religion in our public life,” Michael McConnell wrote some eighteen years ago.<sup>252</sup> “But the religion must be tamed, cheapened, and secularized—just as religious schools and social welfare ministries must be secularized if they are to participate in public programs that are supposed to be open to all. Authentic religion must be shoved to the margins of public life . . . .”<sup>253</sup>

Today, the place of religion in American life is somewhat different, but suspicion of religious belief persists.<sup>254</sup> As churchgoers emerge from the shadows, the same critics who once sought to quarantine religion seek to colonize it in the name of public values. The founding generation, however, also recognized the potential for religious strife.<sup>255</sup> Their solution involved not assimilation, but strengthened pluralism. “In a free government the security for civil rights must be the same as that for religious rights,” James Madison wrote.<sup>256</sup> “It consists in the one case in the multiplicity of interests,

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250. *Cf.* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (“More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.”).

251. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (charging that “[n]either the holding nor the tone of the [majority] opinion is faithful to the meaning of the Establishment Clause”).

252. McConnell, *Religious Participation in Public Programs*, *supra* note 4, at 127.

253. *Id.*

254. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 722–23 (2002) (Breyer, J., dissenting) (expressing concern about potential for “religious strife” and “religiously based social conflict”).

255. *See, e.g., THE FEDERALIST NO. 10*, at 73 (James Madison) (Clinton Rossiter ed., 2003) (“A zeal for different opinions concerning religion . . . [has], in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good.”).

256. *THE FEDERALIST NO. 51* (James Madison), *supra* note 255, at 321.

and in the other in the multiplicity of sects.”<sup>257</sup> So it should not be surprising that the Constitution they drafted would preserve that multiplicity and present roadblocks to the majoritarian conquest.

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257. *Id.*

# THE LOW-INCOME HOUSING TAX CREDIT IN NEW JERSEY: NEW OPPORTUNITIES TO DECONCENTRATE POVERTY THROUGH THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

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## INTRODUCTION

The federal Low Income Housing Tax Credit<sup>1</sup> (LIHTC) program has produced over one million rental housing units from 1995 to 2005, most of which are affordable to low-income tenants.<sup>2</sup> Developers of low-income rental housing apply for federal income-tax credits to subsidize their affordable housing units through a competitive process administered by the states.<sup>3</sup> Recent litigation in New Jersey, Connecticut, and Texas has challenged the ways in which states allocate these credits.<sup>4</sup> The issues in those cases concern the obligations of the states to administer the LIHTC in ways

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1. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (1986).

2. ABT ASSOCS. INC., HUD NATIONAL LOW INCOME HOUSING TAX CREDIT (LIHTC) DATABASE: PROJECTS PLACED IN SERVICE THROUGH 2005 1–9 (2007), available at <http://www.huduser.org/Datasets/lihtc/tables9505.pdf>.

3. Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1778 (2005).

4. See *Inclusive Cmty. Project, Inc. v. Tex. Dep't. of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935, at \*2 (N.D. Tex. Dec. 11, 2008); *Asylum Hill Problem Solving Revitalization Ass'n v. King*, No. (X02)CV030179515S, 2004 WL 113560, at \*1 (Conn. Super. Ct. Jan. 5, 2004); *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

that further national fair housing goals, as articulated in the Federal Fair Housing Act.<sup>5</sup> The Fair Housing Act requires public agencies to act in a manner affirmatively to further fair housing.<sup>6</sup> Generally speaking, this requires agencies covered under the statute to not only refrain from racial discrimination, but also to take affirmative steps to encourage integration.<sup>7</sup> However, the LIHTC statute seemingly betrays those ideals by requiring that state LIHTC administrators give preference to developers who plan to site their low-income housing in communities that are already destabilized by a concentration of poor residents and a lack of economic and educational opportunities.<sup>8</sup>

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5. 42 U.S.C. §§ 3601–3609 (2006). This Note discusses aspects of the Federal Fair Housing Act as well as parts of New Jersey’s Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2008). Federal law recognizes that people ought not to be limited in their opportunities to live in a community on account of race, *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948), but does not recognize a right to reside in any community regardless of economic status, *see Wincamp P’ship v. Anne Arundel County*, 458 F. Supp. 1009, 1027 (D. Md. 1978). New Jersey recognizes an obligation on the part of every municipality to use their zoning powers to create the opportunities for low-income housing in accordance with each municipality’s fair share.

Defining precisely “national fair housing goals” is beyond the scope of this Note. It is assumed, for present purposes, that fair housing constitutes a housing market where people are limited as to the specific homes that they may inhabit because of economic limitations and not because of racial factors, but are not limited to specific communities or neighborhoods for economic or racial reasons.

For some examples of state and federal commitments to fair housing, *see* 42 U.S.C. § 3601 (“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”); 42 U.S.C. § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 821 (3d Cir. 1970) (“Increase or maintenance of racial concentration is *prima facie* likely to lead to urban blight and is thus *prima facie* at variance with the national housing policy.”); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 727–28 (N.J. 1975) (“The presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing . . . . Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.”).

6. *See Shannon*, 436 F.2d at 816.

7. *See South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 882–83 (7th Cir. 1991) (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)) (recognizing the dual obligations of non-discrimination and integration on agencies covered by the Federal Fair Housing Act).

8. *See* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2006).

The LIHTC allocation practices of many states maintain existing concentrations of poverty by giving priority to development proposals for low-income housing in census tracts that are already occupied by a high percentage of low-income families.<sup>9</sup> The result is that LIHTC units are frequently constructed in low-income, high-poverty neighborhoods where families find greater difficulty overcoming a lack of both educational and labor opportunities.<sup>10</sup> This makes housing integration, whether measured economically or racially, more difficult to achieve and significantly limits the opportunities available to LIHTC families.<sup>11</sup>

By denying low-income families more opportunities to leave inner-city communities in favor of better schools and safer neighborhoods, states are squandering an opportunity to break the cycle of intergenerational poverty. In support of that proposition, one study of the effects of concentrated poverty and housing mobility found that children who move out of the inner city and into suburban middle-class communities have better life outcomes than their inner-city peers.<sup>12</sup>

Concerns about LIHTC allocations in high-poverty communities have become particularly salient in New Jersey, where, in 2003, the Fair Share Housing Center (Fair Share)<sup>13</sup> brought suit against the New Jersey Housing and Mortgage Finance Agency (HMFA) in order to challenge the legality of the state's 2002 and 2003 LIHTC allocation plans.<sup>14</sup> This Note argues that *In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan (In re 2003)* was wrongly decided and that, at any rate, the decision should not be treated as binding precedent since the original justifications for *In re 2003* no longer apply.<sup>15</sup> In addition, this Note presents some suggestions for how housing finance agencies (HFA) can improve their siting of LIHTC units from a fair housing perspective. While

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9. Orfield, *supra* note 3, at 1780.

10. *See generally id.* at 1759–61.

11. For an account of how location and the concentration of poverty can affect one's life outcome, see PETER DRIER, JOHN MOLLENKOPF & TODD SWANSTROM, *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* 2–3 (2005).

12. *See* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 170–71 (2000) (noting that suburban movers, as compared to city movers, were more likely to attend college and find employment with benefits).

13. Fair Share is a nonprofit organization promoting fair housing in New Jersey. *See* Fair Share Housing Center, *Our Mission*, <http://fairsharehousing.org/about> (last visited Apr. 7, 2010).

14. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

15. *Id.* at 1.

the focus of this Note is on problems specific to New Jersey, much of this analysis is applicable to the LIHTC program nationally.

*In re 2003* was brought by Fair Share and local chapters of the National Association for the Advancement of Colored People (NAACP) in the Camden area to challenge the HMFA's plan to allocate low-income housing tax credits to developments located in high-poverty areas.<sup>16</sup> Fair Share's appeal of the HMFA's administrative action brought the case directly to New Jersey's Appellate Division.<sup>17</sup> Fair Share argued that the HMFA had failed to affirmatively further fair housing in its LIHTC allocation plan. The plaintiff also claimed that the HMFA's practices violated the *Mount Laurel* doctrine<sup>18</sup>—a state constitutional guarantee particular to New Jersey that prevents municipalities from using their land-use power to exclude low-income housing.<sup>19</sup> Although the appellate division affirmed the HMFA's proposed allocation plan,<sup>20</sup> it also found that the HMFA "has a duty to administer its housing and financing programs in a manner affirmatively to further [fair housing]," despite the defendant's position that it was under no such duty.<sup>21</sup> The court's finding that the duty to affirmatively further fair housing applies to the state housing finance agency has elicited recent attention from legal commentators.<sup>22</sup>

However, in the time since the New Jersey State Appellate Division found in favor of the HMFA, the legal and economic context of the *In re 2003* decision has changed, due largely to recent changes in the law brought on by the federal Housing and Economic Recovery Act of 2008<sup>23</sup> and amendments to New Jersey's Fair Housing Act,<sup>24</sup> as well as drastic changes in the real estate market.<sup>25</sup>

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16. *Id.* at 5.

17. *Id.*

18. *Id.*

19. See generally *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (1975).

20. *In re 2003*, 848 A.2d at 6.

21. *Id.* The duty to affirmatively further fair housing is explained fully in Part II.B.1.

22. See, e.g., Carol Necole Brown & Serena M. Williams, *The Houses That Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans*, 34 *FORDHAM URB. L.J.* 689, 711–13 (2007); Orfield, *supra* note 3; Seema Ramesh Shah, Note, *Having Low Income Housing Tax Credit Qualified Allocation Plans Take into Account the Quality of Schools at Proposed Family Housing Sites: A Partial Answer to the Residential Segregation Dilemma?*, 39 *IND. L. REV.* 691, 701–06 (2005).

23. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

24. See N.J. Pub. L. 2008, ch. 46 (2008).

More tax credits will be available in 2009 than previously.<sup>26</sup> However, obtaining funding to begin construction projects has been exceedingly difficult; construction lending was “virtually shutdown” after the market collapsed in the fall of 2008.<sup>27</sup> Further, new restrictions on New Jersey municipalities by the state legislature banned the use of Regional Contribution Agreements (RCA).<sup>28</sup> Accordingly, some towns may have to increase the amount of land that is zoned for medium- or high-density affordable housing developments. One possible result of an increase in such zonings is that affordable housing development could become cheaper since there would be more opportunities to develop affordable housing in the suburbs than previously.

This Note argues that *In re 2003* was not only wrongly decided, but that these changes in the law and within the market have negated the court’s principal justifications for its legal conclusions in the case. Since those justifications are no longer operative, the legal claims Fair Share presented in the case should come out differently now. Because the New Jersey HMFA and other housing finance agencies have been able to rely on *In re 2003* to defend the practice of siting LIHTC units in high-poverty, low-opportunity areas, this point demands consideration. So, where Myron Orfield argues that *In re 2003* was wrongly decided,<sup>29</sup> this Note argues that not only was *In re 2003* wrongly decided, but that it should not be binding or persuasive to the state courts because of the vastly changed circumstances in which New Jersey, in particular, and all states now find themselves. This position should be tempered, however, by the realization that an HFA’s allocation plan changes every

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25. David Streitfeld, *Recovery Signs in Housing Market Stir Some Hope*, N.Y. TIMES, July 29, 2009, at A1.

26. The Housing and Economic Recovery Act of 2008 granted a temporary increase in the availability of low-income housing tax credits. 122 Stat. 2654.

27. Alan Zibel, *Commercial Real Estate Woes Grow*, ASSOCIATED PRESS FINANCIAL WIRE, Jul. 9, 2009, available at [http://www.google.com/hostednews/ap/article/ALeqM5gfl\\_ByDjrZfdJHz-tEb9cJUNPONwD99B68U00](http://www.google.com/hostednews/ap/article/ALeqM5gfl_ByDjrZfdJHz-tEb9cJUNPONwD99B68U00).

28. Regional Contribution Agreements, as explained in Part II.E, allowed New Jersey municipalities to fulfill half of their *Mount Laurel* obligation to provide affordable housing by paying a less affluent municipality to site affordable housing within the borders of the receiving town. By banning RCAs, the state is effectively forcing some towns that relied on them to fulfill their obligations to accommodate opportunities for affordable housing within their own borders. See N.J. Pub. L. 2008, ch. 46 (discontinuing use of RCAs and creating a new housing rehabilitation program to replace it); see also, e.g., Matt Jackson, *More Special-Needs Housing is Possible*, TOWN J. (Allendale, N.J.), Jul. 23, 2009, <http://www.northjersey.com/news/51446002.html>.

29. Orfield, *supra* note 3, at 1753–54.

year, and one plan that does little to affirmatively further fair housing may be replaced the next year with a more enlightened plan.

A secondary observation offered by this Note is that there are a number of opportunities for state finance agencies across the nation to ameliorate existing siting problems. HFAs can and should adopt LIHTC allocation plans that consider the siting effects of LIHTC units. This is not to say that LIHTC units should never be located in pockets of concentrated poverty, but rather that the existing practice in some states of placing them mostly in high-poverty areas is wrong-headed and illegal.

Part I of this Note will provide an explanation of how the LIHTC is administered and some of the potential problems that can result. Part II examines the fair housing literature and argues that class integration is one of the most important ways to create viable paths for intergenerational social mobility. Part III focuses on the LIHTC litigation that took place in New Jersey, then makes the case that Fair Share's argument—that the state had failed to meet its duty to affirmatively further fair housing—should be looked upon more favorably given the court's reliance on state policy that has since changed and a high-priced market that is now significantly weaker. Part IV offers suggestions for how the HMFA and other state agencies could overcome some of the current obstacles to fair housing in the LIHTC program.

## I. HOW THE LOW-INCOME HOUSING TAX CREDIT WORKS

### A. *The Basics*

LIHTCs are meant to induce developers to construct low-income housing units. Created by Congress in the Tax Reform Act of 1986,<sup>30</sup> the program allows a real estate developer or investor to pay less money in income tax.<sup>31</sup> The tax credits are claimed over a ten-year period.<sup>32</sup> There are two standards by which a building can be deemed a "qualified low-income housing project" and comply with

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30. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189–2208 (1986).

31. U.S. DEP'T OF HOUS. & URBAN DEV., HOW DO HOUSING TAX CREDITS WORK?, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/work.cfm> (last visited Apr. 8, 2010) ("Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their Federal tax liability each year over a period of 10 years.").

32. *Id.*; see also 26 U.S.C. § 42(b)(2)(B) (2006).

the LIHTC program.<sup>33</sup> The first standard requires that at least 20% of the residential units be affordable to and occupied by individuals who earn no more than 50% of the area median income (AMI).<sup>34</sup> The alternate standard requires that at least 40% of the units be affordable to and occupied by individuals who earn no more than 60% of AMI.<sup>35</sup>

There are two different funding levels available through the LIHTC. For many new developments, the total tax credit amounts to 70% of the value of the affordable housing units.<sup>36</sup> Alternatively, credit amounting to 30% of the value of the affordable units can be used to construct or rehabilitate any other building that meets the affordability standards mentioned above.<sup>37</sup> Whether the credit pays 70% or 30% of the value of the affordable units created, the tax credits are stretched over a ten-year period, and the percentage of the credit that can be claimed each year by a developer or tax credit investor is set by Treasury Department regulations.<sup>38</sup> The initial “compliance period”—the period of time during which a building owner must keep the units affordable—lasts for fifteen years<sup>39</sup> but is automatically extended by the statute, usually for another fifteen years<sup>40</sup> if certain conditions are not met.<sup>41</sup> That additional, automatic obligation is referred to as the “extended use period.”<sup>42</sup>

The LIHTC differs from many other federal tax credits in that simply claiming the credits on an income-tax return is not enough; the credits must first be allocated to the individual or company by a

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33. 26 U.S.C § 42(g)(1).

34. § 42(g)(1)(A).

35. § 42(g)(1)(B).

36. § 42(b)(1)(B).

37. *Id.*

38. The yearly amounts that are claimed as tax credits—designated percentages of the building’s value—add up to the total percentage of the value that the tax credits offset over 10 years. §42(b)(2)(B).

39. § 42(i)(1).

40. § 42(h)(6)(D)(ii).

41. § 42(h)(6)(E)(i).

42. § 42(h)(6)(E)(i). However:

[A]n Owner may request termination of the extended use period[;] . . . [§ 42(h)(6)(E)(i)(II)] provides HMFA a one-year timeframe within which to present a buyer willing to a) maintain the property as low-income and b) purchase the property for a qualified contract (“QC”) amount. In the event that the building owner requests termination and HMFA is unable to present a buyer within a year, the extended use period is terminated.

N.J. HOUS. & MORTGAGE FIN. AGENCY Y15 PROPERTIES, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/y15properties.html> (last visited Apr. 12, 2010).

state housing finance agency.<sup>43</sup> The agency, in turn, has a limited number of LIHTCs to allocate.<sup>44</sup> Real estate developers and non-profits interested in creating or rehabilitating affordable housing units make development proposals to their state's housing finance agency in order to request the tax credits.<sup>45</sup> If the tax credits are not allocated to that project and another subsidy source is not found, the project may be financially infeasible. Often, the project is put on hold in order to apply for the credits again the next year.<sup>46</sup>

Many state HFAs evaluate the proposals on a points system.<sup>47</sup> The proposals are graded according to each state's regulatory standards, as expressed in their Qualified Allocation Plan (QAP).<sup>48</sup> The proposals must also meet federal statutory requirements.<sup>49</sup> In some years, the competition for the credits can be fierce.<sup>50</sup> In 2007,

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43. § 42(m)(1)(A)(i).

44. § 42(h)(3)(H).

45. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 LOW INCOME HOUSING TAX CREDIT FINAL CYCLE RESERVATION LIST, [http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008finalcycle\\_reservationlist.pdf](http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008finalcycle_reservationlist.pdf); N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 LOW INCOME HOUSING TAX CREDIT SPRING ROUND RESERVATION LIST, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008%20Spring%20Cycle%20Reservation%20List.pdf>. This is not to say, however, that the bidding process for those funds is not competitive.

46. For example, Linden Lake Senior Housing and Milville Senior lacked sufficient points to get the tax credit in 2005, NEW JERSEY 2005 COMPETITIVE CYCLES, [http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2005\\_rankings.pdf](http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2005_rankings.pdf) (last visited Apr. 8, 2010); both developments reapplied in 2006, when Milville Senior Housing succeeded in obtaining the credit, NEW JERSEY 2006 COMPETITIVE CYCLES, [http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2006\\_spring\\_cycle\\_rankings.pdf](http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2006_spring_cycle_rankings.pdf) (last visited Apr. 8, 2010).

47. See Megan J. Ballard, *Profiting From Poverty: The Competition Between For-Profit And Nonprofit Developers For Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 231 n.95 (2003).

48. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 15 (N.J. Super. Ct. App. Div. 2004).

49. See generally § 42(m).

50. See Ballard, *supra* note 47, at 213. In New Jersey, for instance, a single point can mean the difference between getting the credits or not in a ranking system that allows more than 100 points maximum. Bendix Anderson, *Tax Credits & Tax Exempt Bonds: A State-By-State Preview*, AFFORDABLE HOUSING FINANCE, Dec. 2007, <http://www.housingfinance.com/ahf/articles/2007/dec/NEWJERSEY1207.htm> (last visited Apr. 8, 2010).

Note that even in 2008, in the middle of a real estate market crash, competition for the credits in New Jersey has left most eligible applicants empty-handed, suggesting that the need for credits may actually be increasing as the market weakens. See NEW JERSEY 2008 SPRING CYCLES, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/Spring%20Cycle%20Rankings%207-1-08%20TCC.pdf> (last visited Apr. 12, 2010).

New Jersey developers applied for \$47.9 million in LIHTCs while the state had only \$19.9 million in total credits available.<sup>51</sup>

Each state expresses its own policy preferences through the development of an annual QAP. Because states have a significant amount of freedom to effectuate their preferences,<sup>52</sup> QAPs vary in the extent to which they encourage developers to locate their projects in low-poverty areas.<sup>53</sup>

### B. *The Qualified Allocation Plan and the Siting of LIHTC Units*

Each state must release a yearly QAP that explains the bases on which LIHTC proposals will be evaluated.<sup>54</sup> Each QAP dictates what building and neighborhood attributes will be favored in that state's LIHTC allocations. Criteria like proximity to public schools and public transportation are common neighborhood attributes that are given preference.<sup>55</sup>

Some regions locate most of their LIHTC units in high poverty areas. For instance, in the Newark, New Jersey Primary Metropolitan Statistical Area (PMSA), 86.7% of the LIHTC units built for low-income families are in census tracts that exceed a 10% poverty rate.<sup>56</sup> By comparison, in the Wilmington-Newark, Delaware PMSA, only 25% of similar LIHTC units are located in census tracts that exceed a 10% poverty rate.<sup>57</sup> This trend occurs despite the fact that the Wilmington-Newark PMSA and the Newark, New Jersey PMSA

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51. See Anderson, *supra* note 50. It is interesting, however, that although there are far more applications for the tax credits than there is money available, New Jersey has not allocated all of the tax credits that are available to it. This Note offers no explanation as to why this is, other than the possibility that some funding cycles may be overfunded while others may be underfunded.

52. JEREMY GUSTAFSON & J. CHRISTOPHER WALKER, REPORT BY THE URBAN INSTITUTE, ANALYSIS OF STATE QUALIFIED ALLOCATION PLANS FOR THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 1 (2002), available at <http://www.huduser.org/Publications/pdf/AnalysisQAP.pdf>.

53. POVERTY & RACE RESEARCH ACTION COUNCIL, PERCENTAGE OF FAMILY LIHTC UNITS IN LOW-POVERTY NEIGHBORHOODS (2006), available at <http://www.prrac.org/pdf/LargeMetrosLowPovLIHTC.pdf> [hereinafter PRRAC REPORT] (presenting percentages of LIHTC units in poverty areas for large metropolitan areas).

54. 26 U.S.C. § 42(m)(1).

55. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.15(a)(11)(i) (2009)), available at [http://nj.gov/dca/hmfa/biz/develop/lowinc/2009\\_proposedqap.pdf](http://nj.gov/dca/hmfa/biz/develop/lowinc/2009_proposedqap.pdf) (setting forth the point system for the family cycle).

56. PRRAC REPORT, *supra* note 53.

57. PRRAC REPORT, *supra* note 53. This comparison will hold true for quite a large number of other PMSAs that other commentators may want to study.

have similar poverty rates.<sup>58</sup> Other New Jersey PMSAs have fared even worse and sited anywhere from 97% to 100% of their LIHTC units in middle- and high-poverty areas.<sup>59</sup>

One barrier cited by the New Jersey HMFA to creating a QAP that does more to encourage low-income housing development in high-opportunity areas is the existence of the Qualified Census Tract Preference.<sup>60</sup>

### C. *The Qualified Census Tract Preference*

Section 42 (m) (1) (B) (ii) of the federal tax code requires that a QAP give preference in allocating housing credit dollar amounts among selected projects to:

- (I) projects serving the lowest income tenants,
- (II) projects obligated to serve qualified tenants for the longest periods, and
- (III) projects which are located in *qualified census tracts* . . . and the development of which contributes to a concerted community revitalization plan.<sup>61</sup>

A qualified census tract is an area “in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income.”<sup>62</sup> From 1995 to 2005, there has been a steady increase in the percentage of LIHTC units being built in the high-poverty qualified census tracts (QCT).<sup>63</sup>

When poor families looking for affordable housing are given no other options than to rent an apartment in a high-poverty area, then children in those families will suffer the consequences of

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58. U.S. CENSUS, POPULATION AND HOUSING PROFILE: NEWARK, NJ PMSA, <http://www.census.gov/acs/www/Products/Profiles/Single/2003/ACS/Narrative/385/NP38500US56025640.htm> (last visited Apr. 8, 2010) (10% rate for Newark PMSA); U.S. CENSUS, WILMINGTON-NEWARK PMSA STATISTICS, <http://censstats.census.gov/data/MD/395249160.pdf> (last visited Apr. 8, 2010) (9.3% rate (summation of figures) for Wilmington-Newark PMSA). While the data are derived from different years, they still offer a useful point of comparison.

59. See PPRAC Report *supra* note 53, at 4–5. Atlantic-Cape May PMSA has none of its family units in tracts below 10% poverty. *Id.* At 4. Jersey City has 2.4%. *Id.* Bergen-Passaic has 0.3%. *Id.* However, the Trenton PMSA has a rate of 49.2%. *Id.* at 1.

60. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2004).

61. 26 U.S.C. § 42(m)(1)(B)(ii) (2006).

62. § 42(d)(5)(ii)(I).

63. In 1995, 19.5% of LIHTC units nationwide were built in QCTs. By 2002, LIHTC units in QCTs accounted for 27.1% of all LIHTC units. The rate of increase grew even steeper after 2002, and in 2005, 38.8% of all LIHTC units were located in QCTs. ABT ASSOCIATES, INC., *supra* note 2, at 16.

growing up in concentrated poverty while the adults continue to miss out on better employment opportunities in more desirable locations.<sup>64</sup>

One very important factor in determining whether developers can construct affordable housing beyond the confines of low-opportunity areas is how much money the developer can get up front for selling the rights to a tax credit.<sup>65</sup>

#### D. *The Market for Low-Income Housing Tax Credits*

Once a developer is awarded an LIHTC, it can be claimed on the developer's income-tax returns to directly offset, on a dollar-for-dollar basis, the amount of income tax for the developer.<sup>66</sup> Also, rather than claiming the tax credits, the developer may sell them to investors who may use the tax credits themselves. If the credits are sold, the developer then receives cash that can be used immediately to cover some of the construction costs. The price of the tax credits on the secondary market—determined by supply, demand, and assessment of risk—is very important when determining whether the LIHTC program alone is sufficient to subsidize construction or whether the developer has to go to other federal programs to supplement financing.<sup>67</sup> Further, developers tend to be more attracted to the LIHTC program and are better able to site the developments in suburban areas when the price of the tax credits is high.<sup>68</sup> If the developer must also apply for other affordable housing programs, then she will also be bound by their conditions, thereby limiting what she can do in terms of siting and accommodating mixed-income tenants, two available strategies for avoiding high-poverty concentration. For instance, federally subsidized building grants have their own requirements and application processes.<sup>69</sup> Additionally, special permission is required to combine multiple subsidy programs.<sup>70</sup>

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64. *See infra* Part II.

65. Kirk McClure, *The Low-Income Housing Tax Credit Program Goes Mainstream and Moves to the Suburbs*, 17 *Hous. Pol'y Debate* 419, 432 (2006).

66. Ballard, *supra* note 47, at 218.

67. In 2005, many investors were paying about eighty cents or more per dollar of tax credit. McClure, *supra* note 65, at 429-30.

68. *Id.* at 432.

69. U.S. DEP'T OF HOUS. & URBAN DEV., THINGS YOU SHOULD KNOW ABOUT COMBINING LIHTC WITH MF PROJECT-BASED SECTION 8, Jan. 1, 2010, <http://www.hud.gov/local/shared/working/r10/mf/sect8tips.cfm?state=wa> (last visited Apr. 23, 2010).

70. *Id.*

Because of the recent economic downturn, the LIHTC program faces a new challenge. The demand for tax credits has decreased significantly.<sup>71</sup> As a result, developers must sell their tax credits for less money, thereby making the LIHTC program a less effective means for offsetting the costs of building affordable housing.<sup>72</sup> To help overcome the problem of low demand, the American Recovery and Reinvestment Act of 2009 (Stimulus Act)<sup>73</sup> created a system whereby states can convert some of their tax credit allocations into grants for developers, thus giving the developers cash rather than having to depend on the increasingly troubled market for tax credits.<sup>74</sup> The Stimulus Act limits the LIHTC grants to 2009 and 2010.<sup>75</sup> It remains to be seen whether Congress will make the grants a permanent feature of the LIHTC program or whether they are peculiar to the economic crash of 2008 and 2009.

As explained above, the LIHTC program is administered differently by each state.<sup>76</sup> This is significant because the way each state administers the program, through their QAPs, has a real effect on where LIHTC units are located.<sup>77</sup> The next section discusses the importance of location for low-income families.

## II.

### PLACE MATTERS<sup>78</sup>

#### A. *State-Sanctioned Apartheid: Government's Role in Concentrating Poverty*

It is not the case that American cities were always racially segre-

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71. Tom Daykin, *Dropping Demand for Tax Credits Hits Apartment Projects*, JSONLINE, Dec. 16, 2009, <http://www.jsonline.com/newswatch/79342762.html>.

72. *Id.*

73. Pub. L. No. 111-5, 123 Stat. 115 (2009).

74. *Id.* § 1602.

75. *Id.*

76. *See supra* Part I.B.

77. *See generally* GUSTAFSON & WALKER, *supra* note 52.

78. I would be remiss were I not to acknowledge that the title of Part II is a reference to Peter Drier, John Mollenkopf and Todd Swanstrom's seminal work. *See* DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 2–3 (“[T]his book’s central thesis: place matters. Where we live makes a big difference in the quality of our individual lives. The functioning of the places where we live also has a big impact on the quality of our society. The evidence shows that places—neighborhoods, cities and suburbs, and regions—are becoming more unequal. Economic classes are becoming more distant and separate from each other as the rich increasingly live with other rich people and the poor live with other poor people. Over time, the poor have become concentrated in central cities and distressed inner suburbs, while the rich live mostly in exclusive central-city neighborhoods and outer suburbs. The rising economic segregation has

gated.<sup>79</sup> Prior to the Fair Housing Act, the federal government made conscious efforts to encourage white flight into the suburbs and discourage Black homeownership.<sup>80</sup> This background is important to providing the context for subsequent government efforts to remedy residential segregation.

In 1896, the Supreme Court announced the “separate but equal” doctrine in *Plessy v. Ferguson*,<sup>81</sup> wherein the court articulated a view of segregation that assumed the natural preference of people to live separately from other races.<sup>82</sup>

The *Plessy* opinion marked a period in which residential segregation began to take on epidemic proportions.<sup>83</sup> Further, *Plessy* misunderstood or ignored the fact that many of America’s racial prejudices did not emerge organically among private citizens. Rather, they were promulgated through a variety of colonial-era laws that established a racial hierarchy that had not previously existed.<sup>84</sup> According to Massey and Denton’s work on the subject of residential racial segregation, before 1900 “blacks were more likely

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produced negative consequences that range from reinforcing disadvantage in central-city neighborhoods, to heightening the cost of suburban sprawl, to speeding the deterioration of central cities and inner suburbs. It would be bad enough if this trend resulted simply from individuals and households making choices in free markets, but it does not. Federal and state policies have favored suburban sprawl, concentrated urban poverty, and economic segregation. Only new politics for metropolitan governance that level the playing field and bring all parts of the metropolis into a dialogue with each other can stop the drift toward greater spatial inequality.”).

79. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 20 (1993) (“[B]efore 1900 African Americans could be found in most neighborhoods of northern cities. Although Blacks at times clustered on certain streets or blocks, they rarely comprised more than 30% of the residents of the immediate area; and these clusters typically were not spatially contiguous.”).

80. See generally Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 *YALE L.J.* 188 (2005).

81. 163 U.S. 537 (1896).

82. *Id.* at 551–52 (“If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals . . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”).

83. See generally MASSEY & DENTON, *supra* note 79, at 17–42.

84. See generally john a. powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 *L. & INEQUALITY* 99, 105–12 (1997).

to share a neighborhood with whites than with other blacks.”<sup>85</sup> This is not to say that Blacks enjoyed equal treatment, but merely points out that residential segregation is not necessarily a natural or permanent phenomenon. In fact, Massey and Denton argue that with the exception of African Americans, no ethnic or racial group in American history has ever lived in a set of neighborhoods that are “exclusively inhabited by members of one group” where “virtually all members of that group live.”<sup>86</sup> Despite American popular culture’s collective memory of ethnic ghettos—like the Jewish lower-east side of Manhattan, Irish South Boston, or the Italian North Ward of Newark—historically none of these ethnic enclaves ever featured that degree of ethnic or racial isolation.<sup>87</sup>

Segregation and its effects on the opportunities of racial minorities increased through much of the late nineteenth and twentieth centuries.<sup>88</sup> In 1890, the index of Black isolation in Newark, New Jersey—where 100% would be complete segregation—was at about 4%.<sup>89</sup> By 1930, that number jumped to 23%.<sup>90</sup> Some of that spike is probably explained by Black migration to northern cities from the south<sup>91</sup> and, despite the jump in the 1930s, was not particularly high. But by 1970, the isolation index in Newark had reached 78% and approached 90% in Chicago, Atlanta, and Washington.<sup>92</sup>

One cause of residential segregation in northern cities were steering efforts by realtors to prevent Black families from moving in.<sup>93</sup> Of course, even if a realtor would allow the property to be sold to a Black family, there were other obstacles preventing them from moving into middle-class, white neighborhoods. Federal and

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85. Measured by the index of dissimilarity—the percentage of one group who would have to move from a neighborhood in order to achieve group representations at the same level as the geographic area as a whole—Blacks and European immigrants between 1850 and 1860 had similar rates of segregation. MASSEY & DENTON, *supra* note 79, at 17–22.

86. *Id.* at 18–19.

87. *Cf. id.* (asserting that no other ethnic group, save for African Americans, has ever lived in a set of neighborhoods that are inhabited exclusively by members of that group).

88. *Id.* at 48.

89. STANLEY LIEBERSON, *A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880* 266, 288 (1980).

90. *Id.*

91. *See* MASSEY & DENTON, *supra* note 79, at 43.

92. *Id.* at 48.

93. One survey of real estate agents in Chicago from the 1950’s found that 80% of realtors refused to sell property to Blacks if that property was located in a white neighborhood. *Id.* at 50.

state policies restricting minority access to capital and homeownership opportunities are well-documented.<sup>94</sup> Federal legislation that funded much of the early public housing development specifically considered and rejected a requirement that public housing be desegregated.<sup>95</sup>

One federal policy in particular that exacerbated racial segregation involved banking regulations. Banks relied heavily on the Federal Housing Administration's (FHA) loan guarantees,<sup>96</sup> and the FHA, in turn, developed extensive underwriting criteria, determining which loans could be guaranteed by the federal government. One such criterion was that "if a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values."<sup>97</sup> The FHA refused to insure loans that were not covered by racially restrictive covenants and were not in racially homogenous neighborhoods.<sup>98</sup>

In neighborhoods where residents were categorically denied government-backed mortgages, home prices plunged.<sup>99</sup> The demand for homes that could not be financed through a home loan was low.<sup>100</sup> Blacks who would accept living in racially isolated

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94. *See, e.g.*, Gordon, *supra* note 80.

95. Henry Korman, *How the Proposed Hope VI Reauthorization Ignores the Severe Distress of Racial Segregation*, 17 J. AFFORDABLE HOUS. & COMM. DEV. L. 353, 354 (2008) ("Fearing that authorization and funding for public housing would be defeated by segregationists in the Senate, supporters chose a path of 'let us get the housing now and the desegregation later.' The anti-segregation amendment was defeated. The lack of a civil rights requirement in the 1949 Act provided the justification for federal housing officials and communities in every region of the nation to engage in slum clearance and public housing development for the deliberate purpose of creating segregated neighborhoods in order to contain Black citizens in discrete, highly concentrated locations. Public housing segregation had a purpose beyond that of achieving racial separation in assisted housing. It created higher levels of racial segregation throughout the entire housing market of many metropolitan areas.") (some quotations omitted).

96. *See* DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 121 (noting that one-third of all private housing in the 1950s was financed with FHA or Veteran's Administration help).

97. Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOCIOLOGICAL PERSPECTIVES 291, 307 (2000).

98. *Id.*

99. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1309-11 (1994).

100. *See id.*

neighborhoods still faced barriers to homeownership because of an inability to get mortgages.<sup>101</sup> The low home prices created disincentives to maintain the properties, and neighborhoods faced cycles of deterioration and decrepitude.<sup>102</sup>

After centuries of legal apartheid, the *Plessy* decision, and a federal policy of denying homeownership opportunities to minorities while expanding those opportunities to white families, the United States government began to reverse tack.

### B. *The Government's Role in Expanding Equality*

In 1954, *Brown v. Board of Education* came as an explicit refutation of "separate but equal."<sup>103</sup> The Court finally acknowledged what was obvious to millions of victims of discrimination: that segregation was harmful to those who were excluded from mainstream America.<sup>104</sup> Famed constitutional scholar Charles L. Black, Jr., may have best expressed the obviousness of the inequality inherent in segregation when defending the *Brown* decision from its critics: "The Court that refused to see inequality in this cutting off would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact."<sup>105</sup>

#### 1. The Fair Housing Act and the Duty to Affirmatively Further Fair Housing

The Federal Fair Housing Act of 1968 came in response to explicit racial discrimination in the real estate market.<sup>106</sup> The Act, as amended, limits the ability of people to refuse to rent or sell a home because of a person's race, color, religion, sex, familial status, national origin, or handicap status.<sup>107</sup> The Act also prevents real estate brokers from doing the same.<sup>108</sup> Important to this discussion

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101. See DRIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 121–22 (noting that between 1946 and 1959 Blacks received less than 2% of all FHA loans).

102. See Schill & Wachter, *supra* note 99, at 1309–11.

103. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

104. See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 425–26 (1959).

105. *Id.* at 426.

106. See Brian Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1620–21 (2007).

107. 42 U.S.C. § 3604 (2006).

108. § 3605(a) ("It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or

about the LIHTC, the Fair Housing Act requires that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) *in a manner affirmatively to further the purposes of this subchapter.*”<sup>109</sup> The opening section of the Act provides some indication of those purposes: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>110</sup>

The Third Circuit took a leading role in defining the Department of Housing and Urban Development’s (HUD) duty to affirmatively further fair housing in *Shannon v. United States Department of Housing & Urban Development*.<sup>111</sup> The decision arose out of a suit to enjoin HUD from providing mortgage guarantees to an apartment development in East Poplar, Philadelphia.<sup>112</sup> Residents in the area contended that “the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income Black residents.”<sup>113</sup> They further alleged that “HUD had no procedures for consideration of and in fact did not consider its effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole.”<sup>114</sup>

It is important to note the area of land that the *Shannon* court considered. HUD breaks the United States down into 363 Metropolitan Statistical Areas (MSA).<sup>115</sup> These MSAs can include adjoining counties and can represent a single area of administration for HUD.<sup>116</sup> Yet, rather than looking at whether HUD considered the effect of its action on the MSA or the United States as a whole, the *Shannon* court considered the effects on the nearby neighborhood

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conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”).

109. § 3608(d) (emphasis added).

110. § 3601.

111. 436 F.2d 809 (3d Cir. 1970); Orfield, *supra* note 3, at 1769.

112. *Shannon*, 436 F.2d at 811; Orfield, *supra* note 3, at 1769.

113. *Shannon*, 436 F.2d at 811–12.

114. *Id.* at 812.

115. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB BULL. NO. 08-01, UPDATE OF STATISTICAL AREA DEFINITIONS AND GUIDANCE ON THEIR USES 3 (1999), available at <http://www.whitehouse.gov/omb/bulletins/fy2008/b08-01.pdf>. Note that in addition to the 363 Metropolitan Statistical Areas, there are also 577 Micropolitan Statistical Areas, which are areas that “have at least one urban cluster of at least 10,000 but less than 50,000 population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.” *Id.*

116. See *Hills v. Gautreaux*, 425 U.S. 284, 299 n.15 (1976).

and municipality.<sup>117</sup> The court's focus on a smaller area was relevant in light of the discussion in Part III of this Note, which argues that the *In re 2003* court should have looked for discriminatory intent within the different individual regions of the state instead of only considering LIHTC siting in the state as a whole.<sup>118</sup>

The *Shannon* court held that “[i]ncrease or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.”<sup>119</sup> Yet, it qualified its pronouncement by denying that desegregation, as a goal of national housing policy, must prevail in every case.<sup>120</sup> HUD attempted to defend itself by asserting that it had not taken part in any discriminatory action.<sup>121</sup> In response, the court recounted a history of legislative developments whereby HUD's duties had changed from having none in regards to race, to a duty to refrain from discriminating, and finally to a duty to affirmatively promote fair housing in the context of race.<sup>122</sup>

The FHA was instrumental in putting obligations on state and federal agencies to take steps to ameliorate residential segregation.

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117. *Shannon*, 436 F.2d at 811–12.

118. In *Shannon*, HUD administered its program on an MSA level, but the court scrutinized its actions for the effect at the neighborhood level and at the municipal level. 436 F.2d at 811–12. However, the LIHTC program is administered on a state-wide basis, and the *In re 2003* court looked at concentration of units on a state-wide basis. 848 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2004). This Note argues that the *In re 2003* court should have looked at how LIHTC units are allocated within smaller areas, such as county, MSA, or even region, similar to what the *Shannon* court did when looking at HUD's funding activities.

119. *Shannon*, 436 F.2d at 821.

120. *Id.* at 822 (“[N]or are we suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.”).

121. *Id.* at 820.

122. *Id.* at 816 (“Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary . . . could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed . . . to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.”).

However, post-*Brown* residential segregation cases emerged even before the Fair Housing Act of 1968.<sup>123</sup> *Gautreaux v. Chicago Housing Authority*,<sup>124</sup> where plaintiffs asserted violations of the Equal Protection Clause of the Constitution<sup>125</sup> and Title VI of the 1964 Civil Rights Act,<sup>126</sup> came to be a model for bringing suit against a local government for its public housing siting practices.

2. *Gautreaux v. Chicago Housing Authority* and *Gautreaux v. HUD*

The *Gautreaux* plaintiffs alleged that the Chicago Housing Authority (CHA) had not only steered public housing applicants to certain housing projects based on their race, but that CHA had selected public housing sites “almost exclusively within neighborhoods the racial composition of which was all or substantially all Negro at the time the sites were acquired,”<sup>127</sup> a practice that was “maintaining existing patterns of urban residential segregation by race in violation of the Fourteenth Amendment.”<sup>128</sup> In a companion suit, *Gautreaux v. Romney*, the plaintiffs implicated HUD by alleging that it was aware of the Chicago Housing Authority’s discriminatory practices and that it continued to fund construction of segregated public housing in Chicago anyway.<sup>129</sup>

The plaintiffs prevailed against the Chicago Housing Authority and entered into a consent decree with HUD.<sup>130</sup> HUD’s remedy for supporting Chicago’s discriminatory practice became *Gautreaux*’s now-famous legacy. The *Gautreaux* Assisted Housing Program used Section 8 vouchers—federally subsidized coupons that

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123. See, e.g., *Gautreaux v. Chi. Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (denying the Chicago Housing Authority’s motion to dismiss and allowing plaintiff to move forward with claim that the agency “selected sites deliberately or otherwise, for public housing projects . . . for the purpose of, or with the result of, maintaining existing patterns of urban residential segregation by race in violation of the Fourteenth Amendment”).

124. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

125. U.S. CONST. amend. XIV, § 1.

126. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

127. *Gautreaux*, 265 F. Supp. at 583.

128. *Id.*

129. *Gautreaux v. Romney*, 448 F.2d 731, 737 (1971), *aff’d*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

130. The original remedy from the district court called for 700 public housing units to be constructed in census tracts of low “non-white” concentration. See *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 738–39 (1969). It also prevented Chicago from initiating any other public housing projects until 75% of the 700 units had been constructed. *Id.* at 738. This was referred to as the “scattered-site remedy,” as it also required that the new public housing be scattered through many census tracts, rather than built all in one high-rise project. *Id.*

can be used to offset the cost of rent for low-income families—to help relocate many public housing families to mostly white suburbs outside of Chicago.<sup>131</sup> These families faced serious obstacles upon arriving in their new environments, including some blatantly racist encounters in their new neighborhoods, but many thrived and became prime examples in favor of housing mobility.<sup>132</sup>

High school dropout rates among Gautreaux children dropped significantly compared to their inner-city peers.<sup>133</sup> Gautreaux children were also significantly more likely to attend college.<sup>134</sup> While hardly a flawless experiment in housing mobility, the Gautreaux children “were more likely to be (1) in high school, (2) in a college track, (3) in a four-year college, (4) in a job, (5) in a job with benefits, and (6) not outside of the education and employment systems” compared to other Section 8 families who remained in inner-city Black enclaves.<sup>135</sup>

Despite *Gautreaux’s* purported success, some commentators have questioned whether dispersing low-income families throughout middle-income communities has created new problems.<sup>136</sup> But whether or not Gautreaux-type mobility programs can end intergenerational poverty, it is clear that concentrated poverty has very real human effects. Thus, even if programs to move the poor out of the ghetto would not resolve all of the issues surrounding intergenerational poverty, programs that continue to concentrate the poor into the same failing communities are likely harmful regardless. The next section describes the effects on those living in concentrated poverty.

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131. See generally LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* (2000).

132. See *id.* at 96–99 (describing incidents of near or actual racial violence).

133. *Id.* at 164 (“[F]or those seventeen years of age or younger, a higher percentage of city youth dropped out of high school than did suburban youth (20 percent in the city versus less than 5 percent in the suburbs).”).

134. *Id.* at 165 (“Fifty-five of the Gautreaux youth were age eighteen or older when they were interviewed. In this group, the rate of college enrollment was significantly higher for students in the suburban sample than for city students (54 percent versus 21 percent).”).

135. *Id.* at 171.

136. See Hanna Rosin, *American Murder Mystery*, *THE ATLANTIC MONTHLY*, July 2008, at 40, 54 (questioning whether mobility programs cause more harm than good), available at <http://www.theatlantic.com/doc/200807/memphis-crime>. But see POLICE CRIME STATISTICS (2010), <http://www.cityofmemphis.org/framework.aspx?page=218> (showing that crime has risen in some categories but lowered in others). The data presented by the City of Memphis does not suggest the same sort of rampant crime spree that the article suggests.

C. *The Human Effects of Concentrated Poverty*

The history of racial segregation and its relationship to intergenerational poverty is well documented.<sup>137</sup> Living in poverty has serious health consequences, aside from the obvious material discomforts of living in substandard conditions. In some of the poorest communities, residents are beset with unacceptably high rates of tuberculosis, AIDS, lead paint poisoning, and asthma.<sup>138</sup> It is worth mentioning that in the United States most poor people live outside areas of concentrated poverty.<sup>139</sup> In 2000, only 12% of individuals living in poverty lived in a census tract where the poverty rate was over 40%.<sup>140</sup> There are two stories behind this statistic. The first is the tremendous need for services for people living outside of the traditional urban centers that are envisioned as the most deserving of low-income housing assistance.<sup>141</sup> The second is the especially dire circumstances of the poor who do live in concentrated poverty. It is not sufficient to only focus on strategies to improve the ghettos; the people living in concentrations of poverty need opportunities to exit the ghettos.

Jobs in central cities for non-professionals are harder to come by and pay less than jobs typically available in surrounding suburban communities.<sup>142</sup> Without opportunities to live outside of the central city, families looking for safer neighborhoods with better schools will find that the jobs they desire are well beyond their reach since many of these families rely on public transportation to commute to their places of employment.<sup>143</sup> This situation exemplifies the long-standing debate between urban-revitalization advocates and housing-mobility advocates.<sup>144</sup>

For instance, Fair Share attempted to convince the *In re 2003* court that “community revitalization” strategies were not valid

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137. See, e.g., MASSEY & DENTON, *supra* note 79, at 1–82.

138. Lead paint poisoning can be common in older apartment buildings and can cause brain damage and development disabilities in children. Asthma is sometimes caused by cockroach droppings, found in many of the apartments in the neighborhood. See DREIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 7.

139. *Id.* at 28.

140. *Id.*

141. This would of course bolster the argument that LIHTC units should be more evenly dispersed.

142. See DREIER, MOLLENKOPF & SWANSTROM, *supra* note 11, at 66–71.

143. Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 Geo. J. ON POVERTY L. & POL'Y 155, 164–65 (2005).

144. See Orfield, *supra* note 3, at 1751–53.

methods to ameliorate racial segregation.<sup>145</sup> That argument failed.<sup>146</sup> The competing claim, and the one more often made by state and local governments, is that urban revitalization is the key to ameliorating poverty.<sup>147</sup> Commentators like John A. Powell<sup>148</sup> have noted that the urban-suburban divide misses much of the nuance within the cycle of poverty.<sup>149</sup> Rather than thinking of housing mobility in terms of urban versus suburban, he posits that it is more helpful to think in terms of opportunity versus isolation. The search for high-opportunity over low-opportunity areas sometimes comes out differently than the old urban-suburban divide.<sup>150</sup>

For example, the Moving to Opportunity program (MTO) was established by Congress to test the *Gautreaux* hypothesis, that giving housing voucher recipients opportunities to move outside of their isolated inner-city environments would improve their ability to lead safe and productive lives.<sup>151</sup> The results of the ensuing study did show some gains for the participants and their children, but the results were limited and even negative for MTO families in a few categories.<sup>152</sup> However, there is also a concern that the program focused too much on getting the families to leave *poverty*, and not enough on making sure that they were *moving to opportunity*.<sup>153</sup>

Some researchers suggest that LIHTC units are more likely to be built in suburban and low-poverty areas than other project-based affordable housing programs.<sup>154</sup> However, the results of these studies do not lead to the conclusion that current LIHTC allocations are focused on high-opportunity areas. The research merely sug-

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145. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re 2003*), 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

146. *Id.* at 6.

147. *Id.* at 9.

148. The reader should note that Powell's name is intentionally not capitalized. *See supra* note 84.

149. *See* John A. Powell, *Opportunity Based Housing*, 12 WTR J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 188, 188 (2003).

150. *See id.*

151. *See* ALEXANDER POLIKOFF, *WAITING FOR Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* 258–65 (2006).

152. John Goering, Judith D. Feins & Todd M. Richardson, *A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results*, 13 J. HOUS. RESEARCH 1, 23 (2002).

153. *Id.* (noting that some children who moved out of poor neighborhoods in the MTO program continued to attend the same schools that they had attended while living in high-poverty neighborhoods).

154. *See, e.g.*, LANCE FREEMAN, THE BROOKINGS INST., *SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990s* 5 (2004), *available at* [http://www.brookings.edu/urban/pubs/20040405\\_Freeman.pdf](http://www.brookings.edu/urban/pubs/20040405_Freeman.pdf).

gests that in a panoply of bad siting practices among affordable housing programs, LIHTC is less bad than other programs. Further, in specific regions, especially in New Jersey, placement of LIHTC buildings in high-poverty neighborhoods and cities far outpaces the national average.<sup>155</sup> New Jersey consistently ranks poorly in terms of LIHTC placement in high-opportunity areas.<sup>156</sup>

### III.

#### *IN RE 2003* SHOULD NOT BIND FUTURE COURTS

In light of the fact that *where* people live affects *how* people live, *In re 2003* has serious repercussions for the people living in LIHTC units. The recognition that HFAs ought to do more to affirmatively further fair housing and integration would go a long way towards deconcentrating poverty and may even replicate some of the benefits accrued to participants in the Gautreaux Program. And because of a significant change in the facts upon which the New Jersey Appellate Division relied, the *In re 2003* decision lacks the persuasive force that it might have carried when it was initially decided. The *In re 2003* court relied on state laws that have since been repealed, like New Jersey's Regional Contribution Agreement program, as proof that the HMFA's policies were consistent with the state's fair housing policies.<sup>157</sup> Further, the court recognized that a change in market conditions could necessitate a change in the HMFA's financing of affordable housing.<sup>158</sup> For these reasons, the Court's justifications for the HMFA's action ring hollow, and *In re 2003* should not be considered precedential in future LIHTC litigation.

This section first outlines the reasoning of the *In re 2003* court and argues that the case was wrongly decided.<sup>159</sup> Next, this section explains some of the changes in the law and the facts of the LIHTC

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155. See PRRAC REPORT, *supra* note 53; FREEMAN, *supra* note 154, at 8.

156. See PRRAC REPORT, *supra* note 53.

157. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re 2003*), 848 A.2d 1, 21 (N.J. Super. Ct. App. Div. 2004) (“[S]tate policy, as indicated by the allowance of RCAs, and HMFA’s own statutory mandate to assist urban areas, encourage a substantial level of funding to urban areas.”).

158. *Id.* at 15 (“What is clear from this legislative scheme is that HMFA’s overriding mission is to foster, through its financing and other powers, the construction and rehabilitation of housing, particularly affordable housing, in order to address needs caused by various social factors, including changes in market conditions.”).

159. For scholarship that focuses more heavily on a sensible application of the Fair Housing Act to the administration of New Jersey’s low-income housing tax credits, see Orfield, *supra* note 3.

market that could lead a court to conclude that *In re 2003* is not binding for new legal challenges to New Jersey's QAP.

A. *Summary of the In re 2003 Decision*

In the year it was promulgated, the Fair Share Housing Center challenged the validity of New Jersey's 2003 Qualified Allocation Plan.<sup>160</sup> The plaintiffs—including the Camden County NAACP, the Burlington County NAACP, and the Camden County Taxpayers Association<sup>161</sup>—claimed that “because the 2003 QAP funds affordable housing in urban areas with a high percentage of minority residents, it encourages racial segregation in violation of the Federal Fair Housing Act, 42 U.S.C.A. §§ 3601 to 3609.”<sup>162</sup> This claim centered on the Fair Housing Act's requirement that funding agencies act in a manner “affirmatively to further” fair housing.<sup>163</sup> Fair Share urged the court to apply this duty to the Internal Revenue Service, which administers the LIHTC program nationally, and to the HMFA, which administers it locally.<sup>164</sup>

While the HMFA argued that the LIHTC statute required a preference for funding high-poverty areas,<sup>165</sup> Fair Share argued that the statute also required other preferences, namely that QCTs have “a concerted community revitalization plan” that the HMFA chose to ignore.<sup>166</sup> Fair Share claimed that the 2003 plan violated the state's *Mount Laurel* doctrine,<sup>167</sup> antidiscrimination laws,<sup>168</sup> Ad-

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160. *In re 2003*, 848 A.2d at 5.

161. Additional appellants Camden County NAACP, the Burlington County NAACP, and the Camden County Taxpayers Association were joined as plaintiffs after the initial appeal of the 2003 QAP had already been filed. *Id.* at 6.

162. *Id.* at 5.

163. 42 U.S.C. § 3608(d) (2006) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”).

164. Appellant's Brief on Appeal at 42, *In re Adoption of the 2002 Low Income Hous. Tax Credit Qualified Allocation Plan*, No. A-10-02T2 (N.J. Super. Ct. App. Div. 2004) [hereinafter Appellant's Brief].

165. *In re 2003*, 848 A.2d at 20.

166. Appellant's Brief, *supra* note 164, at 42; *see also* 26 U.S.C. § 42(m)(1)(B)(ii)(III) (2006).

167. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 724 (N.J. 1975) (“[E]very such municipality must . . . make realistically possible an appropriate variety and choice of housing . . . [I]t cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity . . .”).

168. N.J. STAT. ANN. § 10:5 (West 2007).

ministrative Procedure Act,<sup>169</sup> and its constitutional prohibition of public school segregation.<sup>170</sup> The plaintiffs pushed for a ruling from the court that would prevent any LIHTC allocations in high-poverty, predominantly minority census tracts.<sup>171</sup>

Fair Share lost the case. Its appeal of the adoption of the 2003 Qualified Allocation Plan was dismissed by the New Jersey Appellate Division,<sup>172</sup> which had original jurisdiction,<sup>173</sup> and certiorari was subsequently denied by the New Jersey Supreme Court.<sup>174</sup>

New Jersey's QAP has changed since 2003, however. One rule was passed, for instance, that disallows allocating credits to more than two projects in the same municipality.<sup>175</sup> This rule prevents over-allocation to Camden and Newark, two of New Jersey's poorest cities. But unfortunately it does nothing to stop developers from allocating credits in cities adjacent to Newark that also have high concentrations of poverty.<sup>176</sup>

Further, in 2009, the HMFA began to loosen some of the restrictions on combining LIHTCs with inclusionary zoning programs, where cities and towns provide zoning easements in exchange for a certain percentage of affordable units in a build-

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169. § 52:14B.

170. This argument rests on New Jersey's prohibition of public school segregation and the requirement that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools." N.J. CONST. art. VIII, § IV, cl. 1.

171. As amicus curiae, the New Jersey Institute for Social Justice and partner organizations took a middle approach. The Institute's position was that "federal and state civil rights law do apply to the LIHTC," but HMFA should not be precluded from allotting many LIHTCs to urban areas. Orfield, *supra* note 3, at 1788-89.

172. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 6 (N.J. Super. Ct. App. Div. 2004).

173. See N.J. R. Ct. 2:10-5 ("The appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review.").

174. *In re* N.J. Hous. & Mortg. Fin. Agency, 861 A.2d 846 (N.J. 2004).

175. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.4(c) (2009)), available at [http://nj.gov/dca/hmfa/biz/development/lowinc/2009\\_proposedqap.pdf](http://nj.gov/dca/hmfa/biz/development/lowinc/2009_proposedqap.pdf).

176. For example, compare the individual poverty rates in the cities of East Orange (19.2%), Orange (18.8%), and Irvington (17.4%) with the state-wide individual poverty rate of 8.5% and Newark's individual poverty rate of 9.7%. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, <http://censtats.census.gov/data/NJ/1603419390.pdf> (East Orange), <http://censtats.census.gov/data/NJ/0603401313045.pdf> (Orange), <http://censtats.census.gov/data/NJ/0603401334450.pdf> (Irvington), <http://censtats.census.gov/data/NJ/04034.pdf> (New Jersey), <http://censtats.census.gov/data/NJ/395345640.pdf> (Newark).

ing.<sup>177</sup> This was important progress that allows a developer to expand the available subsidies to her project, thereby increasing the likelihood of overcoming high development costs in high-opportunity areas. However, neither of these developments do anything to “affirmatively further” fair housing. They merely lift some of the barriers to building LIHTC units in high-opportunity areas that the HMFA had previously erected.

*B. State Housing Finance Agencies’ Duty to Affirmatively Further*

The New Jersey Appellate Division accepted that the “affirmatively to further” duty applied to the HMFA in administering the LIHTC.<sup>178</sup> However, the court ruled that the HMFA had met that duty and was quick to point out a tension between what the HMFA was statutorily empowered to do, and the sort of “affirmative furthering” that Fair Share and others were looking for.<sup>179</sup> According to the court, when the HMFA adjusted its Qualified Allocation Plan in response to the Fair Share Housing Center’s comments—by getting rid of urban set-asides for the tax credits as well as creating mixed-income set-asides to promote mixed-income developments—those adjustments went far enough to affirmatively further racial integration.<sup>180</sup>

The court distinguished the HMFA as a funding agency, rather than a siting agency, which the court understood to mean that the HMFA is neither empowered nor obligated to “steer projects from one neighborhood . . . to another based on the racial composition of the neighborhood or municipality”<sup>181</sup> Instead, the HMFA is bound by the statutory authority that the LIHTC statute had given it, in congruence with the authority granted to the HMFA by the

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177. Unlike previous QAPs, the 2009 QAP allowed density bonuses in all of the available tax credits when the developer can show that the project could not otherwise be built. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.12(a) (2009)), available at [http://nj.gov/dca/hmfa/biz/devel/lowinc/2009\\_proposedqap.pdf](http://nj.gov/dca/hmfa/biz/devel/lowinc/2009_proposedqap.pdf).

178. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 10 (N.J. Super. Ct. App. Div. 2004) (“HMFA has a duty to administer its housing and financing programs in a manner affirmatively to further the policies of Title VIII.”).

179. *Id.* at 14–15 (“Title VIII may require the agency to administer its tax credit program so as to achieve a condition in which individuals of all races have equal housing-market choices . . . . But achievement of that goal, by focusing primarily on the racial composition of a relevant housing locale, may compromise [the] HMFA’s fundamental mission.”) (citations omitted).

180. *Id.* at 9, 20.

181. *Id.* at 14.

state legislature.<sup>182</sup> The federal LIHTC statute required that the state give preference to applications where the proposed development would be located in a “qualified census tract.”<sup>183</sup> The court’s failure to recognize the tremendous influence that state housing finance agencies wield in siting decisions by developers who apply for the tax credits misses the critical innovation of cases like *Gautreaux v. Romney* and *Shannon v. United States Department of Housing & Urban Development*.<sup>184</sup> In both cases, those courts rejected HUD’s contention that a “funding agency” is not responsible for the racially discriminatory site selections by those who HUD funds.<sup>185</sup> State funding agencies are no different from HUD in this regard; they should be held to account for their funding decisions. It is indeed true that the HMFA cannot choose particular sites, but the agency is well aware that through its QAP, it can approve federal funding for developments that exacerbate existing racial concentrations.

The *In re 2003* court observed that the state legislature created the HMFA with a mission to: “[a]ssist in the revitalization of the State’s urban areas.”<sup>186</sup> The court cited the HMFA’s enabling statute in concluding that HMFA has duties to the state that it must fulfill, and that its duty to affirmatively further fair housing cannot waive existing state duties, such as assisting in “the revitalization of the State’s urban areas.”<sup>187</sup> Conspicuously absent from the court’s analysis, however, was any mention of the HMFA enabling statute’s mission to “[s]timulate the construction, rehabilitation and improvement of *adequate* and affordable housing in the State so as to increase the number of opportunities for adequate and affordable housing in the State for New Jersey residents, including particularly New Jersey residents of low and moderate income.”<sup>188</sup>

The court seemed to pick and choose which of the HMFA’s statutory mandates to pay attention to. It is unclear how low-income housing that is intended for families to live in can be “adequate” when it is located in high-crime areas with poorly performing schools and significant racial isolation. That is not to

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182. *Id.* at 14–15.

183. *Id.* at 15 (internal quotation marks omitted).

184. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971), *aff’d*, *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); *see also* Orfield, *supra* note 3, at 1767.

185. *Romney*, 448 F.2d at 737–41; *Shannon*, 436 F.2d at 821.

186. *In re 2003*, 848 A.2d at 17 (quoting N.J. STAT. ANN. § 55:14K-2(e)(4) (West 2001)).

187. *Id.*

188. N.J. STAT. ANN. § 55:14K-2(e)(2).

say that the HMFA has a statutory obligation to build exclusively in low-poverty areas, but the term “adequate” does suggest that the HMFA should consider factors like school performance, crime rates, and employment opportunities when it funds low-income housing developments. The conclusions drawn by the court in *In re 2003* find mutually exclusive conflicts where none exist, and yet completely ignore concrete mandates by the state legislature to provide adequate housing. The court stated that it is the federal legislation that prevents HFAs from taking a more active role in integrating communities:

HMFA’s power to allocate low-income housing tax credits is circumscribed by 26 U.S.C.A. § 42(m)(1)(B) and (C). Under that statute, the agency is required to adopt a QAP that establishes specific selection criteria and preference standards that will guide it in the allocation of tax credits to competing housing sponsors, local agencies and private developers.<sup>189</sup>

However, a report funded by the Department of Housing and Urban Development points out what is clear to any reviewer of the many different state QAPs: “The federal code allows states the flexibility to assess needs, identify preferences, and establish policies for the allocation of tax credit resources.”<sup>190</sup> Other reports have shown the great disparities in LIHTC siting within high-poverty areas among the states, finding it worst in the Northeast.<sup>191</sup> It may well be the case that the LIHTC statute forces states to give some preference to high-poverty areas, but it is by no means the case that the statute requires the kind of wholesale low-opportunity siting that is prevalent in much of New Jersey, particularly some of the MSAs within the northern half of the state.

In resisting Fair Share’s approach to administering the LIHTC, the HMFA also raised concerns that they would be constitutionally barred from intentionally giving LIHTC preferences to proposals in predominantly non-minority areas.

### *B. Considering Race in LIHTC Allocations*

The *In re 2003* court confirmed that race-conscious tax credit preferences could potentially pose constitutional problems.<sup>192</sup> This was one more reason why the court felt that the HMFA had gone as

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189. *In re 2003*, 848 A.2d at 15.

190. GUSTAFSON & WALKER, *supra* note 52, at 1.

191. See PRRAC REPORT, *supra* note 53.

192. *In re 2003*, 848 A.2d at 17.

far as it could go in furthering fair housing.<sup>193</sup> Race-conscious government action is always subject to strict scrutiny.<sup>194</sup> Courts must look to whether the race-conscious action is “narrowly tailored” to achieve a “compelling government interest.”<sup>195</sup> Many judges and scholars have treated the narrow tailoring test as if it is fatal to all government sponsored programs that take race into account.<sup>196</sup> However, the Supreme Court has deliberately pointed out that strict scrutiny is not fatal in fact, but is merely intended to flush out government policies whose ends may not be justified by their means.<sup>197</sup> In *Adarand Constructors, Inc. v. Peña*, Justice O’Connor attempted to “dispel the notion that strict scrutiny is strict in theory,

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193. *Id.*

194. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995).

195. *Id.* at 227 (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”). For a more recent articulation of the Supreme Court’s jurisprudence on race-conscious government action, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (finding a voluntary plan for achieving racial balance in public schools to be an unconstitutional violation of the Equal Protection Clause).

196. See *Parents Involved*, 551 U.S. at 833–34 (Breyer, J., dissenting) (“Today’s opinion reveals that the plurality would rewrite this Court’s prior jurisprudence, at least in practical application, transforming the ‘strict scrutiny’ test into a rule that is fatal in fact across the board.”); *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (“Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”); *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 (D.C. Cir. 1991) (“To require the government, on that account, to meet the most exacting standard of review—a standard that has been called strict in theory and fatal in fact—would be inconsistent with Congress’s large powers to make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.”) (quotations and citations omitted); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive ‘new’ equal protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”) (purportedly the first instance of the use of the phrase “strict in theory and fatal in fact”); Nicole Love, Note, *Parents Involved in Community Schools v. Seattle School District No. 1: The Application of Strict Scrutiny to Race-Conscious Students Assignment Policies in K–12 Public Schools*, 29 B.C. THIRD WORLD L.J. 115, 120 (2009) (“The [*Parents Involved*] Court’s application of strict scrutiny adopted the jurisprudence of ‘strict in theory, but fatal in fact’ from affirmative action cases and applied it to race-conscious assignment policies.”).

197. See *Adarand*, 515 U.S. at 235.

but fatal in fact. The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”<sup>198</sup> The Court later proved that statement when it permitted racial considerations by the admissions department of a public university’s law school in *Grutter v. Bollinger*.<sup>199</sup>

An empirical study of the application of strict scrutiny found that 30% of all such cases result in the government action surviving the review.<sup>200</sup> When looking only at “suspect class discrimination,” which would include a race-conscious policy for housing developments, the rate is 27%, hardly a signal that any race-conscious government action is doomed to fail in the courts.<sup>201</sup> Admittedly, this study of strict scrutiny gives low odds of success for state agencies.<sup>202</sup> However, while only 14% of strict scrutiny challenges to state agency action survive, the study used a sample of only fourteen applications of strict scrutiny of state agency action.<sup>203</sup>

Despite the fact that race-conscious government policies are not bound to fail, some attempts at racial integration in affordable housing have failed the narrow tailoring test. Two well-known examples are the Dallas Housing Authority’s proposed public housing projects in Mesquite, Texas and the Starrett City apartments in Brooklyn, New York City.

#### 1. *Walker v. Mesquite*

In 1987, the Dallas Housing Authority (DHA) and HUD entered into a consent decree to remedy past and current discrimination in the siting and administration of their public housing projects.<sup>204</sup> The DHA had an intentional practice whereby

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198. *Id.* at 237 (quotations and citations omitted).

199. 539 U.S. 306, 328 (2003).

200. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 796 (2006).

201. *Id.* at 815.

202. Winkler writes that state agencies lose strict scrutiny challenges in all but 14% of cases. *Id.* at 818.

203. *Id.*

204. *Walker v. City of Mesquite*, 169 F.3d 973, 976 (5th Cir. 1999) (“The consent decree addressed the plaintiff class’s challenge under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 to the purposeful racial discrimination and segregation within DHA’s public housing programs. The defendants were DHA and HUD. The City of Dallas was joined as both a defendant to the lawsuit and a party to the consent decree in 1989.”) (footnotes omitted).

“[v]irtually all non-elderly public housing units were constructed in minority areas of Dallas.”<sup>205</sup>

The DHA “repeatedly violated the consent decree,” and in 1992 it was vacated by the district court on a motion for summary judgment by the plaintiffs.<sup>206</sup> The district court found in favor of liability against the DHA and ordered that it demolish its West Dallas project, infamous as “one of Dallas’s worst slums.”<sup>207</sup> In place of that blighted project, the DHA was to construct new public housing units, subject to the restriction that they all be located in areas that had a poverty rate of less than 13% and that were “predominantly white.”<sup>208</sup>

Homeowners in the town of Mesquite challenged the DHA and HUD plan on the grounds that the district court’s order to construct public housing “is not narrowly tailored because it requires that the new units be constructed in predominantly white areas.”<sup>209</sup> On appeal, the Fifth Circuit inquired as to whether the order was narrowly tailored “to remedy the vestiges of past discrimination and segregation within Dallas’s public housing programs.”<sup>210</sup> The court determined that the DHA could not consider the race of the residents of a particular neighborhood when choosing sites for public housing.<sup>211</sup>

## 2. *United States v. Starrett City Associates*

Located in Brooklyn, New York, Starrett City was the largest housing development in the United States, made up of “46 high rise buildings containing 5,881 apartments.”<sup>212</sup> An agreement between the developers of Starrett City and the New York City Board of Estimates created a “racially integrated community,”<sup>213</sup> and as part of the deal the Starrett developers intended to maintain racial quotas for Starrett City tenants that would help to alleviate local concerns about white flight.<sup>214</sup> The United States government chal-

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205. *Id.* at 976 n.4 (“In 1994, of DHA’s approximately 6,400 public housing units, 6,100 were in minority areas and 300 were in predominantly white areas.”).

206. *Id.* at 977.

207. *Id.* at 976; *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 912 F.2d 819, 821 (5th Cir. 1990).

208. *Walker*, 169 F.3d at 977–78.

209. *Id.* at 978.

210. *Id.* at 980.

211. *Id.* at 987.

212. *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1098 (2d Cir. 1988).

213. *Id.* (quoting *United States v. Starrett City Assocs.*, 660 F. Supp. 668, 670 (E.D.N.Y. 1987)).

214. *Id.*

lenged the plan for violations of the Fair Housing Act.<sup>215</sup> On review, the Second Circuit held that the integration plan did violate the Fair Housing Act, despite the defendant's argument that the duty to affirmatively further fair housing required it to take steps to encourage integration.<sup>216</sup> The court noted that race-conscious policies should be an attempt to remedy a past wrong and be temporary in nature, rather than a permanent policy.<sup>217</sup>

### 3. Applying *Starrett City* and *Walker* to *In re 2003*

In reliance on *Starrett City Associates*, the *In re 2003* court noted that race-conscious tax credit preferences would warrant strict scrutiny analysis for equal protection compliance.<sup>218</sup> The court's concern about potential race-conscious regulations seemed to confuse the requirement that race-conscious policies be "narrowly tailored to achieve a compelling state interest"<sup>219</sup> for a complete ban on the use of race-conscious policies at all. If it can be established that the HMFA has an obligation to stimulate the construction of adequate housing and that such housing cannot, by definition, be constructed in places of racial isolation, failing schools, and violent street corners, then the only impediment to race-conscious integration in the LIHTC is the constitutional limitation on race-conscious policies. Assuming that avoiding racial isolation constitutes a compelling interest, that limitation only requires that the plan be narrowly tailored.<sup>220</sup>

Important lessons can be learned from *Walker* and *Starrett City*. For instance, how a compelling government interest is defined becomes an important factor in determining whether a race-conscious policy is narrowly tailored. In the *Walker* case, the compelling interest arose out of claims of discrimination against the DHA, HUD, and eventually the City of Dallas itself.<sup>221</sup> All parties in the case agreed that remedying past discrimination was a compelling gov-

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215. *Id.* at 1097.

216. *Id.* at 1100–01.

217. *Id.* at 1101–02.

218. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 16–17 (N.J. Super. Ct. App. Div. 2004).

219. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

220. The idea that integration is a compelling state interest is not so far-fetched. Justice Kennedy noted in the *Parents Involved* case that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." *Id.* at 783 (Kennedy, J., concurring).

221. *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999).

ernment interest, but the court was bound to considering whether the plan to build in predominantly white areas was narrowly tailored to that particular end.<sup>222</sup> *Starrett City* limited its analysis to whether the racial quota violated the Fair Housing Act, and therefore did not implicate strict scrutiny.<sup>223</sup> Both cases illustrate potential problems that an HFA could run into if it makes race-conscious allocation plans; but, they also underscore specific objections to such plans, such as the use of a quota system, rather than using race as one of many factors that could easily be adapted to the LIHTC application process.

#### 4. Applying *Starrett City* and *Walker* to Future LIHTC Administration

With these observations in mind, LIHTC administrators might be able to adopt a race-conscious policy by (1) advancing a government interest in avoiding racial isolation, rather than focusing on remedying past discrimination; (2) using such a consideration as merely a preference, rather than a quota or rigid requirement for LIHTC construction; and (3) placing no racial limitations on the characteristics of the tenants themselves.

After the government defines its interest, a court has to look at whether the plan is narrowly tailored to that interest. Claiming an interest in remedying past discrimination, as in the *Walker* case, appears to open up a defendant to findings by the court that it could have or should have used vouchers and tenant-based housing programs to accomplish that end. On the other hand, preventing racial isolation, assuming that it is considered a compelling governmental interest, might survive strict scrutiny if the states adopt measures such as the ones discussed below,<sup>224</sup> and if they merely give integrated LIHTC proposals a slight boost in consideration, rather than being completely determinative of whether or not a proposal would receive tax credits. Of course, it is not as though the HMFA would necessarily *have* to consider race in its QAP anyway. Economic characteristics of a neighborhood are also important factors for creating more opportunities for people.

#### C. *Fair Share's* Mount Laurel Claim

Fair Share advanced a claim against the HMFA for violating New Jersey's state constitution and the state supreme court's doc-

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<sup>222.</sup> *Id.*

<sup>223.</sup> *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099–1100 (2d Cir. 1988).

<sup>224.</sup> *See infra* Part IV.

trine that economic exclusion is impermissible.<sup>225</sup> Another way to avoid the problems raised by the HMFA regarding strict scrutiny would be for the HMFA to focus on the *Mount Laurel* doctrine, New Jersey's constitutional guarantee of class-based equality in housing opportunities.

The *Mount Laurel* doctrine is an interpretation of the New Jersey Constitution that, among other things, prevents municipalities from issuing land use regulations in a way that might exclude low- and moderate-income families.<sup>226</sup> The *Mount Laurel* plaintiffs alleged that the town of Mount Laurel, New Jersey, had wielded its land use regulatory powers unlawfully to exclude low- and moderate-income people.<sup>227</sup> The New Jersey Supreme Court concluded that,

every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.<sup>228</sup>

The plaintiffs in *In re 2003* argued that the *Mount Laurel* doctrine requires the HMFA to take action to open up LIHTC opportunities in mixed-income and mixed-race communities.<sup>229</sup> The *In re 2003* court rejected this argument, stating that the *Mount Laurel* doctrine is about municipalities using land use regulations to exclude people on the basis of class, while the HMFA is neither a municipality nor can it directly make siting decisions about LIHTC buildings.<sup>230</sup>

The *In re 2003* plaintiffs argued that the HMFA's allocation plan was the same steering of low-income people into low-income

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225. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 6 (N.J. Super. Ct. App. Div. 2004).

226. More specifically, the *Mount Laurel* doctrine compels New Jersey's municipalities to create a realistic opportunity for affordable housing units to be built. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 415 (N.J. 1983); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 724 (N.J. 1975).

227. See *Mount Laurel I*, 336 A.2d at 728. One of the most interesting facets of the *Mount Laurel* story is how the Court rested its decision on the basis of economic status rather than racial or ethnic status.

228. *Id.* at 724.

229. *In re 2003*, 848 A.2d at 22.

230. *Id.* at 22–23.

communities that was explicitly at issue in the *Mount Laurel* cases.<sup>231</sup> The *In re 2003* court rejected that argument by adhering strictly to the language of the *Mount Laurel I* opinion without relying on the state constitution's guarantees that the *Mount Laurel I* court had depended on to find equal rights for the plaintiffs in that case.<sup>232</sup> The *In re 2003* court left the administration of the *Mount Laurel* doctrine to the Council on Affordable Housing—the state agency created to help municipalities fulfill their *Mount Laurel* obligations.<sup>233</sup>

The *In re 2003* court seemed to forget how the fundamental legal underpinnings of the *Mount Laurel* doctrine came about in the first place. The *Mount Laurel I* court held that (1) the zoning power is an exercise of the state police power; (2) state police powers must “promote public health, safety, morals or the general welfare”; and (3) Mount Laurel's exclusionary zoning practices did not meet that requirement because they failed to consider the needs of the low-income citizens that are affected by the town's zoning practices.<sup>234</sup> Thus, rather than thinking of the *Mount Laurel* doctrine as narrowly as the *In re 2003* court did—as a ban on using the zoning power to exclude low-income people—it would have been more appropriate to view Fair Share's *Mount Laurel* claim as an allegation that the HMFA was exercising the state police power in a way that did not protect all of New Jersey's residents equally.

#### D. Discriminatory Impact and a New Denominator Problem

In order to determine Fair Share's claim about racial discrimination in HMFA's allocation plan, the *In re 2003* court considered “whether the 2003 QAP has a discriminatory impact because it harms the community generally by the perpetuation of segregation,” but made this inquiry with the premise that “the relevant community is the entire State.”<sup>235</sup> The court correctly noted that the “HMFA has a duty to implement the low-income housing tax credit program so as to create further opportunities to racial minorities to move to all areas of the State.”<sup>236</sup> The court also noted that “the 2003 QAP does not represent a violation of that duty because,

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231. See generally *Mount Laurel II*, 456 A.2d at 390; *Mount Laurel I*, 336 A.2d at 713.

232. *In re 2003*, 848 A.2d at 22–25.

233. *Id.* at 24.

234. *Mount Laurel I*, 336 A.2d at 725–26.

235. *In re 2003*, 848 A.2d at 20.

236. *Id.*

as earlier stated, it does provide housing opportunities in suburban areas.”<sup>237</sup>

Although the court was wrong to define the relevant community as the entire state, it is hard to fault the court for assuming it should be so. After all, the plaintiffs were challenging a state agency’s plan to administer a state-wide program. However, the relevant communities examined should have been far more localized, perhaps at a county level or MSA level. Recall the discussion of the *Shannon* decision, above.<sup>238</sup> In that case, the *Shannon* court pointed out HUD’s failure to consider its project’s impact on the surrounding community, rather than HUD’s effect on the demographics of the entire nation. Here, in *In re 2003*, the court should have looked at smaller areas in order to determine whether there were discriminatory impacts. Even with the exceptionally large New York-Newark Consolidated MSA, New Jersey spans more than one single MSA. The court should have considered the location of LIHTC units within particular MSAs located within New Jersey. If it had, it would have found that Atlantic-Cape May PMSA has 100% of its family units in high poverty areas; Jersey City has over 97%; and Bergen-Passaic has over 99%.<sup>239</sup>

MSAs are designed to reflect the commuting patterns and economic relationships within a given area.<sup>240</sup> In other words, MSAs are meant to roughly outline a region where people live, work, and shop. As reflected in the MSA boundaries throughout New Jersey, the housing market in the northern part of the state is not the same as in the southern part of the state. Thus, when a court looks at the state as a whole and finds both suburban development and urban development, it may discover a different story when looking at the developments constructed in one MSA versus another. On a scale that more accurately reflects housing and commuting choices, the MSA, LIHTC allocations look very concentrated in some areas.

Throughout most of the history of the LIHTC, the vast majority of northern New Jersey LIHTC units have been in cities with very high rates of poverty.<sup>241</sup> Far from simply reflecting a preference for qualified census tracts, the LIHTC in the state has become a program for building low-income housing in high-poverty areas of Newark, Patterson, and Jersey City PMSAs in northern New

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237. *Id.* at 20.

238. *See supra* Part II.B.1.

239. PRRAC REPORT, *supra* note 53.

240. U.S. DEP’T. OF HOUS. & URBAN DEV., GLOSSARY, [http://www.huduser.org/glossary/glossary\\_m.html](http://www.huduser.org/glossary/glossary_m.html) (last visited Apr. 8, 2010).

241. PRRAC REPORT, *supra* note 53.

Jersey.<sup>242</sup> It is true that many LIHTC projects are built in southern cities like Camden, Atlantic City, and Trenton,<sup>243</sup> however those MSAs feature a smaller percentage of their LIHTC units being located in high-poverty areas than the Northern MSAs do.<sup>244</sup>

A court convinced by this observation would, of course, have to acknowledge that the HFA is culpable as a funding agency in the same way that HUD has been recognized as a culpable funding agency in cases like *Walker v. City of Mesquite*,<sup>245</sup> *Gautreaux v. Romney*,<sup>246</sup> and *Shannon v. United States Department of Housing & Urban Development*.<sup>247</sup> One potential difference is that an HFA theoretically does not know the locations of the sites that it will fund before it makes rules that will result in the sites being funded. However, they do know that the rules that they promulgate will affect where developments are sited, and they know that taking greater care to develop LIHTC in high-opportunity areas would affirmatively further fair housing.

#### E. Changed Circumstances

While there are a great many reasons why *In re 2003* could have been decided in Fair Share's favor, to some extent it is of little use to lament what could have been. However, a lot has changed since 2003. The housing market has changed, and so has a key state policy.

The *In re 2003* court noted Fair Share's contention, articulated in the writings of David Rusk,<sup>248</sup> that New Jersey's tax credit allocations to projects located within urban areas had the same deleterious effects for which Regional Contribution Agreements (RCA)

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242. *Id.*

243. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2008 SPRING RESERVATION CYCLE, <http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/2008%20Spring%20Cycle%20Reservation%20List.pdf>; see also PRRAC REPORT, *supra* note 53.

244. PRRAC REPORT, *supra* note 53.

245. 169 F.3d 973 (5th Cir. 1999).

246. 448 F.2d 731 (7th Cir. 1971).

247. 436 F.2d 809 (3d Cir. 1970); see also *supra* Part III.B.

248. David Rusk is an "independent consultant" on urban policy. According to his website, he is an:

author, speaker, and consultant on urban policy. [His] basic theme is how urban sprawl, racial segregation, and concentrated poverty interact and impact a region's growth patterns, social equity, and quality of life. A former mayor of Albuquerque and state legislator, [he favors] regional strategies, particularly growth management, mixed-income housing, and tax base sharing. David Rusk, <http://www.gamaliel.org/DavidRusk/default.htm> (last visited Apr. 8, 2010).

were known.<sup>249</sup> RCAs are agreements in which a suburban town and an urban municipality trade affordable housing units for cash.<sup>250</sup> Specifically, the suburb pays cash, and the city builds low-income units within its own borders. The suburb's *Mount Laurel* obligation to create affordable housing opportunities, then, is considered satisfied on a per unit basis.<sup>251</sup>

Under the administration of the Council on Affordable Housing, New Jersey's municipalities are assigned "*Mount Laurel* obligations" whereby they are required to submit a plan to meet their fair share of the expected demand for affordable housing within their region.<sup>252</sup> These obligations are intended to overcome what Justice Pashman, in his concurring opinion in *Mount Laurel I*, called

two distinct but interrelated practices: (1) the use of the zoning power by municipalities to take advantage of the benefits of regional development without having to bear the burdens of such development; and (2) the use of the zoning power by municipalities to maintain themselves as enclaves of affluence or of social homogeneity.<sup>253</sup>

That concern—that suburban communities are in a position to take advantage of the benefits of regional development while avoiding its costs—comes out of the tendency of New Jersey municipalities to encourage affluent residents to move in, while discouraging classes of people who are more likely to bring about higher social service costs.<sup>254</sup>

One of the most onerous of these costs is public education for poor families with multiple children.<sup>255</sup> Public schools in New Jersey are primarily funded through local property taxes,<sup>256</sup> and for every child attending the school, a cost is borne by the school district.<sup>257</sup> These costs are offset more easily when property taxes re-

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249. *In re* Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (*In re* 2003), 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

250. Harold A. McDougal, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 666 (1987).

251. *Id.*

252. *Id.* at 680; see generally *supra* Part III.C.

253. *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 736 (N.J. 1975) (Pashman, J., concurring).

254. Lee Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1267–68 (2006).

255. See *Mount Laurel I*, 336 A.2d at 723.

256. *Id.*

257. One source puts the average cost of each public school student in New Jersey at \$10,000 per student. See Debra Nussbaum, *Reining in Special Education*, N.Y. TIMES, Aug. 31, 2003, at 14NJ.1.

turn a significant amount of revenue per child. If one child lives in a single house with seven bedrooms, on five acres of land, near a golf course, the property taxes on that house are likely to cover the cost of educating that child. On the other hand, if five children live in one apartment with two or three bedrooms, on less than an acre of land, next door to another identical apartment with analogous families, then the property taxes paid to the landlord through rent and passed on to the city through taxes are unlikely to provide an adequate amount of money to cover the expenses of the education of these five children.<sup>258</sup> This is without even considering the fact that low-income students often have special needs that incur even higher costs than the average middle-class student.<sup>259</sup>

The benefits that Justice Pashman referred to are those of living near a city that provides business and employment opportunities, as well as police protection, fire protection, cultural institutions, recreational areas, and transportation hubs.<sup>260</sup> Suburban towns are thereby incentivized to avoid the costs of servicing the poor, but are nonetheless dependant on the urban centers to which the poor are relegated.<sup>261</sup> It is a system where wealthy people get the benefits of living near a city, without having to share the expenses of running a city; the urban poor, conversely, share the benefits of the city but are compelled to pay for it through taxes and rents.<sup>262</sup>

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258. At a cost of \$10,000 per student, a low-income family would have to pay \$50,000 for each of thirteen years of school (kindergarten through twelfth grade) for a total of \$650,000. With the average property taxes in even the most taxed towns—e.g., Millburn, where N.J.’s average property tax levy was \$17,146, *see New Jersey Property Taxes*, THE STAR-LEDGER, <http://www.starledger.com/str/indexpage/taxes/taxseg.asp?frmtown=46380> (last visited Apr. 8, 2010)—it would take thirty-seven years at that tax level just to pay for the education of five children. In Newark, the average property tax levy was \$4,268 in 2007. *New Jersey Property Taxes*, THE STAR-LEDGER, <http://www.starledger.com/str/indexpage/taxes/taxseg.asp?frmtown=51000> (last visited Apr. 8, 2010). Thus it would take 152 years to pay back the costs of public education for five children.

259. Molly McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1351 (2004). The cost of educating a special needs student in New Jersey is said to range from \$20,000 to \$100,000. Nussbaum, *supra* note 257, at 14NJ.1.

260. *See* McDougal, *supra* note 250, at 671.

261. *Id.* at 671 n.47 (“[A] number of functions necessary to support life—an economic base, transportation network, various services—are located elsewhere in the region.”).

262. *See* Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL’Y & L. 471, 512 (1998) (“What is remarkable about these exclusionary measures is that localities are employing the powers of government to improve, purportedly,

After the *Mount Laurel* decisions purportedly sought to end the practice of allowing affluent suburbs to reap the benefits of a metropolitan area, without bearing any of the burdens of the region, it is puzzling that RCAs were ever created in the first place. An RCA is a voluntary agreement between two municipalities to trade some portion of a town's *Mount Laurel* obligation—an obligation to zone for, but not necessarily create affordable housing<sup>263</sup>—in exchange for funding for low-income housing. For example, Newark, the state's largest city, might enter an agreement with another New Jersey town, for example Parsippany, to build one hundred affordable housing units in Newark. Parsippany, a high-growth middle-class suburb, would pay Newark to offset the cost of constructing the units. Prior to 2008, New Jersey's Fair Housing Act,<sup>264</sup> a codification of the *Mount Laurel* doctrine, treated the exchange as if the suburb had met its *Mount Laurel* obligation to create affordable housing opportunities.<sup>265</sup> Parsippany would have been deemed to have met some portion—up to 50%<sup>266</sup>—of its *Mount Laurel* obligation, and the receiving city would have gotten funding to build affordable housing. Everybody wins, except for the low-income families who were supposed to have a realistic opportunity to live in the suburb, according to the state constitution.

In *In re 2003*, Fair Share conflated RCAs—and their potential to trap low income families and their children in failing school districts—with LIHTCs located in the same communities where RCA units were constructed.<sup>267</sup> In other words, Fair Share argued that the 2003 plan for allocating tax credits would result in low-income siting that is more or less identical to the siting of RCAs, which have been abysmal failures in bringing “redevelopment” to poor communities and instead have only harmed children who rely on public education in those communities.<sup>268</sup> But, the *In re 2003* court relied on the state's approval of RCAs as proof of legislative approval of

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the lives of the affluent at the expense of the less affluent, beyond what would have occurred in a free market system.”).

263. See McDougal, *supra* note 250, at 686.

264. N.J. STAT. ANN. §§ 52:27D-301–:329.19 (West 2008).

265. McDougal, *supra* note 250, at 681.

266. *Id.*

267. *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 9 (N.J. Super. Ct. App. Div. 2004).

268. *Id.* at 9–10.

urban development as the dominant plan for promoting fair housing.<sup>269</sup>

As a result of their poor track record, in the spring of 2008, New Jersey passed a law banning RCAs.<sup>270</sup> The legislature had concluded:

The transfer of a portion of the fair share obligations among municipalities has proven to not be a viable method of ensuring that an adequate supply and variety of housing choices are provided in municipalities experiencing growth. Therefore, the use of a regional contribution agreement shall no longer be permitted . . . .<sup>271</sup>

Conversely in 2003, the appellate division had read the existence of RCAs as proof of a state policy favoring urban, low-income housing developments. This development has two major implications for potential LIHTC litigation.

First, the court's reliance on RCAs as proof positive of a state policy favoring urban LIHTCs is now misplaced. Surely, the use of RCAs was not the only factor that led the court to believe that urban siting of LIHTC was permissible, but the change to New Jersey's Fair Housing Act should lead the court, if asked to reconsider the issue, to conclude that the state's policy is not necessarily one that favors the HMFA's reading of its obligations. This development coupled with the argument above regarding the HMFA's mandate to create adequate housing, could be enough to convince the court to reconsider *In re 2003* in light of the amendments to the state FHA, along with the appellate division's clear misreading of the HMFA's statutory obligations to create adequate housing.

Second, without RCAs, New Jersey municipalities will continue to have *Mount Laurel* obligations to create opportunities for affordable housing without an easy way to shirk their duty. This should create an increased supply in land that can be zoned for the development of affordable housing. High-opportunity areas will have the same fair share obligations that they had previously, without any way to fulfill that obligation other than through actually allowing affordable housing to be built in their town. Whereas before, a town could fulfill half of its obligation through units that are outside of the town's borders, that option is no longer available. While the 2003 case lamented that demand for credits in the sub-

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269. *Id.* at 21 (“[S]tate policy, as indicated by the allowance of RCAs, and HMFA’s own statutory mandate to assist urban areas, encourage a substantial level of funding to urban areas.”).

270. *See* N.J. STAT. ANN. § 52:27D-329.6(a) (West 2008).

271. *Id.*

urbs were exceptionally low,<sup>272</sup> a sinking real estate market and a greater availability of affordable housing opportunities within good neighborhoods could increase the feasibility of low-income rental units in high-opportunity areas, where well-performing schools and access to well-paying jobs are more prevalent.

#### IV.

#### NO SHORTAGE OF IDEAS FOR IMPROVEMENT

##### A. *Ending the Qualified Census Tract Preference*

The federal LIHTC statute allows HFAs to favor poverty-stricken areas for tax credit allocation through the Qualified Census Tract preference (QCT preference).<sup>273</sup> The result is that people who are most likely to live in low-income units are relegated to the inner cities where school quality is lowest and neighborhoods are already the most densely populated.<sup>274</sup> One possible solution to the problem is to get rid of the QCT preference entirely.

As a matter of good policy, the QCT preference leaves much to be desired. There is already a natural push towards developing low-income units in high-poverty areas because of the price of land even without a statutorily mandated preference for such developments. Getting rid of the preference would be unlikely to cause the end of inner-city LIHTC development. But the qualified census tract preference is equally harmful in its legal ramifications. By requiring such a preference, the *In re 2003* court was able to point out the tension between an HFA's duty to administer the LIHTC program in a manner to affirmatively further fair housing policies and the LIHTC's requirement that the preference be given to sites that often are racially segregated from the rest of the state.<sup>275</sup> Once the tension was recognized by the court, it was inclined to defer to the agency even when the agency's practices led to more segregation.<sup>276</sup> The result is a de facto nullification of the duty to further fair housing.<sup>277</sup>

It is doubtful that Congress intended for the LIHTC to operate without the traditional duty of its administering agencies to adopt fair housing practices.<sup>278</sup> Yet, if that preference were stripped from

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272. *In re 2003*, 848 A.2d at 20.

273. *Id.* at 15–16.

274. *Id.*

275. *See id.* at 17.

276. *See id.* at 10–11.

277. *See Orfield, supra* note 3, at 1803–04.

278. Professor Orfield notes that the QCT preference was not debated or discussed by Congress before passing the provision. *Id.* at 1778 n.209.

the LIHTC enabling statute, these units would continue to be built in many of the same areas, although with a greater potential for some to be built in middle-income areas. Further, by stripping the preference, there may be a signaling effect to developers that their suburban project proposals might be more favorably received. Putting an LIHTC proposal together costs a developer's resources in time and money. Whether the preference is great or small, as long as developers know that their chances of getting the credits are less when their proposal is sited outside of a qualified census tract, those who weigh the costs and potential benefits of an LIHTC application should be less likely to spend the time and money to even make the proposal. A change in the QCT preference would mean that the average return on investment for the cost of creating a suburban proposal could increase, thereby making it more likely that developers will attempt affordable development in low-poverty communities.

*B. Moving Beyond the Mobility/Revitalization Dichotomy*

Instead of relying on low-income housing construction to revitalize an existing ghetto—as the HMFA had asserted it was trying to do<sup>279</sup>—it might make more sense to use the tax credits in places that already are in the process of renewal, as an anchor and a hedge against gentrification. In many places it will be difficult to tell the difference between a government attempting to improve a blighted area and a government simply riding the rising tide in a neighborhood that is already seeing improvement. It is sometimes hard to tell whether “revitalization,” however defined, causes development, or whether development causes revitalization. However, one way to turn this ambiguity into a clear policy preference is to factor opportunity indicators into the LIHTC yearly rankings.<sup>280</sup>

A recent study at the Furman Center for Real Estate and Urban Policy suggests that the construction of an LIHTC building actually causes some increase in surrounding property values.<sup>281</sup> At first glance, this might bolster claims by state administrators that LIHTC

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279. See *In re 2003*, 848 A.2d at 10.

280. How to define these opportunity indicators is beyond the scope of this Note, but one idea that has gained support in the fair housing community has been school performance. See Orfield, *supra* note 3, at 1797; Shah, *supra* note 22, at 711–18.

281. Ingrid Gould Ellen & Ioan Voicu, *The Impact of Low Income Housing Tax Credit Housing on Surrounding Neighborhoods: Evidence from New York City* 3–4 (Furman Ctr. for Real Estate & Urban Policy, Working Paper 07-02, 2007), available at <http://furmancenter.org/files/ImpactofLowIncomeHousingcombined.pdf>.

buildings are part of a plan to revitalize urban areas that, in the long-term, will desegregate the community.<sup>282</sup> Even assuming that increased property values are caused by LIHTC construction, the question remains whether an increase in property value translates into any tangible benefit to local renters. Property values in high-poverty Bedford-Stuyvesant, Brooklyn may be higher than property values in affluent exurban New Jersey, but in that case, property values tell us nothing about the quality of the public schools. Crime rates, in this example, may have no relationship to property values. There are numerous reasons to be skeptical that an increase in property values in areas that have higher than average poverty rates actually means that the neighborhood has improved the life-chances of its inhabitants, who largely rent their homes from landlords that own the property—landlords who, for obvious reasons, *do* benefit from an increase in property values.

Further, it is unclear whether the LIHTC might have crowded out a more desirable use for the property.<sup>283</sup> In other words, if the goal is revitalization of an urban center, it might be the case that a brand new LIHTC building will be an improvement, but it does not necessarily mean that another developer might not have preferred to build market-rate units that could have had more of a positive impact on urban revitalization while immediately inviting a change in the racial composition of a segregated neighborhood.

Competition between government programs could amount to inefficient subsidies where a developer could have chosen between an inclusionary zoning project or LIHTCs. New Jersey's 2009 QAP changed the state's previous absolute ban on combining inclusion-

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282. The HMFA said:

Revitalization of our cities can address the racial segregation Fair Share decries. Urban revitalization programs, including programs that replace dilapidated low-income housing with mixed income housing, should promote integration in the long run and make our cities vibrant communities for people of all races and economic means. Attractive and safe new housing, combined with the demolition of old, high-rise public housing and the incorporation of commercial uses, is the first step. Upgrade of housing stock in cities, combined with commercial endeavors, should spark eventual gentrification and the return to the cities of higher-economic people of all races.

*In re 2003*, 848 A.2d at 10 (quoting the HMFA's comments on the 2003 QAP, 35 N.J.R. 3311).

283. *Cf. Ellen & Voicu, supra* note 281, at 5 ("In choosing sites for new housing, for instance, developers might have simply picked winners (neighborhoods with growth potential). If so, then what we interpret as positive LIHTC impacts might simply be a continuation of these prior trends.")

ary zoning with LIHTCs.<sup>284</sup> Nonetheless, extra burdens remain on developers who wish to take advantage of a town's inclusionary zoning program and apply for LIHTCs. A developer may not combine the two programs "unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units despite the density bonus and the affordable units are developed contemporaneously with the commercial or market rate residential units."<sup>285</sup> Because of the burden of having to show that the project is not possible without both subsidies, a development that might have used a nearly infinite resource—a town's ability to rezone and allow bigger buildings to be occupied by more tenants in exchange for a percentage of the building being affordable housing—may instead be pressured to accept the tax credits, a finite resource that generally requires that the project be located in a high-poverty area in order to be viable in the competitive bidding process.

Too many programs have accepted urban revitalization over mobility. It has become increasingly unbelievable that revitalization is as effective a tool for urban policy as its frequency would imply. Instead, it seems merely politically convenient for suburban politicians addressing "not in my backyard" (NIMBY) concerns and for urban politicians expected to "bring home the bacon." In other words, revitalization is more politically palatable than mobility policies, but in no sense is it clear that revitalization is superior.<sup>286</sup> Cities across the country have been tearing down their public housing projects because of concerns about the conditions within those buildings.<sup>287</sup> It is not at all clear that new buildings—buildings with the same concentrations of low-income people and racial minorities as the projects that are being demolished—will perform any better merely because they are privately owned rather than public. Certainly, revitalization is an important component of improving the availability of opportunities for people, but there is a real dan-

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284. See PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.12(a) (2009)), available at [http://nj.gov/dca/hmfa/biz/develop/lowinc/2009\\_proposedqap.pdf](http://nj.gov/dca/hmfa/biz/develop/lowinc/2009_proposedqap.pdf).

285. *Id.* The Code further instructs the New Jersey HMFA to adopt the standards promulgated by the Department of Community Affairs for similar types of projects seeking balanced housing funds. *Id.*

286. See Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 499–500 (1994).

287. For an excellent account of one famous example, see SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 238–80 (2002).

ger that revitalization is over-utilized simply because it is easier to accomplish on a political level.

On the other hand, just because housing mobility has a proven track record for creating opportunities for many people does not mean that mobility should be the only goal of housing policy.<sup>288</sup> Also, there is no evidence that moving to a better neighborhood will help every family that makes such a move.

The *In re 2003* court, the HMFA, and Fair Share Housing all erred by falling into this revitalization versus mobility dichotomy, but it was only the court that constructed a narrow ruling justified primarily by rejecting a mobility model in favor of revitalization.<sup>289</sup>

Whether LIHTC development is a burden on or a boon to low-income neighborhoods invites a continuation of the old, tired debate between proponents of urban revitalization and proponents of Gautreaux-style mobility programs. But perhaps the mobility/revitalization dichotomy is obsolete. Ideally, both approaches should be taken together.

Instead of thinking about either a Qualified Allocation Plan that favors rebuilding inner cities, or thinking about a Qualified Allocation Plan that favors suburban construction, states should be developing plans that, among other things, are designed to contribute to revitalization where revitalization is already beginning to happen while also creating real opportunities for housing choice among residents who do not live in revitalizing neighborhoods. In other words, if we are to do both revitalization and mobility, then it may be possible, in some cases, to do both at the same time if affordable housing programs can get creative about building rental units in the sorts of communities that actually show promise in terms of revitalization and would represent real alternatives for people living in highly concentrated areas of racial isolation and poverty.

Rather than making the case for times when revitalization works or making the case that mobility is the superior policy for

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288. Indeed, this was also an observation in *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 822 (3d Cir. 1970) ("Nor are we suggesting that desegregation of housing is the only goal of national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto."), but the *In re 2003* court's interpretation of "instances where a pressing case may be made for the rebuilding of a racial ghetto" makes *Shannon* essentially toothless, since as long as the agency can claim to believe that urban revitalization will help inner-city residents, it has met the burden established by the *In re 2003* court. See *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 12 (N.J. Super. Ct. App. Div. 2004).

289. *In re 2003*, 848 A.2d at 15–18.

fostering integration, policymakers should be creating opportunities for developers to both build low-income units where affordable units are currently scarce, as well as build well-constructed and safe housing in areas where quality housing is scarce.

### C. Looking to School Performance

Some commentators have suggested using the credits with an eye toward the performance of public schools that service the community where the low-income units are built.<sup>290</sup> The idea is to give extra “points” to a developer’s LIHTC application when the project would be located in a public school district that can both support the predicted increase in students as well as provide them with an adequate education.

Fair Housing’s claim against New Jersey’s HMFA included charges that the siting of the state’s LIHTC units in urban enclaves amounted to a guarantee that children who would live in those buildings would receive an inadequate education.<sup>291</sup> This was not to be the first serious challenge to New Jersey’s educational system via its constitutional guarantee of an equal opportunity to receive an education.<sup>292</sup> In the *Abbott* cases, students of low-income municipalities successfully challenged the state’s funding formula that put poorer school districts at a financial disadvantage.<sup>293</sup>

Other states have also found themselves on the losing end of “inadequate education” claims.<sup>294</sup> In Connecticut, *Sheff v. O’Neil* involved a successful challenge to the quality of public education given to the children of Hartford on the basis of its inequality in terms of educational opportunities when compared to children throughout the rest of the state.<sup>295</sup>

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290. See, e.g., Shah, *supra* note 22, at 711–18.

291. *In re 2003*, 848 A.2d at 16.

292. The Court addressed constitutionality of the school system under the Public School Education Act of 1975, N.J. STAT. ANN. § 18A:7A-1 to -52, under the New Jersey Constitution’s “Thorough and Efficient” Clause. *In re 2003*, 848 A.2d at 16.

293. *In re 2003*, 848 A.2d at 16 (“We again face the question of the constitutionality of our school system. We are asked in this case to rule that the Public School Education Act of 1975 violates our Constitution’s thorough and efficient clause. We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient.”) (citations omitted).

294. See, e.g., Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50 (N.Y. 2006) (deferring to New York’s education spending estimates).

295. See *Sheff v. O’Neil*, 678 A.2d 1267, 1281 (Conn. 1996) (“[T]he existence of extreme racial and ethnic isolation in the public school system deprives school

Given New Jersey's mandate that children be given a "thorough and efficient" public education,<sup>296</sup> inquiring as to the quality of schools where a low-income housing tax credit unit would be built only seems to make sense.<sup>297</sup> The HMFA has given points for proximity to schools, presumably with the assumption that this would confer some benefits to children of low-income families.<sup>298</sup> On the other hand, by giving points for low-income developments that are close to schools, the HMFA is merely increasing its existing preference for urban LIHTC developments. In New Jersey's cities, public schools are numerous and are often within walking distance of their students' homes.<sup>299</sup> Conversely, in suburbs, which are associated with more opportunities for children and adults, public schools are not necessarily within walking distance for many of their students.<sup>300</sup> Yet, the relative quality of the suburban schools is far beyond the quality of those in the inner city.<sup>301</sup> A preference for quality schools makes sense; preference for nearby schools does not.

#### D. Collecting Tenant Data

In the recently passed Housing and Economy Recovery Act of 2008, Congress mandated that each state agency allocating low-income housing tax credits

shall furnish to the Secretary of Housing and Urban Development, not less than annually, information concerning the race,

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children of a substantially equal educational opportunity and requires the state to take further remedial measures." For an excellent account of that litigation and the issues that it raises, see SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2007).

296. N.J. CONST. art. VIII, § 4, cl. 1.

297. The *In re 2003* court did not deny that children had this constitutional right; it merely noted that it was not HMFA's task to bring that right to fruition. *In re 2003*, 848 A.2d at 21.

298. PROPOSED 2009 QUALIFIED ALLOCATION PLAN (codified as N.J. ADMIN. CODE § 5:80-33.15(a)(11)(i) (2009)), available at [http://www.nj.gov/dca/hmfa/biz/devel/lowinc/2009\\_proposedqap.pdf](http://www.nj.gov/dca/hmfa/biz/devel/lowinc/2009_proposedqap.pdf).

299. Newark alone has about ninety public schools within its city limits. See Newark Public School Directory 2009–2010, <http://www.nps.k12.nj.us/schools.html> (last visited Apr. 8, 2010).

300. As a counterexample, the Township of Roxbury has only eight schools, serving a town that is about twenty-two square miles. See Roxbury Schools, <http://www.roxbury.org/schools.html> (last visited Apr. 8, 2010); Map of Roxbury, <http://www.roxburynj.us/documents/Maps/Parks%20Map.pdf> (last visited Apr. 8, 2010).

301. Only 39% of Newark public school students can read at the "proficient" level or above, while the state average is 57%. N.J. DEP'T OF EDUC., NEW JERSEY STATE REPORT CARD, <http://education.state.nj.us/rc/rc09/dataselect.php?c=13;d=3570;s=170;lt=CD;st=CD&datasection=all> (last visited Apr. 8, 2010).

ethnicity, family composition, age, income, use of rental assistance under section 8(o) of the United States Housing Act of 1937 or other similar assistance, disability status, and monthly rental payments of households residing in each property receiving such credits through such agency.<sup>302</sup>

In the coming years, this will open up new opportunities for fair-housing advocates to evaluate the effectiveness of the LIHTC program and to find out who the LIHTC program serves. This change in the law could also signal a new national attention to potential problems in LIHTC siting.

### *E. Rethinking Regionalism*

How we define the spaces that are studied has a tremendous impact on the conclusions that might be drawn from any research in the housing and urban policy field. As argued above, LIHTC administrators and the courts should take a more localized view of where LIHTC units are constructed. In the southern part of New Jersey, many LIHTC units are built in diverse towns outside of Camden and Trenton.<sup>303</sup> Yet, in the northern part of the state, very few of the middle-class Newark suburbs build any LIHTC units that are not intended exclusively for senior citizens.<sup>304</sup> Of course, this is not meant to suggest that Camden and Trenton do not have more than their fair share of LIHTC units. However, it does seem that there is more of a balance in southern New Jersey.

Looking at the problem state-wide does not tell the whole story. For instance, a court seeing ten suburban units and twenty urban units can make a determination that the HFA's administration of LIHTCs does not concentrate poverty. But if looking at a smaller area that more accurately reflects how people really make housing choices, it may be the case that there are ten LIHTC buildings in Essex County, New Jersey, all ten of which are in Newark. In other words, even if there are LIHTC units being built in middle-income, integrated communities in the southern part of the state, these do not constitute a viable housing choice for families with social and economic ties to the northern part of the state where few such integrated LIHTC units exist.

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302. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2875, 122 Stat. 2654 (2008).

303. See, e.g., N.J. HOUS. & MORTGAGE FIN. AGENCY, 2005 SPRING RESERVATION CYCLES, [http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/20059\\_awardees.pdf](http://www.state.nj.us/dca/hmfa/biz/devel/lowinc/20059_awardees.pdf) (last visited Apr. 8, 2010).

304. *Id.*

Other commentators have suggested that using the area median income (AMI) as a measure of affordability disadvantages the very poor in regions of the country where the average income is very high.<sup>305</sup> Removing the QCT preference would likely be the most direct way of leveling the field and creating opportunities to build low-income units in mixed-income neighborhoods. Changing to a national median income, however, would be problematic. Advocates for that approach cite Marin County as a place where the AMI is very high.<sup>306</sup> As of 2009, AMI for the San Francisco-Oakland-Fremont MSA, where Marin County is located, reaches \$91,900.<sup>307</sup> In the New York, Northern New Jersey, Long Island, NY-NJ-PA, MSA, where both New York City and Newark are located, the AMI is \$74,600. The argument by proponents of a national median income are that since places like Marin County have such high AMIs, “low-income housing” can be occupied by people who are not the most in need of affordable housing options.<sup>308</sup>

They are right that using AMI as it is currently structured is not the best way to ensure affordable housing access for people who need it most. However, a national median income would cause as many problems as it solves. First, there is the problem of applying a national median income in areas where the cost of living is very low. The Department of Housing and Urban Development (HUD) publishes the Estimated Median Family Income each year. For 2008, the estimated median was \$61,500 per family.<sup>309</sup> In many parts of Mississippi, area median income is at or below \$42,000; that is only

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305. See, e.g., David Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 556 (1998) (arguing that the lack of incentive to charge rents below minimum levels will leave rent-restricted units unaffordable for low-income families); Shilesh Muradlidhara, *Deficiencies of the Low-Income Housing Tax Credit in Targeting the Lowest-Income Households and in Promoting Concentrated Poverty and Segregation*, 24 LAW & INEQ. 353 (2006) (arguing that low-income housing tax credit does not meet the needs of low-income households and may actually promote housing segregation and discrimination).

306. Cohen, *supra* note 305, at 556.

307. FANNIE MAE, AREA MEDIAN HUD INCOME, <https://www.efanniemae.com/sf/refmaterials/hudmedinc/hudincomeresults.jsp?STATE=CA> (last visited Apr. 8, 2010).

308. Cohen, *supra* note 305, at 557.

309. DEP'T OF HOUS. & URBAN DEV., NOTICE PDR-2008-01, ESTIMATED MEDIAN FAMILY INCOMES FOR FISCAL YEAR 2008 1 (2008), [http://www.huduser.org/datasets/il/i108/Medians\\_2008.pdf](http://www.huduser.org/datasets/il/i108/Medians_2008.pdf) (last visited Apr. 8, 2010).

68% of the national median.<sup>310</sup> While it is true that families in Marin County who make more than the national median but less than the area median might qualify for affordable housing when they are, in fact, wealthier than the average American, it is also true that families in Mississippi who earn more than the area median but less than the national median currently do not qualify for most affordable housing programs. If the national median was the measure for determining a family's housing-assistance needs, then the median family in rural Mississippi would necessarily qualify, despite their being of "average" income in their area. This, of course, does not even take into account the vast differences in housing prices between places like San Francisco-Oakland-Fremont MSA, where the median price of a single family home was \$777,300 at the end of 2007, and the Gulfport-Biloxi MSA, where it was \$150,400.<sup>311</sup> Families making the national median income in these two areas will clearly have very different abilities to afford adequate housing. Thus, using a national average income seems a very bad idea.

#### *F. Keeping the Price of the Tax Credits High*

In 2006, Kirk McClure was celebrating the LIHTC program's evolution into a viable tool to bring developers to low-poverty suburbs.<sup>312</sup> He wrote that the program was "increasingly attractive to developers in markets that were previously underserved by housing assistance programs—namely, the low-poverty suburbs."<sup>313</sup> Central to McClure's analysis was a strong market for the tax credits.<sup>314</sup> According to his research, tax credit investors paid about forty-five cents on the dollar for tax credits when the program first began in the late eighties, representing an estimation by investors that the tax credits were risky and therefore not worth paying a high price.<sup>315</sup> A lack of demand for a relatively new commodity could also explain the low price. However, by 2005 that had changed, and investors were paying "80 cents or more per dollar of tax credit," giving them a much lower yield.<sup>316</sup>

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310. FANNIE MAE, AREA MEDIAN HUD INCOME, <https://www.efanniemae.com/sf/refmaterials/hudmedinc/hudincomeresults.jsp?STATE=MS> (last visited Apr. 8, 2010).

311. NAT'L ASS'N OF REALTORS, MEDIAN SALES PRICE OF EXISTING SINGLE-FAMILY HOMES FOR METRO. AREAS 2-3 (2010), [http://www.realtor.org/Research.nsf/files/MSAPRICESF.pdf/\\$FILE/MSAPRICESF.pdf](http://www.realtor.org/Research.nsf/files/MSAPRICESF.pdf/$FILE/MSAPRICESF.pdf) (last visited Apr. 8, 2010).

312. McClure, *supra* note 65, at 419.

313. *Id.*

314. *Id.* at 428-32.

315. *Id.* at 428.

316. *Id.*

Since 2009, the price for tax credits plummeted.<sup>317</sup> When the price of tax credits gets very low, the amount of money that investors pay the developers for their tax credits barely covers the costs of development.<sup>318</sup> Low tax credit prices mean a threat to the viability of new LIHTC proposals since the developer will either have to receive more credits to help offset development costs or abandon plans that otherwise would have been profitable. McClure's research suggests that when LIHTC prices get very low, LIHTC development in the suburbs suffers.<sup>319</sup>

The American Recovery and Reinvestment Act of 2009<sup>320</sup> contains provisions that attempt to alleviate the current problem of low tax credit prices. Section 1602 of the Act provides states with an opportunity to use grants to finance low-income rental housing, rather than relying exclusively on tax credits.<sup>321</sup> In order to receive a Section 1602 grant, the developer is required to go through the same process that the LIHTC program would otherwise require.<sup>322</sup> However, instead of having to find investors to buy the credits at a deep discount in today's market, the developer can benefit directly from the grant. This provision is temporary,<sup>323</sup> although it could conceivably be extended. Whether it would be a good idea to make a provision like this permanent is beyond the scope of this Note, but it is certainly a topic worth considering.

## CONCLUSION

The LIHTC statute was designed to give the states a lot of leeway in administering the program.<sup>324</sup> It encourages each state to prepare an allocation plan that will best meet its goals and needs. However, many states have failed to recognize the need for the LIHTC program to affirmatively further fair housing.<sup>325</sup> This is a

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317. Daykin, *supra* note 71.

318. McClure, *supra* note 65, at 428–32.

319. *Id.* at 428–32.

320. The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

321. *Id.* § 1602.

322. *Id.*

323. *Id.*

324. *See supra* Part I.B.

325. *See Inclusive Cmty. Project, Inc. v. Tex. Dep't. of Hous. and Cmty. Affairs*, No. 3:08-CV-0546-D, 2008 WL 5191935, at \*2 (N.D. Tex. Dec. 11, 2008); *Asylum Hill Problem Solving Revitalization Assoc. v. King*, No. (X02)CV030179515S, 2004 WL 113560, at \*1 (Conn. Super. Ct. Jan. 5, 2004); *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan (In re 2003)*, 848 A.2d 1, 5 (N.J. Super. Ct. App. Div. 2004).

significant shortcoming and needs to be remedied. Residential racial segregation was made possible, if not created, by actions of the federal government.<sup>326</sup> The government should, therefore, play a role in ameliorating the problem. The federal FHA attempts to accomplish that, but the New Jersey court failed to recognize the federal FHA's applicability to LIHTC administration.

One quick improvement to the LIHTC program could come from the federal government itself. Getting rid of the Qualified Census Tract preference would make it harder for states to justify their predisposition to award LIHTCs in high-poverty, racially-isolated areas.

The states should take steps to ensure that low-income housing tax credits are awarded to developers who propose affordable housing units in high-opportunity areas. The states also have to look at their allocation plans in terms of regions that accurately reflect realistic housing choices. For instance, high-opportunity locations in South Jersey may not be realistic destinations for those living in inner-city Newark.

State agencies can move beyond looking at whether an area is within a QCT. They could also look at whether a high-poverty area is improving or whether a moderate-poverty area is declining. Another idea is to look less at proximity to public schools and more at the quality of public schools. The new requirement from the Housing and Economic Recovery Act of 2008 that states collect tenant data will help to better evaluate whether some of these ideas work. The Act itself also reflects a shift in values and recognition that the racial composition of low-income housing is important.

In New Jersey, HMFA should not rely on *In re 2003*. The banning of RCAs, and the appellate division's reliance on facts that are no longer applicable should serve as ample warning to the HMFA and other LIHTC administrating agencies that the duty to affirmatively further may be taken more seriously by the courts the next time around.

LIHTC development in the next year or so will be difficult to predict. The conventional wisdom is that real estate development on the whole has come to a screeching halt. Another view is that the government's commitment to fund the LIHTC at high levels will make some otherwise undevelopable projects suddenly viable. With development costs, like land acquisition, dropping, but LIHTC funding going higher than ever before, it is quite possible that LIHTC projects could buck the trend. There is simply no good

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326. See *supra* Part II.A.

way of knowing right now. Whether LIHTC development continues unabated, or whether LIHTC development takes years to reach pre-2008 levels, state agencies must take the initiative to create opportunities for low-income families, and must take notice of the potential consequences for maintaining residential segregation.

# GRASS ROOT BUREAUCRATS: HOW PREDICTION MARKETS CAN INCENTIVIZE CITIZENS TO FILL ESA DATA GAPS

DANIEL R. MARX\*

## INTRODUCTION

Prediction markets,<sup>1</sup> which allow participants to place bets on the probability of a particular event, have been used with great success in the election context. Virtually ubiquitous during the 2008 election, prediction markets were used to forecast the chances of a particular candidate winning the election, and were often used by Internet pundits to keep “score” of the polls throughout the run-up to November 4th.<sup>2</sup> Though the markets do not facilitate a formal, top-down style of information collection, the final election predictions still turned out to be quite accurate.<sup>3</sup>

Thus, prediction markets are clearly a valuable tool in the American electoral context. But do prediction markets have value

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1. I will use the term “prediction market” throughout this Note, but other scholars have referred to the same institutions as “information markets,” “decision markets,” or “ideas future markets.” Tom W. Bell, *Prediction Markets for Promoting the Progress of Science and the Useful Arts*, 14 *GEO. MASON L. REV.* 37, 39 (2006).

2. See, e.g., *Barack Obama Beating Hillary Clinton In Intrade Prediction Market*, THE HUFFINGTON POST, Feb. 7, 2008, [http://www.huffingtonpost.com/2008/02/07/barack-obama-beating-hill\\_n\\_85489.html](http://www.huffingtonpost.com/2008/02/07/barack-obama-beating-hill_n_85489.html); Paul Krugman, *The Conscience of a Liberal*, <http://krugman.blogs.nytimes.com/2008/09/10/even-odds/> (Sept. 10, 2008, 15:50 EST); Posting of eyesonobama to Daily Kos, <http://www.dailykos.com/story/2008/10/28/174032/13/743/645054> (Oct. 28, 2008, 14:50 PST).

3. Intrade, the most popular prediction site for political wagering, predicted the electoral outcome of the United States presidential election almost exactly. Its only mishaps were Indiana and Missouri, although the latter was forecasted as a virtual toss-up. Compare Intrade, US Election 2008 Historical Data, <http://www.intrade.com/jsp/intrade/intradeTV/> (last visited Apr. 9, 2010) (click on the graph below to see how Intrade forecasted the electoral outcome of each state over time; blue states signify an Obama victory and red states signify a McCain victory), with New York Times, Election Results 2008, <http://elections.nytimes.com/2008/results/president/map.html> (last visited Mar. 29, 2009).

in other fields? For many legal scholars, the answer is a resounding “yes.”<sup>4</sup> For example, noted scholar Cass Sunstein has recently described prediction markets as “among the most intriguing institutional innovations of the last quarter-century.”<sup>5</sup> Through the use of prediction markets, the quality of group deliberation can be made more objective because traders in these markets have a direct financial incentive to forecast the correct outcomes of uncertain events.<sup>6</sup> Furthermore, prediction markets are less subject to the cognitive errors and social pressures that normally affect decisions made by groups.<sup>7</sup> To that end, scholars have proposed that prediction markets can be designed to enhance agency decision-making,<sup>8</sup> corporate governance,<sup>9</sup> and the furtherance of scientific knowledge.<sup>10</sup>

Finally, prediction markets have the potential to combat what economist Friedrich A. von Hayek termed the knowledge problem—essentially, the idea that no central planner can ever gather enough relevant information to allocate resources efficiently.<sup>11</sup> This is because prediction market prices “aggregate[ ] both the information and the tastes of numerous people, producing judgments that incorporate more material than could possibly be assembled by any central planner, even one who insists on deliberation with and among experts.”<sup>12</sup>

This Note will focus on the application of prediction markets to improve the functionality and efficiency of the Endangered Species Act (ESA).<sup>13</sup> One of the major problems hindering the effectiveness of the ESA is the prevalence of rampant data gaps, which prediction markets can help to fill. Though some environmental activists find market-based solutions to be anathema to their

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4. See, e.g., Michael Abramowicz & M. Todd Henderson, *Prediction Markets for Corporate Governance*, 82 NOTRE DAME L. REV. 1343 (2007); Bell, *supra* note 1; Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005).

5. Sunstein, *supra* note 4, at 962.

6. See *infra* note 31 and accompanying text.

7. See *infra* notes 31–36 and accompanying text.

8. See Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933 (2004).

9. See Abramowicz & Henderson, *supra* note 4.

10. See Bell, *supra* note 1.

11. The “knowledge problem” refers to the fact that information needed to rationally allocate economic resources is so inherently decentralized that it can never be aggregated by a single planner. See generally F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

12. Sunstein, *supra* note 4, at 1023.

13. 16 U.S.C. §§ 1531–1544 (2006).

cause,<sup>14</sup> this Note argues that the ESA can act as a proving ground for prediction markets because of the localized nature of environmental problems. Moreover, this Note will offer specific suggestions about how a prediction market can be operationalized to address the particular information gaps that most need to be filled in order to effect optimal environmental policy, focusing explicitly on obtaining information from a broad segment of the population.

To demonstrate through a simplified example, the United States Fish and Wildlife Service (FWS) of the Department of the Interior might issue securities that pay out \$10 upon the extinction of an endangered species residing in Montana within ten years. Participants would then buy and sell the securities, depending on their own assessment of the species' viability. Ultimately, the price would reach an equilibrium point dependant on the relevant information supplied by individual bettors in the form of securities bought and sold. In turn, this price would provide valuable information to the FWS. If the security price were to reach equilibrium at \$3, for example, the price would indicate a thirty percent chance of extinction, and the FWS could adjust policy as appropriate. Even more importantly, prediction-market participants would be required to post all information relied upon to make their bets to a public forum for use by other participants and the FWS. This information, which might, for example, detail the location of species populations, would enable the FWS to further tailor policy.

Although the prediction market would be open to the public,<sup>15</sup> it would mostly attract participants with some form of inside knowledge concerning the species' health. These participants might range from Montana residents who have noticed a dwindling number of the species on their properties, to local developers who expect an increase in habitat-destroying commercial construction, to University of Montana biologists who think that this species' unique behavioral patterns make FWS models of extinction inaccurate. Moreover, dedicated trading firms may send representatives to Montana to interview residents about relevant information, thereby incorporating local knowledge into the security price indirectly.

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14. See, e.g., David Ehrenfeld, *Why Put a Value on Biodiversity?*, in BIODIVERSITY 212, 213 (E.O. Wilson ed., 1988) (“[B]y assigning value to diversity we merely legitimize the process that is wiping it out . . .”); R. EDWARD GRUMBINE, GHOST BEARS 62 (1992) (arguing that economic models are inapplicable to environmental problems because “[h]umans cannot . . . impose limited notions of order on a living world that, by its very nature, will not be pinned down”).

15. FWS employees would be excepted from trading on the markets.

If prediction markets are successfully implemented in the endangered species context, they will not only bring about more informed environmental policy, but provide a template as to how this tool can be used to engage citizens in a variety of contexts. If the full promise of prediction markets is ever realized, they may succeed in transforming agencies into “bottom-up” enterprises.<sup>16</sup> For example, many ESA decisions, although formally effectuated at the federal level, could be largely influenced by the knowledge of the local citizenry<sup>17</sup>—knowledge that is accumulated and represented by the bets placed on the prediction exchange.

Part I of this Note examines how prediction markets operate, their successes thus far, and the theoretical advantages they present as compared to other forms of information collection and analysis. Part II first offers a brief overview of the ESA and then explains why the Act is rife with information gaps that can potentially be filled through the use of prediction markets. At this point, the analysis will branch into separate discussions concerning two categories of data needed to successfully implement the ESA: scientific estimates concerning the numbers and habitats of species, and economic predictions of the consequences of inhibitive regulation. Part III describes how prediction markets can be structured to fill these information gaps and includes analysis on the different metrics that participants will attempt to predict. Part IV offers case studies on two types of agency action authorized by the ESA that have proven particularly problematic—species listing and critical habitat design-

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16. “Bottom-up” is a catch-all term to describe agencies that are more engaged with the private sector (either citizens, citizens’ groups, or businesses) in order to arrive at more tailored and efficient regulations for their regulated constituents. Scholars employ various terminologies to describe the movement towards increased collaboration between agency and citizenry. Professor Stewart describes it as the rise of “government-stakeholder network structures,” see Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448–50 (2003), while Professor Lobel speaks of agencies shifting from a regulatory to a governance paradigm, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343–44 (2004). Professors Dorf and Sabel coined the term “democratic experimentalism” to describe an administrative framework in which “power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances.” Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998).

17. This Note advocates a variation from the typical devolutionist paradigm, in which local policy is determined by the local citizens’ values or preferences. Such a paradigm would likely bring about regulatory repeals because endangered species regulations designed to benefit the whole nation often disproportionately hinder local economic interests. Under my model, ESA decisions would only be influenced by the technocratic knowledge of the local citizenry.

nation—and explores how prediction markets can rationalize the implementation of these policies. Part V will respond to potential objections to a prediction-markets model. Finally, Part VI will conclude.

## I. HOW PREDICTION MARKETS OPERATE

Prediction markets are similar to traditional equity markets, such as the New York Stock Exchange or NASDAQ, in the sense that prediction market participants—the general public—can enter online exchanges and buy and sell uniform assets. However, unlike equity markets, the relevant assets are not tied to an ownership stake in a company; instead, the asset payouts depend upon the occurrence of a particular event or condition.<sup>18</sup> For example, on Intrade, a popular online prediction market,<sup>19</sup> bettors can purchase contracts that pay out if Mitt Romney becomes the 2012 Republican presidential nominee,<sup>20</sup> if Chad Ochocinco wins Dancing with the Stars,<sup>21</sup> or if the United States or Israel performs an overt air strike against Iran before December of 2010.<sup>22</sup>

Valuable information can be inferred from the examination of market prices on Intrade and similar sites. For example, a contract that pays \$10 if Tim Geithner departs as Treasury Secretary sold for \$3 on January 29, 2010, suggesting that traders assign the Secretary a thirty percent chance of leaving his post.<sup>23</sup> If a majority of traders

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18. See Abramowicz, *supra* note 8, at 934; Robert W. Hahn & Paul C. Tetlock, *Using Information Markets to Improve Public Decision Making*, 29 HARV. J.L. & PUB. POL'Y 213, 219 (2005).

19. Intrade is one of the most popular online prediction sites, but others include Betfair, <http://www.betfair.com> (last visited Mar. 10, 2010); Iowa Electronic Markets, <http://www.biz.uiowa.edu/iem> (last visited Mar. 10, 2010); Economic Derivatives, <http://www.economicderivatives.com> (last visited Mar. 10, 2010); and the Hollywood Stock Exchange, <http://www.hsx.com> (last visited Mar. 10, 2010).

20. Intrade, 2012 Republican Presidential Nominee, [http://www.intrade.com/jsp/intrade/common/c\\_cd.jsp?conDetailID=652757&z=1269981701840](http://www.intrade.com/jsp/intrade/common/c_cd.jsp?conDetailID=652757&z=1269981701840) (last visited Mar. 31, 2010).

21. Intrade, Winner of Dancing with the Stars, [http://www.intrade.com/jsp/intrade/common/c\\_cd.jsp?conDetailID=716907&z=1269982123161](http://www.intrade.com/jsp/intrade/common/c_cd.jsp?conDetailID=716907&z=1269982123161) (last visited Mar. 31, 2010).

22. Intrade, US/Israeli Overt Air Strike Against Iran, [http://www.intrade.com/jsp/intrade/common/c\\_cd.jsp?conDetailID=667576&z=1269981895329](http://www.intrade.com/jsp/intrade/common/c_cd.jsp?conDetailID=667576&z=1269981895329) (last visited Mar. 31, 2010).

23. See Justin Wolfers & Eric Zitzewitz, *Interpreting Prediction Market Prices as Probabilities* (April 2006) (unpublished manuscript), available at <http://www.nber.org/papers/w12200.pdf> (arguing that prediction market prices typically closely

subsequently think that the probability of Geithner's departure is less than thirty percent, they will sell contracts until the market enters equilibrium. As a result, the price will decrease to reflect the lowered probability of the Secretary retaining office.

Although online markets are primarily used for entertainment and simple speculation, they have proven extraordinarily accurate in a variety of contexts.<sup>24</sup> As a result, the private and public sectors have begun to experiment with the use of prediction markets for information. For instance, in 2003, the Department of Defense briefly experimented with a market mechanism to predict future terrorist attacks.<sup>25</sup> The project, known as the Policy Analysis Market, was eventually shut down due to negative public reaction.<sup>26</sup> Additionally, firms such as Hewlett-Packard (HP) and Eli Lilly have had success using internal markets—those comprised entirely of company insiders—to predict sales and drug development, respec-

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follow average trader beliefs of the probability that an event will occur); Intrade, How Does it Work?, <http://www.intrade.com/jsp/intrade/help/index.jsp?page=howitworks.html> (last visited Mar. 31, 2010). To see how the calculation works, assume that the contract price of \$2.52 represents the expected value (EV) of the contract payouts. Given that the contract will pay out nothing if Romney loses, but \$10 if he wins, then Romney must have approximately a twenty-five percent chance of winning.  $EV = \$2.52 = (\text{chance of Romney losing}) \times 0 + (\text{chance of Romney winning}) \times \$10$ . Thus, the chance of Romney winning =  $\$2.52/\$10 = 25.2\%$ .

24. See Joyce Berg et al., *Results from a Dozen Years of Election Futures Market Research*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 742, 747–48 (Charles R. Plott & Vernon L. Smith eds., 2008) (“[O]ver the majority of the time this market ran, its predictions were dramatically more accurate and stable than polls.”); Refet Gürkaynak & Justin Wolfers, *Macroeconomic Derivatives: An Initial Analysis of Market-Based Macro Forecasts, Uncertainty, and Risk*, in NBER INTERNATIONAL SEMINAR ON MACROECONOMICS 2005 11, 21 (Jeffrey A. Frankel & Christopher A. Pissarides eds., 2007) (concluding that prediction markets are better than experts at estimating economic statistics); John Ledyard et al., *An Experimental Test of Combinatorial Information Markets*, 69 J. OF ECON. BEHAV. & ORG. 182, 182 (2009) (“In every known head-to-head field comparison, information markets have been no less accurate than other social institutions.”); Saul Levmore, *Simply Efficient Markets and the Role of Regulation: Lessons from the Iowa Electronic Markets and the Hollywood Stock Exchange*, 28 J. CORP. L. 589, 593 (2003) (describing a prediction market which uses play money that has proven so successful at predicting box office returns that “studios have begun relying on these estimates to structure the distribution of their films”).

25. Carl Hulse, *Pentagon Prepares a Futures Market on Terror Attacks*, N.Y. TIMES, July 29, 2003, at A1.

26. Carl Hulse, *Swiftly, Plan for Terrorism Futures Market Slips Into Dustbin of Idea Without a Future*, N.Y. TIMES, July 30, 2003, at A10.

tively.<sup>27</sup> Indeed, an academic study analyzing HP's prediction markets found they were more successful than official forecasts in six out of eight attempts.<sup>28</sup>

Why have prediction markets proven so successful? At the most basic level, the answer lies in the attributes that prediction markets share with markets in general:

Markets are generally the best available mechanism for gathering and aggregating dispersed information from private, self-interested economic agents. . . . [I]f the prices in information markets are poor predictors of the future, speculators have a direct economic incentive to get better information and trade on their superior information, moving prices toward the expected value of the contract payments.<sup>29</sup>

The market's information discovery function is difficult to approximate through other means. For example, the only means by which the FWS incentivizes information collection is through salaries—by paying staff experts to engage in certain tasks.<sup>30</sup> Yet, the fact that these tasks are paid for by fixed fee elucidates the superiority of prediction markets, which offer financial incentives commensurate with the amount of useful information the seeker can discover such that he can calibrate his effort with the quantity of

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27. See Abramowicz & Henderson, *supra* note 4, at 1349–50. Abramowicz & Henderson also mention the use of prediction markets at Siemens, GE, and France Telecom. See *id.* at 1350.

28. See Kay-Yut Chen & Charles R. Plott, Information Aggregation Mechanisms: Concept, Design and Implementation for a Sales Forecasting Problem 13 (March 2002) (unpublished manuscript), available at [http://www.hpl.hp.com/personal/Kay-Yut\\_Chen/paper/ms020408.pdf](http://www.hpl.hp.com/personal/Kay-Yut_Chen/paper/ms020408.pdf).

29. Hahn & Tetlock, *supra* note 18, at 221. Some might criticize this statement by arguing that markets are inherently prone to asset bubbles caused by inherent behavioral biases. See, e.g., GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009). While not denying the truth of this claim in the context of other markets, I contend that it is not necessarily applicable to prediction markets. For example, Akerlof and Shiller argue that asset bubbles are caused in large part by rising overconfidence, *id.*, but this problem does not seem applicable to prediction markets, which are not subject to an inherent upward trend. Abramowicz & Henderson, *supra* note 4, at 1355. Furthermore, the cheap credit that has so often fueled past asset bubbles, see generally ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2D ED. 2005), would not necessarily drive prediction market prices upwards, although it may encourage higher trading volumes if traders bet with borrowed money.

30. See U.S. GOV'T. ACCOUNTABILITY OFFICE, ENDANGERED SPECIES: FISH AND WILDLIFE SERVICE GENERALLY FOCUSES RECOVERY FUNDING ON HIGH-PRIORITY SPECIES, BUT NEEDS TO PERIODICALLY ASSESS ITS FUNDING DECISIONS, GAO-05-211, at 4 (2005), available at <http://www.gao.gov/new.items/d05211.pdf>.

data he expects to uncover. Moreover, prediction markets can be utilized by anyone with useful information; the “expert” need not have a relationship with the FWS nor negotiate a contract with the agency. From this perspective, a prediction market can act as a contracting device that massively reduces the agency’s search and transaction costs. The markets incentivize parties to provide labor for the agency and customize compensation according to the value that the “expert” provides, even though the researcher might only have a passing relationship with the FWS.

Even when all possible information is available to a decision maker, prediction markets have value in that they promote objective decision-making. This is because traders have a direct financial incentive to recognize and correct any cognitive defect in reasoning.<sup>31</sup> Principally, this economic motivation counters the heuristics and social dynamics that often systematically skew group decision-making.<sup>32</sup> This function is particularly helpful in the agency setting because of the omnipresence of bureaucratic pathologies such as interest group pressure and availability cascades.<sup>33</sup>

The objectivity of the market is further enhanced by the ability to canvass “the wisdom of crowds”—the tendency for group estimates, as measured by the average response, to outperform individual estimates.<sup>34</sup> Even if one trader errs in his estimate because of personal bias, this theory states that this effect will not be noticeable in the aggregate as long as a majority of traders are more likely to be right than wrong and the number of traders is sufficiently

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31. Sunstein, *supra* note 4, at 1024–25.

32. First, by contrast, a deliberative group tends to amplify the cognitive errors of its individuals. These predictable cognitive defects include the representative heuristic, in which judgments of probability are influenced by assessments of resemblance; the availability heuristic, in which difficult questions of probability are answered based on whether answers immediately come to mind; and framing effects, in which answers are influenced by the wording of the question. *Id.* at 990–93. Second, groups often struggle to properly aggregate information within their possession because of the “common knowledge effect,” through which information held by all group members has more influence on group judgments than information held by a minority. *Id.* at 994–99. Third, reputational cascades may cause group members to ignore what they know to be correct so they may maintain the good opinion of others. *Id.* at 1002–04. Finally, an effect known as group polarization results in group members articulating more extreme positions once deliberation begins. *Id.* at 1004–06.

33. See Abramowicz, *supra* note 8, at 966–71. An availability cascade is a “self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.” Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999).

34. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

large.<sup>35</sup> “The wisdom of crowds” might partly explain why information markets have repeatedly been shown to best the predictions of fully informed experts.<sup>36</sup>

Prediction markets might also shine a light on the relatively opaque processes of agency decision-making. Market data provides interested parties with an instant snapshot of the scientific or economic consensus on the matter, which enables parties to cultivate informed assessments of the agency or legislature’s priorities or machinations.<sup>37</sup> For instance, if the agency generally follows market consensus but suspiciously ignores the market’s exhortation to regulate in a particular instance, the deviation might alert environmental advocates that interest group pressures or other non-policy considerations are at play.

Additionally, the markets might help uncover shifts in regulatory attitude. If a new administration displays consistent skepticism towards predictions that justify additional regulation, this can serve as evidence of a shift in executive priorities. Absent the mechanism of prediction markets, the administration could potentially disguise the shift by slanting their presentation of the relevant evidence, but prediction markets are not as easily manipulated because they depend on political outsiders making independent judgments to advance financial, rather than political, priorities.<sup>38</sup>

Use of prediction markets in government agencies, in particular, would engender a great amount of transparency. Ideally, all citizens in a democratic state would acquaint themselves with ex-

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35. *See id.*; Sunstein, *supra* note 4, at 971–74.

36. *See* Hahn & Tetlock, *supra* note 18, at 222; *see also* sources cited *supra* note 24.

37. *See* Abramowicz, *supra* note 8, 969–71; Hahn & Tetlock, *supra* note 18, at 263–65.

38. One might contest that the type of transparency mentioned above can already be obtained by perusing unbiased empirical research. Strictly speaking, this is true, but it is difficult for most citizens to compile sufficient amounts of research without cumbersome efforts. In contrast, prediction markets compile thousands of bits of data into a single, easily interpretable value, which informs traders’ bets. *Cf.* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *Geo. L.J.* 257, 295 (discussing the value of standardized, and therefore easily comparable, information in promoting accountability). The prediction market offers the additional benefit of allowing inter-temporal comparisons. Hahn & Tetlock, *supra* note 18, at 263. Even if an agency adopts a consistent regulatory position throughout a political term, the markets might indicate that the position is increasingly extreme because it is more and more discordant with scientific or economic reality. By comparison, empirical studies can be compared across time, but any change in methodology would make even direct quantitative comparisons inexact.

pert opinion with regard to important policy matters. Prediction market prices, if made available online, could provide citizens with a quick summary of expert consensus. One possible salutary result is that if government action is consistent with the shown consensus, this may increase the chances of societal acceptance of the action's legitimacy, particularly amongst persons whose personal interests are harmed by the action.<sup>39</sup> Additionally, prediction markets could increase the incidence of civic action. For example, county residents incensed by the market's prediction of the imminent extinction of a beloved creature in the area may be motivated to organize and apply private pressure to the businesses at the root of the problem.<sup>40</sup>

In sum, prediction markets can theoretically supply the FWS with more accurate and objective information and a more transparent process for information production. The rest of this Note is devoted to a discussion of how these theoretical benefits would actually come about in practice.

## II.

### APPLYING PREDICTION MARKETS TO THE ESA

#### A. *Introduction to the ESA*

The ESA is primarily administered by the FWS.<sup>41</sup> The ESA's stated goal is "conservation," which requires the FWS not only to ensure the survival of species, but also to increase those species' numbers so that they can exist without the safeguards provided by the ESA.<sup>42</sup> One of the FWS' central responsibilities is the task of

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39. See Abramowicz, *supra* note 8, at 970 ("Yet agencies will be better able to pursue policies in which the claimed justification would in fact be sufficiently persuasive, because information markets can reduce the informational asymmetry and thus help to reduce distrust.").

40. See Karkkainen, *supra* note 38, at 316–23 (describing how easily obtainable and objective information can encourage community monitoring by triggering awareness, leveling the field for negotiations and facilitating enforcement).

41. The National Marine Fisheries Service (NMFS) and the FWS share responsibility for implementation of the Act. Generally, the FWS manages land and freshwater species, while the NMFS cares for marine and "anadromous" species. But since the NMFS only has jurisdiction over sixty-eight species, I will refer exclusively to the FWS throughout this Note. NOAA Fisheries, Office of Protected Resources, Endangered Species Act (ESA), <http://www.nmfs.noaa.gov/pr/laws/esa/> (last visited Mar. 22, 2010).

42. 16 U.S.C. §§ 1531(b), 1532(3) (2006). The FWS has arguably had success in fulfilling its first goal: one estimate claims the ESA has saved 227 species from extinction. J. Michael Scott et al., *By the Numbers*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE 16, 31 (Dale D. Goble et al.

listing “endangered” species—those “in danger of extinction throughout all or a significant portion of its range.”<sup>43</sup> The agency can also list a species as “threatened” if the species is likely to become endangered in the foreseeable future, but the consequences are similar to that of an “endangered” listing.<sup>44</sup> The Secretary of the Interior can list a species on his own accord, and citizens can also submit petitions to encourage a listing, to which the Secretary must respond within twelve months.<sup>45</sup> As of March 2010, the FWS has listed 1540 endangered species and 360 threatened species.<sup>46</sup>

A listing triggers a series of legal consequences. First, the FWS is required to designate the species’ “critical habitat”<sup>47</sup> concurrent with the listing.<sup>48</sup> In doing so, the agency can consider the “economic impact” or “any other relevant impact” of the designation.<sup>49</sup> The only legal effect generated by a critical habitat designation is found in Section 7 of the ESA, which requires federal agencies to consult with the FWS to insure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened spe-

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eds., 2006). However, as of 2003, the ESA had led to the recovery of a mere thirteen species. *Id.* at 33.

43. § 1532(6).

44. § 1532(20). A “threatened” listing allows the Secretary statutory flexibility to craft narrow prohibitions on takings. § 1533(d). However, the FWS generally imposes the same Section 9 restraints that are applied to “endangered” species. Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the ESA*, 16 NAT. RESOURCES & ENV’T. 59, 63 (2001).

45. § 1533(b)(3). Today, most listings come about through the latter process, particularly as a result of petitions submitted by environmental groups. See Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 17 N.Y.U. ENVTL. L.J. 490, 496 (2008).

46. U.S. Fish & Wildlife Service, Summary of Listed Species: Listed Populations and Recovery Plans, [http://ecos.fws.gov/tess\\_public/Boxscore.do](http://ecos.fws.gov/tess_public/Boxscore.do) (last visited Mar. 2, 2010).

47. This is defined as:

(i) the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied . . . upon a determination by the Secretary that such areas are essential to the conservation of the species.

§ 1532(5)(A).

48. § 1533(a)(3)(A)(i).

49. § 1533(b)(2). Notably, this is the only instance where the Act permits consideration of such criteria. See, for example, § 1533(b)(1)(a), which makes no mention of “economic impact” and states that the “Secretary shall make [listing] determinations . . . solely on the basis of the best scientific and commercial data available.”

cies or result in the destruction or adverse modification” of its critical habitat.<sup>50</sup> This requirement can be quite burdensome: it forced over 219,000 formal and informal consultations between 1998 and 2001 alone.<sup>51</sup>

In addition to restrictions on federal actions, a listing prohibits public and private actors from “tak[ing]” any endangered species.<sup>52</sup> “Take” is defined broadly through the statute and a regulation to include killing, harassing or harming the species directly, or through degradation of the species’ habitat.<sup>53</sup> Until the 1980s this provision was rarely enforced,<sup>54</sup> but since then it has become one of the most controversial provisions of the Act,<sup>55</sup> as it has the greatest inhibitory effect on private citizens.<sup>56</sup> The Secretary is able to blunt this provision’s force by issuing permits allowing a taking if it is “incidental to . . . the carrying out of an otherwise lawful activity,” but the applicant must first submit a conservation plan that will “minimize and mitigate” the impact of the taking.<sup>57</sup> Furthermore, the process is extremely costly and time consuming: individual permits must be negotiated, then subjected to an environmental assessment, and finally published in the Federal Register for comment.<sup>58</sup>

### B. *Applying Prediction Markets to Scientific Data Gaps*

Both listing decisions and critical habitat determinations require the compilation and review of voluminous amounts of data. The FWS is statutorily obligated to consider, among other factors,

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50. § 1536(a)(2).

51. U.S. FISH & WILDLIFE SERVICE, CONSULTATION WITH FEDERAL AGENCIES: SECTION 7 OF THE ENDANGERED SPECIES ACT 2 (2002), <http://library.fws.gov/Pubs9/consultations.pdf>.

52. See § 1538(a)(1).

53. § 1532(19); 50 C.F.R. § 17.3 (2006); see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 696–704 (1995) (affirming a broad reading of the statute encompassing indirect “takings”).

54. Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 310 (1997).

55. See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 347–51 (2008) (surveying the means by which private landowners offer political resistance to the ESA).

56. See Thompson, *supra* note 54, at 310 (“Section 9 gives the federal government immense and broad authority over private land use decisions in many regions of the nation.”).

57. 16 U.S.C. § 1539(a) (2006).

58. See Thompson, *supra* note 54, at 317–18; Albert C. Lin, Note, *Participants’ Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369, 376–81 (1996) (describing the process of developing a Habitat Conservation Plan).

threats to an animal's habitat, the risk it faces from disease or predation, and the inadequacy of existing regulatory mechanisms when deciding whether a species is "endangered."<sup>59</sup> When designating a critical habitat, the FWS must determine the area occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."<sup>60</sup>

Luckily, the FWS has access to a wide network to aid in the gathering of this data. After receiving basic information about a given species' status in the listing petition, the FWS contacts federal, state, local, and tribal agencies; interested conservation or industry groups; and scientists or professional organizations possessing special knowledge about the species.<sup>61</sup> It also solicits several rounds of comments from the general public through notice-and-comment-rule-making<sup>62</sup> and utilizes formal peer-review procedures.<sup>63</sup> Finally, draft rules receive "considerable internal review" from officials at field, regional, and headquarters offices before being published.<sup>64</sup>

These procedures are elaborate, but not foolproof. The most obvious way in which prediction markets could improve current FWS procedures is by aiding the collection of demographic data. Since one of the primary goals of the ESA is minimizing the risk of extinction, the FWS must naturally obtain extinction risk estimates in order to prioritize species protection.<sup>65</sup> However, such estimates are obviously less accurate when the population size and location of the species are unknown.<sup>66</sup> If distinct populations of the species

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59. § 1533(a)(1).

60. § 1532(5)(A).

61. U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: FISH AND WILDLIFE SERVICE USES BEST AVAILABLE SCIENCE TO MAKE LISTING DECISIONS, BUT ADDITIONAL GUIDANCE NEEDED FOR CRITICAL HABITAT DESIGNATIONS, GAO-03-803, AT 12 (2003), available at <http://www.gao.gov/new.items/d03803.pdf>.

62. *Id.*

63. See *infra* notes 93–97 and accompanying text.

64. U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 12–13.

65. There are far more imperiled species than the number that can be protected under the ESA, thus necessitating the need for prioritization such that the neediest can be protected. See *infra* note 144 and accompanying text.

66. See Mary Ruckelshaus & Donna Darm, *Science and Implementation, in* 2 THE ENDANGERED SPECIES ACT AT THIRTY: CONSERVING BIODIVERSITY IN HUMAN-DOMINATED LANDSCAPES 104, 112 (J. Michael Scott et al. eds., 2006) ("Research is needed on how best to make population or species demographic parameter estimates from spotty census information."); Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q.

live in separate locations, then researchers must also identify movements between populations and correlations of fate in the event of catastrophe.<sup>67</sup> Aside from prioritization, information on species range and habitat are crucial for enforcement of both Sections 7 and 9.<sup>68</sup>

### 1. Prediction Markets and the Creation of Private Incentives

Because endangered and threatened species have small populations, they are difficult to document with comprehensive detail.<sup>69</sup> Interestingly, the result of incomplete documentation is that FWS employees and private citizens occasionally make discoveries of entirely new populations.<sup>70</sup> Yet, the FWS possesses no mechanism to account for such discoveries, and valuable demographic information often slips by undetected.<sup>71</sup> The prediction market not only provides such a mechanism, but also actively encourages persons to make reasonable efforts to discover census data. The slim chance

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1029, 1119 (1997) (“With data on the simple presence or absence of a species so difficult to collect, determining nesting success or evaluating population trends can be nearly impossible.”); W. Parker Moore, *Back to the Drawing Board: A Proposal for Adopting a Listed Species Reporting System Under the Endangered Species Act*, 24 UCLA J. ENVTL. L. & POL’Y 105, 124 (2006) (“Without being able to pinpoint a species’ range, population locations, and habitat with verifiable accuracy, the Services cannot afford that species the protections which Congress contemplated in the ESA.”).

67. WILLIAM MORRIS ET AL., *THE NATURE CONSERVATORY, A PRACTICAL HANDBOOK FOR POPULATION VIABILITY ANALYSIS* 49–52 (1999), [http://training.fws.gov/ec/resources/advanced\\_sec\\_7/june\\_2005/scientific\\_references/tnc\\_morris\\_etal\\_1999.pdf](http://training.fws.gov/ec/resources/advanced_sec_7/june_2005/scientific_references/tnc_morris_etal_1999.pdf).

68. For example, to prove that a habitat modification constitutes a “taking,” the FWS might have to show that the act “significantly impair[s] essential behavioral patterns.” 50 C.F.R. § 17.3 (2006).

69. See Kristen Carden, *Bridging the Divide: The Role of Science in Species Conservation Law*, 30 HARV. ENVTL. L. REV. 165, 202–03 (2006) (“[I]n the species conservation context, there is never ‘enough’ science available when a decision needs to be made. . . . For a lesser known species. . . information on population status . . . is virtually nonexistent.”); see also Doremus, *supra* note 66, at 1119; Moore, *supra* note 66, at 109–10.

70. Moore, *supra* note 66, at 110 (citing Interview with Martin Miller, Chief, United States Fish & Wildlife Service—Region 5, Division of Threatened and Endangered Species (Apr. 27, 2004) (noting that discovery of new information concerning listed species “happens pretty frequently” because the Services generally lack site-specific information for many species, especially during the first few years immediately following a species’ listing)). Indeed, the watershed case *Tennessee Valley Authority v. Hill* came about because a University of Tennessee ichthyologist discovered a previously unknown species later identified as the snail darter. See 437 U.S. 153, 158 (1978).

71. Moore, *supra* note 66, at 110.

of finding a new population will not provide enough incentive for individuals to comb the countryside, but it may inspire a landowner to inspect his own property. Especially given that the majority of endangered species reside at least in part on private land,<sup>72</sup> such reasonable efforts may be enough to generate vastly improved census data.<sup>73</sup>

Indeed, one of the difficulties associated with current data collection practices is the reluctance of landowners to cooperate with the FWS for fear that a discovery of endangered populations will bring about Section 9 land use regulations. Private landowners are often reluctant to let FWS researchers on the property, much less voluntarily disclose demographic information.<sup>74</sup> Prediction markets would partially overcome these concerns by giving the landowner a direct financial incentive to make such disclosures: he could simply place a bet forecasting the survival of the species, and then expect the market to move in the direction of his bet upon disclosure of the previously unknown populations on his land.<sup>75</sup>

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72. U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS, GAO/RCED-95-16, AT 4 (1994); see also Jodi Hilty & Adina M. Merenlender, *Studying Biodiversity on Private Lands*, 17 CONSERVATION BIOLOGY 132, 133 (2003) (estimating that some habitat for ninety-five percent of endangered species is on private property); David S. Wilcove & Joon Lee, *Using Economic and Regulatory Incentives to Restore Endangered Species: Lessons Learned from Three New Programs*, 18 CONSERVATION BIOLOGY 639, 640 (2004) (noting a recent estimate that at least one population of two-thirds of federally listed species reside on private land).

73. Cf. Adler, *supra* note 55, at 333 (“In some cases, a private landowner might be the only person who knows a listed species is on their land.”); Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 432 (“Rural landowners may find it difficult to monitor their property, but they have it easier than the government.”).

74. Adler, *supra* note 55, at 332–33; Doremus, *supra* note 66, at 1120. Moreover,

[a] landowner’s refusal to allow on-site surveys can effectively limit the listing agencies to reliance on historic occurrence records, remote sensing methods, and surveys of government-owned property. Given these obstacles, it may be virtually impossible in some cases to demonstrate that a species is approaching extinction before it is too late.

*Id.*

75. Note that the landowner has no incentive to kill these unknown populations after betting on their demise. If he were to do so, and then disclose the animals’ deaths to the public, the market price associated with the animals would be unlikely to shift. This is because market participants would have previously thought that no animals were present on the landowner’s land (since the population was unknown), and the disclosure of the animals’ deaths would merely confirm this belief. If the population were known, then the landowner could

True, the financial incentive might not be commensurate with the costs of regulation in all instances, but if the landowner intends to keep the information hidden, he must contend with the possibility of neighbors making similar disclosures.<sup>76</sup> This leaves the landowner with a prisoner's dilemma of sorts: faced with the risk that a neighbor will disclose the population's existence, he will opt to make the disclosure himself so that he is at least likely to achieve some financial gain.<sup>77</sup>

Just as prediction markets can encourage citizens to inspect their properties for species sightings, they can similarly encourage them to look for habitat structures essential to endangered species' survival—information obviously relevant to the designation of critical habitat. Some observers believe that the information currently used to perform designations is sometimes inadequate, both because of the time constraints involved and the sheer difficulty of collecting habitat data.<sup>78</sup> As evidence of the latter point, consider FWS efforts to document vernal pool environments, which are small wetlands ranging from puddles to shallow lakes<sup>79</sup> and are a habitat to fifteen different endangered species.<sup>80</sup> Vernal pools are characterized by their ability to remain dormant, or completely dried up for years, such that the FWS “cannot quantify in any meaningful way what proportion of each critical habitat unit may be actually occupied” by vernal pools.<sup>81</sup> Although the FWS eventually did send staff to some of the pools to conduct in-person examinations,<sup>82</sup> it doubtless could have provided a more tailored critical

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theoretically bet in favor of extinction, kill the animals, and make a profit. However, such illegal behavior would be difficult to cover up since the bet would be traceable to the landowner, and it might come too late to forestall regulation because the animals' presence would already be known to regulators.

76. Even if the species exists in only one tract, Professor Elmendorf points out that “neighbors can peer across fence lines, and neighbors pick up gossip like lint.” Elmendorf, *supra* note 73, at 432.

77. Imagine that the regulation resulting from disclosure would cost the landowner \$10,000, but she could earn \$5,000 by placing a bet and then disclosing the information to the market. Although the disclosure would net her a loss of \$5,000, she would effectively lose \$10,000 if she failed to do so and a neighbor made the disclosure instead.

78. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 19–20; see also *infra* notes 69–70 and accompanying text.

79. U.S. Environmental Protection Agency, Vernal Pools, <http://www.epa.gov/owow/wetlands/types/vernal.html> (last visited Mar. 25, 2010).

80. Home Builders Ass'n of N.C. v. U.S. Fish & Wildlife Serv., No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518, at \*3 (E.D. Cal. Nov. 2, 2006).

81. *Id.* at \*1, \*14.

82. *Id.* at \*19.

habitat designation if it received information contributions from residents in the area who had been able to observe the vernal pools over a number of years.

Habitat information is also important to species listing decisions because habitat destruction is often the key factor pushing the species into peril;<sup>83</sup> of course, large data gaps exist in this context as well.<sup>84</sup> For example, in *Western Watersheds Project v. Fish and Wildlife Service*, the court struck down the Service's listing decision in part because crucial information was missing for seventy-eight percent of the sage grouse's habitat.<sup>85</sup> The FWS was unable to identify whether certain oil and gas leases contained sage grouse protections, nor whether Best Management Practices designed by the Bureau of Land Management (BLM) were effective in improving sage grouse habitats on land managed by the Bureau.<sup>86</sup> However, both of these data gaps likely could have been filled by industry experts or BLM officials, simply by using the incentives provided by the prediction market: the chance to turn a profit by utilizing superior information.

## 2. Prediction Markets and Reliability

Prediction markets do not only increase the amount of information available to the FWS, but can also make that information more reliable. Most of the "scientific" data utilized by the FWS is infused with subjectivity. For instance, since the mechanisms of extinction are still poorly understood, the models used to develop extinction probabilities rely on simplifying assumptions, many of which have not been verified by field data.<sup>87</sup> Consequently, Holly Doremus characterizes such models as "hunches."<sup>88</sup> To make matters worse, the models often go unpublished, meaning they cannot be replicated.<sup>89</sup> And when census data is limited, biologists are forced to resort to rules of thumb or simply use habitat loss as a rough proxy for species decline.<sup>90</sup> The aggregative nature of the prediction market avoids the risk of idiosyncratic guessing—a threat to an agency that relies on the views of a single scientist, or a

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83. See, e.g., David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 *BIOSCIENCE* 607, 607 (1998).

84. See *infra* note 172.

85. See 535 F. Supp. 2d 1173, 1187 (D. Idaho 2007).

86. *Id.*

87. Doremus, *supra* note 66, at 1119.

88. *Id.*

89. *Id.*

90. *Id.* at 1121.

few who are subject to an availability cascade.<sup>91</sup> The prediction market would also help to filter out individual biases, particularly the political opinions that materialize among scientists when dealing with an ideologically-charged matter such as species protection.<sup>92</sup>

Of course, the scientific community already possesses a method for filtering out biases and idiosyncrasies: peer review. Formally, the FWS is supposed to solicit the opinions of three specialists for “listing and recovery activities,”<sup>93</sup> which usually results in approval of the agency’s policies.<sup>94</sup> However, these seemingly positive results are suspect because the agency implements an ad hoc model of peer review with no means of ensuring the objectivity of its reviewers.<sup>95</sup> Moreover, scientifically rigorous peer review demands time and resources that simply are not available to the agency,<sup>96</sup> and reviewers have little incentive to volunteer their time and effort.<sup>97</sup>

The lack of objective peer review not only undermines accuracy, but insures limited political transparency. Many decisions under the ESA are supposed to be made in accord with the “best scientific and commercial data available,”<sup>98</sup> but the line between politics and science is thin. If interest group pressure demands a

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91. *See supra* note 33.

92. Keep in mind that the scientific norm of political neutrality has significantly eroded. *See* Doremus, *supra* note 66, at 1149. Note also that debates over land use regulation have proven extremely divisive, partly because of the divergent cultural attitudes of the combating participants. *See* Elmendorf, *supra* note 73, at 433–34.

93. Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270, 34,270 (July 1, 1994).

94. U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 21–22 (stating that between fiscal years 1999 and 2002, peer reviewers disagreed with the FWS in only two instances).

95. *See id.* at 15–16; *see also* J.B. Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 586 (2004).

96. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 15–16 (noting that peer review normally must occur within an abbreviated time frame and that the FWS is often unable to find independent reviewers because of the “scarcity of experts on a particular species”); Ruhl, *supra* note 95, at 591 (“[S]ome species simply do not have the time that the Scientific Method demands.”).

97. Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397, 435 (2004); *see also* Anne Hecht & Mary Parkin, *Improving Peer Review of Listings and Recovery Plans under the Endangered Species Act*, 15 CONSERVATION BIOLOGY 1269, 1272 (2001) (suggesting that the Service should compensate peer reviewers).

98. 16 U.S.C. § 1533(b)(1)(A) (2006).

particular result and the decisive data is little more than a guess, pressure to reinterpret the “evidence” may be significant.<sup>99</sup> The fact that the “best scientific and commercial data available” is such a vague standard exacerbates the problem.<sup>100</sup> Furthermore, scientific uncertainty allows the agency to hide value choices within simplifying assumptions.<sup>101</sup> For instance, conservative assumptions may represent an application of the precautionary principle rather than skepticism towards field data.<sup>102</sup>

Given the reasons to suspect the efficacy of peer review as currently practiced,<sup>103</sup> the “market check” provided by prediction ex-

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99. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 20 (“[I]nterested parties representing a diverse set of interests raised concerns that Service officials at the Headquarters level are succumbing to political pressures to not list species despite support from regional and field scientists who believe evidence shows that listing is warranted.”). An extreme example of such meddling occurred during the tenure of Julie MacDonald as Deputy Assistant Secretary for Fish and Wildlife and Parks. Ms. MacDonald and other officials repeatedly commanded scientists to alter their methodologies in order to arrive at different conclusions calling for less regulation, even when the alternate conclusions conflicted with the “best available science.” See OFFICE OF THE INSPECTOR GEN. OF THE U.S. DEP’T OF THE INTERIOR, INVESTIGATIVE REPORT: THE ENDANGERED SPECIES ACT AND THE CONFLICT BETWEEN SCIENCE AND POLICY 1–2 (2008).

100. U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 9; see also Memorandum from Earl E. Devaney, Inspector Gen. of the U.S. Dep’t of the Interior, to Dirk Kempthorne, U.S. Sec’y of the Interior (Dec. 15, 2008) (contending that Ms. MacDonald’s abuses were in part caused by the enormous discretion afforded to the FWS).

101. See, e.g., Doremus, *supra* note 66, at 1087–88 (arguing that ESA listing decisions involve decisions of taxonomy and viability, which appear to be value-neutral and scientific, but the agencies have to look beyond scientific information).

102. The precautionary principle states that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Ruhl, *supra* note 95, at 565 (quoting Rio Declaration on Environment and Development, UNCED, U.N. Doc. A/CONF.151/Rev. 1, 31 I.L.M. 874, 879 (1992)). The decision to employ the principle is a normative one. *Id.* at 569.

103. Notice-and-comment-rule-making and judicial review also serve as external checks on the FWS, but the efficacy of these institutions in promoting objectivity is limited. Courts grant the Service heavy deference when reviewing its decisions, only demanding a “rational connection” between the facts and the outcome. U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 22. As a result, most litigation does not concern the Service’s use of science, and instead turns on definitional or procedural issues. *Id.* Those who comment on proposed rules may provide substantive guidance, but no mechanism exists for ensuring its objectivity. In addition, given the Service’s troubles with recruiting scientists in the peer review context, it is even less likely that the relevant experts would offer their services during the notice-and-comment period, when their advice is not specifically requested. See Doremus, *supra* note 97, at 435.

changes might be especially valuable. To be sure, prediction markets provide a different type of analysis: scientists seek to minimize false positives at the cost of false negatives when reviewing others' work,<sup>104</sup> which is not necessarily the case for "trader reviewers." Also, traders will not always engage in rigorous review; instead, they will only devote resources commensurate with the financial benefits that can be obtained by expected increases in accuracy. Despite these limitations, the market check remains a cheap substitute for peer review because of its provision of objectivity to an inherently subjective process.

Finally, the dynamism of prediction markets is perfectly suited to ecological research. The currently accepted scientific paradigm views an ecosystem as a "complex, constantly changing mosaic that never reaches a true equilibrium state."<sup>105</sup> The changes are unpredictable and subject to external events, such that researchers never obtain a "definitive" understanding of the system.<sup>106</sup> Thankfully, prediction markets do not come to conclusions, but instead constantly add layers of knowledge as traders continually perform research in pursuit of profit. This stream of feedback allows the agency to revise policies in accord with current consensus as it adjusts to the caprices of ecological reality.<sup>107</sup> Furthermore, prediction markets place a premium on analyzing ecological change as quickly as possible—the first to trade on "inside information" often makes the bulk of the profit. Such haste is useful because some ecological changes, like a forest fire that suddenly leaves a species in a perilous state,<sup>108</sup> demand an immediate policy response in the form of an emergency listing or critical habitat designation.<sup>109</sup>

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104. Ruhl, *supra* note 95, at 570.

105. Carden, *supra* note 69, at 242.

106. *Id.*

107. See Hahn & Tetlock, *supra* note 18, at 263 (asserting that prediction markets can provide updated information in "something that approximates real time").

108. Island species are especially vulnerable to extinction through random demographic or environment effects because of their small numbers. See Marco Restani & John M. Marzluff, *Funding Extinction? Biological Needs and Political Realities in the Allocation of Resources to Endangered Species Recovery*, 52 *BIOSCIENCE* 169, 172 (2002).

109. 16 U.S.C. § 1533(7) (2006) (allowing the Secretary to skip a number of procedural steps that normally precede new regulations if he is faced with "any emergency posing a significant risk to the well-being of any species").

C. *Applying Prediction Markets to Economic Data Gaps*

Citizens possess information that potentially enables them to more accurately assess the cost of regulatory actions than the government's current scheme. They can do so effectively via a prediction market.<sup>110</sup> First, citizens have more knowledge of local enforcement practices. Costs resulting from the application of Section 7, which requires federal agencies to consult with the FWS to insure that certain actions do not threaten endangered species, vary as a result of erratic enforcement.<sup>111</sup> Since enforcement decisions are ultimately determined by FWS officials in regional offices, local developers are best positioned to predict the whims of these local bureaucrats and hence can disclose valuable information to the marketplace when evaluating policy decisions that affect species in the area.

In addition, citizens can better assess enforcement cost due to their ability to more accurately predict the pace of real estate development in the relevant area. Real estate growth rates are far from uniform and vary based on factors such as physical constraints on developable land, the amount of preexisting development, competing non-urban uses, and local zoning ordinances and growth controls.<sup>112</sup> All of these variables represent areas of knowledge uniquely within the purview of local developers, and these citizens can probably estimate how the variables will shift over time. Also, development is often "lumpy" in the sense that much of the new development in a given region might be encapsulated in a single project.<sup>113</sup> In such a situation, knowledge of the developer's plans becomes particularly important in projecting enforcement costs:

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110. There is nearly universal agreement that the ESA is not administered in a cost-effective manner. *See, e.g.*, Jason F. Shogren, *Benefits and Costs*, in 2 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 66, at 181, 181; Jonathan Remy Nash, *Trading Species: A New Direction for Habitat Trading Programs*, 32 COLUM. J. ENVTL. L. 1, 9 (2007); Wyman, *supra* note 45, at 518–23 (discussing requiring the FWS to identify the most cost-effective ways of protecting a species after it is listed). As previously discussed, the FWS is statutorily prohibited from considering cost when making listing decisions, but it is obligated to consider the "economic impact" of critical habitat designations. *See supra* note 49 and accompanying text. Unfortunately, the Service's economic analyses are often plagued by numerous information gaps, which will be discussed in detail below. *See infra* Part IV.B.

111. *See Moore, supra* note 66, at 171 (emphasizing the agency's discretionary enforcement of Section 7); Wyman, *supra* note 45, at 503–06 (arguing that estimates of cost are skewed by anecdotal "horror stories" because the FWS rarely enforces Section 7 or 9 to the fullest extent possible).

112. David L Sunding, *Economic Impacts*, in 2 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 66, at 190, 204.

113. *Id.* at 194.

prediction markets incentivize the developer himself to reveal those plans.

Although prediction markets used in the environmental context would be primarily targeted towards improving critical habitat designations, they might incidentally encourage private individuals to behave more prudently. As it currently stands, land use regulations effectuated by the ESA create a number of perverse incentives. For example, landowners are often encouraged to inefficiently rush development before their property is designated as a critical habitat.<sup>114</sup> If this option is unavailable, landowners have been known to simply destroy the species' habitat to preempt regulation.<sup>115</sup> Both of these practices are in part a result of landowners' exaggerated fears of the magnitude and likelihood of land use regulation.<sup>116</sup> Therefore, prediction markets might mitigate inefficient practices simply by providing landowners with objective information, inferred from the prediction markets, concerning the chances of regulation and its projected costs—information that may convince landowners that their fears are exaggerated hinder a potentially irrational response.<sup>117</sup>

The availability of the prediction exchange might also alleviate the need to rush development in the first place. Imagine a landowner who plans to construct a hotel in Area A in three years' time, but is worried that the FWS might first list that area as part of an endangered species' critical habitat. However, the FWS would exclude Area A from the animal's critical habitat if the construction of the hotel were to commence before the designation, as it would realize that the regulatory imposition would be significant. Naturally, the landowner might inefficiently rush construction rather

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114. See Adler, *supra* note 55, at 317–19; Geoffrey K. Turnbull, *The Investment Incentive Effects of Land Use Regulations*, 31 J. REAL EST. FIN. & ECON. 357, 369 (2005) (“Once a particular tract of land is developed, the irreversibility of land improvements erases any remaining threat of this kind of regulation for the tract.”).

115. See Adler, *supra* note 55, at 320–31 (providing empirical and anecdotal evidence documenting the problem).

116. See Wyman, *supra* note 45, at 506 (“Although often called the pit bull of environmental laws, the ESA may in reality be a paper tiger given the extent to which it is not enforced in many cases. But the perception that the ESA is a pit bull itself is costly.”). Professor Elmendorf thinks that such overreactions may be tied to a spiteful urge to retaliate against the green movement. Elmendorf, *supra* note 73, at 433.

117. Of course, it is possible that the prediction markets could exacerbate landowners' fears in some circumstances. However, since landowner's usually overestimate rather than underestimate the costs and likelihood of regulation, the markets still should produce a positive effect in the aggregate.

than leave the designation to the caprices of FWS bureaucrats.<sup>118</sup> With the availability of a prediction exchange, the landowner can instead send a credible signal that he plans construction in the near future: he simply places a large bet forecasting high regulatory costs associated with Area A.<sup>119</sup> If the FWS develops a reputation for respecting such results, the landowner can rest assured that Area A will remain unregulated without having to bear the cost of rushed development. The bet is credible because the landowner risks financial loss in the absence of construction; in that case, regulatory costs would be much lower than predicted, and he would suffer a large loss on the bet. In this sense, the bet is akin to recoverable collateral if the landowner does not fulfill his guarantee to construct the hotel.

A problem could arise if the landowner realizes that the regulatory costs would be too insignificant to forestall regulation: he might opt to exaggerate his project's scale, figuring that the inaccuracy of his prediction will be compensated for by the better regulatory environment that it produces. However, this plan falls apart if other market participants discover A's true plans, and there is reason to think that prediction markets are successful at uncovering such intentions.<sup>120</sup> Furthermore, the FWS can make special efforts to punish deception as a deterrent. For instance, in the above hypothetical, the agency could revise their initial critical habitat designation to include Area A in order to deny the landowner any

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118. As it currently stands, the FWS has limited appetite for assessing the costs of projects that would commence in the distant future, unless those projects are already authorized or publicized. *See, e.g.*, U.S. FISH & WILDLIFE SERV., FINAL DRAFT ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE SANTA CRUZ TAPPLANT 10 (*prepared by* Industrial Economics, Inc., 2002), *available at* <http://www.fws.gov/pacific/news/2002/pdf/0411tar.pdf> ("This report estimates impacts of listing and critical habitat designation on activities that are 'reasonably foreseeable,' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public.").

119. Of course, this scenario requires that Area A be sufficiently small such that costs associated with the landowner's project would make up a significant portion of the overall costs connected with designation.

120. *See infra* notes 195–200 and accompanying text. Because a landowner must disclose his identity when placing bets, this form of manipulation would seem particularly tough to disguise. A landowner's bet that acts to deter regulation of the landowner's property would raise an immediate cloud of suspicion, prompting other market participants to further investigate the bet's credibility.

benefit from his deception,<sup>121</sup> although this would be costly if the need arose on a frequent basis.

### III. STRUCTURING PREDICTION MARKETS

#### A. *Establishing the Exchange*

This subsection details how the FWS could establish a prediction market to collect scientific information.<sup>122</sup> However, much of the discussion can be generalized to a market that would collect economic data as well.

First, the agency would set up an exchange and take responsibility for monitoring, maintenance, legal controls, and any other necessities.<sup>123</sup> It would then establish a contract for each species for which data is needed. Since the ESA assumes that losses short of extinction are relatively insignificant,<sup>124</sup> the logical prediction market metric is the chance of extinction, rather than an intermediate measure. The contract would pay out fully if the species becomes extinct within a certain time frame, and the market price of the contract would represent the chances of extinction for that time frame. The relevant time period would have to be sufficiently long to produce non-negligible probabilities, perhaps ten years, although the time frame would vary depending on the species. A long time period might necessitate the posting of collateral when

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121. The ESA grants the FWS authority to revise designations from time to time as appropriate. 16 U.S.C. § 1533(a)(3)(A) (2006).

122. The ESA might have to be amended such that the FWS could take full advantage of the data utilized by prediction markets. It is unclear whether market data would qualify as the “best scientific data available” such that it could be relied upon by the agency when making listing decisions. A comprehensive analysis of this matter is beyond the scope of this Note. However, courts do seem to offer significant deference as to what constitutes “best available science.” They have opined that the requirement “merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)) (alterations in original). A commentator has suggested that the “best available science” definition imposes little that is not already required under the Administrative Procedure Act. *See Doremus, supra* note 97, at 423.

123. *See Hahn & Tetlock, supra* note 18, at 266–67. Presumably, the agency would contract this task to a consulting service, such as NewsFutures, that possesses experience in establishing prediction exchanges for private enterprises.

124. *See Stephen Polasky & Holly Doremus, When the Truth Hurts: Endangered Species Policy on Private Land with Imperfect Information*, 35 J. ENVTL. ECON. & MGMT. 22, 43 (1998). However, the ESA might disvalue losses to the extent that they make the species’ full recovery less likely.

purchasing or short selling a contract, but the collateral could be invested in treasuries so as not to discourage traders concerned with the time value of money.<sup>125</sup>

The agency should post all of its field data and modeling exercises online so that it would be easily accessible to potential bettors; bettors could then build off this data (if the market judges it valid) rather than replicating it. Furthermore, as a condition for trading on the market, bettors should be required to post any relevant data on which they relied, particularly sightings of species, subsequent to making that bet. This information is crucial to the agency for planning recovery programs and enforcement activities; it also adds to the foundation of knowledge upon which other bettors rely. Although this provision might be difficult to enforce, it is actually consistent with the bettors' self interest. Assuming the information is relevant and valid, the market price of the contract will change in the direction of the trader's bet following public disclosure—this allows the trader to cash out from his position and instantly realize gains, rather than waiting until the end of the contract period, which may be years away, for payout. Cashing out immediately also negates the risk that additional information will emerge that is adverse to the trader's betting position.<sup>126</sup>

A potential problem is that prediction markets are subject to a circularity problem.<sup>127</sup> Traders know that if the market were to indicate a high chance of extinction for a given species, the FWS will likely react with ameliorative policy measures designed to lower the risk. Consequently, the probability will never rise in the first place, stripping the market of its functionality.

One means of circumventing this problem is through the use of conditional markets.<sup>128</sup> Under this scheme, the agency would issue two securities for each species. One contract would pay out in the event of a certain policy action (and the fulfillment of the contract condition) and the other if that course of action is not taken. For example, one contract might indicate a one percent chance of extinction if the Secretary lists a species as endangered, while an-

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125. See Abramowicz & Henderson, *supra* note 4, at 1380.

126. Of course, there might be countervailing incentives that would cause a trader not to disclose information. More empirical evidence concerning the activities of traders participating in prediction markets is needed to substantiate my hypothesis.

127. See Abramowicz, *supra* note 8, at 985; Abramowicz & Henderson, *supra* note 4, at 1353; Sunstein, *supra* note 4, at 1042 n.387.

128. This scheme is based on a method discussed by Hahn and Tetlock, *see* Hahn & Tetlock, *supra* note 18, at 239, but other proposals are discussed throughout the literature. *See, e.g.*, Abramowicz & Henderson, *supra* note 4, at 1353–54.

other contract would demonstrate a five percent extinction risk if no listing occurs.<sup>129</sup> Taken together, these prices indicate that a listing would reduce the probability of extinction by four percent and would hence be quite valuable. If the Secretary ultimately decided to pursue a listing, then the first contract would stay valid and would pay out in the event of extinction, while the latter would be unwound, meaning that all bets would be nullified and collateral returned to the original owners.<sup>130</sup>

### B. *Alternative Metrics*

This proposal is subject to two flaws, which may undermine its viability. First, extinctions are difficult to definitively ascertain and often take years to verify.<sup>131</sup> Of course, time brings greater certainty, but even a ten-year time horizon would strain the bettors' patience. Thus, as an alternative to betting on extinction, traders could predict whether a species is expected to achieve "critical status" as determined by a designated FWS employee. Such a determination would be in accord with preset rigid guidelines and would indicate that the species is perilously close to extinction. Even if this process introduces a modicum of subjectivity, the market should remain functional as long as certain conditions are met.<sup>132</sup>

The second problem arises from the rarity of extinction. For many species, the possibility of extinction is sufficiently remote that the security price is close to zero (although still nonnegligible). Gleaning information from such prices is difficult because of the inevitable occurrence of "noise," or random fluctuations, during the lifespan of the security.<sup>133</sup> For instance, it might be difficult to assess whether a doubling in contract price represents a doubling in risk or simply a random fluctuation (because the price increase would represent such a small increase in absolute value). When multiple contract prices must be analyzed, as is the case with condi-

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129. To further clarify, the first contract would only pay out if the species is listed *and* it goes extinct, while the second would pay out only if the species is not listed and it goes extinct. If a trader strongly believed that the species would go extinct, he would probably purchase both contracts, so as not to be subject to the whims of the government. However, he would not be obligated to purchase the contracts in tandem.

130. See Abramowicz & Henderson, *supra* note 4, at 1353.

131. See Doremus, *supra* 66, at 1121 ("[O]nly in rare cases, when all individual members of a species are known, is it clear when the last death occurs."). Sometimes species are considered extinct only to be subsequently rediscovered. See, e.g., Scott et al., *supra* note 42, at 31.

132. See *infra* notes 138 and 140.

133. See Abramowicz, *supra* note 8, at 956.

tional markets, the problem is further magnified. Also, traders would need to invest very large sums of money in order to make sizeable profits because even important information disclosures would likely result in very small price movements. Such capital requirements would make market participation impractical for many individuals concerned with liquidity or risk.<sup>134</sup>

An alternative scheme would have bettors predict the species' population size at the end of a given time period, contingent on a particular policy action. For each contingency (whether or not the policy is pursued), the agency would issue a series of security classes designed to elicit a probability distribution.<sup>135</sup> For example, one security would pay out in the instance of 0–5000 population size, another in the event of 5000–20,000, and another if the species were to number more than 20,000. The implied probabilities of the three securities should add to one, indicating that one contract is bound to pay out. The agency could adjust the number of securities classes and payout conditions depending on current population numbers and the information needed to determine policy success.

The scheme's advantage is that the payout conditions could inevitably be manipulated to produce nontrivial probabilities, eliminating the noise problem. Moreover, this information is probably more useful when the species' extinction is not a serious threat—it enables the FWS to decide which actions can be taken to lift species' numbers to the point of self sufficiency, which helps effectuate the ESA's second goal of ensuring species survival absent ESA safeguards. Of course, population size also serves as a proxy, although an imperfect one, for extinction risk.<sup>136</sup> Another advantage is the potential to issue contracts associated with shorter time periods,

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134. For a potential solution to this problem, *see infra* Part V.C for a discussion of liquidity constraints and risk aversion and possible solutions.

135. The same approach is utilized by Intrade to generate predictions on non-binary outcomes. *See, e.g.*, Intrade Prediction Markets, <http://www.intrade.com> (follow "Financial," then "Dow Jones Index") (last visited Mar. 30, 2010). This scheme also facilitates the "market scoring rule," which is discussed later. *See infra* notes 186–194 and accompanying text.

136. *See Moore, supra* note 66, at 141 ("Although the certainty of a species' long term survival is impossible to gauge with mathematical equation, the probability of its survival predictably rises as its abundance and range increase."). Other factors which influence extinction risk include population growth rate, variability in population growth rate over time, the number of demographically independent species populations and, human behavior. *See Ruckelshaus & Darm, supra* note 66, at 109, 111. However, many of these other factors may be devised from changes in the market values over time, and from the evidence submitted in conjunction with bets.

since most species will dwindle in numbers long before they become extinct.

The disadvantage is that population size is not an objectively knowable fact in the sense that it is easily observable or verifiable; rather, any population-size figure is essentially an estimate based upon a mixture of field data and modeling assumptions.<sup>137</sup> Yet this fact alone would not erase the market's vitality. After the expiration of the relevant contract, the FWS could select an expert evaluator at random to analyze all compiled data, including the information posted by bettors.<sup>138</sup> He would then issue a finding which determines payouts.

Under this scenario, the market price would represent a prediction of the evaluator's likely determination rather than empirical reality. Yet traders still have equal incentive to gather field data because it would affect the evaluator's projections. Bettors are subject to the chance that the evaluator will read the evidence haphazardly or let ideology interfere or make a blind guess due to the lack of data. However, the market predicts the estimate of an average evaluator, rather than the particular evaluator chosen, and given that these fluctuations roughly cancel out in the aggregate, the market maintains objectivity.<sup>139</sup>

To help insure independence, the evaluator could receive similar protections as that of an administrative law judge.<sup>140</sup> For example, she might only be removed for good cause as established by an external commission and ex parte contacts between the evaluator and judge could be prohibited.

### C. *Estimating Cost*

The structure of a prediction market forecasting economic data will be similar to that of one predicting scientific data. The

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137. See Doremus, *supra* note 66, at 1119.

138. The following approach is loosely based on Michael Abramowicz's proposal to establish prediction markets to estimate the results of a cost-benefit analysis. See Abramowicz, *supra* note 8, at 997–1003. Like a cost-benefit analysis, population estimates are grounded in empirical reality, but necessarily somewhat subjective in character. But while Abramowicz sees the primary benefit of his project as enhanced objectivity, my scheme's chief function is information discovery. *Id.* at 1003.

139. See *id.*

140. Administrative law judges (ALJ) presiding over Social Security hearings bear some resemblance to the evaluators I envision. Like these ALJs, FWS evaluators would collect evidence, issue decisions, and oversee a fundamentally inquisitive (as opposed to adversarial) process. See *Snead v. Barnhart*, 360 F.3d 834, 838 (8th Cir. 2004).

FWS would issue contracts requiring prediction of the costs that can be directly traced to environmental regulation in a specific area. Again, two contingent securities would be issued: one asking bettors to predict total costs in a geographic area in the event that it is designated as critical habitat, and one in the event that it is not. The costs resulting from the designation would then be implied from the spread between the securities.<sup>141</sup> Contracts would likely ask for predictions of costs in the ten years subsequent to the critical habitat designation, as this is the time frame currently utilized by the FWS when issuing economic impact assessments.<sup>142</sup>

The main weakness of the cost metric is the introduction of significant subjectivity, but again the problem can be dealt with through the random appointment of an independent evaluator. However, compared with determinations of population size, estimations of cost present a greater challenge because of the presence of line-drawing problems. While it is relatively obvious (at least to a scientist) what it means to be a member of a listed species, the same cannot be said for directly attributable cost. For example, is inefficient delay caused by the regulatory uncertainty that follows a delay a direct or indirect cost? A business whose valued supplier goes bankrupt due to regulation?

Still, this problem is not insurmountable: the FWS could simply issue binding guidelines that address the most common line-draw-

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141. Under an alternative approach, the FWS could issue a single security designed to estimate all costs caused by the relevant regulation (bets would be unwound if the regulation did not come about). The problem with this approach is that in a world of overlapping regulations, causation is not always clear. *See* Sunding, *supra* note 112, at 191 (“[L]and development can be subject to multiple environmental regulations, and for more than one endangered species. The cumulative effect is likely to be larger than the sum of individual effects.”). So for example, say that a critical habitat designation for Species A brings about \$10,000 in additional costs, but it would only have cost \$7,000 if not for coexistent protection of Species B. It is not clear that the Species A designation is the proximate cause of all \$10,000, as Species B regulation is a but-for cause of \$3,000. These types of problems might arise frequently because seventy-two percent of endangered species are concentrated in just six states. Scott et al., *supra* note 42, at 20.

142. *See* Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 HARV. ENVTL. L. REV. 129, 176 n.209 (2004) (“Almost all of the economic analyses limit the time horizon to ten years”). In connection with the statutory requirement, FWS contracts out the preparation of economic impact assessments to estimate the likely affects of critical habitat designations. *See, e.g.*, INDUSTRIAL ECONOMICS, INC., FINAL ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE FISH SLOUGH MILK-VETCH (2005), available at <http://www.fws.gov/economics/Critical%20Habitat/ESA%20Reports%20as%20of%20August%202005/Fish%20slough%20milk-vetch/Final%20Report/FSMV%20Final%20EA%205-26-05.pdf>.

ing dilemmas. Furthermore, the evaluators could issue short opinions resolving any remaining ambiguities, which would gradually develop into a coherent jurisprudence. Like the contracts measuring animal population size, these contracts would be structured to elicit a probability distribution showing the chances of costs falling within a particular range. Traders would be rewarded if they bet on the correct range. Therefore, most minor ambiguities would not affect contract payouts anyway.<sup>143</sup>

#### IV. APPLYING PREDICTION MARKETS TO POLICY ACTIONS

##### A. *Listing Decisions*

The decision to list an imperiled species as “endangered” or “threatened” significantly affects a species’ chances of survival and can forewarn of a heavy economic burden. With so much at stake, one might expect the Secretary to carefully consider all of the relevant evidence; in fact, the decision-making process is chaotic and chronically underfunded. In regard to the latter point, some estimate that the number of listed species amounts to only ten to twenty percent of the total number of imperiled species.<sup>144</sup> However, during fiscal year 2008, the FWS appropriated a mere \$8,207,000 for new listings, and it is unlikely the FWS could list the additional species without significantly greater resources.<sup>145</sup> To make matters worse, the process for allocating the FWS’s limited funding is not driven by need. The majority of the allocation is

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143. If current practice is any guide, market participants will not be able to produce estimates with excessive precision, so the probability distribution would likely feature broad intervals, further minimizing the effect of minor ambiguities.

144. Frank W. Davis et al., *Renewing the Conservation Commitment*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 42, at 296, 297 (estimating that the ESA covers only fifteen to twenty percent of imperiled species); David S. Wilcove & Lawrence L. Master, *How Many Endangered Species Are There in the United States?*, 3 FRONTIERS IN ECOLOGY & ENV’T 414 (2005) (concluding that the Act covers less than ten percent of imperiled species).

145. See Review of Native Species that are Candidates for Listing as Endangered or Threatened, 73 Fed. Reg. 75,176, 75,185–86 (Dec. 10, 2008) (to be codified at 50 C.F.R. pt. 17) [hereinafter Candidates for Listing] (stating the listing budget and the various activities that it must fund); D. Noah Greenwald et al., *The Listing Record*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 42, at 51, 64 (stating that the FWS estimates \$153 million is necessary to address listing backlogs); Wyman, *supra* note 45, at 496. However, this appropriation represents a reasonable increase over last year’s budget of roughly \$5,200,000. See Review of Native Species that Are Candidates for Listing as Endangered or Threatened, 72 Fed. Reg. 69,034, 69,050 (Dec. 6, 2007) (to be codified at 50 C.F.R. pt. 17).

devoted to “court mandated listing activities,”<sup>146</sup> and empirical evidence cautions against the notion that interest groups sue on behalf of the most vulnerable species.<sup>147</sup> Congressional politics also play a role: listing decisions are affected by the current membership of the oversight committee and which imperiled species reside in their respective states.<sup>148</sup> For its part, the FWS refuses to formulate explicit listing standards, which could at least address the blatantly inconsistent decisions that often arise under current processes.<sup>149</sup>

Of course, citizens can prompt the FWS to consider listing vulnerable species by filing a petition;<sup>150</sup> unfortunately, they cannot expect a response within a reasonable amount of time. The FWS is statutorily obligated to issue a decision within two years, but the agency frequently circumvents that timeline by listing the species as a “candidate” or issuing a “not practicable” finding.<sup>151</sup> Between 1974 and 2003, it has taken the FWS an average of eleven years to list a species, and listing rates have steadily declined since 1996.<sup>152</sup> Moreover, these delays are not just a matter of inconvenience: forty-two species have become extinct while awaiting a final decision.<sup>153</sup> Obviously, these delays are partly driven by a lack of adequate funding, but they also result from uncertainty surrounding the species’ viability and concern over a listing’s economic impact.<sup>154</sup>

A prediction market would be an efficient means for adding rationality to the listing process. The FWS could issue contingent contracts designed to assess the impact for a species if a listing were to occur within a short period of time. It would be infeasible to

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146. See Wyman, *supra* note 45, at 496.

147. See Restani & Marzluff, *supra* note 108, at 173–74 (finding that interest groups are much more likely to sue to protect threatened species, rather than endangered ones).

148. See J.R. DeShazo & Jody Freeman, *Congressional Politics*, in 1 THE ENDANGERED SPECIES ACT AT THIRTY, *supra* note 42, at 68, 68–69; see also Doremus, *supra* note 66, at 1122–27 (arguing that the ambiguity of viability standards will inevitably lead to political meddling).

149. Doremus, *supra* note 66, at 1124.

150. See 16 U.S.C. § 1533(b)(3) (2006).

151. Greenwald et al., *supra* note 145, at 60–61.

152. *Id.* at 55 fig.5.1, 62.

153. *Id.* at 51. The authors also point out that species often are not listed until they are near extinction, which lowers their chance of survival and makes recovery efforts more expensive. *Id.* at 62–63.

154. See U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES: FACTORS ASSOCIATED WITH DELAYED LISTING DECISIONS, GAO/RCED-93-152, at 7–8 (2003), available at <http://archive.gao.gov/t2pbat5/149751.pdf> (discussing specific instances where questions about the sufficiency of biological data and concerns about the economic impacts of listings delayed listing decisions).

issue contracts for each of the thousands of species that may be at risk;<sup>155</sup> however, the FWS could issue contracts for each of its candidate species (currently there are 251),<sup>156</sup> or in response to an outside petition.

Prediction market data would be of great use to conservation-oriented interest groups when deciding what litigation to pursue. These groups sometimes sue for the protection of hundreds of species all at once,<sup>157</sup> but such broad suits might be counterproductive because they increase the immense listing backlog at the FWS.<sup>158</sup> The information provided by prediction markets would allow interest groups to only sue on behalf of the neediest species. This strategy enables the interest group to achieve the most good with its potentially limited resources, but it also insures a better allocation of the FWS's own listing funds since appropriations are so heavily influenced by outside litigation.<sup>159</sup>

Prediction markets might also affect listing decisions indirectly by altering public and congressional opinions. This Note has previously detailed how prediction markets elucidate divergences between agency policy and academic or commercial consensus.<sup>160</sup> An interest group could use market data to demonstrate that the FWS is failing to protect a species that is most in need of aid and could use this simple presentation to rally public support—it might even accuse the FWS of ignoring the will of the people as expressed through the prediction market. If public opinion firmly supports or opposes a listing, it is likely to affect the views of those politically powerful legislators who have been shown to carry influence over the FWS's listing decisions. However, if public opinion is polarized, the politician might also gravitate towards market consensus because it provides political cover: rather than offend one side of the debate, she can characterize her position as deference to expertise.

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155. Experts estimate the FWS has managed to list only a small percentage of the species that are truly in danger. *See supra* note 144 and accompanying text.

156. Candidates for Listing, *supra* note 145, at 75,177. A candidate species is one “for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but for which issuance of the proposed rule is precluded.” *Id.* at 75,183–84.

157. *See, e.g.,* Juliet Eilperin, *Since '01, Guarding Species is Harder; Endangered Listings Drop Under Bush*, WASH. POST, Mar. 23, 2008, at A1 (“WildEarth Guardians filed a lawsuit Wednesday seeking a court order to protect 681 Western species all at once.”).

158. *See supra* notes 150–54 and accompanying text.

159. *Id.*

160. *See supra* pp. 109–110.

Finally, even if the FWS could not legally consider contract prices under the ESA,<sup>161</sup> it could certainly make use of the scientific evidence that traders are required to submit in conjunction with their bets. So if the market were to indicate that a species is prone to an especially high risk of extinction, the FWS could immediately examine the submitted evidence with special care and make a listing decision based on the review. If the risk of extinction were especially high, the agency could expedite the listing process for that species so that it does not fall prey to extinction before regulation takes effect. Under this practice, the agency can use the market as a means of contracting out the gathering of information and as a signaling device to determine where agency manpower should be allocated. By mostly ignoring contract prices, the agency loses out on the objectivity enhancing function of the market, but this function can be replicated by outside litigants and politicians who do pay attention to market data.

### B. Critical Habitat Designations

Recall that the principal effect of a critical habitat designation is to affect actions authorized, funded, or carried out by a federal agency. Under Section 7, federal agencies may not take any action that is likely to “result in the destruction or adverse modification” of the critical habitat of a listed species, and agencies whose actions “will likely affect” a species must “consult” with the FWS to ensure compliance.<sup>162</sup> FWS formerly maintained that critical habitat designations are wholly superfluous because Section 7 already prohibits all federal actions that would “jeopardize” the “continued existence” of a listed species.<sup>163</sup> However, in 2001, the Fifth Circuit ruled that the agency’s interpretation contravenes congressional intent by equivocating the two standards, and that “adverse modification” is related to the concept of “conservation;” therefore, there is a broader duty than if the agency merely had to ensure the species’ survival.<sup>164</sup>

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161. See *supra* note 122 (analyzing whether the FWS’s use of prediction-market data would violate the statute requiring the FWS to rely on the “best scientific data available” when making listing determinations).

162. 16 U.S.C. § 1536(a) (2006).

163. See, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 439 (5th Cir. 2001).

164. *Id.* at 441–42; see also *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (also holding that the agency’s interpretation contravenes congressional intent). The agency abandoned its interpretation following these two decisions. See, e.g., Revised Proposed Designation of Critical Habitat for 12 Species of Picture-Wing Flies from the Hawaiian Islands, 72

Despite the FWS' former position and the apparent linguistic similarity between the "adverse modification" and "jeopardy" standards, the effects of a critical habitat designation are real and significant. Oliver Houck notes that courts are much more likely to enjoin development activity when a critical habitat has been designated. "[T]he ESA's prohibition on modification of critical habitat is interpreted by courts as strong and unyielding; the prohibition on jeopardy is viewed as discretionary and flexible."<sup>165</sup> Anecdotal evidence confirms that federal agencies agree with this proposition.<sup>166</sup> Furthermore, the National Research Council considers the "adverse modification" standard more objective and quantifiable and therefore easier to prove in court.<sup>167</sup> Finally, local agencies often interpret a critical habitat designation as a signal to tighten up their own land use regulations, especially when they are relatively under-informed.<sup>168</sup> Therefore, the large economic impact associated with designation, albeit hard to quantify, should indicate that habitats should be drawn with the utmost care.

In practice, this is hardly the case. The agency tends to resort to overly broad designations because of the high cost of narrower tailoring and to ensure that all species are included.<sup>169</sup> The latter cause might be further traced to information deficits. For example, the agency is statutorily obligated to designate a habitat at the time of listing, but it possesses almost no information about the location of animal populations at this time, causing it to resort to breadth in

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Fed. Reg. 67,428, 67,442 (proposed Nov. 28, 2007) (to be codified 50 C.F.R. pt. 17).

165. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 310 (1993).

166. See Sinden, *supra* note 142, at 164 (describing how the Environmental Protection Agency and Army Corps of Engineers terminated costly consultation activities after a court vacated the pygmy owl critical habitat designation).

167. See NAT'L RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 76 (1995).

168. Sunding, *supra* note 112, at 191.

169. Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 NAT. RESOURCES & ENV'T 88, 92 (2001); see, e.g., Cape Hatteras Access Pres. Alliance v. U.S. Dep't. of the Interior, 344 F. Supp. 2d 108, 122 (D.D.C. 2004) (FWS argued an overbroad designation was required in part because of the lack of sufficient data). Note that countervailing political pressures and the threat of lawsuits from landowner groups may counsel the FWS against overbroad designations in some instances. See, e.g., Press Release, Pacific Legal Foundation, Overbroad Bighorn Sheep Habitat is Reduced, Following PLF Legal Action, (Apr. 14, 2009), available at <http://community.pacificlegal.org/Page.aspx?pid=869>.

designations.<sup>170</sup> One would think that the statutory command to consider “economic impact” would act as a check on this practice. However, the agency’s means of taking direct cost into account are highly imperfect,<sup>171</sup> and it rarely even attempts to consider secondary economic effects.<sup>172</sup> Even when the agency does identify significant expenses, it possesses no reliable means of comparing costs and benefits.<sup>173</sup> Instead, the agency almost always declares that the

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170. See Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 STAN. ENVTL. L.J. 133, 206 (2001).

171. The FWS produces an “economic impact assessment” in connection with each designation. Under one approach, the agency relies upon computer models incorporating estimates of demographic and regulatory changes to predict future residential, commercial, and industrial development. See Sinden, *supra* note 142, at 176–77 (citing U.S. FISH & WILDLIFE SERV., DRAFT ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATION FOR THE SAN BERNARDINO KANGAROO RAT ES-6 (*prepared by Industrial Economics, Inc.*, 2001) [hereinafter KANGAROO RAT]). It then translates its prediction into an estimate of the number of Section 7 consultations that will be required, from which it infers the costs stemming from the consultations, both in terms of project modifications and “per effort” costs. *Id.* at 177–78. Finally, the agency tries to separate out those costs that would still be present under the “jeopardy” standard in order to isolate the effect of the critical habitat designation. *Id.* at 178–79. In moving from one estimate to the next, the FWS sometimes relies on empirical data: for example, it might look at historical patterns to determine the percentage of future consultations that will require project modification. See, e.g., KANGAROO RAT, *supra*, at 100 (relying on records of past kangaroo rat consultations). But sometimes it will employ similar assumptions with little explanation and minimal consultation with experts. See, e.g., *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006); KANGAROO RAT, *supra*, at 100 (stating that the percentage of projects that are likely to have a federal nexus is “difficult to determine,” then generating an estimate based entirely on “conservations with the [Army Corps of Engineers]” and the number of waterways in the area). Even when data is used, the fact that so many assumptions are required makes the overall result sensitive to reasonable adjustments of the underlying postulations. Sinden, *supra* note 142, at 179.

172. See Sinden, *supra* note 142, at 201. Measurement of secondary effects is an extremely complicated task, see *id.*, and most analyses that have tried have reached only tentative conclusions. See, e.g., *Endangered and Threatened Wildlife and Plants; Final Designation and Nondesignation of Critical Habitat for 46 Plant Species From the Island of Hawaii*, HI, 68 Fed. Reg. 39,624, 39,681 (July 2, 2003) (to be codified at 50 C.F.R. pt. 17) (“While our final economic analysis includes an evaluation of potential indirect costs . . . some types of costs are unquantifiable.”).

173. See Sinden, *supra* note 142, at 183; Ronny Millen & Christopher L. Burdett, Note, *Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, 7 MINN. J. L. SCI. & TECH. 227, 277 (2005) (“FWS’s practice of comparing quantitative estimates of the costs of designating critical habitat with qualitative estimates of habitat benefits ignores this inherent mismatch.”). The FWS has shown an increased willingness to use contingent valuation surveys, but such devices are highly controversial. See CHARLES D. KOLSTAD, ENVIRONMENTAL ECONOMICS 364 (1999).

costs are “not significant” whether they number in the thousands or hundreds of millions.<sup>174</sup>

All of the criticisms listed above have led to heavy discontent with the current designation process.<sup>175</sup> Fundamental flaws in the system must be cured by statute, but prediction markets can at least help to fill the information gaps currently crippling the system. The structure of how such a market would be run is familiar: the FWS would issue economic contracts pertaining to various geographical “units” being considered for designation. The relevant contingency would be the eventuality of designation, and as usual, the gap between parallel contracts would indicate the designation’s likely effect.

The implementation of scientific prediction markets for listing purposes would probably provide the agency with a wealth of information on animal locations to begin with; under current practices, much of that information does not arrive until the recovery planning stage.<sup>176</sup> The rapid collection of scientific information insures that critical habitat boundaries can be drawn quickly, at least when that information indicates that expeditiousness is necessary because of the threat of imminent extinction. Furthermore, to the extent that prediction markets produce better information on species location, the FWS can more narrowly tailor critical habit boundaries and thus minimize regulatory burden.

Finally, the market’s presentation of scientific data in standardized terms enables the agency to make more consistent tradeoffs between “economic impact” and species harm. The limitations of contingent valuation surveys reinforce the difficulty of comparisons between the two values—any comparison is inherently subjective and doubtless affected by political considerations.<sup>177</sup> However, standardization at least allows the agency to behave consistently and transparently once a tradeoff level has been set.

Because the FWS would have to issue separate contracts for each geographical unit when assessing a designation, cost is a concern. One solution is to only issue contracts in select areas: either

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174. Sinden, *supra* note 142, at 183.

175. Craig Manson, the former Assistant Secretary of the Interior, identified it as “broken” during congressional testimony. *A Bill to Amend the Endangered Species Act of 1973 to Reform the Process for Designating Critical Habitat Under That Act: Hearing on H.R. 2933 Before the H. Comm. on Resources*, 108th Cong. 9 (2004) (statement of Craig Manson, Assistant Secretary for Fish, Wildlife & Parks, U.S. Department of the Interior).

176. *See* Patlis, *supra* note 170, at 206.

177. *See* Sinden, *supra* note 142, at 207.

in units where information is sparse or where bureaucrats have reason to suspect that cost will be high. However, critical habitat markets would produce information that is substitutable for the economic impact assessments prepared by consultancies. So if courts determine that market data may fulfill the statutory requirements,<sup>178</sup> or if the ESA is amended, the FWS could potentially save millions in fees. Even if these contingencies do not come to pass, the market would still prove useful: for example, the information submitted in conjunction with bets should prove useful for drafting impact statements and may even eliminate the need to outsource the activity.

## V.

### POTENTIAL OBJECTIONS

#### A. *Liquidity*

The most obvious defect in the framework sketched so far is the possibility of illiquid markets. Liquidity refers to the ability of market participants to execute large transactions with minimal impact on current price, and it is important for several reasons.<sup>179</sup> First, liquidity is needed to obtain a reasonably steady price signal; transaction prices in illiquid markets fluctuate wildly, and any single trade does not necessarily represent market consensus.<sup>180</sup> Second, liquidity enables bettors to profit off of their possession of insider information, which in turn incentivizes bettors to acquire such information.<sup>181</sup> If markets are too thin, bettors will be unable to

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178. The FWS is generally given broad discretion when evaluating economic impact. *See* Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., No. CIV. S-05-0629 WBS-GGH, 2006 W.L. 3190518, at \*20 (E.D. Cal. Nov. 2, 2006) ("The consideration and weight to be given to any [economic] impact is completely within the Secretary's discretion."). When conducting reviews of economic analyses, courts primarily look to see if the agency "articulates a rational connection between the facts found and choices made," *id.* at \*23 (quoting *Pac. Coast Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005)), and if critical assumptions have at least some empirical basis, *see* *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006). Both of these requirements would seem to be fulfilled by prediction markets. The FWS "is required to consider the data that it already has in its possession," *id.* at 1153, but assuming that such information is made publicly available, the FWS could argue that it is automatically incorporated into the market. Although I am optimistic that prediction markets would satisfy the statutory standard, I am unable to offer a firm conclusion because of the absence of analogous precedents.

179. Hahn & Tetlock, *supra* note 18, at 251.

180. *Id.*

181. *Id.* at 251-52; *see* Abramowicz, *supra* note 8, at 957.

profit off insider information indicating that a contract is undervalued (or overvalued) because they could not purchase more than a few contracts at the prevailing market price before pushing the price upwards (or downwards).

Without a technical fix, ESA prediction markets will almost surely suffer from a lack of liquidity. The problem is most acute in fledging markets, of which there will be many in a scheme that requires the issuance of new contracts every time a new policy action is contemplated.<sup>182</sup>

There are several potential fixes to the liquidity problem. When evaluating the results of a prediction market, the FWS should look at average transaction prices over a range of time, as opposed to solely focusing on the “market” price, which is the price of the last known transaction.<sup>183</sup> Although this technique partially filters out the “noise” generated in thin markets, it does nothing to address the reduced incentives for traders to discover insider information. To address this latter concern, the FWS will have to encourage more trader participation through subsidies:<sup>184</sup> either direct or indirect. Depending on administrative feasibility, the FWS might offer a “premium” to winning contracts, or they could act as a market maker by offering to buy and sell contracts at slightly more favorable terms than the market would otherwise dictate. Also, the size of the subsidy need not be fixed: it could vary for each contract based on the importance of the information to the agency.<sup>185</sup>

Although a subsidy by itself would be helpful, the liquidity problem could essentially be solved if implemented by means of a “market scoring rule.”<sup>186</sup> Under this system, the FWS would first devise a scoring rule to induce participants to bet on what they believe to be the true probability distribution of the events in question—this becomes the standard by which all bettors are paid.<sup>187</sup> Scoring rules are well documented in economics literature and often used in practice; they are essentially formulas that adjust payouts for each outcome depending on the participant’s stated

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182. See Hahn & Tetlock, *supra* note 18, at 252.

183. See Abramowicz, *supra* note 8, at 946.

184. See *id.* at 960.

185. See Abramowicz & Henderson, *supra* note 4, at 1351.

186. The concept was originally devised by Robin Hanson. See Robin Hanson, *Combinatorial Information Market Design*, 5 INFO. SYS. FRONTIERS 107 (2003).

187. Abramowicz, *supra* note 8, at 959–60.

probability distribution.<sup>188</sup> After a bettor makes an initial prediction, anyone can make a subsequent prediction as long as the subsequent predictor agrees to pay off the previous predictor according to the scoring rule when the market closes.<sup>189</sup> In turn, this subsequent predictor is paid in accord with the extent that his prediction improves on that of the previous bettor. The process continues until the market closes, and the last predictor is paid by the FWS the amount that he is owed under the scoring rule: this is how the agency would effectively subsidize the market.<sup>190</sup>

The market scoring rule as just described has proven successful in laboratory settings<sup>191</sup> and is currently utilized by a number of online exchanges.<sup>192</sup> The beauty of this technique is that it works effectively even when only a single person bets on a contract. That person is incentivized to state his true prediction via the scoring rule, which rewards accuracy with higher payouts, and to update that prediction as soon as new information becomes available. If she is not quick, she risks another participant entering the market and placing a bet that reflects the new information, thereby denying her the maximum payout.<sup>193</sup> When many bettors participate, the market scoring rule mimics what we think of as a traditional prediction market. From a user interface perspective, the two are identical: in each, the user can buy or sell any number of contracts, with the price changing with each incremental purchase.<sup>194</sup>

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188. *Id.* at 959. See, e.g., Robert T. Clemen, *Incentive Contracts and Strictly Proper Scoring Rules*, 11 TEST 167 (2002) (reinterpreting scoring rules in the context of agency theory); Hanson, *supra* note 186, at 109 (outlining the strengths and weaknesses of scoring rules and documenting prior uses); Kenneth C. Lichtendahl Jr. & Robert L. Winkler, *Probability Elicitation, Scoring Rules, and Competition Among Forecasters*, 53 MGMT. SCI. 1745 (2007) (suggesting adjustments to scoring rules to account for competition among forecasters).

189. Abramowicz, *supra* note 8, at 959.

190. *Id.* at 960. Note that the amount of subsidy is effectively determined by the makeup of the scoring rule. See *id.* It cannot be specified exactly *ex ante* because it is dependent on the accuracy of the final prediction.

191. See Ledyard et al., *supra* note 24.

192. See Posting of David Pennock to Oddhead Blog, <http://blog.oddhead.com/2006/10/30/implementing-hansons-market-maker> (Oct. 30, 2006, 11:26 AM) (discussing the use of market scoring in various online contexts).

193. The Market Scoring Rule, <http://predictocracy.org/blog/?p=80> (Jan. 23, 2008). The original predictor could still make a bet reflecting the new information after the fact, but it would be less effective, as it would entail the responsibility to pay off the other bettor.

194. Abramowicz & Henderson, *supra* note 4, at 1352. Subsequent bettors will only receive money to the extent that they improve on prior predictions, but the first predictor will always receive income, at least with any scoring rule that always produces a positive reward. Abramowicz, *supra* note 8, at 960. Perhaps the

### B. Manipulation

Another worry is that concerned parties such as interest groups or developers might manipulate the markets to suit their policy goals. For example, one could imagine a group of developers pooling money together to place large bets predicting the high costs of regulation in order to forestall such regulation. One check on such strategic behavior is financial: making bets that deviate from empirical reality is costly in the short run. However, some parties might be willing to swallow the cost if the policy in question is particularly important or if the market has limited trading volume, such that shifting the market consensus is relatively cheap. However, the more important check is the presence of other traders. Traders know they can make a profit when manipulative behavior occurs because such conduct opens a gap between a contract's price and fundamental value.<sup>195</sup> The existence of the gap incentivizes traders to invest resources into discovering fundamental value, and hence the attempted manipulation should result in a *more* accurate market price.<sup>196</sup> Empirical research has confirmed this result,<sup>197</sup> and it probably explains why prior attempts at manipulation in online markets have failed.<sup>198</sup> At best, manipulation can succeed in ad-

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one flaw in the scheme is the windfall that would be received by the first bettor, which effectively comes out of the agency's pocket. *See id.* at 960. However, even this blemish can be addressed by auctioning off the right to make the first bet or having the agency itself place that bet. *See id.* at 960–61. The latter alternative is especially intriguing because it makes receipt of the subsidy dependent on the extent to which the market improves on the agency's guess. As a result, the FWS would only have to pay out significant sums when they have received a tangible benefit in return.

195. *See* Abramowicz, *supra* note 8, at 973; Hahn & Tetlock, *supra* note 18, at 258; Robin Hanson & Ryan Oprea, *A Manipulator Can Aid Prediction Market Accuracy*, 76 *ECONOMICA* 304, 311–12 (2008).

196. *See* Abramowicz, *supra* note 8, at 973; Hahn & Tetlock, *supra* note 18, at 258; Hanson & Oprea, *supra* note 195, at 311–12.

197. *See* Robin Hanson et al., *Information Aggregation and Manipulation in an Experimental Market*, 60 *J. ECON. BEHAV. & ORG.* 449 (showing manipulative trading strategies were unsuccessful in a laboratory setting); Paul W. Rhode & Koleman S. Strumpf, *Manipulating Political Stock Markets: A Field Experiment and a Century of Observational Data* (June 2008) (unpublished manuscript, available at [http://www.unc.edu/~cigar/papers/ManipIHT\\_June2008\(KS\).pdf](http://www.unc.edu/~cigar/papers/ManipIHT_June2008(KS).pdf)) (finding that attempts to manipulate the Iowa Electronic Markets only affected market prices for brief time periods).

198. *See* Sunstein, *supra* note 4, at 1037 (describing how a coordinated attempt to boost Buchanan share prices on the Iowa Electronic Markets during the 2000 election season resulted in only a transient price spike). During the 2008 election season, unusual bursts in the John McCain share price led some to believe that a manipulator was to blame. *See* David Rothschild & Justin Wolfers, *Market*

ding noise to the system,<sup>199</sup> but this should not significantly affect the market's functionality as long as the FWS considers prices over a range of time.<sup>200</sup>

Manipulation could still permanently alter prices if traders are unable to determine whether anomalous trades are motivated by insider information or deceit.<sup>201</sup> However, the ESA market structure mitigates this problem because parties are required to publicly display their data after placing bets; when interested parties lack the evidence needed to justify quirky bets, the market is instantly tipped off that nefarious motives are at play. Furthermore, the FWS should publicly disclose the origin of all bets, so that repeat traders are able to develop and monitor reputations for reliably acting upon credible information.<sup>202</sup> Finally, manipulative attempts that are successfully detected result in significant transfers of wealth away from the guilty party, so parties should be deterred from attempts even if they possess a small chance of success.

### C. *Liquidity Constraints and Risk Aversion*

Some might contend that most individuals will refrain from participating in the market because of liquidity constraints or risk aversion. This objection is especially noteworthy because it directly challenges my vision of the prediction market as an inclusive institution that assimilates information at the ground level.<sup>203</sup> On the one hand, there are means of participation that require only minimal resources. For example, if a citizen possesses insider informa-

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*Manipulation Muddies Election Outlook*, WSJ.COM, Oct. 2, 2008, <http://online.wsj.com/article/SB122283114935193363.html>. However, “[o]nce the market dealt with these bumps, the trend immediately reverted to Sen. Obama.” *Id.* These occurrences were later confirmed to be manipulative attempts. Josh Rogin, *Trader Drove Up Price of McCain ‘Stock’ in Online Market*, CQPOLITICS, Oct. 21, 2008, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000002976265&referrer=js>; see also Posting of Alex Tabarrok to <http://www.marginalrevolution.com/marginalrevolution/2008/10/manipulation-of.html> (Oct. 18, 2008, 7:41 EDT) (arguing attempts at market manipulation support the hypothesis they improve market accuracy).

199. See *supra* note 198.

200. See *supra* note 183 and accompanying text. To counter manipulation, Abramowicz also suggests that the agency wait until trading calms before closing the market, or leave the exact closing time ambiguous. Abramowicz, *supra* note 8, at 974.

201. Abramowicz, *supra* note 8, at 975–76.

202. *Id.* Traders probably would not object to such disclosure, as the ability to develop the reputation of a credible market player is in itself valuable. Without it, traders might be incapable of influencing market prices and thus unable to take gains immediately. See *id.* at 975.

203. See *supra* Part I.

tion, he can place a small bet, disclose that information and collect on the bet after the price moves upward—all within a matter of days, and hence subject to small risk of loss. Yet there are limits to this strategy. Predictions based on enhanced modeling techniques or data that is costly to verify will not be quickly digested by the market; the trader must then possess the security for a longer period, potentially until the market closes.<sup>204</sup> In addition, the size of the insider's gain is constrained by the size of the bet he can afford such that richer individuals will be more incentivized to seek out information. This seems backward from a labor-market efficiency perspective because the wealthy would contend with the highest opportunity costs if they were to spend their days scanning the countryside for endangered species. We also might think of this result as unfair, especially if we view betting on the market as loosely analogous to voting on policy outcomes.<sup>205</sup>

Luckily, individuals can transcend economic constraints by selling information to professional traders. This is a common routine in equity markets, and there is no reason to think the practice would not flourish amidst prediction markets as well.<sup>206</sup> Professional traders, or trading firms, could obtain the financing needed to make large bets (perhaps by tapping the capital markets), and they could reduce risk by dabbling in a range of securities.<sup>207</sup> At first, individuals might be reluctant to sell their secrets for fear of the information being appropriated without payment, as it would be difficult to execute a binding contract before the counterparty knows the nature of the information.<sup>208</sup> However, trading firms might seek to acquire reputations for fair treatment of their “suppli-

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204. The more time that passes, the greater the risk that the individual suffers losses due to new information disclosures, so this practice probably is not feasible for most risk-adverse individuals, not to mention those with liquidity constraints.

205. See Robin Hanson, *Shall We Vote on Values, Bet on Beliefs?*, 18 J. POL. PHIL. (forthcoming 2010), available at <http://hanson.gmu.edu/futarchy.pdf> (considering a form of government in which policy would be set by speculators betting on which actions they expect to raise national welfare).

206. Abramowicz & Henderson, *supra* note 4, at 1380.

207. The risks associated with most bets are likely to be asset specific rather than systematic, and hence overall risk can be substantially reduced through diversification. In other words, it is unlikely that all of a trader's bets would simultaneously turn sour, a fate that might befall an equity investor during a recession. Burton G. Malkiel, *From A Random Walk Down Wall Street*, in FOUNDATIONS OF CORPORATE LAW 26, 34–35 (Roberta Romano ed., 1993).

208. This problem is known as Arrow's Disclosure Paradox. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in 5 COLLECTED PAPERS OF KENNETH J. ARROW: PRODUCTION AND CAPITAL 104, 111 (1985).

ers” so as to incentivize further information exchange.<sup>209</sup> Alternatively, the citizen could demand a guarantee of a portion of the firm’s profits derived from his information prior to disclosing that data.

In some sense, professional traders might be thought of as partnering with the government because they play an especially prominent role in precipitating citizen engagement.<sup>210</sup> In addition to providing liquidity, they can be expected to publicize and facilitate market usage through their active solicitation of information relevant to their bids.<sup>211</sup> For example, if the FWS announces the issuance of a lucrative, highly subsidized new contract, we might expect trading firms to send representatives to the relative area so that they can seek out and interview knowledgeable individuals (for a price). Alternatively, the firm might advertise the existence of a website where individuals could submit pictures of species or development blueprints. The opportunity for profit will surely motivate the firms to experiment with different schemes and implement those that prove successful.

## VI. CONCLUSION

The proposal outlined is ambitious, especially in light of the unproven nature of prediction markets for policy purposes.<sup>212</sup> Certainly there are risks involved; in addition to the concerns already mentioned, prediction markets may prove too complicated for widespread usage, or the financial sums involved may be insufficient to incentivize significant research efforts.

But if prediction markets prove successful, their upside is enormous. Most immediately, endangered species policy would drastically improve because FWS processes would become more transparent and numerous information gaps would be filled. At a broader level, they offer the hope of fundamentally transforming

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209. See Abramowicz & Henderson, *supra* note 4, at 1380.

210. Professional traders might be loosely analogized to the “service providers” described in *A Constitution of Democratic Experimentalism*. See Dorf & Sabel, *supra* note 16, at 317 (describing how service providers leverage their expertise to act as “the link between the government of officials and the local knowledge of citizens”).

211. See Abramowicz & Henderson, *supra* note 4, at 1380.

212. As far as I know, no federal or state government has made use of prediction markets for policy purposes, save for the Defense Department’s ever so brief experiment with the Policy Analysis Market. See Hulse, *supra* note 25; Hulse, *supra* note 26.

the agency from an impersonal bureaucracy into a receptor of the labors and knowledge of citizens who are closest to the subject being regulated. Although such a paradigm has already been dreamt up by academics,<sup>213</sup> online markets represent the networking technology that can help bring this vision closer to reality. Surely, prediction markets are somewhat of a gamble, but as any experienced trader can tell you, sometimes gambles pay off.

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213. *See supra* note 16 and accompanying text.

## TWILIGHT: THE FADING OF FALSE LIGHT INVASION OF PRIVACY

ANDREW OSORIO\*

### INTRODUCTION

One hundred twenty years ago Samuel Warren and Lewis Brandeis sowed the first seeds of America's distinct privacy law in their groundbreaking treatise *The Right to Privacy*.<sup>1</sup> Through their work, the pair argued that the common law could, and should, "protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever[ ] their position or station, from having matters that they may properly prefer to keep private, made public against their will."<sup>2</sup> Seventy years later William Prosser penned his article *Privacy*, wherein he differentiated and cataloged what he deemed to be the various limbs of the legal sapling planted by Warren and Brandeis.<sup>3</sup> In so doing, Prosser succeeded in grafting onto the law a new branch, which he termed "False Light in the Public Eye."<sup>4</sup> Dimly conceived, Prosser claimed that this "form of invasion of privacy . . . consists of publicity that places the plaintiff in a false light in the public eye."<sup>5</sup> Adopted by the American Law Institute (ALI) in the Restatement of Torts as "Publicity Placing Person in False Light,"<sup>6</sup> this tort has faced near constant assault from scholars since its formal recognition.<sup>7</sup> Just

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\* New York University School of Law, J.D. Candidate, 2010; Pomona College, B.A., 2003. I would first like to thank Dr. Ivan and Mrs. Sheryl Osorio; they neither pushed nor pulled (much) but guided me gently along my own path. I am also indebted to Aaron Terry, Stuart Karle, Michael Sant'Ambrogio, and the staff of the *New York University Annual Survey of American Law* for all of the insightful editorial advice. Lastly, I dedicate this work to Mrs. Geraldine Terry; without her, none of this would have been possible.

1. 4 HARV. L. REV. 193 (1890).

2. *Id.* at 214–15.

3. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

4. *Id.* at 398–401.

5. *Id.* at 398.

6. RESTATEMENT (SECOND) OF TORTS § 652E (1977). The tort will be referred to throughout this Note as either "false light invasion of privacy" or simply "false light."

7. *E.g.*, J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783 (1992); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364 (1989); Jeffrey Deutschman, Note, *Fellows v.*

ahead of the fiftieth anniversary of this tort's academic christening, a decision by the Supreme Court of Florida<sup>8</sup> has cast further doubt on the continued viability of this troubled offshoot of privacy law. In *Jews for Jesus, Inc. v. Rapp*, Florida's highest court added its state to a list of jurisdictions that do not recognize the tort as part of their common law.<sup>9</sup> Spurred by the holding in *Rapp*, this Note will press forward with the argument against a cause of action for false light invasion of privacy.

Part I of this Note provides general background by outlining the history and operation of the various underlying theories that comprise privacy law, with a special emphasis on false light; defamation will also be covered in brief. This Part also defines the particular conception of privacy that will be used throughout this Note. Part II presents a summary of the current arguments in favor of the continued recognition of false light followed by a rebuttal analyzing the inherent shortcomings of each defense. Part III offers a novel and untested argument against the tort followed by a few concluding remarks.

In particular, this Note first argues that the scope of the tort is wholly duplicative of the combined interests safeguarded by the law of defamation and the other branches of privacy law thereby depriving it of any independent *raison d'être*. Second, continued recognition of false light invasion of privacy may create an unwarranted chilling effect on free speech while providing little more than a source of mischief for plaintiffs who artfully pad their pleadings to intimidate defendants, bogging down courts in the process. Last, whatever gleam of independent justification may have once existed for the tort has long since faded as there has been a sea change in the way this country experiences privacy. This fundamental shift

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National Enquirer, Inc.: *Turn Out the False Light, the Party's Over*, 5 ADELPHIA L.J. 95 (1987-89); Susan Hallander, Note, *A Call for the End of the False Light Invasion of Privacy Action as it Relates to Docudramas*, 15 SETON HALL J. SPORTS & ENT. L. 275 (2005); Bruce A. McKenna, Note, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113 (1979).

8. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098 (Fla. 2008).

9. *Id.* at 1100. The following states have also rejected Prosser's tort: Virginia, *WJLA-TV v. Levin*, 564 S.E.2d 383, 394 n.5 (Va. 2002); New York, *Costanza v. Seinfeld*, 693 N.Y.S.2d 897, 899 (N.Y. Sup. Ct. 1999), *aff'd in part*, 719 N.Y.S.2d 29 (App. Div. 2001); Texas, *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994); Massachusetts, *ELM Med. Lab. v. RKO Gen., Inc.*, 532 N.E.2d 675, 681 (Mass. 1989), *abrogated by* *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990); Missouri, *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 480-81 (Mo. 1986); North Carolina, *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405, 411 (N.C. 1984).

renders false light not merely redundant but unrecognizable against the backdrop of modern privacy norms.

## I.

### A. “*The Right to be Let Alone*”

As the year 1890 drew to a close, legal scholars witnessed the publication of what many consider to be one of the most influential articles on any topic in American law.<sup>10</sup> Combining pointed social critique with a creative jurisprudential brush,<sup>11</sup> the once and future Supreme Court Justice Louis Brandeis and his then-partner at law Samuel Warren argued that as “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society,”<sup>12</sup> the time had come to acknowledge “the right ‘to be let alone.’”<sup>13</sup> Borrowing heavily from the courts of England and Ireland—since “there was nothing resembling an explicit notion of privacy in tort law in 1890”<sup>14</sup>—*The Right to Privacy*, although “light on hard precedent,”<sup>15</sup> argued eloquently for a law “[t]he general object [of which] is to protect the privacy of private life.”<sup>16</sup>

While some observers have detected an ulterior motive in the ostensibly altruistic and egalitarian notion of privacy espoused by Warren and Brandeis,<sup>17</sup> the authors saw their treatise as a bulwark against the slackening of social norms and the growing impropriety of the media. In an oft-quoted passage, the attorneys unleashed a

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10. See generally Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133 (1992); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992); Prosser, *supra* note 3.

11. At least one other writer has commented on the “ingenious manner in which its authors drew on threads of past jurisprudence, constructing a legal concept . . . out of property doctrine, tort law, copyright law, and damage principles.” Bezanson, *supra* note 10, at 1134.

12. Warren & Brandeis, *supra* note 1, at 193.

13. *Id.* at 195. In fairness, Warren and Brandeis borrowed this catchy phrase from Judge Thomas M. Cooley’s earlier work, COOLEY ON TORTS 29 (2d ed. 1888).

14. Gormley, *supra* note 10, at 1345.

15. *Id.*

16. Warren & Brandeis, *supra* note 1, at 215.

17. Although the details are not clear, most agree that the article was born out of Warren’s personal distaste for the newspapers in Boston. See, e.g., Prosser, *supra* note 3, at 383 (alleging that when “the newspapers had a field day on the occasion of the wedding of a daughter . . . Mr. Warren became annoyed”). But see Gormley, *supra* note 10, at 1349 (“These stories, unfortunately, appear to be apocryphal. Warren’s daughter was only six years old at the time the privacy article appeared, making it unlikely that her wedding launched a thousand lawsuits.”) (citation omitted).

withering broadside against the newspaper industry and a public that seemed all too content with the rapidly shrinking sphere of solitude to which a man might still lay claim and the deleterious effects attendant thereto:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. . . . It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly downcast by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.<sup>18</sup>

As the passage above reveals, *The Right to Privacy* is a product of its day.<sup>19</sup> In the latter half of the 1800s there was a dramatic change in the form and substance of journalism in the United States. Technological innovations—Warren and Brandeis referred to “instantaneous photographs” and “other modern device[s] for recording or

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18. Warren & Brandeis, *supra* note 1, at 196.

19. See also Bezanson, *supra* note 10, at 1133 (“The *Right to Privacy* w[as] a response to the encroachment of urbanization on rural values and institutions and an attempt to develop communicative norms from contemporary but threatened social conventions.”).

reproducing scenes or sounds”<sup>20</sup>—coupled with a new business model and shifting societal demographics gave rise to “yellow journalism.”<sup>21</sup> Moreover, the industrial revolution provided an influx of new readers into America’s major cities, who supplied the demand for this fashionable form of reporting.<sup>22</sup>

Given that these massive changes in information technology and media consumption coincided with the beginning of the twentieth century, it would be tempting to characterize *The Right to Privacy* as a mournful ode to a bygone day, put to paper by a pair of curmudgeons unwilling and ill-equipped to deal with modern life. However, to dismiss the men as anachronisms, or their work as expressing an atavistic utopia, would be to overlook the relevance of privacy law, and their influence upon it, 120 years later.<sup>23</sup>

### B. *The Various Privacy Torts*

Initially adopted in 1939 as “Interference With Privacy,”<sup>24</sup> the principle underlying the beginnings of privacy law was inchoate at best. The First Restatement of Torts offered the following brief explanation: “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.”<sup>25</sup> Twenty-one years later, in an effort to provide a comprehensive overview of

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20. Warren & Brandeis, *supra* note 1, at 195, 206.

21. See generally SIDNEY KOBRE, *THE YELLOW PRESS AND GILDED AGE JOURNALISM* (1964); FRANK LUTHER MOTT, *AMERICAN JOURNALISM, A HISTORY: 1690–1960* (3d ed. 1962).

22. As one author has pointed out, when

the United States entered the age of industrialism, the nation moved from a rural to an urban emphasis, producing a new working class which swarmed into the cities anxious to know about the new world around them . . . [and w]ith the growing market of barely-educated, immigrant, inquisitive masses in the large cities, newspapers . . . revamped the idea of the old penny press of the 1830s, seeking mass circulation.

Gormley, *supra* note 10, at 1350.

23. Although this paper puts aside any questions as to the wholesale value of privacy law, a few scholars have indeed questioned its general utility. For instance, one early commentator felt that “the concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well meaning but impatient academicians can upset the normal development of the law by pushing it too hard.” Frederick Davis, *What Do We Mean by “Right to Privacy”?*, 4 S.D. L. REV. 1, 23 (1959); see also Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

24. RESTATEMENT (FIRST) OF TORTS § 867 (1939).

25. *Id.*

the law, Dean William Prosser authored *Privacy*,<sup>26</sup> wherein he laid out a taxonomy of the tort that was roughly sketched by Warren and Brandeis seventy years prior.

Prosser began by noting that the “law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’”<sup>27</sup> Described generally these torts are:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.<sup>28</sup>

Although Prosser contends that the privacy torts are exclusive in nature,<sup>29</sup> they are in fact quite complementary at times, as will be shown in the proceeding subparts. Additionally, to more fully understand the arguments against false light it is necessary to appreciate the range of alternative claims that may be brought to bear against a defendant for invading the privacy of another. Accordingly, the torts of intrusion upon seclusion, publicity given to private life, and appropriation of name or likeness will be discussed in brief<sup>30</sup> followed by a more detailed explication of false light invasion of privacy.

### 1. Intrusion

The first of the privacy torts laid out by Dean Prosser involves an action that would “overlap, to a considerable extent at least, the action for trespass to land or chattels” in the sense that “there must

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26. *Supra* note 3. In addition to being the reporter for the RESTATEMENT (SECOND) OF TORTS, *see infra* note 33, Prosser was the dean of the University of California, Berkeley Law School from 1948–1961. *See* Berkeley Law—Former Deans, <http://www.law.berkeley.edu/529.htm> (last visited Apr. 19, 2010).

27. Prosser, *supra* note 3, at 389 (citation omitted).

28. *Id.*

29. *See supra* note 27 and accompanying text.

30. The explanations provided, *infra* Parts I.B.1–3, are by no means comprehensive and are intended only to familiarize the reader with the most rudimentary facets of these torts, such that they may follow along more easily with the Note’s argument.

be something in the nature of prying or intrusion”<sup>31</sup> into the private affairs of an individual that “would be offensive or objectionable to a reasonable man.”<sup>32</sup> Building upon this general notion, the authoritative definition issued by the ALI<sup>33</sup> states: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>34</sup> Courts in turn have adopted this formulation with relative uniformity.<sup>35</sup> A particularly instructive *précis* offered by the Supreme Court of California in *Shulman v. Group W Productions, Inc.*<sup>36</sup> explained that:

Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an “invasion of privacy.” It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.<sup>37</sup>

As will become evident in the following subparts, this form of invasion of privacy is notably distinct from the other three varieties in that publicity<sup>38</sup> is not an element for making out a viable claim—the intrusion itself constitutes the entirety of the wrong.<sup>39</sup> Despite this singularity and Prosser’s contention that the privacy torts are wholly distinct causes of action, this Note will also show the extent to which the privacy torts can overlap. For instance, if a defendant

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31. Prosser, *supra* note 3, at 390.

32. *Id.* at 391.

33. It is certainly worth noting that several scholars have described Prosser’s role with the ALI as playing no small part in the adoption of his four torts. For instance, J. Clark Kelso opined that

The influence of the article is only partly attributable to the article itself. By 1960, Prosser was widely recognized as one of the leading torts scholars in the country, and held the influential position of Reporter for the Restatement (Second) of Torts. Many believed that if Prosser said the cases stood for a particular proposition, then it must be true.

Kelso, *supra* note 7, at 789.

34. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

35. For a number of cases applying this standard, see *id.* and RESTATEMENT (SECOND) OF TORTS app. § 652B (1977).

36. 955 P.2d 469 (Cal. 1998).

37. *Id.* at 489.

38. See *infra* note 40.

39. See RESTATEMENT (SECOND) OF TORTS § 652B (1977); *supra* text accompanying note 34.

was to publicize a discovery made by virtue of his unlawful intrusion, then an additional action would exist for Prosser's second tort—publicity given to private life.

## 2. Publicity Given to Private Life

According to the ALI:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.<sup>40</sup>

As the Second Restatement of Torts makes clear, several limitations are placed on a plaintiff attempting to pursue a claim under this cause of action.<sup>41</sup>

First, based on Prosser's formulation, the defendant must somehow publicly disseminate the information he has acquired; a private disclosure to another party will not suffice.<sup>42</sup> For instance, if a creditor were to contact the employer of an individual in default in an attempt to effect collection, and thereby reveal the fact that the debtor was currently in arrears, then the revelation of this debtor's private financial information would not constitute publicity.<sup>43</sup> Conversely, if a creditor were to post in the window of his shop the names of those who were currently in default, then this would constitute publicity.<sup>44</sup>

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40. RESTATEMENT (SECOND) OF TORTS § 652D (1977); *see also id.* at cmt. a (“‘Publicity,’ as it is used in this Section, differs from ‘publication,’ as that term is used in § 577 in connection with liability for defamation. ‘Publication,’ in that sense, is a word of art, which includes any communication by the defendant to a third person. ‘Publicity,’ on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.”).

41. RESTATEMENT (SECOND) OF TORTS § 652D (1977). I will also refer to this tort as “disclosure” throughout this Note.

42. Prosser, *supra* note 3, at 393; *see also supra* note 40.

43. *See, e.g.,* Sears, Roebuck & Co. v. Moten, 558 P.2d 954, 958 (Ariz. Ct. App. 1976).

44. *See, e.g.,* Brents v. Morgan, 299 S.W. 967, 971 (Ky. 1927); *Seinfeld: The Little Jerry* (NBC television broadcast Jan. 9, 1997) (telling the story of a man who struggles to have a bounced check removed from display in a local bodega because of the embarrassment it has caused him—in no small part because the check has a picture of a clown holding balloons).

Second, if the information is of “legitimate public concern”—or in other words “newsworthy”—then the plaintiff is barred from bringing suit.<sup>45</sup> This element of disclosure is difficult to define as there exists a genuine distinction between matters of proper concern to the public and those which are merely of interest.<sup>46</sup> And, unfortunately, it would seem that courts have adopted a rather permissive and uncritical stance when making such determinations.<sup>47</sup>

Third—and perhaps most problematic because of the inherently subjective character of the question—the matter disclosed must be “highly offensive to a reasonable person.”<sup>48</sup> Additionally, because this tort deals with statements of true fact, it is, from a First Amendment<sup>49</sup> standpoint, the most susceptible to attack as the pursuit of truth is often described as a vital corollary to the freedom of speech.<sup>50</sup> Moreover, the Supreme Court has yet to determine the

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45. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (“When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.”).

46. To quote Cass Sunstein, “[T]here is an important difference—as the Constitution’s framers well knew, and as many people today appear to have forgotten—between the public interest and what interests the public.” Cass Sunstein, Op-Ed., *Reinforce the Walls of Privacy*, N.Y. TIMES, Sept. 6, 1997, §1, at 23.

47. See Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 76 (1974).

48. RESTATEMENT (SECOND) OF TORTS § 652D (1977). The nature of what constitutes “highly offensive” is clearly susceptible to myriad interpretations depending on the given place and time as well as the party sitting in judgment. Judge Posner, for instance, felt that in order for a disclosure to be sufficiently offensive, a case must involve “details the publicizing of which would be not merely embarrassing and painful but *deeply shocking* to the average person subjected to such exposure.” *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234–35 (7th Cir. 1993) (emphasis added); cf. *Hussain v. Palmer Commc’ns Inc.*, 60 Fed. App’x 747, 752 (10th Cir. 2003) (applying verbatim Comment c to the RESTATEMENT (SECOND) § 652E); *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) (noting that “[i]n order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard”); *Hunley v. Orbital Scis. Corp.*, No. CV-05-1879, No. CV-06-2567, 2007 U.S. Dist. LEXIS 24101, at \*6 (D. Ariz. Mar. 27, 2007) (“[A] plaintiff’s subjective threshold of sensibilities is not the measure, and trivial indignities are not actionable.”) (citations omitted).

49. U.S. CONST. amend. I.

50. See, e.g., *Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986) (explaining that a “‘chilling’ effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern”); *Adler v. Bd. of Educ.*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) (stating that academic freedom is central to “the pursuit of truth which the First Amendment was designed to protect”).

full scope of its constitutionality<sup>51</sup>—also an issue of concern for false light as discussed below.<sup>52</sup>

Fourth, and finally, the publicized information must be private; liability will not attach to an individual who discloses information of a public nature (e.g., matters of public record such as date of birth or marital status).<sup>53</sup> Nor will courts find liability when facts readily apparent to the public are further publicized. For instance, an individual who is out and about cannot be heard to complain when another further publicizes a fact that he has already left open to the public eye.<sup>54</sup> By way of illustration, a husband and wife were denied relief when their “affectionate pose” at a sidewalk cafe was captured and further publicized.<sup>55</sup>

However, as mentioned earlier, the various privacy torts may act in concert. So, while the facts of a particular case may not support a claim for the tort of disclosure—as was the case with the amorous couple mentioned above<sup>56</sup>—a claim for Prosser’s tort of appropriation, discussed in the next subpart, may still prevail.

### 3. Appropriation of Name or Likeness

Simply put, this tort “consists of the appropriation, for the defendant’s benefit or advantage, of the plaintiff’s name or likeness.”<sup>57</sup> The particular interest protected by this branch of privacy law is, generally speaking, the plaintiff’s exclusive right to exploit his name or likeness inasmuch as it may be economically beneficial

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51. See RESTATEMENT (SECOND) OF TORTS § 652D Special Note on Relation of § 652D to the First Amendment to the Constitution (1977).

52. See *infra* Part I.B.4.

53. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (“The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.”).

54. See *id.* (“[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. . . . Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public.”).

55. See, e.g., *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 442, 445 (Cal. 1953) (finding no liability for defendant when plaintiff sued after a photograph was taken—and later included in a published article—of him and his wife “in an affectionate pose” at a sidewalk cafe).

56. See *id.*

57. Prosser, *supra* note 3, at 401; see also RESTATEMENT (SECOND) OF TORTS § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

to do so.<sup>58</sup> As a result, the paradigmatic form of appropriation occurs when a defendant makes use of the plaintiff's image to promote a business or product, or in any other way usurps his image for commercial ends.<sup>59</sup> This tort, like its cousins, does not necessarily operate in isolation, despite Prosser's claim, and may be brought by the plaintiff as an additional theory of recovery. To wit: If in the process of unlawfully using the plaintiff's image the defendant also makes, or attributes, false statements concerning the plaintiff, he will have cast him in a false light.

#### 4. Publicity Placing Person in False Light

Unlike its older cousins whose lineage can be traced back over a century to *The Right to Privacy*,<sup>60</sup> false light's modest roots go back no further than *Privacy*,<sup>61</sup> in which Prosser himself openly admits that Warren and Brandeis's original conception of the right to be let alone would not have encompassed this new tort.<sup>62</sup> Instead, Prosser claims that this new species of tort first emerged in 1816 in the English case of *Lord Byron v. Johnston*<sup>63</sup> and that it appeared sporadically throughout American law beginning in the early 1900s.<sup>64</sup> This claim, however, has been contested: Professor J. Clark Kelso, after reviewing the fifty-some cases cited in support of false light's purported jurisprudence,<sup>65</sup> concluded that "none of the cases Prosser cited in support of false light privacy come close to recognizing such a tort. False light existed only in Prosser's mind."<sup>66</sup> What then is the nature of this tort born solely from the fertile soil of Dean Prosser's imagination?

Professor Diane Zimmerman of the New York University School of Law explains that

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58. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977) ("The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity . . . . Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, *the right created by it is in the nature of a property right . . . .*") (emphasis added).

59. See, e.g., *Toffoloni v. LFB Publ'g Group, LLC*, 572 F.3d 1201, 1205–08 (11th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 1920 (Mar. 1, 2010); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

60. See generally Warren & Brandeis, *supra* note 1.

61. "Prior to Prosser's article, the words 'false light' and 'privacy' are not joined together in any reported American decisions." Kelso, *supra* note 7, at 783.

62. Prosser, *supra* note 3, at 398.

63. (1816) 35 Eng. Rep. 851 (Ch.).

64. Prosser, *supra* note 3, at 398–400.

65. Kelso, *supra* note 7, at 788–816.

66. *Id.* at 787.

[t]he tort of false light invasion of privacy arises either when something factually untrue has been communicated about an individual, or when the communication of true information carries a false implication. Generally, two minimum requirements exist for a false light claim. To be actionable, the falsehood must first be “material and substantial.” Then, communication of the misinformation must reach an audience sufficiently large to constitute widespread publicity.<sup>67</sup>

Another major distinction between false light and the other forms of invasion of privacy, highlighted by the above passage, stems from the fact that the former does not concern itself with facts relating to the private lives of those affected (e.g., their image or habits). Instead, false light, as the name implies, is born out of statements that are either entirely false or, fallacious as a result of the improper juxtaposition of true facts.<sup>68</sup> So, although Professor Zimmerman’s summation is both clear and precise, further explication of this tort is warranted. And, as luck would have it, the first Supreme Court case to deal with false light, *Time, Inc. v. Hill*,<sup>69</sup> offers a textbook example of an attempt to pursue a claim for false light.

In September of 1952, a trio of escaped convicts held the seven members of the Hill family captive in their Pennsylvania home for nineteen hours, after which they released the family unharmed.<sup>70</sup> The father, James Hill, in a brief interview immediately following the ordeal, emphasized that his family had not been mistreated in any way but thereafter fought all attempts to keep his family in the media’s gaze—going so far as to relocate his family to Connecticut in an attempt to evade further attention.<sup>71</sup>

The following spring, Joseph Hayes published his novel *The Desperate Hours*, based largely upon the events that had befallen the Hill family the previous year.<sup>72</sup> However, unlike the Hills, the fic-

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67. Zimmerman, *supra* note 7, at 370–71 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967)); see also RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977) (“On what constitutes publicity and the publicity of application to a simple disclosure, see § 652D, Comment a, which is applicable to the rule stated here.”); *id.* at cmt. c (“The plaintiff’s privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.”).

68. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, illus. 2 (1977).

69. 385 U.S. 374 (1967).

70. *Id.* at 378.

71. *Id.*

72. *Id.*

tional family in *The Desperate Hours* was made to endure verbal abuse and physical assault.<sup>73</sup> At this point it would have been difficult to draw unambiguous parallels between the fictionalized account and the actual events underlying the novel as Hayes had altered some of the specific details. Nevertheless, any doubt was removed when the book was adapted for the stage and LIFE magazine ran a feature explaining that the play was based upon the novel that in turn drew from the Hill family's actual experiences.<sup>74</sup> The magazine even transported members of the stage cast to the Hill's former residence in Philadelphia and photographed them enacting scenes from the play outside the house.<sup>75</sup> Considering that the audience may well have been unable to differentiate between a piece of fiction loosely based on true events and the actual subjects after which the work was modeled, the lower courts found that LIFE had indeed cast the Hill family in a false light.<sup>76</sup>

But, although the article and photographs framed the Hills in a false light,<sup>77</sup> and even though the lower courts found in favor of the aggrieved family—setting aside the a priori question of whether they properly differentiated “between the public interest and what interests the public”<sup>78</sup>—the Court ultimately found for the defendant.<sup>79</sup> The Court issued its ruling on the ground that the trial judge's instructions to the jury failed to make clear that it was incumbent upon the Hills to prove that LIFE had actual knowledge that it was spreading falsehoods or, in the alternative, had acted with reckless disregard for the truth.<sup>80</sup>

Borrowing from its landmark defamation ruling in *New York Times Co. v. Sullivan*,<sup>81</sup> the Court held that “actual malice”<sup>82</sup> was the appropriate standard for false light since “sanctions against either innocent or negligent misstatement would present a grave hazard

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73. *Id.*

74. *Id.* at 377.

75. *Id.*

76. *Id.* at 379.

77. The public may well have come to believe that the family actually suffered through the fictional events dreamt up by Hayes—a definite falsehood.

78. Sunstein, *supra* note 46.

79. *Hill*, 385 U.S. at 398. It should be noted, however, that the Supreme Court's preliminary vote favored the plaintiff. See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 240–303 (1985).

80. *Hill*, 385 U.S. at 394–97.

81. 376 U.S. 254 (1964).

82. The court required a finding that the defendant acted “with knowledge that [his statement] was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

of discouraging the press.”<sup>83</sup> This, in turn, would jeopardize what the Court had described in *Sullivan* as this country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>84</sup>

By drawing on the holding in *Sullivan*, the Court carried over one of the major restrictions in defamation law to its treatment of false light. Consider the ALI’s initial proposal for false light: “One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy.”<sup>85</sup> This preliminary formulation clearly does not contemplate scienter as one of the requisite elements for a successful claim. But, due to the Court’s decision in *Hill*,<sup>86</sup> the prescription for false light formally adopted by the Second Restatement varies substantially in that it reflects the Court’s requirement that the plaintiff prove the defendant’s mental state:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) *the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.*<sup>87</sup>

Considering the Court’s analogous treatment of defamation and false light, along with Prosser’s own belief that the “interest protected [by false light] is clearly that of reputation, with the same overtones of mental distress as defamation,”<sup>88</sup> it is worthwhile to detour ever so briefly into the law of defamation, since the similarities between these two torts justify, in part, the prescribed abandonment of false light as a recognizable cause of action.

### C. *The Law of Defamation*

Generally speaking, a statement is defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or deal-

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83. *Hill*, 385 U.S. at 389.

84. *Sullivan*, 376 U.S. at 270.

85. RESTATEMENT (SECOND) OF TORTS § 652E (Tentative Draft No. 13, 1967).

86. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977) (“It is on the basis of *Time v. Hill* that Clause (b) has been set forth.”).

87. RESTATEMENT (SECOND) OF TORTS § 652E (1977) (emphasis added).

88. Prosser, *supra* note 3, at 400.

ing with him.”<sup>89</sup> Additionally, in order to be actionable, the statement must be 1) false; 2) unprivileged;<sup>90</sup> and 3) communicated to a third party.<sup>91</sup>

At first glance there is an obvious difference between defamation and false light in that the latter does not require a specific harm to reputation; other, more generalized harm—such as the “overtones of mental distress” mentioned by Prosser—are seemingly sufficient. Moreover, while a statement must be “defamatory” to be actionable under the former,<sup>92</sup> a statement that is “highly offensive” is adequate for the purpose of bringing a false light claim.<sup>93</sup> Additionally, while false light requires publicity, defamation requires only “publication”—a term of art that involves only the communication of the defamatory statement to a party other than the defamed.<sup>94</sup>

However, Prosser himself noted that there existed a great deal of overlap between the torts while also recognizing that false light was not, as initially envisioned, constrained to the same extent as defamation.<sup>95</sup> Interestingly enough, it was this general aspect of false light that worried Dean Prosser even as he laid out his new tort:

It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of

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89. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

90. There exist absolute and conditional privileges under which a party is not held liable for an action that would otherwise be defamatory. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 586 (1977) (“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding . . . if it has some relation to the proceeding.”).

91. *Id.* § 558.

92. *But see* *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976) (“States could base [defamation] awards on elements other than injury to reputation, [such as] personal humiliation and mental anguish and suffering.”) (internal quotation marks omitted).

93. *See supra* notes 85 and 87 and accompanying text.

94. *See* R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 154 (17th ed. 1977).

95. Prosser, *supra* note 3, at 400–01.

freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?<sup>96</sup>

Nevertheless, in spite of his own misgivings as to the creation that he was prepared to unleash upon the world—like Victor Frankenstein before him—the good dean was simply unable to stop himself.

#### *D. Of Which Privacy Shall We Speak?*

In constructing their tort, Warren and Brandeis explained that the “general object in view is to protect the privacy of private life.”<sup>97</sup> This is, however, but one among several forms of privacy of which the law is cognizant. As such, it is worth taking a moment to ensure that in going forward it is clear which particular interest is being discussed when this Note refers to “privacy.”

If one begins with Warren and Brandeis’s proposition that the right to privacy is an effort to protect the private lives of citizens—the right to be let alone—one is then obliged to ask: Against whom are we exercising this right? According to Professor Ken Gormley, this deceptively facile question is unanswerable by any unified theory as “legal privacy consists of four or five different species of legal rights which are quite distinct from each other and thus incapable of a single definition.”<sup>98</sup> Under the professor’s proposed system of classification, the following compose the spectrum of interests encompassed by privacy:

1. Tort privacy (Warren and Brandeis’s original privacy);
2. Fourth Amendment privacy (relating to warrantless governmental searches and seizures);
3. First Amendment privacy (a “quasi-constitutional” privacy which exists when one individual’s free speech collides with another individual’s freedom of thought and solitude);
4. Fundamental-decision privacy (involving fundamental personal decisions protected by the Due Process Clause of the Fourteenth Amendment, often necessary to clarify and “plug gaps” in the original social contract);
5. State constitutional privacy (a mish-mash of the four species, above, but premised upon distinct state constitutional guarantees often yielding distinct hybrids).<sup>99</sup>

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96. *Id.* at 401.

97. Warren & Brandeis, *supra* note 1, at 215.

98. Gormley, *supra* note 10, at 1339.

99. *Id.* at 1340.

So, while each class of privacy interest outlined by Gormley in some way reflects the fundamental notion of the right to be let alone, this Note is concerned with false light as it relates to the first of these groups—“tort privacy.” However, while this answers the question at the most basic level, it is still unclear as to what exactly is meant by tort, or common law, privacy. The responses to this question are legion: The form of privacy that relates to false light has been described as “the individual control over the disclosure of confidential personal information in a more complex milieu of personal and social relationships;”<sup>100</sup> the protection of an individual’s “inviolate personality;”<sup>101</sup> “selective anonymity;”<sup>102</sup> or simply “the withholding or concealment of information.”<sup>103</sup>

To be certain, the purpose and scope of common law privacy admit of more than one definition and in the end privacy may be more of a gestalt or ad hoc concept<sup>104</sup>—one which judges and juries tentatively feel out on a case-by-case basis, using their “gut” as much as anything else. Unfortunately, any such attempt at a cohesive theory of privacy is well beyond the modest aims of this Note, and so it is sufficient for present purposes to say that 1) the exclusive focus of the remaining inquiry will center on common law privacy and; 2) within the realm of public interest, this form of privacy stands as a safeguard against the unwarranted intrusion of the many against the one.

## II.

This Part proceeds by laying out the current rationales in support of a false light tort and then presents the counterarguments advocating its abandonment. However, to better understand the school of thought defending false light, it makes sense to provide at the outset at least one example where false light has been extinguished as a cause of action. As such, this Part begins with the case that has served as the impetus for this Note.

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100. Bezanson, *supra* note 10, at 1135.

101. Warren & Brandeis, *supra* note 1, at 205.

102. Zimmerman, *supra* note 7, at 365. This is the idea “that individuals ought to have legal power to control dissemination of information about themselves when that information relate[s] to nonpublic aspects of their lives.” *Id.*

103. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393 (1978).

104. See Kalven, *supra* note 23, at 333 (arguing that the tort has “no legal profile”).

A. *“To Recognize or Not to Recognize—That is the Certified Question”*<sup>105</sup>

In *Jews for Jesus, Inc. v. Rapp*,<sup>106</sup> the Supreme Court of Florida declined to recognize the tort, “conclud[ing] that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment.”<sup>107</sup> The factual background of the case is as follows. Plaintiff Edith Rapp’s husband (Marty Rapp) had taken ill and was not expected to survive.<sup>108</sup> As a result, plaintiff’s stepson Bruce Rapp, the biological son of Marty Rapp, came to visit his ailing father fearing he would not have another chance to do so.<sup>109</sup> Bruce, an employee of Jews for Jesus, Inc., would later recount in the Jews for Jesus newsletter that during this visit his stepmother—a woman of the Jewish faith—made inquiries of her stepson regarding Jesus, asked God for forgiveness, and repeated with Bruce the sinner’s prayer.<sup>110</sup> This account was published on the internet and seen by at least one of plaintiff’s relatives.<sup>111</sup> Following the publication of the newsletter containing the story, Edith Rapp filed suit alleging that “Jews for Jesus falsely and without her permission stated that she had ‘joined Jews for Jesus, and/or [become] a believer in the tenets, the actions, and the philosophy of Jews for Jesus.’”<sup>112</sup>

The trial court dismissed all of Edith’s claims,<sup>113</sup> and the Fourth District of the Florida District Courts of Appeal affirmed, with one exception.<sup>114</sup> Edith Rapp claimed, inter alia, false light invasion of privacy, and the Fourth District, relying on the Restatement, “noted that the tort involved a ‘major misrepresentation’ of a person’s ‘character, history, activities or beliefs’ and that just as a misrepresented political party affiliation could be such an example, so too could misrepresentation of a person’s religious beliefs.”<sup>115</sup> Although the Fourth District was prepared to facially reject the tort, it was concerned that state precedent ran contrary to its preferred solution and, accordingly, certified to the Supreme Court of Florida

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105. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1103 (Fla. 2008).

106. *Id.*

107. *Id.* at 1100.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1101.

112. *Id.* (alteration in original).

113. *Id.*

114. *Id.* at 1101–02.

115. *Id.* at 1102. The Fourth District Court of Appeal quoted the RESTATEMENT (SECOND) OF TORTS § 625E in defining Rapp’s cause of action. *See id.*

the question of whether the state recognized false light invasion of privacy as a viable theory of recovery.<sup>116</sup>

After providing the reader with an abridged history of false light,<sup>117</sup> Justice Pariente explained that the court had reviewed its past treatment of false light and felt compelled to “conclude that the Court was simply repeating citations from academic treatises or law review articles about privacy torts in general or discussing an alternative tort in particular.”<sup>118</sup> In essence, the court recognized that “none of these cases actually involved a claim of false light.”<sup>119</sup> Realizing that the court had never directly addressed the desirability of adopting false light as part of Florida’s common law, Justice Pariente moved into a discussion of the policy concerns that spoke against acknowledging the tort. As an opening to this inquiry, she observed that

courts rejecting false light have expressed the following two primary concerns: (1) it is largely duplicative of defamation, both in the conduct alleged and the interests protected, and creates the potential for confusion because many of its parameters, in contrast to defamation, have yet to be defined; and (2) without many of the First Amendment protections attendant to defamation, it has the potential to chill speech without any appreciable benefit to society.<sup>120</sup>

After a general comparison of the elements and application of false light and defamation,<sup>121</sup> the court arrived at the heart of the first question under review: whether the nature of false light was sufficiently independent to merit recognition as a stand-alone tort.

Answering this question in the negative, the court first explained that the primary justification for false light is the supposed disparity in the nature of the rights protected under the law of defamation and false light<sup>122</sup>—the former protects against injuries to reputation while the latter, purportedly, guards against mental pain and the like. However, the court went on to declare that this “may be a distinction without a difference in practice because conduct that defames will often be highly offensive to a reasonable person, just as conduct that is highly offensive will often result in injury to

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116. *Id.*

117. *Id.* at 1102–03.

118. *Id.* at 1103.

119. *Id.*

120. *Id.* at 1105.

121. *Id.* at 1105–08.

122. *Id.* at 1108–09.

one's reputation."<sup>123</sup> As evidence for its own position, the court cited to the growing similarity in the actual treatment of the two torts within other jurisdictions.<sup>124</sup>

However, despite the practical homogeneity of false light invasion of privacy and defamation, Justice Pariente expressed grave concern over a significant difference between the two torts. Citing a case from the Ohio Supreme Court<sup>125</sup>—ironically one which recognized false light—Justice Pariente seemed willing to accept, for the sake of argument, that the interest protected by false light was “the *subjective* one of injury to [the] inner person” as compared to “the *objective* one of reputation” guarded by defamation.<sup>126</sup> Nonetheless, acceptance of the foregoing created an entirely new problem:

[T]he very fact that false light is defined in subjective terms is one of the main causes for concern because the type of conduct prohibited is difficult to define. Unlike defamation, which has a defined body of case law and applicable restrictions that objectively proscribe conduct with relative clarity and certainty, false light and its subjective standard create a moving target whose definition depends on the specific locale in which the conduct occurs or the particular sensitivities of the day.<sup>127</sup>

This in turn gave rise to fears regarding the constitutionality of such a cause of action since “utilizing a subjective standard that fails to draw reasonably clear lines between lawful and unlawful conduct may impermissibly restrict free speech under the First Amendment.”<sup>128</sup> In short, Justice Pariente feared that “the ‘highly offensive to a reasonable person’ standard runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear.”<sup>129</sup> Although the possibility of extending the restrictions placed on defamation to false light is mentioned in passing,<sup>130</sup> such action would lead us back to the first question confronted by the court: What useful purpose would false light serve if it were wholly duplicative of defamation? To this question the court answered: none.<sup>131</sup>

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123. *Id.* at 1109.

124. *Id.* at 1109–10.

125. *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.

126. *Rapp*, 997 So. 2d at 1109 (alteration in original) (quoting *Weinfeld*, 2007-Ohio-2451, at ¶ 47).

127. *Id.* at 1110 (internal quotation marks omitted).

128. *Id.* (citation and internal quotation marks omitted).

129. *Id.*

130. *Id.* at 1112.

131. *Id.* at 1112–14.

Having seen one example of the judicial abandonment of false light,<sup>132</sup> the stage is properly set to present, and rebut, the current arguments supporting false light invasion of privacy.

*B. There is No Alternative*

One of the favorite claims made by those who see a continued place for false light in the common law is that defamation is not a perfect cognate for the privacy tort in terms of the interest protected, and, as such, a particular class of harms may go unremedied in its absence.<sup>133</sup> The type of injury in question stems from the alleged damage wrought by “false statements that are nondisparaging but still highly offensive.”<sup>134</sup> As the argument goes, since defamation requires a statement that falsely vilifies the injured party, untrue statements that are “nondisparaging” but harmful nevertheless—because they manage to offend or in some other way distress the victim—are irremediable without a false light tort that is ostensibly tailor-made for just such an occasion. Unfortunately, what these authors have presented is a false choice and their claim simply does not hold up.

To begin with, this argument flies in the face of legal reality. Although the proponents of false light believe that defamation is insufficient, the Supreme Court disagreed with this position in *Time, Inc. v. Firestone*.<sup>135</sup> Discussing recovery for claims of defamation, the Court noted that “*States could base awards on elements other than injury to reputation, specifically . . . personal humiliation, and mental anguish and suffering a[re] examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.*”<sup>136</sup> A fair reading of the above passage indicates that defamation is, on a practical level, capable of doing the work of false light if, as the defenders of false light contend, the only major obstacle is defamation’s reliance on disparaging statements and its inability to compensate for subjective harms to the individual’s feelings. Moreover, it would appear as though the Supreme Court has

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132. See also *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 904 (Colo. 2002) (holding that “false light is too amorphous a tort for Colorado”).

133. See, e.g., Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885, 900 (1991); Jacqueline Hanson Dee, Comment, *The Absence of False Light from the Wisconsin Privacy Statute*, 66 MARQ. L. REV. 99, 120–21 (1982); Robin Baker Perkins, Note, *The Truth Behind False Light—A Recommendation for Texas’ Re-adoption of False Light Invasion of Privacy*, 34 TEX. TECH. L. REV. 1199, 1209–29 (2003).

134. Schwartz, *supra* note 133, at 892.

135. 424 U.S. 448 (1976).

136. *Id.* at 460 (internal quotation marks omitted and emphasis added).

made a self-fulfilling prophecy out of Prosser's concern in *Privacy* by agreeing, in *Zacchini v. Scripps-Howard Broad. Co.*,<sup>137</sup> that "[t]he interest protected in permitting recovery for placing the plaintiff in a false light is *clearly that of reputation, with the same overtones of mental distress as in defamation.*"<sup>138</sup> At this point it would be difficult to argue that false light is not, in terms of its general purpose, wholly interchangeable with defamation. Regardless of whether the former is actionable without disparagement or the latter is intended to protect reputation, the two serve a common and undifferentiated purpose.

However, assuming arguendo that without false light, courts "might well be inclined awkwardly to stretch the concepts of defamation in order to justify the granting of relief,"<sup>139</sup> adherents to this either-or dichotomy have yet to explain how, or why, the other privacy torts in conjunction with intentional infliction of emotional distress (IIED) are insufficient replacements. To demonstrate this point, this Note will examine a pair of cases generally trotted out by the champions of false light as exemplars of its continued relevancy.

#### 1. *Braun v. Flynt*

In *Braun v. Flynt*,<sup>140</sup> the magazine *Chic* published photos of the plaintiff, Jeannie Braun, in their "Chic Thrills" section.<sup>141</sup> At the time, Mrs. Braun was employed at an amusement park in Texas where she performed in an act billed as "Ralph, the Diving Pig."<sup>142</sup> In this particular spectacle, the plaintiff would tread water in a swimming pool into which Ralph would dive, having been lured by a bottle of milk wielded by the plaintiff.<sup>143</sup> An editor from *Chic*, having seen the show, contacted the amusement park's public relations director in order to secure permission to run photos of the plaintiff's performance after having explained that his was a "men's magazine containing men's fashion, travel and humor."<sup>144</sup> Following the photo's appearance in defendant's publication—juxtaposed

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137. 433 U.S. 562 (1977).

138. *Id.* at 573 (internal quotation marks omitted and emphasis added).

139. Schwartz, *supra* note 133, at 900.

140. 726 F.2d 245 (5th Cir. 1984).

141. *Id.* at 247.

142. *Id.*

143. *Id.*

144. *Id.*

with other, more explicit fare<sup>145</sup>—plaintiff sued for defamation and false light invasion of privacy.<sup>146</sup> At trial, the jury found

that a false impression as to Mrs. Braun's reputation, integrity or virtue had been created and that *Chic* knew or should have known that such a false impression was created; that *Chic* had acted willfully and with reckless disregard for Mrs. Braun's reputation by publishing her picture; [and] that *Chic* had published Mrs. Braun's picture in a manner highly offensive to a reasonable person.<sup>147</sup>

On appeal, the Fifth Circuit noted that there had been recovery for both defamation and false light “even though the two actions contain *identical* elements of damages.”<sup>148</sup> Cognizant that a plaintiff may only recover once where the cause of damage alleged is the same under multiple theories,<sup>149</sup> the court moved to disentangle the source of plaintiff's award. This, the court realized, would be difficult since “[a]lthough we recognize that the principal element of injury in a defamation action is impairment of reputation, while an invasion of privacy claim is founded on mental anguish . . . Mrs. Braun was entitled to recover actual damages for mental anguish under *both* causes of action.”<sup>150</sup> In the end, the court found that “it is, as a practical matter, *impossible to distinguish between damages Mrs. Braun suffered from defamation and from invasion of privacy.*”<sup>151</sup>

With the court's above findings in mind, one must ask: What, if anything, did false light add to this case? This Note asserts that the answer is: nothing whatsoever. This conclusion finds support in Professor J. Clark Kelso's authoritative survey of the approximately 650 cases ostensibly involving false light occurring between *Privacy's* publication in 1960 and 1992.<sup>152</sup> Based on the results of his research, Professor Kelso concluded that “there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law.”<sup>153</sup> However, in fairness, the above

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145. *Id.* at 248.

146. *Id.*

147. *Id.* at 248–49 (internal quotation marks omitted).

148. *Id.* at 250 (emphasis added).

149. *Id.*

150. *Id.* (emphasis added).

151. *Id.* at 251 (emphasis added).

152. See Kelso, *supra* note 7.

153. *Id.* at 785. Kelso goes on to opine that “false light is simply added on at the end of the complaint to give the appearance of greater weight and importance.” *Id.*; see also Schwartz, *supra* note 133, at 892 (noting that quite often “plaintiff's false light claim turns out to be little more than an administrative annoyance

case will first be examined in a world where false light no longer shines.

Assuming for the moment 1) the absence of false light; and 2) that defamation would be inapplicable to anything beyond harm to reputation (i.e., not actionable upon grounds of suffering, humiliation, or mental anguish), the plaintiff in *Braun* would be no worse off. To begin with, because defamation encompasses statements that are literally true but create a false and defamatory impression (defamation by implication),<sup>154</sup> it would be incorrect to argue that recovery for factually accurate representations that are contextually false is solely within the purview of false light. Therefore, the core of the plaintiff's theory—that publishing a photo of her performance in a “glossy, oversized, hard-core men's magazine”<sup>155</sup> implied that she was involved in pornography—would remain viable. Next, even if defamation was not viable as a means of recovery for plaintiff's psychological harm, there exist several alternatives.

The plaintiff is free to allege intentional infliction of emotional distress.<sup>156</sup> Nevertheless, advocates of false light are likely to view this option with some skepticism as the bar for IIED is quite lofty: “Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”<sup>157</sup> Additionally, it could well be argued that *Chic's* behavior, although reprehensible, would not rise to the level of “Outrageous!” but may certainly have qualified under false light's murky standard of “highly offensive to a reasonable person.”<sup>158</sup>

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in dealing with what is primarily and essentially a defamation action”); Zimmerman, *supra* note 7, at 366 (calling false light “a tool for discomfiting defendants”).

154. Defamation by implication arises, not from what is stated, but from what is implied when a defendant ‘(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.’

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007) (quoting DAN B. DOBBS, PROSSER & KEETON ON THE LAW OF TORTS § 116, at 117 (Supp. 1988)) (alteration in original).

155. *Braun*, 726 F.2d at 247.

156. “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

157. *Id.* at cmt. d.

158. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

However, an approach to measuring the value of torts that focuses on the results rather than the means misses the point entirely. The proper rubric is not whether a tort's general existence is justified because in its absence a plaintiff in a single instance would be unable to obtain relief under a particularized set of facts. Instead, it is whether an interest—in this case the victim's emotional interest in privacy—is protected by any tort whatsoever. In other words, the law should avoid the possibility of *damnum absque injuria* for an entire class of wrongs but need not guarantee recovery for every occurrence thereof; the issue of individual compensation is best left to judge and jury. Since even the proponents of false light must be satisfied by the fact that emotional and dignitary interests are afforded protection under privacy law, defamation, and IIED, despite the absence of false light, the legal community is left to wonder if, as Professor Kelso doubts, the tort adds anything of value whatsoever. Moreover, all is not lost for the plaintiff who must make do without false light under the facts of *Braun* since the current hypothetical is still framed by the either-or fallacy between false light and defamation—a fallacy that overlooks the availability of other privacy claims.

Plaintiffs in this parallel legal universe devoid of false light could still bring a privacy claim to protect their emotional well-being even if defamation were off-point and IIED's standard too high to satisfy. In the case of *Braun*, for instance, there is no reason why a claim of appropriation would be insufficient to recompense the victim for the harm to her privacy interest. As mentioned earlier, this branch of privacy law “consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness.”<sup>159</sup> And, from the facts outlined above, it is clear that defendant's magazine appropriated Mrs. Braun's image with the intent of satisfying its readership and promoting circulation—twin aims that serve a commercial end and therefore come squarely within the wheelhouse of appropriation.

Given that the tort appears to fit well with the facts of the case, it is entirely unclear why appropriation does not adequately serve Mrs. Braun's interest in privacy in lieu of false light. Granted, there are critics who might point to the limited nature of the tort as a remedy for pecuniary loss rather than noneconomic intrusion upon an individual's privacy.<sup>160</sup> Such complaints, however, overlook the fact that this cause of action “is not limited to commercial appropri-

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159. Prosser, *supra* note 3, at 401.

160. See *supra* notes 58–59 and accompanying text.

ation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one."<sup>161</sup>

In short, there is nothing that false light provided Mrs. Braun that could not have been accomplished through the use of defamation, intentional infliction of emotional distress, and/or one of the remaining privacy torts—in this case, appropriation. Having hopefully converted a few false light adherents through the preceding exploration of *Braun v. Flynt*, this Note now moves into its second case study, *Spahn v. Julian Messner, Inc.*,<sup>162</sup> to examine a unique and troubling aspect of false light, which serves to cast additional shadows on its already dim existence.

## 2. *Spahn v. Julian Messner, Inc.*

*The Warren Spahn Story*, written by Milton J. Shapiro, was an unauthorized biography of the left-handed Cy Young award winner and Baseball Hall of Fame inductee.<sup>163</sup> Spahn sued for invasion of privacy under New York law alleging that defendant, as publisher of the biography, circulated an account of his life that contained serious factual inaccuracies.<sup>164</sup> Following the trial, wherein plaintiff prevailed in obtaining both injunctive relief and damages under the statute,<sup>165</sup> the New York Court of Appeals affirmed<sup>166</sup> what commentators have described as a finding of false light invasion of privacy.<sup>167</sup> Yet, what makes this case different, and all the more

161. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

162. 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967) (requiring further consideration in light of *Time v. Hill*, 385 U.S. 374 (1967)).

163. *See Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 531 (1964), *aff'd*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

164. *Id.* New York Civil Rights Law codified invasion of privacy as follows:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . . .

N.Y. CIVIL RIGHTS LAW § 51 (1921).

165. *Spahn*, 250 N.Y.S.2d at 544.

166. *Spahn*, 221 N.E.2d at 546.

167. *See, e.g.*, Schwartz, *supra* note 133, at 893–94; Nathan E. Ray, Note, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 MINN. L. REV. 713, 716 (2000).

disquieting, is the nature of the falsities upon which plaintiff's recovery was grounded. To wit, the trial court found, *inter alia*, that [t]he book mistakenly states that Warren Spahn had been decorated with the Bronze Star. In truth, Spahn had not been the recipient of this award, customarily bestowed for outstanding valor in war. Yet the whole tenor of the description of Spahn's war experiences reflects this basic error. Plaintiff thus clearly established that the heroics attributed to him constituted a gross non-factual and *embarrassing* distortion as did the description of the circumstances surrounding his being wounded.<sup>168</sup>

What is notable about the type of falsehoods highlighted in the above passage is that they are, by most accounts, flattering. To have served in battle with the sort of bravery and distinction that merits formal recognition hardly seems like a slight in the traditional sense. In point of fact, this probably explains why Spahn chose not to allege the more established tort of defamation and why proponents of false light often fall back on this case when defending the tort.<sup>169</sup>

Instead, what is presented—according to those who see *Spahn* as justifying a role for false light—is a subspecies of “false statements that are nondisparaging but still highly offensive.”<sup>170</sup> However, unlike the variety of offensive and nondisparaging fabrications that turn on the negative connotations drawn therefrom, the agents of false light also believe that “[i]t is possible for a plaintiff to recover for a so-called ‘laudatory’ false light.”<sup>171</sup> According to one commentator who subscribes to this theory, recovery for harm in these instances is premised upon the notion that “[u]ndeserved praise might cause the same discomfort and embarrassment to a person with integrity as does an unmerited attack and could create an impression that such a person invited the unearned honors.”<sup>172</sup>

Taking into account the already tenuous standard under which relief is granted for false light,<sup>173</sup> the prospect of further loosening the tort's moorings to anything that resembles an objective stan-

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168. *Spahn*, 250 N.Y.S.2d at 538–39 (emphasis added).

169. *See supra* note 167 and accompanying text.

170. Schwartz, *supra* note 133, at 892.

171. Bryan R. Lasswell, Note, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 172 (1993).

172. Ray, *supra* note 167, at 715–16.

173. *See* *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1110 (Fla. 2008); *see also* Zimmerman, *supra* note 7, at 394 (“[F]alse light is relatively unencumbered by common law restrictions; the major limitations are the *rather vague* requirements of substantiality and offensiveness.”) (emphasis added).

dard seems to be patently incongruous with this nation's avowed dedication to upholding the right to free speech.<sup>174</sup> At its most basic, the problem with acknowledging laudatory false light is that "a plaintiff upset by a flattering untruth is in as good a position to sue as someone who complains of a false allegation of criminal conduct"<sup>175</sup>—a scenario wherein the incentives created are clearly misaligned with the basic notion that the law, whether primed for deterrence or retribution, must differentiate and make allowances for offenses that are inherently dissimilar.

So while the sort of acclamatory prevarications found in *Spahn* may be objectionable, to say that they cause "discomfort and embarrassment" is in no way equivalent to finding them highly offensive—a prerequisite of the Second Restatement of Torts to properly allege false light invasion of privacy.<sup>176</sup> Even Professor Schwartz, who lobbied in favor of false light as a limited cause of action, admitted that 1) "unless nondisparaging false statements actually rise to the level of highly offensive, the harm they bring about may not be substantial enough to justify all the costs involved in the recognition and administration of a false light tort,"<sup>177</sup> and 2) "[i]f defamation restrictions do make sense, the plaintiff should not be able to avoid them by presenting an alternative pleading."<sup>178</sup> In *Spahn*, both of these problems appeared front and center.

As hypothesized earlier, Spahn seems to have brought a privacy claim as the factual inaccuracies described by the court do not appear blatantly defamatory. Regardless, as with *Braun*, there is no reason to believe that false light is the only privacy tort capable of protecting Spahn's interest in preventing the spread of disinformation in regards to his personal life. In fact, despite attempts to cast this case as one supporting false light,<sup>179</sup> the truth is that while the trial court mentioned false light twice in its ruling,<sup>180</sup> the New York Court of Appeals *never once discussed the tort in its opinion*.<sup>181</sup> Instead, the latter court upheld the decision in Spahn's favor under the relevant state statutory provision, which appears on its face to be more akin to appropriation than false light as it specified recovery "where

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174. See, e.g., *Sullivan v. N.Y. Times Co.*, 376 U.S. 254, 270 (1964).

175. Zimmerman, *supra* note 7, at 394.

176. See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

177. Schwartz, *supra* note 133, at 896.

178. *Id.* at 889.

179. See sources cited *supra* note 167.

180. See *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 532, 543 (1964), *aff'd*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

181. See *Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967).

a person's 'name, portrait or picture is used within this state for advertising or for the purposes of trade' without that person's written consent."<sup>182</sup> As such, it could well be argued that Spahn's award was upheld on the basis of appropriation, not false light, which results in another situation wherein the tort looks as if it serves no discernible purpose.

All the same, having conceded that defamation is inapposite to cases of laudatory false light, and even assuming that neither intentional infliction of emotional distress nor any of the remaining privacy torts are sufficient, this Note suggests that there is an alternative source of relief.

### C. *Public Disclosure Estoppel*

In cases of nondisparaging false light, whether laudatory or not, an estoppel claim suffices to permit recovery under the privacy tort of disclosure when defamation, the remaining privacy claims, and IIED are inapplicable. This solution—substituting the tort of disclosure for false light—was toyed with but rapidly dismissed by Decker McLean, a professor of journalism, who wrote that absent false light, “[a]nother option for such plaintiffs would be to recast their claims as public disclosure privacy invasion claims. In such recasting they would have to assert that what was published was true, but was embarrassing, unconscionably published, and logically disconnected from any public matter.”<sup>183</sup> The only problem identified by the author is the need for plaintiffs “to assert that what was published was true”—a minor impediment, easily overcome by the following proposal.

As explained above, unlike false light invasion of privacy, the tort of disclosure concerns itself with the unlawful revelation of facts that are true, highly offensive, and of no genuine concern to the public.<sup>184</sup> Clearly, the tort was not meant to address fictional allegations concerning the victim's private life. However, by importing a specialized breed of estoppel from the law of copyright, it should be possible to bridge the gap between the two privacy torts leaving us with a world wherein false light is truly and utterly redundant.

According to *Nimmer on Copyright*, the seminal treatise on the law, there exists “a rule of estoppel whereby one who represents his work to be completely factual may not in a subsequent . . . action

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182. *Id.* at 544.

183. Decker McLean, *False Light Privacy*, 19 COMM. & L. 63, 70 n.27 (1997).

184. See also RESTATEMENT (SECOND) OF TORTS § 652D (1977).

prove that part of the work was fictional.”<sup>185</sup> Put another way, “[u]nder the doctrine of copyright estoppel, once a . . . work has been held out to the public as factual the author[ ] cannot then claim that the [work] is, in actuality, fiction.”<sup>186</sup> In pertinent part, this strain of estoppel doctrine, if applied to nondisparaging fabrications, prevents defendants from fictionalizing a more exciting or attractive reality concerning their subject in order to attract readership—and so reap the benefits—while, at the same time, disclaiming harm for having publicized their imagined narrative. Assuming then that state courts are willing to accept this novel adaptation of a doctrine that has already been widely adopted among federal courts,<sup>187</sup> there seems to be little in the way of genuine objection to the idea that the tort of disclosure is entirely suited to replacing false light.

For instance, beginning with the basic requirements of disclosure and false light, it is possible to see—aside from the former’s initial confinement to truthful matters—congruity with respect to the basic requirements. To start with, both torts require the defendant to have publicized the matter in question; merely communicating with someone other than the subject is insufficient and the account must reach the public.<sup>188</sup> Next, the matter given publicity must be of the sort that a reasonable person would find its widespread dissemination highly offensive.<sup>189</sup> Third, while disclosure only permits actions against matters that are “not of legitimate concern to the public,”<sup>190</sup> a similar condition has been read into false light requiring the fabrication to be both “material and substan-

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185. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[C], at 2-178.12 (2009).

186. *Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 28 (C.D. Cal. 1984).

187. See, e.g., *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 875 (11th Cir. 2005); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 453 (5th Cir. 2003); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960).

188. Compare RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining disclosure as “giv[ing] publicity to a matter concerning the private life of another . . .”), with RESTATEMENT (SECOND) OF TORTS § 652E (1977) (defining false light as “giv[ing] publicity to a matter concerning another that places the other before the public in a false light . . .”).

189. Compare RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“if the matter publicized is of a kind that would be highly offensive to a reasonable person”), with RESTATEMENT (SECOND) OF TORTS § 652E (1977) (“if the false light in which the other was placed would be highly offensive to a reasonable person”).

190. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

tial.”<sup>191</sup> In point of fact, disclosure may actually outperform false light in guarding an individual’s interest in privacy since, under the former, the matter disclosed need be neither material nor substantial as long as it is not a matter of justifiable public interest.<sup>192</sup> Additionally, the caveat that the matter need be of no legitimate public concern should, in theory, have little impact on disclosure’s applicability when considered alongside Professor Sunstein’s admonition that “there is an important difference . . . between the public interest and what interests the public.”<sup>193</sup> Nonetheless, there is at least one notable difference.

While the ALI has required that in order for a plaintiff to proceed under false light invasion of privacy the defendant must have acted either with knowledge of the truth or in reckless disregard thereof,<sup>194</sup> courts have not necessarily required the same of plaintiffs in order to recover under disclosure. In fact, there is case law supporting the position that merely negligent conduct is sufficient.<sup>195</sup> On the one hand, this would suggest that disclosure could be an even more powerful shield than false light for warding off unwarranted publicity—the assumption being that the need to show only negligence lessens the burden on defendants, which would lead to an increase in successful claims. On the other hand, there is the potential of increasing the tension between this tort and the bedrock principle of American constitutional law “that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’”<sup>196</sup> guaranteed to all citizens.

But, before free speech concerns make a short-lived affair out of this proposal, it must be remembered that the Supreme Court in *Time, Inc. v. Hill* imposed the “actual malice” standard on false light<sup>197</sup> as reflected in the ALI’s requirement that “the actor had

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191. *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967); see also *Rinsley v. Brandt*, 700 F.2d 1304, 1308 (10th Cir. 1983); RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

192. See *supra* Part I.B.2.

193. See Sunstein, *supra* note 46.

194. See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

195. See *Rinehart v. Toledo Blade Co.*, 487 N.E.2d 920, 923 (Ohio Ct. App. 1985) (holding that a disclosure action is sustainable without establishing recklessness on the part of the defendant).

196. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

197. *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967). The Court borrowed the requirement from its earlier defamation ruling in *New York Times Co., v. Sullivan*. See *Hill*, 385 U.S. at 387.

knowledge of or acted in reckless disregard as to the falsity of the publicized matter.”<sup>198</sup> There is, therefore, no reason why the actual malice standard could not likewise apply to the tort of disclosure should the concerns regarding its potential to chill free speech become manifest. Moreover, unlike false light invasion of privacy, carrying over this requirement from defamation to disclosure would not render the latter superfluous as the interests protected by the two torts in no way overlap. Disclosure guards against the emotional harm that attends the improper dissemination of embarrassing, private details,<sup>199</sup> whereas defamation safeguards an individual’s reputational interest against false and injurious statements.<sup>200</sup> Lastly, although critics may contend that the viability of this proposal depends on the plaintiff’s apparent willingness to allow the defendant to assert that the publicized fiction was true—a seemingly contradictory position for a party who is bringing a claim based on the fabrication of intimate details regarding their life—this objection ignores two basic facts.

The first is the nature and extent of the recovery available to a victim through a court of law. If a plaintiff’s ultimate goal is to avoid further public scrutiny, then he would be well-advised to stay as far away from the courthouse as is humanly possible. If, instead, the aggrieved party’s true goal is vindication before the masses, then he would do well to make his case directly to the people rather than relying on a piece of legal paper to do the work in his stead. The American judicial system has never been able, nor was it expressly intended, to overrule the fearsome and informal public jury, which weighs and measures a man’s guilt outside the courtroom. The examples are countless but one need only ask former NFL great Orenthal James Simpson if his triumph in criminal court did anything to alter public perception as to his culpability in the murder of his wife. Practically speaking, courts are ill-equipped to return the genie to the bottle once it has been set free, and the most a plaintiff can hope for is to prevent further dissemination of the falsehood through injunctive relief and monetary recovery for past harm.

The second fact overlooked by potential critics of this proposal is that the estoppel bars only the *defendant* from recanting his alleged story.<sup>201</sup> As currently formulated, there is nothing in copyright estoppel which would force the plaintiff into complicity with

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198. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

199. *See supra* Part I.B.2.

200. *See supra* Part I.C.

201. *See supra* notes 185–86 and accompanying text.

the defendant's fabrication since the doctrine prevents only "the author" or the "one who represents his work to be completely factual" from later claiming that the story was fictitious.<sup>202</sup> Therefore, if copyright estoppel was adopted in the context of privacy law without substantial revision, a plaintiff would still be able to deny the entirety of the defendant's alleged story while still forcing the defendant to litigate as though it were true for the purpose of assigning liability. However, even assuming the worst (i.e., that a plaintiff would have to remain passive in the face of the alleged fiction in order to obtain legal or equitable recovery in court), the plaintiff would not be formally estopped from turning around and pleading his case to the public. If such were the case, the a priori question that a potential plaintiff must ask of himself is what type of relief is most desired and which trier of fact, judicial or public, is best able to satisfy his needs.

The preceding arguments against false light invasion of privacy have largely focused on the practical reality that the tort is, by any of the measures discussed above, utterly dispensable. In contrast to this positivist line of reasoning, the final Part of this piece proposes a new normative rationale for extinguishing false light.

### III.

The case against false light invasion of privacy has thus far consisted of illustrations as to how the complementary nature of defamation, IIED, and the original privacy torts have left no independent, legally cognizable justification sufficient to merit the existence of a tort that is administratively taxing, constitutionally suspect, and devoid of real-world value. Ironically, the minnows seem to have swallowed the whale despite Dean Prosser's initial concern that the tort of false light would devour whole the law of public defamation.<sup>203</sup> In reality, false light has not turned out to be the leviathan of which Prosser foretold.<sup>204</sup> In addition to the damning evidence against the utilitarian worth of false light, there exists

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202. See NIMMER & NIMMER, *supra* note 185; see also *supra* notes 185–86 and accompanying text.

203. See Prosser, *supra* note 3, at 400–01; *supra* text accompanying notes 95–96.

204. A decade or more ago it was predicted by knowledgeable observers that invasion of privacy would play an ever-expanding role in tort law. . . . The expectation has not been fulfilled. Even in jurisdictions where the tort is recognized, actions for "false light" invasion of privacy have continued to play a secondary role to defamation.

ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 401 (1980).

a strong theoretical argument against its lingering survival. As such, the final Part of this paper will endeavor to explain how the world has turned and left false light in the dark—just where it was before appearing in Prosser’s imagination.

A. *Then . . .*

As originally conceived by Warren and Brandeis, the law of privacy was only one component of the “general right to the immunity of the person[ ]—the right to one’s personality.”<sup>205</sup> In turn, this basic right flowed from the common law’s ability to grow and change in accordance with an evolving society.<sup>206</sup> In particular, it was the drastic evolution of America’s sociopolitical landscape during the end of the nineteenth century<sup>207</sup> that prompted Warren and Brandeis to respond by drafting the model for a new area of American law, which they intended to “preserve a ‘civilized’ and ‘cultured’ society, particularly in an evolving . . . democracy that placed a premium on the individual.”<sup>208</sup> So motivated, *The Right to Privacy* was born. However, seven decades later, William Prosser’s effort has, in retrospect, failed to flourish, and the question of “why?” still remains.

The core of this failure is most readily perceived in light of one author’s insightful observation into the developmental history of the various and distinct forms of privacy. To wit, this commentator has remarked that

the most distinctive characteristic of privacy . . . is its heavy sensitivity to historical triggers. . . . [E]ach type of privacy . . . has been directly jolted into existence by transformations in American life and technology, which have created a societal mood powerful enough to incubate a new, legally protected right.<sup>209</sup>

Bearing the above in mind, the late 1800s—an era heavily marked by industrialization, technological innovation, yellow journalism, increasing immigration, and a population shifting from the outlying countryside to the new urban centers—was the perfect soil in which to plant the first seeds of common law privacy. In other words, it was the right tort at the right time. It reflected the fears of

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205. Warren & Brandeis, *supra* note 1, at 207.

206. *See id.* at 193.

207. This included “industrialization, the growth of mass urban areas, and the impersonalization of work and social institutions, including institutions of communication.” Bezanson, *supra* note 10, at 1137; *see also* Gormley, *supra* note 10, at 1350–53.

208. Gormley, *supra* note 10, at 1352.

209. *Id.* at 1439.

the day and filled a much-needed gap created when society's growth outran the common law's ability to keep pace. Unfortunately for Dean Prosser, while the sixties were a decade marked by significant change and innovation—the Vietnam War, Martin Luther King and the Civil Rights movement, Apollo 11, the assassination of J.F.K, and Woodstock, to name just a few—this country did not undergo the sort of fundamental societal transformation that resulted in the favorable climate for Warren and Brandeis's privacy. Take, for instance, the ease with which the authors of *The Right to Privacy* were able to identify and express the issues of their period and the attendant harm to which their tort was addressed.<sup>210</sup> By comparison, in the scant four pages that he dedicates to false light,<sup>211</sup> Prosser hardly seems sure of how to classify the nature of his tort or the new and distinct harm to be redressed, aside from likening its scope to that of defamation—a comparison that has ultimately led to significant uncertainty.

Regardless of whether the conditions in the sixties were, comparatively speaking, as poor as suggested for false light invasion of privacy, with five subsequent decades to gain a sure footing in the loam of America's common law one would assume that if Prosser's tort were ever to take off, it would have done so by now. Why then are courts and commentators today more likely to either weed out false light entirely or shape it into something more closely resembling defamation than they are to cultivate it? Although academics and courts have failed to settle upon an exact harm to be remedied by false light<sup>212</sup>—a fact readily conceded by even its most ardent advocates<sup>213</sup>—it is reasonable to imagine that Prosser had actually intended it to guard against injury that “affects how the individual views himself in the community, as with unwanted publicity placing him in a false light.”<sup>214</sup> Essentially, the tort may be said to guard against the cognitive dissonance that arises when a false projection of the individual clashes with his own self-image. With that basic explanation in mind, this Note now proceeds to discuss why the tort has failed to capture the support of courts and academics.

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210. See Warren & Brandeis, *supra* note 1, at 196; *supra* text accompanying note 18.

211. See Prosser, *supra* note 3, at 398–401.

212. See Zimmerman, *supra* note 7, at 371–72.

213. See Ray, *supra* note 167, at 728.

214. *Id.* at 743.

*B. . . . And Now*

It has been said that in olden times “privacy reflected the fact that personal identity developed in discrete institutions such as the extended family and the circle of friends and associates that are perhaps best captured in the term ‘local community.’”<sup>215</sup> Today, however, there has been a monumental shift away from reliance on kith and kin as the primary determinant of individual mores and self-identity. It is this change in the process of enculturation—the traditional notion that “the individual’s identity was generally secure in a relatively few stable and local relationships”<sup>216</sup>—which has wholly obviated the need for false light invasion of privacy. It is self-evident that nowadays “identity through association is more elusive and complex; it does not draw on a small number of stable institutions, but instead depends on many specialized and changing relationships.”<sup>217</sup> If this is true, it becomes practically impossible to deduce with any certainty the mental harm suffered by someone when it is not possible to define with any precision the social backdrop against which he has elected to identify himself. In other words, the type of harm anticipated by false light is no longer cognizable if, as a prerequisite, it is necessary to first firmly identify the relevant social environment within which the plaintiff has formed his sense of identity. Why is this step necessary though?

To begin with, false light is concerned with statements that “would be highly offensive to a reasonable person.”<sup>218</sup> Both of these elements—the offensiveness of the statement and the reasonableness of the person—are dependent upon the social context in which the plaintiff is found. This in turn requires agreement as to which community is most relevant to making this determination—a task made increasingly difficult by virtue of the fact that the “emerging functionality and multiplication of groups results in less dependence on the part of individuals on any specific group.”<sup>219</sup> Put differently, how do courts begin to establish a basis for determining whether the plaintiff has suffered an injury when it is uncertain as to how many groups the plaintiff belongs and what, if any, role a particular group has played in the development of his identity? And although some will inevitably point out that false light purports

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215. Bezanson, *supra* note 10, at 1139.

216. *Id.* at 1141.

217. *Id.*

218. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

219. Bezanson, *supra* note 10, at 1148 (quoting Ferdinand Schoeman, Privacy and Social Freedom 48–50 (Sept. 4, 1989) (unpublished manuscript, on file with the author)).

to encompass a set of subjective and internal interests distinct from an individual's objective and external reputation—defamation's territory—the former relies as much upon the outward community as does the latter. This is so because the harm, although personal, arises when “false light statements . . . impugn or confound the individual's identity in society, his sense of self within society.”<sup>220</sup>

Essentially, false light has lost its punch; it is not feasible to satisfy its already vague and amorphous “highly offensive to a reasonable person” standard because “as the community's role in shaping the individual and promoting survival and transmission of strategies for common life becomes distributed among more restrictive functional associations, more relationships will arise from which aspects of people's lives become irrelevant or at least less central.”<sup>221</sup> In short, without being able to fully weigh the impact of nondisparaging but supposedly offensive statements on an individual's emotional well-being—for lack of a sufficiently identifiable social setting against which to make this determination—it is impossible to say with any certainty that false light invasion of privacy in fact protects man's “spiritual nature . . . feelings . . . and intellect.”<sup>222</sup>

#### CONCLUSION

As an independent cause of action in today's common law, false light invasion of privacy is both a redundant and conceptually bankrupt plaything for overzealous plaintiffs. Taking into consideration the well-established law of public defamation, the more recent but widely accepted tort of privacy (as conceived by Samuel Warren and Lewis Brandeis), and the even younger tort of intentional infliction of emotional distress, there is little room in an overly crowded market for a tort that is unable to distinguish itself in any meaningful way from the competition. In addition, there is the constitutional issue of false light's potential to unnecessarily chill free speech. Lastly, false light has revealed itself to be without relevance in a world that has come to value disparate, transitory, and compartmentalized groups in place of more stable and holistic social enclaves. But for those who bemoan the end of this tort's fifty-year march into oblivion, it may well be time to cease raging against the dying of false light and to simply go quietly into that good night.

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<sup>220</sup>. Schwartz, *supra* note 133, at 897.

<sup>221</sup>. Bezanson, *supra* note 10, at 1150 (quoting Schoeman, *supra* note 219, at 51–52).

<sup>222</sup>. Warren & Brandeis, *supra* note 1, at 193.

