BANNING STATE RECOGNITION OF SAME-SEX RELATIONSHIPS: CONSTITUTIONAL IMPLICATIONS OF NEBRASKA’S INITIATIVE 416

Christopher Rizzo*

INTRODUCTION

Nebraska is not unique in having passed a ban on state recognition of some same-sex relationships—dozens of states have done so.¹ What is unprecedented is the breadth of

* The author is an attorney and Menapace Fellow at the Municipal Art Society in New York City; practice areas include environmental, land use and constitutional law as it relates to municipal governance. He is a graduate of Manhattan College, 1997, and of Pace University School of Law, 2001. The conclusions and opinions expressed in this article are exclusively those of the author and do not represent any official or unofficial position of the Municipal Art Society or any of its members.

¹ See Partners Task Force for Gay & Lesbian Couples, State Legislative Reactions to Suits for Same-Sex Marriage (April 2002) (listing Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington and West Virginia as states, in addition to Nebraska, that have passed anti-marriage laws intended to block in and out of state marriage licenses of same-sex couples), available at http://www.buddybuddy.com/t-line-2.html; ALA. CODE § 30-1-19 (2002); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. § 25-901 (2002); ARK. CODE ANN. § 9-11-109 (Michie 2002); CAL. FAM. CODE § 300 (West 2002); COLO. REV. STAT. § 14-2-104 (2002); FLA. STAT. ch. 741.212 (2002); GA. CODE ANN. § 19-3-31 (2002); HAW. REV. STAT. § 572-1 (2002); IDAHO CODE § 32-201 (Michie 2002); ILL.
Nebraska’s law and the wide margin, seventy percent, by which it was passed by voters in November 2000. The law, referred to as “Initiative 416,” is the most far-reaching ban on same-sex relationships in the United States, providing:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

This constitutional amendment, passed by popular initiative, reflects nationwide concern that recognition of marriage by persons of the same sex will be mandated in states where no explicit ban exists.
The concern stems from decisions by state courts in Alaska, Hawaii and Vermont holding that denying gays the right to marry, and the rights associated with marriage, is unlawful. Other states, like Nebraska, feared that these decisions would required to give effect to any public act . . . respecting a relationship between persons of the same sex that is treated as a marriage . . . .” See also 1 U.S.C. § 7 (defining marriage as a legal union between a man and a woman). For further discussion of DOMA’s effects upon state law and recognition of same-sex relationships, see supra Part I.B (exploring the provisions of DOMA as a response to potential state court recognition of same-sex marriage rights and setting forth provisions of the statute). See also Evelyn Nieves, Ballot Initiative That Would Thwart Gay Marriage is Embroiling California, N.Y. TIMES, Feb. 25, 2000, at A12 (discussing the controversial nature of California’s Knight Initiative, which asks California voters to define marriage in such a way that same-sex marriages from other states would not be recognized).


State legislatures in Hawaii and Vermont responded by offering varying levels of marriage-like rights to gays. See, e.g., HAW. REV. STAT. ANN. § 431:10-234 (addressing reciprocal beneficiaries’ rights in life insurance policies) (2000); HAW. REV. STAT. ANN. § 560:2-212 (2000) (regarding the right of election to surviving reciprocal beneficiaries); HAW. REV. STAT. ANN. § 572c (1999) (providing for “reciprocal beneficiary relationships”); VT. STAT. ANN. tit. 15, § 1201(2) (2002) (allowing same-sex couples to establish “civil union” relationships, which enables them to receive the benefits and protections and be subject to the responsibilities of married spouses); VT. STAT. ANN. tit. 15, § 1204 (2002) (describing the benefits, protections and responsibilities of parties to a civil union, which include the responsibility for support, application of laws relating to annulment, separation, divorce, child custody, property division and maintenance, group insurance for state employees, medical care, family leave benefits, workers’ compensation benefits, public assistance benefits and marital evidentiary privilege among others).
foster gay marriage in their states and responded with bans.\footnote{The federal government responded as well with DOMA. See H.R. REP. No. 104-664 (1996) (stating that the report is “a response to a very particular development in the State of Hawaii. . . . The prospect of permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.”). \textit{Id.; see also YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES} 229 (2002) (noting that in response to the Hawaii decision, thirty-five states passed laws in the five year period between 1996 and 2001 that “restrict marriage to opposite-sex couples by specifically defining marriage as a union between persons of the opposite sex, specifically prohibiting marriage between persons of the same sex in the state, and avoiding recognition of same-sex marriages lawfully performed in other states”). For further discussion of DOMA, see \textit{infra} Part I.B.} The underlying source of these concerns is the requirement under the Full Faith and Credit Clause of the United States Constitution that the states recognize legal decisions of other states.\footnote{U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause reads, “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” \textit{Id. See also MERIN, supra note 7, at 231. Merin notes: If same sex marriage is legalized in one or more states, the question will arise whether marriages performed there are to be recognized in other jurisdictions. It is debatable whether the U.S. Constitution will compel such recognition, because the Full Faith and Credit Clause has not commonly been relied upon by courts in determining whether they should recognize out-of-state marriages (e.g., common law marriages) that could not have been performed within the jurisdiction. \textit{Id.}} Thus, numerous states have passed laws prohibiting recognition of a same-sex marriage, even if valid when performed in another state.\footnote{See \textit{supra} note 1 (listing states that have passed DOMAs).} The ban enacted in Nebraska, however, goes beyond marriage and discusses other relationships like “domestic partnerships,” “civil unions” and “other” relationships.\footnote{NEB. CONSTITUTION art. 1, § 29.} States are permitted to regulate marriage, but the scope and content of Initiative 416 raises questions about whether the amendment is a
valid exercise of the state’s power to determine who can and cannot be married.\textsuperscript{11}

Litigation over the amendment’s constitutionality is almost certain.\textsuperscript{12} The real conflict, however, is taking place among American citizens as changing values and attitudes towards homosexuality are reflected in courts and legislatures across the country.\textsuperscript{13} As the Supreme Court of Hawaii aptly noted, “with all

\textsuperscript{11} Marriage is inarguably a domestic matter, and it is well established that “there is no federal law of domestic relations.” De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (holding that the court must look to state law in determining whether an illegitimate child is included within the term “children” as used in the federal Copyright Act); see also Ankenbrandt v. Richards, 504 U.S. 689 (1992) (finding no subject matter jurisdiction in federal courts for domestic relations cases); Ex parte Burrus, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the states, and not to the laws of the United States.”); Salisbury v. Lust, 501 F. Supp. 105, 107 (D. Nev. 1980) (“The power to regulate marriage is a sovereign function retained by the states; it has not been granted to the federal government.”); O’Neill v. Dent, 364 F. Supp. 565, 569 n.6 (E.D.N.Y 1973) (“[S]ubject to constitutional limitations, the legislatures of the States are authorized to regulate the qualifications of the contracting parties, the forms or procedures necessary to solemnize the marriage, the various duties and obligations which it creates, and the procedures for dissolution”).

\textsuperscript{12} See American Civil Liberties Union, Statewide Anti-Gay Marriage Laws (Jan. 31, 1998), at http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9211&c= . The ACLU maintains that anti-gay marriage laws violate various constitutional provisions, including full faith and credit and equal protection, as well as the right to interstate travel as established by the Supreme Court. \textit{Id.}

\textsuperscript{13} In fact, the number of states with nondiscrimination laws banning discrimination on the basis of sexual orientation increases nearly every year. For an updated, annual compilation and analysis of such legislation, see National Gay Lesbian and Lesbian Task Force, \textit{State Legislative Tracking and Reporting} (providing year-round legislative tracking and reporting as well as an annual analysis report for all state legislative activity pertaining to lesbian, gay, bi-sexual and trans-gendered issues), at http://www.ngltf.org/statelocal/tracking.htm (last visited Mar. 4, 2003).

For example, New Jersey’s non-discrimination statute protects gays from discrimination in employment and public accommodations:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges
due respect to the Virginia Courts of a bygone era, we do not believe that trial judges are the ultimate authorities on Divine Will, and . . . constitutional law may mandate, like it or not, that customs change with an evolving social order." 14 The court was referring to the opinion by the Virginia courts upholding the ban on mixed-race marriages, an opinion that was overturned by the United States Supreme Court in Loving v. Commonwealth of Virginia. 15 Similarly, state courts in Alaska, Hawaii and Vermont mandated equal rights for gays, even though the legislatures had not previously done so. 16

of any place of public accommodation . . . without discrimination because of . . . sexual orientation . . . . This opportunity is recognized as and declared to be a civil right.


Additionally, contentious public hearings held in Nebraska while Initiative 416 was under consideration demonstrate the deep divisions that exist over this issue. For a full account of these debates and the issues raised therein, see generally Initiative Measures 415 and 416: Hearing Before the Committee on Education, 96th Leg., 2d Sess. (2000) [hereinafter Hearing Before the Committee on Education]; Initiative Measures 415 and 416; Hearing Conducted by Nebraska Secretary of State, 96th Leg., 2d Sess. (Oct. 11, 12, 2000) [hereinafter Hearing Conducted by Nebraska Secretary of State].

14 See Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993) (stating that although the Virginia courts in the 1800s may have “declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the ‘custom’ of the state to recognize mixed marriages,” current courts must apply constitutional law recognizing changing customs and social standards) (quoting Loving v. Virginia, 388 U.S. 1, 3 (1967))). This article references Baehr v. Lewin in short citation form as Baehr I to distinguish it from Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), on remand from 910 P.2d 112 (Haw. 1996), aff’d, 950 P.2d 1234 (Haw. 1997), which involved the same group of plaintiffs.


16 See Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (finding that the “recognition of one’s choice of a life partner is a fundamental right and therefore the state must have a compelling interest to refuse the exercise of that right by same-sex partners”); Baker v. State, 744 A.2d 864 (Vt. 1999) (reversing the trial court’s judgment and retaining jurisdiction pending legislative action because the State was constitutionally required to extend to same-sex couples the common benefits
This article does not focus on the fundamental right to marry or the first sentence of the Nebraska law concerning same-sex marriage. Rather, the article explores the second sentence of Initiative 416, which goes beyond a mere ban on marriage and states that Nebraska shall not recognize “a civil union, domestic partnership, or other similar same-sex relationship.” Part I provides the history of state recognition of same-sex relationships and the controversy it has caused in many states. Part II and protections that flow from marriage under Vermont law); Baehr I, 852 P.2d at 68 (remanding the case for a hearing to determine whether Hawaii’s marriage license law furthered compelling state interests and was narrowly drawn to avoid unnecessarily violating plaintiffs’ equal protection rights).

17 This does not reflect the author’s conclusions about the constitutionality of the ban on gay marriage. This ban has several constitutional implications, including violation of the fundamental right to marry, due process, gender discrimination, equal protection and discrimination based on sexual orientation. Hawai’i’s court first considered the ban on gay marriage as a denial of the fundamental right to marry and gender discrimination. See generally Baehr I, 852 P.2d 44. Alaska considered claims of gender discrimination as well as denial of the right to choose a life partner. See Brause, 1998 WL 88743 at *5-6. Finally, Vermont’s Supreme Court directly addressed the issue of sexual orientation discrimination. See Baker, 744 A.2d at 886-87.

A thorough examination of these issues is beyond the scope of this article. For thoughtful discussions and analysis of these and other similarly compelling matters, see Nan D. Hunter, Millennium Speech the Sex Discrimination Argument In Gay Rights Cases, 9 J.L. & Pol’y 397 (2001) (arguing that laws that discriminate on the basis of sexual orientation in fact discriminate on the basis of sex and examining the impacts of feminist jurisprudence, as well as lesbian, gay, bisexual and transgender rights); Arthur S. Leonard, Ten Propositions About Legal Recognition of Same-Sex Partners, 30 CAP. U. L. REV. 343 (2002) (discussing the various ramifications of legal recognition of same-sex partners on equality for homosexuals, as well as achieving access to marriage and strategies to do so); John P. Safranek & Stephen J. Safranek, Can Homosexual Equal Protection Claims Withstand the Implications of Bowers v. Hardwick?, 50 CATH. U. L. REV.703 (2001) (discussing the difficulty for a homosexual to bring a federal equal protection claim as long as Bowers v. Hardwick remains good law).

18 NEB. CONST. art. 1, § 29.

19 It should be noted that some suggest that same-sex unions may not necessarily reflect the participants’ sexual orientation, but rather the desire to take advantage of tenant or inheritance laws. See, e.g., HAW. REV. STAT.
considers the scope of the Nebraska amendment with its broad language, and the potential impact it may have beyond the context of gay marriage. Once the scope of the law is established, Part III considers equal protection concerns raised by the second sentence of Initiative 416, which bars recognition of non-marriage unions between same-sex partners but not opposite-sex partners. Given that state courts are generally required to recognize judicial decisions and contracts from other states, Section IV examines the Full Faith and Credit Clause of the United States Constitution and issues that the law will raise in this context.\textsuperscript{20} Section V considers whether Initiative 416 will impair contracts between same-sex partners, implicating the Contract Clause of the United States Constitution.\textsuperscript{21} Finally, Section VI concludes that the Initiative 416 does violate the Constitution in light of the Supreme Court’s decision in \textit{Romer v. Evans}.\textsuperscript{22}

\textsuperscript{20} U.S. CONST. art. IV, § 1; \textit{see} Atherton v. Atherton, 181 U.S. 155, 160 (1901) (explaining that the purpose of the Full Faith and Credit clause is to “give the same conclusive effect to the judgments of all the States, so as to promote certainty and uniformity in the rule among them”); \textit{supra} note 8 (quoting the Full Faith and Credit Clause). For further explanation, see \textit{infra} Part IV.

\textsuperscript{21} U.S. CONST. art. I, § 10, cl. 1. The Contracts Clause reads, “No State shall . . . pass any . . . law impairing the obligation of contracts . . . .” \textit{Id.}; \textit{see also} GERALD GUNTHE R & KATHLEEN M. SULLIVAN, \textit{CONSTITUTIONAL LAW} 506 (13th ed. 1997) (explaining the main purpose of the “contracts clause was to restrain state laws affecting private contracts,” especially as they related to debtor relief laws). For further explanation, see \textit{infra} Part V.

\textsuperscript{22} 517 U.S. 620 (1996). In \textit{Romer}, homosexuals and municipalities challenged the validity and enforcement of Amendment 2 to the Colorado
I. THE SAME-SEX MARRIAGE CONTROVERSY

For many years marriage was universally considered a relationship between a man and a woman. Same-sex couples that challenged state laws that denied them the right to marry invariably lost. For example in 1974 in Singer v. Hara, the Supreme Court of Washington found that the state’s law clearly defined marriage as between a man and a woman. The court first noted that states are given the exclusive power to regulate marriage and determine which persons are eligible to be married. Accordingly, in Singer, the legal challenge to Washington’s law ended with the judicial determination that the state had exercised this authority and defined marriage as

Constitution which precludes all legislative, executive or judicial action at the state or local level designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Id. at 624. The Court held that Amendment 2 violated the Equal Protection Clause and “classified homosexuals . . . [so] to make them unequal to everyone else” and strangers to the laws of Colorado. Id. at 635.

23 See Laurence Drew Borten, Sex, Procreation, and the State Interest in Marriage, 102 COLUM. L. REV. 1089 (2002) (stating that marriage revolves around sexual intercourse and has always been the legal union of a man and woman); Lynne Marie Kohm & Mark A. Yarhouse, Fairness, Accuracy and Honesty in Discussing Homosexuality and Marriage, 14 REGENT U. L. REV. 249 (2001) (stating that marriage has always been a fundamental constitutional right but that there are “minimum requirements to marry [which] include: the parties being of minimum age, one at a time, unrelated by blood or marriage, and of different sexes”).

24 See Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the Washington marriage statute prohibits same-sex marriages and does not violate the equal rights amendment to the Washington State Constitution); see also Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (holding that there is no constitutional protection of the right of marriage between persons of the same sex, and that two women cannot enter into a marriage).

25 Singer, 522 P.2d at 1189. Specifically, the court noted that, despite a 1970 amendment that replaced “male” and “female” with “persons,” the legislature still intended not to authorize same-sex marriage, as was evident in the use of “male” and “female” on the affidavit for issuance of a marriage license. Id.

26 Id. at 1197.
between a man and a woman. Specifically, the court noted that
the law made reference to ‘‘the male’ and ‘the female’ which
clearly dispel[led] any suggestion that the legislature intended to
authorize same-sex marriages.’’

A. State Responses

The first changes came when state courts in Hawaii and
Alaska interpreted their state constitutions to guarantee gays the
right to marry. In Baehr v. Lewin, the Supreme Court of
Hawaii found that denying gays the right to marry was gender
discrimination. The court applied ‘strict scrutiny’ to what it
called a sex-based classification. The state was ordered to
demonstrate that the law ‘‘further[ed] compelling state interests
and [was] narrowly drawn to avoid unnecessary abridgement of
constitutional rights.’’ Later, when the state’s response to the
court order was considered in Baehr v. Miike, the court found
that the state had failed to show a compelling reason for denying
gays this right. Faced with the prospect that the state’s court

---

27 Id. (‘‘[W]e are unable to say that there is not a rational basis upon
which the state may limit the protection of its marriage laws to the legal union
of one man and one woman.’’).

28 Id. at 1189. The court also rejected a challenge based upon gender
discrimination, as plaintiffs claimed that the Washington marriage statutes
violated their equal rights under the Washington State Constitution because
allowing a man to marry a woman but not another man is a classification made
based upon sex. Id. at 1191-92. The court pointed out, however, that same-sex
marriage licenses are denied equally to both male and female pairs, and
therefore the marriage statutes do not violate equal rights. Id.

29 See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that Hawaii’s
Constitution restricting marriage to male and female is sex-based
Super. Ct. Feb. 27, 1998) (holding that the marriage code in Alaska’s
Constitution is also sex-based discrimination).

30 Baehr I, 852 P.2d at 44.

31 Id. at 67.

32 Id. at 68.

on remand from 910 P.2d 112 (Haw. 1996), aff’d, 950 P.2d 1234 (Haw.
1997). The court declared that sex based discrimination invoked strict
would require gay marriage in the state, Hawaiians amended their constitution to read that “the legislature shall have the power to reserve marriage to opposite-sex couples.” Unlike Nebraska’s Initiative 416, however, Hawaii’s amendment does not address non-marital same-sex relationships like “domestic partnerships.” Hawaii’s law is also limited to public recognition of marriage rights, stating that private solemnization is not unlawful.

To remedy some of the inequities acknowledged by the court,

scrutiny, and thus the state bore the burden of showing that it had a compelling interest and narrowly tailored means for achieving that interest. Id. at *19. The state failed to overcome its presumption that the restriction was unconstitutional because it failed to present sufficient evidence that the optimal development of children is adversely affected when same-sex couples raise children. Id. at *21. Further, the state failed to show that allowing same-sex marriage would negatively affect public policy, assure that Hawaii marriages are recognized in other states, or any other important state interest. Id. at *22.

34 HAW. CONST. art. 1, § 23. See David Orgon Coolidge, The Hawaii Marriage Amendment: Its Origins, Meaning and Fate, 22 U. HAW. L. REV. 19, 26-27 (2000) (noting that the “Marriage Amendment” was a direct response by opponents of the Baehr I decision seeking to prevent the inevitable ability of same-sex couples to obtain marriage licenses in the state).

35 The significance of this legislative approach is illustrated by comparing the text of Hawaii’s amendment to Nebraska’s. Hawaii’s legislature focused only on marriage and used terminology making the act of marriage one that is “reserved” for opposite sex couples, and there is no mention of same-sex couples. See HAW. CONST. art. I, § 23. Hawaii’s Constitution states simply, “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.” Id. (emphasis added). Instead of reserving the right for some, the Nebraska legislature framed the issue as a restriction against the behavior of same-sex couples. See NEB. CONST. art. I, § 29. It states, “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” Id. (emphasis added).

36 See HAW. REV. STAT. § 572-1.6 (2002). The statute states, “Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens or obligations of marriage under the laws of Hawaii.” Id.
Hawaii’s legislature quickly moved to provide same-sex couples with some rights traditionally reserved to married couples. For example, same-sex partners in Hawaii can now register to become “reciprocal beneficiaries.” Parties to these agreements need not be gay, simply of the same-sex and willing to prepare a notarized declaration of their relationship. Some of the rights extended include the right of election for surviving spouses and reciprocal beneficiaries, the right to life insurance for a partner and hospital visitation rights.

37 See, e.g., Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993) (noting that on its face the statute “denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the State’s regulation of access to the status of married persons, on the basis of the applicants’ sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws.”).

38 See HAW. REV. STAT. § 572C-5 (2002). The statute states that “[t]wo persons . . . may enter into a reciprocal beneficiary relationship and register their relationship as reciprocal beneficiaries by filing a signed notarized declaration of reciprocal beneficiary relationship with the director.” Id.

39 See id.


The right of election may be exercised only by a surviving spouse or reciprocal beneficiary who is living when the petition for the elective share is filed in the court under section 560:2-211(a). If the election is not exercised by the surviving spouse or reciprocal beneficiary personally, it may be exercised on the surviving spouse’s or reciprocal beneficiary’s behalf by the spouse’s or reciprocal beneficiary’s conservator, guardian, or agent under the authority of a power of attorney.

Id. (emphasis added).


Every life insurance policy made payable to or for the benefit of the spouse or the reciprocal beneficiary of the insured, and every life insurance policy assigned, transferred, or in any way made payable to a spouse or reciprocal beneficiary, or to a trustee for the benefit of a spouse or a reciprocal beneficiary, regardless of how the assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse or reciprocal beneficiary.

Id.

42 HAW. REV. STAT. § 323-2 (2002). The statute states that a “reciprocal
State courts in Alaska also addressed this issue and found denying gays and lesbians the right to marry unconstitutional under state law.\(^{43}\) The court first considered the right to privacy and the right to "choice of life partner."\(^{44}\) Although marriage to a partner of the same-sex is not a fundamental right in Alaska, because no such right is rooted in tradition, the court found that the right to choose a life partner is.\(^{45}\) Denial of this right merited beneficiary, as defined in chapter 572C, of a patient shall have the same rights as a spouse with respect to visitation and making health care decisions for the patient.” Id.

\(^{43}\) See Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). Plaintiffs, two men, sought and were denied a marriage license by the State of Alaska. Id. at *1. Thereafter, they filed a complaint seeking a declaration that the prohibition of same-gender marriage violated the Alaska Constitution. Id. Specifically, the plaintiffs sought a ruling on the level of scrutiny to be applied in review of the Marriage Code. Id. In finding that the choice of a life partner implicates constitutional provisions, namely the right to privacy and equal protection, the parties were ordered to determine whether a compelling state interest could be shown for the ban on same-sex marriage. Id. at *6. In 2001, the Alaska Supreme Court heard from the same plaintiffs on the matter of whether a same-sex couple precluded from marrying may be denied benefits that are legally available only to married people. See Brause v. State of Alaska, Dep’t of Health & Human Services, 21 P.3d 357 (Alaska 2001). The court affirmed dismissal of the claim on the grounds that no actual controversy was ripe for adjudication. Id. The standard for determining ripeness, as articulated by the Alaska Supreme Court, depended on “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.” Id. at 359 (quoting Lake Carriers’ Ass’n v. MacMullan, 406 U.S. 498, 506 (1972)). According to the court, the plaintiffs did not allege that they ever had or would be deprived rights available exclusively to married persons and “to the extent that the need to decide is a function of the probability that they will suffer an anticipated injury, [plaintiffs] failed to demonstrate such a need.” Id. at 360.

\(^{44}\) Brause, 1998 WL 88743, at *1. The plaintiffs claimed that the right of privacy encompassed the right to choose one’s life partner as an important and personal choice, necessitating a compelling interest by the State to justify interference. Id.

\(^{45}\) Id. at *4. The court recognized that marriage between a man and woman is a deeply rooted tradition and, therefore, a fundamental right. Id. (citing Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965)). Yet the question invoked here—“whether the personal decision [to] choose a mate of the same gender will be recognized as the same
strict scrutiny, and the court ordered the state to demonstrate a compelling interest. In fact, it criticized the Hawaiian court’s historical approach to determining if gay marriage was a fundamental right, stating: “It is self-evident that same-sex marriage is not ‘accepted’ or ‘rooted in the traditions and collective conscience’ of the people. Were this not the case [the plaintiffs] would not have had to file complaints seeking precisely this right.” Rather, the relevant question was whether the choice of a “life partner” was rooted in tradition. The court found that it clearly was.

Like the court in Hawaii, Alaska’s court also found that the ban on same-sex relationships was gender discrimination, saying, “Sex-based classification can hardly be more obvious.” The Alaskan constitution contains a strongly worded anti-discrimination clause that states, “Civil Rights: no person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin.” As in Hawaii, strict

fundamental right”—is decided by answering whether the choice, as opposed to the existence of same-sex marriage, is within the realm of the fundamental right of privacy. Id.

46 Id. at *6.
47 Id. at *4. The court referred to Baehr v. Lewin, and concluded that “the Hawaii court could reach such a conclusion because of the question it chose to ask”—whether same-sex marriage is a deeply rooted tradition. Id.; see also Baehr I, 852 P.2d 44 (Haw. 1993).
49 Id. The court found that freedom to choose a life partner is a fundamental right subject to denial only if the state had a compelling interest. Id. at *1. Government intrusion into the choice of a life partner “encroach[ed] on the intimate personal decisions of the individual,” and the choice can include persons of the opposite or of the same sex. Id. at *5. The court noted that because the right to marry and raise a traditional family is constitutionally protected, the right to “choose one’s life partner and have a recognized non-traditional family” should also be protected. Id. at *6.

50 Id. See also Baehr I, 852 P.2d at 562-79 (finding that the Hawaii statute limiting marriage certificates to male-female couples was a clear showing of discrimination based on sex, implicating the Equal Protection Clause of the Hawaii Constitution).
51 Alaska Const. art. 1, § 3.
scrutiny was applied. Ultimately, however, the litigation ended by a constitutional amendment defining marriage to exist “only between one man and one woman.”

Advocates of same-sex marriage had their most significant legal victory in Vermont. Vermont’s constitution contains a unique “Common Benefits Clause,” stating “that government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community and not for the

---

52 See Baehr I, 852 P.2d at 571 (stating that whenever denial of equal protection of laws is alleged, a strict scrutiny standard should be applied to determine whether there is a compelling state interest and whether the statute in question is narrowly drawn to avoid unnecessarily violating a plaintiff’s equal protection under the law); see also Brause, 1998 WL 88743 at *6 (holding that the strict scrutiny test is applicable to review a statute when it denies the fundamental right to choose one’s life partner).

53 See ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”). This section took effect on January 3, 1999, and the amendment is the result of a referendum voted on by the Alaska electorate in November 1998, shortly after Brause was decided. Id. See also Mark Strasser, From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda, 36 HOUS. L. REV. 1193, 1194 (1999). The referendum reportedly passed by a 2 to 1 majority. Id. at 1247 n.373. The amendment forms a strong barrier to same-sex marriages being allowed in Alaska because now the power to allow such unions no longer exists in the legislator but instead the ban is embedded in the State’s constitution. Id. at 1247-49. The Alaska Supreme Court acknowledged the amendment by declaring the relevant counts of an appeal of a same-sex couple’s denial of a marriage licenses to be “moot” in light of the amendment. See Brause v. State Dep’t of Health & Soc. Servs., 21 P.3d 357, 358 (Alaska 2001).

54 See Baker v. State, 744 A.2d 864 (Vt. 1999). Same-sex couples brought an action against the State of Vermont seeking a declaratory judgment that a refusal to issue them marriage licenses violated the state’s marriage statutes and Constitution. Id. The court held that the exclusion of same-sex couples from the benefits and protections granted under the state marriage law violated the common benefits clause of the State Constitution. Id. The significance of this legal battle was noted by the National Gay and Lesbian Task Force—Policy Institute director Paula Ettelbrick stated in a press release that “the decision is a significant step forward for our community.” See National Gay & Lesbian Task Force, Vermont Begins to Pave the Way for Fairness for Same-Sex Couples (Dec. 20, 1999), at http://www.ngltf.org/news/release.cfm?releaseID=254.
particular emolument or advantage of any single person, family or set of persons, who are of party only of the community.” 55 In Baker v. Vermont, the Supreme Court of Vermont directly addressed the issue of sexual orientation based discrimination under this Common Benefits Clause, rather than considering the issue of gender discrimination. 56 The decision held that barring gay marriage, or at least the rights associated with marriage, was unconstitutional. 57 Following this decision, and unlike in Hawaii and Alaska, Vermont’s legislators did not undertake complicated

55 See VT. CONST. art. 7, chap. I; see also Baker, 744 A.2d at 867. The plaintiffs argued that:

In denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.

Id. at 870. In addition, the plaintiffs contested the trial court’s holding that the statute “served the State’s interest in promoting the ‘link between procreation and child rearing.’” Id. In support of this argument the plaintiffs asserted that a large number of married couples chose to remain childless, while a growing number of same-sex couples had children. Id. In essence, they demonstrated the paradox in “recognize[ing] the rights of same-sex partners as parents, yet deny[ing] them—and their children—the [rights of] spouses.” Id.

56 See Baker, 744 A.2d at 880. The court held that the statute did not discriminate on the basis of gender because “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex.” Id. But see Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (reversing a trial court decision barring same-sex marriages and remanding for further proceedings to determine whether the statute discriminated on the basis of gender).

57 See Baker, 744 A.2d at 884.

The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority . . . . Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law . . . the exclusion falls substantially short of this standard.

Id.
NEBRASKA'S INITIATIVE 416

constitutional amendments to bar legal recognition of same-sex relationships and marriages.\footnote{For a discussion of the constitutional amendments that followed judicial decisions in Hawaii and Alaska, see supra notes 36-42, 53 and accompanying text.} Rather, Vermont opted to provide gays with an alternative to marriage: “civil unions.”\footnote{VT. STAT. ANN. tit. 15, § 1202 (1999). Specifically, the statute provides that for a valid civil union to be established, the parties must “(1) [n]ot be party to another civil union or a marriage; (2) [b]e of the same sex and therefore excluded from the marriage laws of this state; [and] (3) [m]eet the criteria and obligations set forth in 18 V.S.A. chapter 106.” Id. A full discussion of Vermont’s civil union statute is beyond the scope of this article, although it has been the subject of substantial writing, research and analysis, both in the popular media and in academic journals. For further analysis, see Tonja Jacobi, Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary’s Role, 26 VT. L. REV. 381 (2002) (examining the judiciary’s role in deferring to the legislature in determining social policy); Jill Jourdan, The Effects of Civil Unions on Vermont Children, VT. B.J., March 28, 2002, at 32 (discussing the benefits that children of same-sex couples receive as a result of Vermont’s civil union legislation); Mary LaFrance, Defining Marriage: What Ballot Question 2 Doesn’t Do, NEV. LAW., Oct. 10, 2002, at 15 (describing how the Vermont Assembly addressed the issue of religious freedom in adopting the Vermont civil union law); Arthur S. Leonard, Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes, 17 N.Y.L. SCH. J. HUM. RTS. 415, 556 (2000) (stating that Vermont’s legislation, by avoiding labeling the civil union a marriage, “has deprived couples who are civilly united from being able to argue that other states are required to recognize their status under the settled principles of comity that states follow in recognizing out-of-state marriages”); Mark Strasser, Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise and Constitutional Guarantees, 33 LOY. U. CHI. L.J. 597, 608 (2002) (analyzing the array of reactions to Vermont’s civil union statute and concluding that although Vermont’s approach currently strikes an appropriate balance, future amendments should remove the separate status and allow same-sex marriage). Various advocacy groups and organizations also provide updated legal information regarding laws that affect same-sex couples and the legal options available under civil union legislation. See generally Lambda Legal Defense & Education Fund, at http://www.lambdalegal.org (last visited Mar. 3, 2003); American Civil Liberties Union, at http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm; National Gay and Lesbian Task Force, at http://www.ngltf.org; Lesbian/Gay Law Notes, at http://www.qrd.org/qrd/www/legal/lgln (providing monthly legal updates on court rulings, legislation, and

The civil
union is available only to couples that are “of the same sex and [are] therefore excluded from the marriage laws of this state.”60 The law essentially grants to gay couples all the rights and responsibilities associated with marriage. These include divorce laws, estate laws, joint tax status, adoption rights and insurance rights.61

B. The Federal Response

The federal government has also enacted legislation barring recognition of same-sex relationships.62 The federal Defense of Marriage Act (DOMA) was passed in 1996, following the Supreme Court of Hawaii’s decision in *Baehr I*, and prior to the Vermont court’s decision in *Baker v. Vermont*.63 The law has two other legal developments affecting gays and lesbians) (last visited Mar. 3, 2003).

60 VT. STAT. ANN. tit. 23, § 1202 (2002).

61 See id. at § 1204. Section 1204 provides a “nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union.” Id. Some of the protections and responsibilities include domestic relation law, probate and adoption law and procedure, state employee insurance, and state and local tax laws. Id. For a full discussion of domestic partnership rules and arrangements as they pertain to conflict of law issues and recognition of such arrangement between and amongst the various states, see generally Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflicts of Laws Questions and Concerns*, 2001 B.Y.U. L. Rev. 1235 (2001) (addressing potential conflicts of laws recognizing domestic partnerships with issues of personal jurisdiction and choice of law).


63 See H.R. REP. NO. 104-664, at 5 (1996). Congress, responding directly to developments in Hawaii, stated:

It is, of course, no business of Congress how the Hawaiian Supreme Court interprets the Hawaiian Constitution, and the Committee expresses no opinion on the propriety of the ruling in *Baehr*. But the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers.

Id.
operative provisions. The first provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.64

The second provision states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies or of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.65

Relying on Singer v. Hara,66 Congress passed DOMA not only to “defend traditional marriage” at the federal level, but to allow states to avoid the “orchestrated legal assault being waged against” state control of the definition of marriage.67

---

for same-sex couples is profound—1,049 federal statutes deal with married couples, conferring hundreds of rights and responsibilities upon them.\textsuperscript{68} The federal law, however, is not nearly as broad as Nebraska’s Initiative 416. In fact, not only does the text explicitly mention only marriage, the legislative committee that drafted the law stated that “the committee would emphasize the narrowness of this provision.”\textsuperscript{69}

\textsuperscript{68} See Lambda Legal Defense and Education Fund, Denying Access to Marriage Harms the Family (noting that “[a]t the federal level, civil marriage is a gateway to more than 1049 protections, benefits, and obligations”), available at http://www.lambalegal.org/cgi-bin/iowa/documents/record?record =873 (last visited Mar. 3, 2003). The statute count was performed by the Lambda Legal Defense and Educational Fund and presented by Robert Pileggi, at a lecture at Columbia Law School on February 24, 2000.

\textsuperscript{69} See H.R. REP. NO. 104-664, at 21 (1996). Specifically, the Committee stated:

This section provides that ‘(n)o State . . . shall be required to give effect’ to same-sex ‘marriage’ licenses issued by another State. The Committee would emphasize the narrowness of this provision. Section 2 merely provides that, in the event Hawaii (or some other State) permits same-sex couples to ‘marry, other States will not be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize that ‘marriage,’ or any right or claim arising from it.

\textit{Id.}

This is not to suggest that, if challenged, the federal DOMA would necessarily pass constitutional muster. In fact, a number of commentators have suggested that it would not. See, e.g., Leonard G. Brown III, \textit{Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent}, 19 Campbell L. Rev. 159, 165 (1996) (discussing the debate over the constitutionality of DOMA); James M. Donovan, \textit{DOMA: An Unconstitutional Establishment of Fundamentalist Christianity}, 4 Mich. J. Gender \& L. 335, 338 (1997) (concluding that DOMA is unconstitutional because it has crossed the line between secular and religious and betrays the Establishment Clause of the Constitution); Scott Ruskay-Kidd, \textit{The Defense of Marriage Act and the Overextension of}
NEBRASKA'S INITIATIVE 416

Passage of the federal DOMA was followed by thirty-five “mini DOMAs” at the state level. Like the federal law, these state statutes ban recognition of gay marriage performed within or without the state. For example, Idaho passed a ban on recognition of gay marriages performed in other states. The ban was particularly meaningful because Idaho’s constitution contains

Congressional Authority, 97 COLUM. L. REV. 1435, 1450 (1997) (finding that Congress exceeded its authority in interpreting the Full Faith and Credit Clause); Evan Wolfson & Michael F. Melcher, Constitutional and Legal Defects in H.R. 3396 and S. 1740, the Proposed Federal Legislation on Marriage and the Constitution, Lambda Legal, Sept. 1, 1996 (finding that the proposed statutes are unconstitutional because the statutes attempt to circumvent the Full Faith and Credit Clause, abridge fundamental rights including the right to marry and the right to travel, and nationalize domestic law), available at http://www.lambdalegal.org/cgibin/iowa/documents/record?record=80#N_25.

70 See supra note 1 (listing states that have passed DOMAs); see also Bradley J. Betlach, The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination, 24 WM. MITCHELL L. REV. 407 (1998) (discussing the constitutionality of the Minnesota Defense of Marriage Act); Nancy J. Feather, Defense of Marriage Acts: An Analysis Under State Constitutional Law, 70 TEMP. L. REV. 1017 (1997) (arguing that state enacted defense of marriage acts may often be unconstitutional because state constitutions tend to offer greater protection than the Federal Constitution in the area of individual rights including privacy, equal rights and equal protection); Mark Strasser, When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood, 23 CARDOZO L. REV. 299, 305 (2001) (discussing state versions of the Defense of Marriage Act); Partners Task Force for Gay & Lesbian Couples, State Legislative Reactions to Suits for Same-Sex Marriage (April 2002) (noting which states have passed anti-marriage laws and detailing the years in which these laws were enacted), available at http://www.buddybuddy.com/toc.html.

71 See IDAHO CODE § 32-209 (Michie 2000).

All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

Id.
a common benefits clause similar to Vermont’s.\textsuperscript{72}

C. Nebraska Law and Same-Sex Partners

Nebraska sought to pass its own ban on gay marriage as well. For example, the attorney general of Nebraska was asked by the legislature to recommend the best method of defending the state’s “traditional” marriage against the court decision in Hawaii.\textsuperscript{73} This report suggested that the nation’s only unicameral legislature pass a ban on gay marriage to allow the federal DOMA to be effective in Nebraska.\textsuperscript{74} It stated that “[w]ithout affirmative legislation on the subject, Nebraska would most likely be subjected to litigation in an attempt to force recognition of same-sex marriage licenses issued in Hawaii.”\textsuperscript{75} Hawaii never did recognize same-sex marriage, and Nebraska never passed such a

\textsuperscript{72} See IDAHO CONST. art. 1, § 2. This clause, titled “Political power inherent in the people,” states:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

\textit{Id.} For a discussion of Vermont’s Common Benefits Clause, see \textit{supra} note 55.


New Legislation expressly prohibiting or excluding recognition of same-sex marriages under Nebraska law is the only certain way to avoid the possibility that Nebraska could be forced to recognize same-sex marriage licenses issued in Hawaii. Given the existing uncertainty under Nebraska law, additional legislation would be required to ensure that Nebraska would be protected under DOMA.

\textit{Id.}

\textsuperscript{74} \textit{Id.} See also Kim Robak, \textit{The Nebraska Unicameral and Its Lasting Benefits}, 76 NEB. L. REV. 791 (1997) (explaining Nebraska’s unicameral system, the way in which bills and legislation are passed by unicameral government and how it differs from other states’ bicameral legislatures).

ban. This prompted activists opposing same-sex marriage to pursue a popular initiative. The result is Initiative 416 and a near-certain legal challenge.

II. THE SCOPE OF INITIATIVE 416

The scope of the second sentence of Initiative 416 is not immediately clear on the face of the law. In addition to the first sentence’s ban on gay marriage, the second sentence encompasses “civil unions, domestic partnerships, and other similar same-sex relationships.” While Nebraska courts have yet to define these terms, they have plenty of guiding precedent from other jurisdictions to interpret the second sentence of Initiative 416 to mean something more than a marriage. Additionally, drafts of the law that were not submitted to the voters also demonstrate that the second sentence of the amendment targets other forms of same-sex relationships.

76 See Hearing Conducted by Nebraska Secretary of State, supra note 13, at 28-31 (Oct. 11, 2000). The first attempts to pass legislation banning gay marriage in Nebraska began in 1996 and were led by the Nebraska Family Council (“NFC”). Id. at 28. The group’s efforts, including general communication to legislators, a rally at the state Capitol and petition drives, were inspired by the recent introduction of L.B. 1260, proposed legislation that would have legalized same-sex marriage. Id. The NFC’s work did not have any effect that year because it was too late in the session to introduce new legislation. Id. The grass-roots foundation laid by these opponents of same-sex marriage, however, would inspire others to push for similar legislation a few years later. Id. at 28-30.

77 Id.


79 NEB. CONST. art. I, § 29.

80 For an examination of opinions from other jurisdictions, see infra Part II.C.

81 For an examination of the proposed drafts of Initiative 416, see infra Part II.B.
A. Relationships Covered by Initiative 416

Nebraska’s legislators clearly targeted civil unions created for same-sex partners in Vermont. The chief proponent of Initiative 416 stated at a public hearing:

Nebraska will be the first state though to address counterfeit or look-alike marriages if this amendment passes. Since Vermont sanctioned civil unions during the time that we were drafting this amendment, it would have been remiss not to have a stated public policy regarding backdoor attempts to define marriage by calling it another name.82

Supporters also attempted to address the meaning of “domestic partnership” and “other similar same-sex relationship” at these public hearings.83 As supporter Guyla Mills stated at a public hearing before Initiative 416 was passed:

Opponents of this initiative also state that this language is ambiguous and vague. The terms civil unions and domestic partnerships are terms that have been coined to grant homosexual partner relationships.84

Unfortunately, statements like this do not clarify the law’s true breadth, and reveal only that the drafters targeted more than just marriage.

Initiative 416 may also implicate privately created benefits. Hawaii’s gay marriage ban states, for example, that the law has

---

82 Hearing Conducted by Nebraska Secretary of State, supra note 13, at 31 (Oct. 11, 2000). Guyla Mills, a lobbyist for the Nonpartisan Family Coalition, was one of the sponsors of the Nebraska amendment defining marriage as a union between a man and a woman. Id. She also serves as Chairperson of the Defense of Marriage Amendment Committee, which was the group responsible for securing enough signatures to place this amendment on the ballot.

83 Id. at 32. Domestic partnerships have commonly been understood to mean either business relationships or cohabitation. Id. The proponents of this amendment contend that sanctioning same-sex unions will inevitably result in businesses being forced to provide state benefits because they too are domestic partnerships. Id.

84 Id.
no implications on private solemnization of marriage, while Nebraska’s does not.\(^\text{85}\) Many businesses offer insurance benefits and bereavement leave to employees with same-sex partners.\(^\text{86}\) To obtain these benefits, an employee may have to sign a “domestic partner affidavit” to establish that their partner is entitled to health benefits.\(^\text{87}\) Initiative 416 could be used by insurance companies to justify denying benefits to same-sex domestic partners in Nebraska.

Domestic partnerships are also occasionally established at the local or municipal level. For example, San Francisco and New York have created registries through which city employees can obtain health benefits for their partners.\(^\text{88}\) This may also be an issue for other governmental entities, like the University of Nebraska, which recently proposed to grant same-sex partner benefits.\(^\text{89}\) Because the University is a government entity,


\(^{86}\) See More Companies Offering Same-Sex Partner Benefits, N.Y. Times, Sept. 26, 2000, at C2 (finding more companies than ever before are offering health benefits to partners of gay and lesbian employees); Leigh Strope, More Same-Sex Benefits Offered, ASSOC. PRESS, Oct. 2, 2001 (reporting that the number of “Fortune 500” employers offering same-sex domestic partnership benefits rose from 61 in 1998 to 145 in 2001 and the larger and more prominent the corporation is, the more likely it is to offer such benefits), available at http://www.biz.yahoo.com/apf/011002/domestic_partners_1.html (last visited Nov. 20, 2002). See also Lambda Legal Defense and Education Fund, Partial Summary of Domestic Partner Benefits Listings, available at www.lambdalegal.org.

\(^{87}\) See Hearing Conducted by Nebraska Secretary of State, supra note 13, at 69 (Oct. 12, 2000).

\(^{88}\) See Slattery v. City of New York, 686 N.Y.S. 2d 683 (Sup. Ct. 1999) (upholding New York City’s jurisdiction for domestic partnership benefits and holding New York City domestic partnership law does not conflict with New York State law or public policy); Associated Press, Domestic-Partner Law is Upheld in Court, N.Y. Times, Nov. 7, 1999, at 40; see also Katherine Q. Seelye, Gay Policy in San Francisco Draws Penalty in House, N.Y. Times, July 30, 1998, at 18A (reporting that the San Francisco House of Representatives narrowly passed a measure that would deny Federal housing money to San Francisco because the city supports live-in homosexual partners).

\(^{89}\) See Ray Parker, University of Nebraska-Lincoln Approves Health
Initiative 416 could prohibit it from recognizing same-sex relationships.

In addition to programs and laws that specifically provide benefits to same-sex partners, some laws of general applicability have been interpreted to protect same-sex partners in Nebraska. For example the state law offering domestic violence protection and restraining orders is used to protect same-sex partners. It is as yet unclear whether a court order of protection pursuant to this law would be deemed governmental recognition of a “similar same sex relationship.” Judicial recognition and enforcement of contracts entered into by same-sex partners could also be banned under Initiative 416. Gay partners routinely create contracts to establish some of the rights and obligations obtained automatically upon marriage—416 could bar judicial enforcement of these contracts.

Benefits to Same-Sex Couples, at http://www.inform.umd.edu/EdRes/Topic/Diversity/Specific/Sexual_Orientation/Issues/Benefits/unl.html (last modified Apr. 18, 2000). The University of Nebraska proposed to grant same-sex partners of faculty members the same health and insurance benefits that spouses of heterosexual faculty members receive. Id.

90 See NEB. REV. STAT. § 42-928 (2000). The statute, titled “Protection order; restraining order; violation; arrest,” reads:

A peace officer shall with or without a warrant arrest a person if (1) the officer has probable cause to believe that the person has committed a violation of an order issued pursuant to section 42-924, a violation of section 42-925, a violation of an order excluding a person from certain premises issued pursuant to section 42-357, or a violation of a valid foreign protection order recognized pursuant to section 42-931 and (2) a petitioner under section 42-924 or 42-925, an applicant for an order excluding a person from certain premises issued pursuant to section 42-357, or a person protected under a valid foreign protection order recognized pursuant to section 42-931 provides the peace officer with a copy of a protection order or an order excluding a person from certain premises issued under such sections or the peace officer determines that such an order exists after communicating with the local law enforcement agency.

Id.

91 See JOHNETTE DUFF, SPOUSAL EQUIVALENT HANDBOOK (1992). This book advises couples of ways to use comprehensive agreements and contracts in lieu of a state-sanctioned marriage. See also Lambda Legal Defense and
Education Fund, Life Planning: Legal Documents for Lesbians and Gay Men (1998) [hereinafter Lambda Life Planning] (discussing documents gay and lesbian couples are advised to draft in order to counter state legal presumptions regarding property, health care, and family in the event of death or disability), available at http://lambdalegal.org/sections/library/lifeplanning.pdf. The handbook promotes documents including powers of attorney, wills, living wills, revocable trusts, parenting agreements, living together agreements and funeral arrangement agreements. Id. Wills and revocable trusts are both tools that allow a deceased party to pass property upon death and defeat state intestate succession laws that distribute property based on familial ties. While a will must be recorded in a public office, a revocable trust does not, making it a more attractive alternative to lesbian and gay couples because it bypasses probate administration. Id. at 7, 19. Living together agreements deal with the division of property during the partner’s lifetime as opposed to after death. These agreements address financial obligations regarding income and expenses, ownership of property and the distribution of property in the event the relationship ends. Id. at 9. A power of attorney authorizes a specified party to act on the principal’s behalf regarding personal, medical, business, or financial decisions. Id. at 6, 14. The power of attorney can be drafted to authorize such decisions for general activities, for specific transactions and time periods, or only upon the principal’s incapacity. Id. While living wills do not provide any benefits to partners, they do provide instructions to health care providers regarding life support systems in the event of a terminal illness or injury and an original copy of the document should be provided to a trusted companion. Id. at 6, 16. Additionally, a health care proxy allows the designation of a representative authorized to make health care decisions when the principal is unable to do so. See also Lambda Legal Defense and Education Fund, Advance Planning (Dec. 18, 2001), available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=935. Parenting agreements allow partners to nominate a guardian who is not a legally recognized parent of a child. Lambda Life Planning, supra, at 20. Although the contract itself is not enforceable in court because courts must use the best interest of the child standard in awarding custody of minor children, the document can be used as evidence of a relationship in the court proceeding. Id. at 7, 20.

While any legally competent adult can draft these documents, such documents are always open to attack on the grounds of incompetence, undue influence, fraud or duress. Id. at 3. Courts, however, have consistently held such contracts enforceable absent any of the above grounds. See, e.g., Posik v. Layton, 695 So.2d 759 (Fla. 1997) (finding that contracts between unmarried adults are enforceable unless based on sexual services, thereby validating a lesbian couple’s contract containing a provision requiring a monthly living expense payments if the contract was breached); Crooke v.
B. Proposed Drafts—Defining the Scope of 416

Read in sum, the various drafts and object clauses preceding the language actually adopted for Initiative 416 clearly demonstrate the intent to encompass more than marriage. One un-adopted draft states, “Only a marriage between one man and one woman shall be recognized in Nebraska.”92 Rejection of this version indicates that supporters of the law deemed it inadequate for their purposes.

The earlier drafts also suggest that the supporters’ true goal was not simply to ban gay marriage, but to deny any other method of conferring the rights and benefits of marriage upon same-sex partners. One version states “[t]he unique status, benefits, rights and protections of marriage as of January 1, 2000, shall be reserved solely to a man and a woman united in marriage.”93 This version implies that insurance and inheritance rights, for example, could not be conferred upon unmarried same-sex partners.

Finally, the “object clause” of the version submitted to voters fails to elucidate the intended scope.94 It states:

Gilden, 414 S.E.2d 645 (Ga.1992) (finding a contract addressing the division of lesbian couple’s property was valid, reversing the lower court’s decision to the contrary); Silver v. Starrett, 176 Misc. 2d 511 (N.Y. Sup. Ct. 1998) (finding that there was no duress in the execution of a separation agreement granting property rights between a lesbian couple, and, therefore, the agreement was enforceable).

If such contracts are now banned for gays, they remain a viable option for heterosexuals. This raises equal protection issues that will be addressed in this paper. See supra Part V.

92 See Nonpartisan Family Coalition, Draft Petitions to Add Language to Nebraska Constitution (April 19, 2000; May 24, 2000) [hereinafter Draft Petitions] (on file with author).

93 Draft Petitions (April 19, 2000), supra note 92, at 5.

94 Nebraska law requires that public initiative measures have an “object clause.” Neb. Rev. Stat. § 32-1401 (2002). The law directs the public to “print a concise statement in large type of the legal effect of the filing of the petition and the object sought to be secured by submitting the measure to the vote.” Id. (describing the form of petition required for initiating any law or any amendment to Nebraska’s Constitution). See also Alan E. Peterson, Term Limits: The Law Review Article, Not The Movie, 31 Creighton L. Rev. 767,
NEBRASKA’S INITIATIVE 416

The purpose of this proposed change in the Nebraska Constitution is to define clearly marriage as a union between one man and one woman, to provide that only marriage between one man and one woman, whether contracted in Nebraska or outside Nebraska, shall be recognized in Nebraska, and to declare that same-sex civil unions, domestic partnerships, or similar same-sex relationships are not valid or recognized in Nebraska.95

Because this clause merely restates the petition language, it does little to reveal the objective of the law. When read together with various proposed drafts, however, the object clause strongly suggests that the adopted version of 416 covers much more than marriage.

C. Guidance from Other Jurisdictions to Determine the Scope of Initiative 416

Nebraska’s courts have not addressed many of the definitional issues regarding the terms employed in Initiative 416. In fact, the only place in Nebraska law that currently includes any of these terms is business law, which uses the term “domestic partnership.”96 Others states and cities recognizing same-sex partnerships have faced court challenges to define these terms.97

---

95 Draft Petitions (May 24, 2000), supra note 92.

96 See Neb. Rev. Stat. § 67-451(2) (2000). Although the statute is part of the Uniform Partnership Act governing the effect of a business partnership merger, it explicitly refers to a domestic partnership. Id. In relevant part, the statute reads, “The Secretary of State of this state is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger.” Id.

97 See, e.g., Rutgers Council of AAUP Chapters v. Rutgers, The State Univ., 689 A.2d 828 (N.J. Super. Ct. 1997) (refusing to include domestic partners in the definition of dependents for the purpose of health insurance coverage); Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. 1995) (holding that the city did not have the power to grant health care benefits to
For example, in *Slattery v. City of New York*, a taxpayer group unsuccessfully challenged the City’s extension of health benefits to domestic partners of municipal employees of both the same and opposite sex. The plaintiffs argued that the City attempted to define marriage, recognize a de-facto common law marriage, acted in conflict with the state’s power to confer health benefits and granted gay domestic partners marital status. The court rejected these arguments, finding that benefits and municipal registries did not constitute marriage. One important distinction for the court was that “domestic partnerships” were created without any of the formal requirements of marriage.

The Supreme Court of Colorado reached a similar conclusion in *Schaefer v. City & County of Denver*. There, a local law
creating “spousal equivalents” for the purposes of extending health care benefits was held not to be an illegal attempt to redefine marriage. The court stated that “[t]he ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental insurance benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage.”

Additionally, judicial invalidation of municipal provision of health benefits for gay couples does not require that the provision be construed as re-defining marriage. For example, in *Lilly v. City of Minneapolis* the Supreme Court of Minnesota found that only the State could determine who was entitled to government health care benefits. Municipalities can extend benefits only as

---

99 and accompanying text (articulating the legal challenges presented in *Slattery*).

103 *Schaefer*, 973 P.2d at 721.

104 *Id.*

105 See, e.g., *Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998) (finding the municipality’s interpretation of a statute to benefit same-sex domestic partners as usurping the legislature’s intent in crafting the law); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995) (concluding that the city exceeded its power to provide benefits to employees and their dependents by recognizing domestic partners as “a family relationship” and providing employee benefits to them “in a comparable manner . . . as for a spouse”); *Devlin v. City of Phila.*., 809 A.2d 980, 993 (Pa. Comw. Ct. 2002) (holding that inclusion of two unmarried, unrelated people who live together as life partners did not fall within the statutory guidelines enumerating the class for tax benefits).

106 527 N.W.2d 107, 111 (Minn. 1995). The City of Minneapolis passed a resolution providing reimbursement to city employees for health care insurance costs for same-sex domestic partners. *Id.* at 108. The resolution also permitted health insurance reimbursement for certain classes of blood relatives. *Id.* The ordinance attempted to “provide employee health care benefits to persons not defined as ‘spouse’ or ‘dependents’ in a general state statute concerning the grant of health care benefits to municipal employees.” *Id.* at 109. The plaintiff in *Lilly* was a resident of Minneapolis who sought to enjoin the City from enforcing the ordinance. *Id.* The court noted that Minneapolis was a “home rule” charter city, which meant that the city could legislate as to “matters of a purely local nature.” *Id.* at 113. Since conferring health insurance is a statewide matter, the court found that Minneapolis’
permitted by the state. Accordingly, the City of Minneapolis’ attempt to grant benefits to city employees’ “domestic partners” was illegal on this basis, not because the law constituted local recognition of gay marriage.

These decisions are significant because, when supporters of Initiative 416 speak of “domestic partnerships” and “same-sex relationships,” they refer to relationships that courts have defined as not meaning marriage. This includes state-sanctioned civil-unions, contracts creating domestic partnerships, as well as informal partnerships created when health benefits are offered to same-sex partners. Initiative 416 has potential implications for gay couples in myriad contexts, therefore, including denial of recognition of non-marriage partnerships, contracts, health benefits, municipally created registries and requests for protection from domestic violence.

III. INITIATIVE 416 AND EQUAL PROTECTION

Nebraska’s Initiative 416 does more than deny same-sex partners the right to have extra-jurisdictionally created civil actions were *ultra vires* and “without legal force or effect.” *Id.*

107 *Id.* at 111.

108 *Id.* at 108.

109 See Sarah Schweitzer, *Civil Unions in VT: Easier to Enter Than Exit*, BOSTON GLOBE, Nov. 15, 2002, at A1 (noting that civil unions are marriages in all but name).

110 Contracts between non-marital partners are routinely enforced. *See*, e.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding that express contracts between non-marital co-habitants may be enforced and in the absence of an express contract, the court may find a contract implied in law); Salzman v. Bachrach, 999 P.2d 1263 (Colo. 2000) (holding that agreement between non-marital cohabitants did not violate public policy); Boland v. Catalano, 521 A.2d 142 (Conn. 1987) (holding that the existence of a sexual relationship between the parties did not preclude the existence of an express agreement between a non-marital couple).

111 See Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. 1998) (holding that a city ordinance granting health care benefits to spousal equivalents was matter of local concern that was not preempted by state statute).
unions and reciprocal beneficiary status recognized in the state. It also denies gays the right to petition Nebraska’s legislature for the creation or recognition of non-marriage relationships like civil unions, domestic partnerships, \textsuperscript{112} registries\textsuperscript{113} and perhaps even partner health benefits, by foreclosing legal recognition of virtually any domestic arrangement or agreement between same-sex couples.\textsuperscript{114} This sweeping, extraordinary limitation presents distinct questions as to whether the amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.\textsuperscript{115}

\textsuperscript{112} See Slattery v. City of New York, 686 N.Y.S.2d 683, 683 (Sup. Ct. 1999) (discussing a New York City law that recognizes certain rights of a domestic partnership, while emphasizing the difference between a domestic partnership and a marriage).

\textsuperscript{113} While these types of unions are not widely available for heterosexual or homosexual couples in the United States, they do exist for gays in several European countries. France has created an unmarried partners registry that is like a contract for same-sex and opposite-sex couples. See Suzanne Daley, \textit{France Gives Legal Status to Unmarried Couples}, N.Y. TIMES, Oct. 14, 1999, at A3 (discussing a law passed by the French Parliament that gives legal status to unmarried couples as well as homosexual couples allowing them the same rights as married couples with respect to tax advantages, inheritances, housing, and social welfare). Despite passage of the French law, activists protested the law, stating that it gave homosexual unions a lower status than marriage. \textit{Id.} Denmark, Germany, Iceland, Norway and Sweden have also created civil unions for gay couples, followed by the Netherlands, which has recently permitted same-sex partners to marry. See Reuters, \textit{Same Sex Dutch Couples Gain Marriage and Adoption Rights}, N.Y. TIMES, Dec. 20, 2000, at A8. (discussing a new law passed in the Netherlands that affords same-sex couples the same rights as heterosexual couples to marry and adopt children and acknowledging similar laws in other European countries). The Netherlands is the first nation to offer gays the right to marry. \textit{Id.}

\textsuperscript{114} As noted, the second sentence of Nebraska’s Initiative 416 was broadly drafted and declares that a “civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska.” See \textsc{neb. const.} art. I, § 29.

\textsuperscript{115} \textsc{u.s. const.} amend. XIV, § 1.
Initiative 416 implicates the Fourteenth Amendment because non-married heterosexuals can petition the state legislature to confer legal rights to opposite-sex partners, while homosexuals cannot. Additionally, depending upon the scope of the law in application, Initiative 416 may deny homosexuals the right to petition for domestic partner benefits programs and registries at the state or municipal level. Finally, if Initiative 416 does implicate contractual relationships, gay cohabitation contracts that create domestic partnerships would be unenforceable in courts, while unmarried heterosexual couples would retain this alternative to marriage.

Homosexuals are a cognizable group under the Equal Protection Clause, which bars any state from denying “to any

---

116 The inclusion of “same-sex” in the text of Nebraska’s amendment explicitly treats individuals involved in same-sex relationships differently than those in opposite-sex relationships. This unequal treatment conflicts with the principles of the Equal Protection Clause of the United States Constitution as it has been construed and applied by the United States Supreme Court. See, e.g., Romer v. Evans, 517 U.S. 620, 633-35 (1996). The Romer Court stated that “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” Id. at 633. The Court further added, “‘Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.’” Id.

117 For an explanation as to whether Initiative 416 could prevent recognition of same-sex contracts and relationships in the context of municipal, local or even employment level, see supra Part IV.C (discussing cases from other jurisdictions in which local and municipal laws governing same-sex relationships were struck down on the basis that the laws usurped the State’s power to define marriage and marital relations).

118 As noted, the second sentence of Initiative 416 explicitly bans recognition of non-marital unions or contracts only in the context of same-sex relationships, allowing opposite-sex non-marital unions or contracts to be cognizable by courts or the legislature. See supra Part III (discussing the scope of Initiative 416 and the legislative intent to reach all permutations of homosexual unions).
person within its jurisdiction the equal protection of its laws.” 119 The United States Supreme Court addressed this issue in *Romer v. Evans*, and found that laws based on sexual orientation are not subjected to strict scrutiny. 120 Rather, the applicable standard in this context is “if a law neither burdens a fundamental right nor targets a suspect class . . . the legislative classification [will be upheld] so long as it bears a rational relation to some legitimate end.” 121 In *Romer*, the Court reviewed a Colorado constitutional amendment that barred government protection for sexual orientation based discrimination. 122 Several municipalities in the state had passed laws attempting to do just that—make discrimination based on sexual orientation illegal. 123 The Supreme Court determined that the Colorado law violated the Equal Protection Clause because gays as a class were barred from

119 *U.S. Const.* amend. XIV, § 1.
120 517 U.S. 620 (1996). In *Romer* the court struck down an amendment to Colorado’s Constitution that precluded all legislative, executive or judicial action designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships. *Id.* The level of scrutiny eventually agreed upon by the Colorado Supreme Court was strict scrutiny, which was not satisfied and the enforcement of the amendment was enjoined. *Id.* The United States Supreme Court affirmed but did not apply strict scrutiny and struck down the law on the basis that it seemed “inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at 632. *See also* Gay Students Org. of Univ. of N.H. v. Bonner, 367 F.Supp. 1088 (D.N.H. 1974). *Bonner* was a civil rights action arising out of the denial by University of New Hampshire officials of the right of the Gay Students Organization, a homosexual organization to hold “social functions” on the campus. *Id.* at 1901. The organization claimed that the denial violated its First and Fourteenth Amendment rights and requested that the court declare its rights to organize and function on the University campus. *Id.* The New Hampshire District Court found that gays students could not be treated dissimilarly from other students, rejecting morality as a sound basis for such discrimination, and held that once the University granted a particular privilege of holding social functions to other campus organizations, the Fourteenth Amendment required that the privilege be available to all organizations on an equal basis. *Id.* at 1097.

121 *Romer*, 517 U.S. at 631.
122 *Id.* at 629.
123 *Id.*
seeking official state protection. Although this right remained available for all other groups, the Court acknowledged that under the challenged legislation “[h]omosexuals [were] forbidden the safeguards that others enjoy or may seek without constraint.” Similarly, heterosexual couples in Nebraska may petition the government for recognition of non-marriage relationships, while homosexuals are effectively barred from doing so. Diluting a group’s political or voting power based on a characteristic that has no relation to a legitimate state interest is unconstitutional. Under Initiative 416, a distinct group of politically unpopular persons is burdened and barred from petitioning elected officials for civil unions, domestic partnerships, and other same-sex relationships as a means of obtaining the rights associated with marriage.

Legislation that targets a group of politically unpopular persons and denies governmental protection or voting power to

---

124 Id. at 635. The court stated, “A State cannot so deem a class of persons a stranger to its laws. [The Colorado Amendment] violates the Equal Protection Clause.”

125 Id. at 631. See also Citizens for Responsible Behavior v. Riverside City Council, 2 Cal. Rptr. 2d 648 (Ct. App. 1991) (rejecting a legislative proposal that would deny gays the ability to petition their local council for laws barring discrimination).

126 See Gordon v. Lance, 403 U.S. 1, 4 (1971). In Gordon, the Supreme Court found that requiring sixty percent approval by the municipality’s voters for bond indebtedness gave a minority of the population greater voting power than the majority. Id. at 6. Despite this finding, the Court held that in this case the voting requirement did not violate the Equal Protection Clause because there is nothing in the language of the constitution requiring that a majority always prevail on every issue.

127 See Romer, 517 U.S. 620, 635 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (citing Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); see also Equal. Found. of Greater Cincinnati. v. City of Cincinnati, 128 F.3d 289, 299 (6th Cir. 1997) (citing Romer’s description of homosexuals as a “politically unpopular minority”); Philips v. Perry, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting) (characterizing discrimination against gay military service members as “discrimination against an unpopular class”).
obtain such protection is also plainly unconstitutional. For example in *Hunter v. Erickson* the Supreme Court refused to permit Akron, Ohio to deny racial minorities the right to petition for protection against housing discrimination.128 The municipal ordinance at issue denied protections in housing, leasing or renting based on race, color, religion, national origin or ancestry without a voter referendum.129 Protective measures for other groups, like those based on gender, political affiliation or pet ownership, could merely be enacted by the city council.130 The Supreme Court articulated, “[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”131 Accordingly, the ordinance was deemed to discriminate against minorities and “constitute[d] a real, substantial, and invidious denial of the equal protection of the laws.”132

Initiative 416 has an effect similar to the ordinance at issue in *Hunter*, inasmuch as protective measures, like domestic partnership status, offer considerable life security to couples.133

---

128 393 U.S. 385 (1969). Minority citizens sought a writ of mandamus against city officials to prevent them from implementing an Akron city ordinance providing that a majority of city voters had to approve any amendment to the city charter that would allow the city council to pass an ordinance regulating the use, sale, advertisement, transfer, listing, lease, sublease, or financing of real estate on basis of race, color, religion, national origin or ancestry. *Id.* The United Court Supreme Court reversed the Ohio Supreme Court and found that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.*

129 *Id.* at 387.

130 *Id.* at 390-91.

131 *Id.* at 393.

132 *Id.*

These are now nearly impossible for gays to obtain. Heterosexuals can petition their representatives for a host of rights and protections, although gays cannot. Additionally, as noted in Hunter, passage by voter referendum does not immunize a law from the Equal Protection Clause. Initiative 416 could be found unconstitutional based upon the rationale of Hunter because it does not bar creation of marriage alternatives or benefit programs for all unmarried persons.

The mere fact that a suspect class is not targeted in Nebraska does not mean that the rational basis test will be passed. Politically unpopular groups, whether a suspect class or not, cannot be targeted by laws that bear no relation to a legitimate state interest. The burden Initiative 416 places on gays

---

134 See Hunter, 393 U.S. at 392 (noting that “[c]haracterizing [the ordinance] simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden . . . but does not justify it”).

135 Supreme Court precedent establishes that the rational basis test applies in the context of challenges to laws that discriminate on the basis of sexual orientation because homosexuals are not a suspect class. See, e.g., Romer v. Evans, 517 U.S. 620, 641-43 (1996) (stating that rational basis, the normal test for compliance with the Equal Protection Clause, is the governing standard and affirming the Supreme Court of Colorado’s decision that homosexuality is not a distinct class); see also Equal. Found. of Greater Cincinnati v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) (holding that it is virtually impossible to distinguish or separate individuals of a particular orientation according to a particular sexual conduct); Beller v. Middendorf, 632 F.2d 788, 808-09 n.20 (9th Cir. 1980) (holding that the military discharge for engaging in homosexual acts would be rational under minimal scrutiny because the general military policy of discharging all homosexuals is rational).

136 See U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 532 (1973). In this case, several groups brought a class action lawsuit against the Department of Agriculture, its Secretary and other departmental officials seeking injunctive and declaratory relief against the implementation of section 3(e) of the Food Stamp Act. Id. Each one of the groups was deemed ineligible to participate in the Food Stamp Program because they had one or more unrelated individuals living in their households. Id. at 531. For example, one member of the class, Jacinta Moreno, lived with Ermina Sanchez and Ms. Sanchez’s three children. Id. Ms. Sanchez cared for Ms. Moreno, a diabetic, and they shared common living expenses. Id. Although without Ms. Moreno’s residence in the household, Ms. Sanchez and her children would be eligible
resembles the issue presented to the Supreme Court in *United States Department of Agriculture v. Moreno*. Moreno was a class action challenge to an amendment to the Federal Food Stamp Act that rendered ineligible for federal assistance any household containing an individual unrelated by blood or marriage to any other household member. The Court found that the law was created to deny federal assistance to people regarded as “hippies,” but the government’s expressed goal to eliminate fraudulent claims for federal assistance bore no rational relation to whether needy persons sharing a household were related. Ultimately, the Court stated, “[B]are congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Similarly, Initiative 416 is narrowly drafted, targeting unmarried gay couples, but lacks any determination that unmarried gay couples pose a greater threat to society than unmarried heterosexual couples.

**B. Initiative 416 Lacks a Rational Relationship to a Legitimate State Interest**

Because gays as a class are afforded some protection under the Equal Protection Clause, evaluation of the constitutionality of the law requires application of the rational basis test. No
rational basis is discernable on the face of the law, nor from the three hearings that were conducted to do exactly that—provide a record of the proponents’ goals in enacting the law.\textsuperscript{142}

The Supreme Court set forth the analytical framework for determining whether a law has a rational relation to a legitimate state interest in \textit{City of Cleburne, Texas v. Cleburne Living Center}.\textsuperscript{143} The Texas law at issue in \textit{Cleburne} required a special use permit for group homes for the mentally retarded.\textsuperscript{144} Laws concerning mentally retarded persons are subject to the rational basis test.\textsuperscript{145} The Court, however, found the zoning law’s “relationship to an asserted goal so attenuated as to render the distinction arbitrary and irrational.”\textsuperscript{146} Apartment buildings, hospitals, sanitariums, dormitories, nursing homes and private
clubs, among other types of uses, did not require special use permits.\footnote{For example, homes for drug addicts and the insane did require special use permits. \textit{Id.} at 447.} The distinction between many of these uses and group homes was particularly elusive, and the Court found that the City Council was apparently trying to assuage residents’ prejudice against and fears of the mentally retarded, without any supporting evidence that a group home posed a special threat to the community.\footnote{\textit{Cleburne}, 473 U.S. at 448. The other factors included the location of the home near a school, or within a flood plain. Neither of these concerns was unique to the group home, which had been singled out as requiring a permit. \textit{Id.} at 449.} Rather than being based on the legitimate government purposes of safety and community stability, “this case appear[ed] . . . to rest on an irrational prejudice against the mentally retarded . . . . “\footnote{\textit{Id.} at 449. The Court noted: If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard. \textit{Id.}}

One example of a law that constitutionally and rationally distinguished between two classes of individuals was addressed in \textit{Heller v. Doe}.\footnote{\textit{Id.} at 315.} There, the Court upheld a law that distinguished between the “mentally retarded” and the “mentally ill,”\footnote{\textit{Id.} at 315.} Where the State of Kentucky had different standards for the involuntary commitment of the two groups.\footnote{\textit{Id.} The court noted: [A]t a final commitment hearing, the applicable burden of proof for involuntary commitment based on mental retardation is clear and convincing evidence, while the standard for involuntary commitment based on mental illness is beyond a reasonable doubt. . . . \textit{Id.}}
retarded could be committed when their incapacity was established by clear and convincing evidence, while the mentally ill had to be proven incapacitated at a higher standard, beyond a reasonable doubt. This distinction was deemed appropriate because mental retardation was usually diagnosed at an earlier age and with greater certainty than mental illness. Thus the distinction bore a rational relation to a legitimate state interest—preventing inappropriate involuntary confinement.

Heterosexual and homosexual unmarried persons, however, are not distinguishable in the same manner as the groups in *Heller*, and Initiative 416 appears to be grounded, absent any other stated purpose, solely in prejudice against gays.

### 1. Religious Beliefs and Prejudicial Animus

One common basis propounded at the hearings for Initiative 416 was religion, an illegitimate basis for state laws.

---

commitment hearings for mental retardation, unlike for mental illness, ‘guardians and immediate family members’ of the subject of the proceeding ‘may participate . . . as if a party to the proceedings,’ with all attendant rights, including the right to present evidence and to appeal.

*Id.* (citations omitted).

154 *Id.*

155 *Id.* at 321.

156 *Id.* at 328.

157 The Nebraska statute, according to many of its supporters, is an effort to codify a Christian perspective on homosexual partnerships. See, e.g., *Hearing Conducted by Nebraska Secretary of State, supra* note 13, at 100 (Oct. 12, 2000) (“The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness.”).

The Constitution expressly forbids the establishment of any state religion. See U.S. CONST. amend. I. The test generally applied to such laws examines “[f]irst, the statute must have a secular legislative purpose; second, its principal effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See also* Bd. of Educ. v. Grumet, 512 U.S. 687 (1994) (declaring that a state statute delegating authority over public schools to a religious group as
Supporters of the amendment repeatedly referred to the biblical story of Adam and Eve.\textsuperscript{158} There were also references to the “Judeo-Christian” foundation of the United States.\textsuperscript{159} For example, one commentator noted, “Nebraska was settled by men and women of Christian faith who worked hard to produce their freedom to worship their God in the Church of their choice. The foundation of our ancestors’ faith was the Bible, the inspired word of God.”\textsuperscript{160}

In \textit{Loving v. Commonwealth of Virginia}, the Supreme Court rejected the contention that anti-miscegenation laws could be constitutionally based in religious beliefs.\textsuperscript{161} There, the trial judge, whose decision was later overturned by the Court, invoked the intent of “almighty God” to keep the races separate.\textsuperscript{162} This justification plainly did not pass constitutional muster.\textsuperscript{163}
Religious beliefs can certainly offer no more of a sound a basis for laws expressing intolerance for homosexuals than for those founded in racial intolerance.\textsuperscript{164} 

Neither can animus and intolerance of same-sex relationships be a constitutionally permissible basis for Initiative 416. As the Supreme Court noted in \textit{Palmore v. Sidoti}, “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”\textsuperscript{165} In \textit{Palmore}, parents were litigating the custody of their daughter.\textsuperscript{166} The father sought to modify a prior judgment granting custody to the mother, due to “changed conditions”—the mother’s relationship with a black man.\textsuperscript{167} The father proposed that a child growing up vital personal rights essential to the orderly pursuit of happiness by free men.”

\textit{Id.}


That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.

\textit{Id.} A thorough analysis of attempts to invoke religion to validate legislative classifications on the basis of sexual orientation is beyond the scope of this article, although this has been thoughtfully explored elsewhere. See generally William N. Eskridge, Jr., \textit{A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law}, 106 Yale L.J. 2411 (1997) (drawing comparisons between sexual orientation and religion as “identity characteristic[s] that [are] both physically invisible and morally polarizing”); John V. Harrison, \textit{Peeping Through the Closet Keyhole: Sodomy, Homosexuality, and the Amorphous Right of Privacy}, 74 St. John’s L. Rev. 1087 (2000) (concluding that, despite the nation’s efforts to protect sexual liberties, many individuals are still considered criminals “because of the way they privately express the most basic of human instincts”).

\textsuperscript{165} 466 U.S. 429, 433 (1984).

\textsuperscript{166} \textit{Id.} 430-31.

\textsuperscript{167} \textit{Id.} at 430. The Court articulated the father’s challenge as stating that “the child’s mother was then cohabiting with a Negro . . . whom she married two months later. Additionally, the father made several allegations of instances
in a racially mixed household would potentially face community scorn.\textsuperscript{168} The Florida state courts found credence in this argument, though the Supreme Court soundly rejected it.\textsuperscript{169} Similarly, in order to uphold Initiative 416, the courts would have to come to the improbable conclusion that religious or societal intolerance are legitimate bases for unequal treatment of homosexuals, but are not adequate bases for unequal treatment of the races.\textsuperscript{170}

\textsuperscript{168} Id. at 430. Specifically, the father presented recommendations from the court counselor in an earlier case describing the social consequences of an interracial marriage. \textit{Id}. The lower court accepted the recommendation for a change in custody because the wife had “chosen for herself and for her child, a life-style unacceptable to the father and to society. . . . The child. . . . is, or at school age will be subject to environmental pressures not of choice.” \textit{Id}.

\textsuperscript{169} See id. at 431. The Court noted:

The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

\textit{Id}.

\textsuperscript{170} This conclusion has been noted in other judicial opinions ruling on the constitutionality of sexual orientation based legislative classifications. \textit{See}, \textit{e.g.}, \textit{Dean v. District of Columbia}, 653 A.2d 307 (D.C. 1995) (noting that sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause); \textit{High Tech Gays v. Defense Indus. Sec. Clearance Office}, 668 F.Supp. 1361 (N.D. Cal. 1987) (noting that a Department of Defense policy reflected irrational prejudice and outmoded stereotypes and notions about homosexuals); \textit{see also Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. Cal. L. Rev.} 797 (1984); \textit{Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification}, 98 Harv. L. Rev. 1285 (1985).

Another commentator has noted that legislative bans on same-sex marriages ought to be declared unconstitutional on the same basis that the Supreme Court invalidated racially discriminatory marriage statutes. \textit{See Merin, supra note 7}, at 236. Specifically, Merin states:

Full recognition of same-sex marriages in the United States will be possible only if and when the U.S. Supreme Court decides that both
Another basis put forth for Initiative 416 is that it protects and stabilizes the institution of marriage in Nebraska. There is no evidence, however, that barring gays access to their legislators enhances the stability of marriage. While protecting state and federal DOMAs are unconstitutional and that states cannot constitutionally invoke a public policy exception to refuse recognition of out-of-state same-sex marriages, as it did in the case of anti-miscegenation laws more than thirty years ago.

Id.  

171 See Family First, Capitol Watch, at 3 (Apr. 3, 2002) (supporting Initiative 416 because it would reinforce the traditional understanding of marriage instead of weakening and destroying it by introducing other forms of marriage), available at http://www.familyfirst.org/capitolwatch/1000.pdf. See also Pam Belluck, Nebraskans to Vote on Most Sweeping Ban on Gay Unions, N.Y. TIMES, Oct. 21, 2000, at 9 (quoting former Governor Bob Nelson saying Initiative 416 “makes a statement for traditional marriage” and that a homosexual union “was not a moral relationship”); Stephen Buttry & Leslie Reed, Voters OK Same Sex Union Ban, OMAHA WORLD-HERALD, Nov. 8, 2000, at 1 (quoting Bill Ramsey, Co-Chairman of the Nebraska Coalition for the Protection of Marriage, hailing the passage of Initiative 416 as a vital message saying, “Marriage as we know it, respect it and love it has been preserved”).

172 See Lambda Legal Defense and Education Fund, Get the Facts: Talking About the Freedom to Marry: Why Same-Sex Couples Should Have Equality in Marriage (June 20, 2001) (arguing that allowing same-sex couples to marry promotes stability in the community in the same way opposite sex marriage does) at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=47. The article argues:

Same-sex couples build their lives together like other couples, working hard at their jobs, volunteering in their neighborhoods, and valuing the responsibilities and love that their family commitments provide to them and to the children they may have. These families have everyday concerns, like being financially sound, emotionally and physically healthy, and protected by adequate health insurance. These concerns heighten when there are children in the family. Marriage provides tangible protections that address many of these concerns. Promotion of support and security for families is a benefit to the entire community; it does not de-stabilize other families. Equal access to marriage will also emphasize equality and non-discrimination for all of society.
families and marriages is indisputably a legitimate state interest, the amendment bears no rational relation to this end.\textsuperscript{173}

Initiative 416 was enacted to protect marriage, undoubtedly a legitimate state interest. Yet the distinction made between unmarried homosexuals and heterosexuals undermines the assertion that the law is related to the protection of traditional marriage.\textsuperscript{174} The law is under-inclusive inasmuch as is does not

\textit{Id.}\textsuperscript{173} State legislatures are permitted to regulate issues of domestic law, and state courts are granted jurisdiction to determine issues of application and interpretation of these issues. See \textit{supra} note 11 (discussing the reservation of issues of domestic law to the states). Because Initiative 416 limits the rights of homosexuals in the State and establishes a legislative distinction between heterosexual relationships and homosexual relationships, the amendment will merit rational basis scrutiny for examination as to whether the distinction is rationally related to a legitimate government interest. See \textit{supra} Part III.A (discussing the application of the rational basis test to legislative classifications based on sexual orientation).

\textsuperscript{174} Proponents of anti-miscegenation laws in \textit{Loving} noted that the laws applied equally to blacks and whites as an attempt to characterize the laws as equitable. See \textit{Loving v. Virginia}, 388 U.S. 1, 7 (1967). Initiative 416, however, cannot be similarly defended, because gays and heterosexuals are treated dissimilarly.

Additionally, legislation protecting “traditional” family structures has occasionally been rejected by courts on the basis that there is no single established definition of the makeup of a “traditional” family. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (refusing to establish a bright line definition of family by “cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family”); Smith v. Org. of Foster Families, 431 U.S. 816, 843-44 (1977) (noting the difficulty of defining family for Due Process purposes and considering factors other courts have considered in making such a determination); see, Alber v. Ill. Dep’t of Mental Health & Developmental Disabilities, 786 F.Supp. 1340, 1367 n.25 (N.D. Ill. 1992). In \textit{Alber}, the court noted:

\[\text{T}h\text{e} \text{S}upreme \text{C}ourt \text{h}as \text{s}pecified \text{t}hat \text{n}eith\text{e}r \text{t}he \text{t}raditional “\text{b}oundary \text{of} \text{th}e \text{n}\text{u}\text{c}\text{l}\text{e}r\text{a}\text{l}\text{ f}\text{a}\text{m}\text{i}\text{l}\text{y}” \text{n}or \text{t}he \text{e}xist\text{e}\text{n}c\text{e} \text{o}\text{f} \text{b}lood \text{r}\text{e}\text{l}\text{a}\text{tions}\text{h}\text{}s \text{nor} \text{t}he \text{l}eg\text{i}t\text{i}m\text{i}c\text{t}y \text{of} \text{a} \text{f}amily \text{arr\text{i}m\text{a}n\text{g}\text{e}\text{m}\text{n}ent \text{u}nder \text{st}ate \text{l}aw \text{d}ef\text{i}n\text{e}s \text{t}he \text{b}ound\text{a}ri\text{s} \text{of} \text{f}amily \text{r}\text{i}g\text{h}t\text{s}. \text{L}ower \text{c}ourts \text{a}r\text{e} \text{t}hus \text{f}ree, \text{wit\text{n}h} \text{t}he \text{limits \marked \ou\text{t} \by \text{t}he \text{C}ourt, \to \text{d}e\text{t}\text{e}r\text{i}n\text{a} \text{t}\text{i}e} \text{t}h\text{a}t \text{a} \text{p}art\text{i}cular \text{n}\text{on-\text{n}}\text{u}\text{c}\text{l}\text{e}r\text{a}\text{l} \text{o}r \text{n}on-\text{b}iological \text{f}amily \text{m}er\text{t} \text{c}onst\text{i}tution\text{a}l \text{p}r\text{o}\text{t}e\text{c}t\text{i}o\text{n}.\]
ban non-marriage relationships between heterosexuals, belying the proponents’ political animus towards homosexuals. This sort of political animus rendered the Colorado law at issue in *Romer v. Evans* a violation of the Fourteenth Amendment.

Moreover, Nebraska’s courts have already upheld cohabitation agreements between unmarried heterosexual couples. The Supreme Court of Nebraska considered a cohabitation agreement in *Kinkenon v. Hue* and stated that “[t]he record shows that sexual services did not form the basis for the agreement between the parties. For that reason, this agreement does not violate public policy.” Implicit in this decision is that contracts of cohabitation outside of marriage are not void or against the state’s public policy, at least when created between heterosexual partners.

The distinction between gay and heterosexual unmarried couples is also undermined by decisions from other jurisdictions. For example, in *Baehr v. Miike*, the Hawaii court determined, after extensive hearings, that there were no negative implications for children raised by same-sex parents. Additionally, the

---

175 As noted, Initiative 416 bans only “same-sex relationships” but does not apply to similar arrangements between opposite sex couples. See Neb. Const. art. I, § 29.


177 See *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981) (holding that parties entered into an oral contract whereby the appellant was to perform certain services, including housework, for the appellant in exchange for a home to live in for the rest of her life and that this contract was specifically enforceable). See also *Wolf v. Mangiamele*, No. A-97-284, 1998 WL 902572 (Neb. Ct. App. Sept. 15, 1998) (noting that agreements between parties engaged in non-marital, but presumptively sexual, relationships, are valid and enforceable as long as sexual services do not form the basis of the agreement).

178 *Kinkenon*, 301 N.W.2d at 80.

179 1996 WL 694235, at *5 (Haw. Cir. Ct. Dec. 3, 1996). The Hawaii court found that there was insufficient evidence to establish or prove any adverse consequences resulting from same-sex marriage. *Id.* In its hearings, the court found that although a father and a mother provide a child with unique paternal and maternal contributions important to the development of a happy, healthy and well-adjusted child, such contributions are not essential. *Id.* The evidence presented established that the most important factor in the
Supreme Court of Vermont found that denying the benefits and protections of marriage to children of same-sex households posed a greater risk to families. Other courts have arrived at similar conclusions in the context of parental custody and adoption rights. Thus, Initiative 416 not only runs afoul of the Fourteenth Amendment, it also destroys the very interests it seeks to protect—family stability and marriage.

IV. FULL FAITH AND CREDIT AND INITIATIVE 416

The second sentence of Initiative 416 also violates the Full Faith and Credit Clause of the United States Constitution. The Clause requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child. Id. The sexual orientation of parents is not, alone, an indicator of parental fitness and does not automatically disqualify them from being good, fit, loving or successful parents. Id.


181 See, e.g., V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (holding that a biological mother’s same-sex former domestic partner had standing to seek joint legal custody of, and visitation with, mother’s biological children); In re Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002) (holding that unmarried same-sex partners could adopt a child without the legal parent relinquishing his or her parental rights); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (finding that same-sex couples may have recourse in the courts in the event that a custody dispute results from the breakup of relationship); In re B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (holding that an unmarried same-sex partner could adopt her partner’s biological child); see also Susan Becker, Re-Orienting Law and Sexuality: Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law, 48 CLEV. ST. L. REV. 101 (2000); Melanie B. Jacobs, Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents, 50 BUFF. L. REV. 341 (2002); Linda Whobrey Rohman et al., The Best Interests of the Child in Custody Disputes, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 59 (L.A. Weithorn ed., 1987).

182 U.S. CONST. art. IV, § 1.
prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effects thereof.”

Since no state currently allows same-sex marriage, the first sentence of Nebraska’s amendment has no immediate implications.

Additionally, the so-called “public policy exemption” to the Full Faith and Credit Clause may permit states to decline recognition of marriages that violate the state’s public policy. The federal

---

183 Id.

184 As noted, the first sentence of Initiative 416 bans only same-sex marriage, and other states have passed similar laws. See supra notes 1, 3 (discussing the text of Initiative 416 and noting that similar laws have been passed in other states). Moreover, the force of the Full Faith and Credit Clause has been questioned in the context of recognition of out-of-state marriages. See, e.g., MERIN, supra note 7, at 231 (noting that “it is debatable whether the U.S. Constitution will compel such recognition, because the Full Faith and Credit Clause has not commonly been relied upon by courts in determining whether they should recognize out-of-state marriages (e.g., common law marriages) that could not have been performed within the jurisdiction”).

185 See, e.g., Matlock v. R.R. Ret. Bd., 166 F.3d 347 (10th Cir. 1998). In Matlock, the plaintiff filed an application for disabled widow’s insurance benefits under the Railroad Retirement Act, on account of a deceased wage earner. Id. In denying the application, the court stated the general rule that “[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” Id. See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1996) (examining the “public policy” exception in the context of the Full Faith and Credit Clause).

There is debate as to whether, in the event one state recognizes the right of same-sex couples to marry, other states can avoid recognition of such marriages on the basis of this public policy exception. See MERIN, supra note 7, at 232. Specifically, MERIN notes:

Notwithstanding the Full Faith and Credit Clause, in situations involving marriage validity, and according to traditional choice-of-law rules, courts have generally followed the rule of lex celebratonis, which states that a marriage valid where entered into should be recognized as valid everywhere, and the tendency in American conflicts cases is to validate marriages entered into in other jurisdictions, unless the legislature has rejected the rule of validity or the marriage is so abominable that validating it would offend the
DOMA reinforced this exception. There is, however, no basis in public policy sense of morality.

Accordingly, and because “each state has its own conflicts doctrine, many states look to the Restatement (Second) of Conflicts of Laws (1996) for direction.” Id. Other commentators have made similar observations. See, e.g., Sylvia Law, Access to Justice: The Social Responsibility of Lawyers: Families and Federalism, 4 Wash. U. J. L. & Pol’y 175, 217 (2000) (“Several states, such as California, adopted rules stating that any marriage valid in the place contracted is valid in their state. Other states take a more restrictive approach and refuse to recognize marriages that violate a strong public policy of the state.”); Scott Ruskay-Kidd, Note, The Defense of Marriage Act and the Overextension of Congressional Authority, 97 Colum. L. Rev. 1435, 1439 (1997) (observing that while the general rule is lex celebrationis, some states employ an exception to the rule “if honoring a sister state’s marriage would violate an important public policy of the enforcing state”); Note, In Sickness and in Health, in Hawaii and Where Else?: Conflicts of Laws and Recognition of Same-Sex Marriages, 109 Harv. L. Rev. 2038, 2043 (1996) (“Although each state has its own conflicts doctrine, many states look to the Restatement for direction.”).

See H.R. Rep. No. 104-664, at 7 (1996) (finding that the purpose of the legislation is to defend the institution of traditional heterosexual marriage and to protect the rights of the states to formulate their own public policy regarding the legal recognition of same-sex marriages). It should be noted, however, DOMA does not require that states recognize same-sex unions.

Other commentators have made similar observations. See, e.g., Merin supra note 7, at 228-29. Merin notes that “[a]lthough a provision in DOMA allows states not to recognize same-sex marriages performed in another state, the act does not mandate that states disregard such marriages.” Id. He further states that, “each state needs to determine individually whether to take advantage of the act’s exception to the Full Faith and Credit Clause of the U.S. Constitution.” Id. at 229; see also Leonard G. Brown III, Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent, 19 Campbell L. Rev. 159, 169 (1996) (stating that section 2 of DOMA uses the words, “No State . . . shall be required,” which clearly shows that Congress did not intend to require a state to do anything; they are merely recognizing an already existing state right to disregard an act, judgment or decree when it violates a state’s legitimate public policy); Diane M. Gillerman, The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage, 34 Hous. L. Rev. 425, 463 (1997) (making the argument that DOMA does not attempt to govern the resolution of the same-sex marriage issue within each state, impose a choice of either recognition or non-recognition on the states, attempt to define marriage for state law purposes, impose any
for Nebraska to refuse to acknowledge contracts entered into by same-sex couples prior to entering the state, as legal instruments cannot be denied recognition based on a public policy exception. Rather, conflicts of laws doctrines require a court to determine what law to apply to adjudicate a claim.188

Nor is there any “‘roving public policy exception’ to the full faith and credit due judgments.”189 Cases that are routinely cited for such an exception were severely limited in scope by the Supreme Court in Baker v. General Motors Corp.190 There, the Court stated that “[i]n assuming the existence of a ubiquitous ‘public policy exception’ permitting one State to resist recognition of another State’s judgment, the District Court . . . misread our precedent.”191 Accordingly, a decision by one state’s court to recognize a contract as legally binding is not necessarily affirmative law regarding the issue or “commandee[r] the legislative processes of the States”.

187 See Merin, supra note 7, at 228-31 (discussing the issue of whether a state can disregard a legal same-sex marriage of another state based on policy reasons); see also Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 56 Colum. L. Rev. 969, 980-81 (1956) (discussing the dubious term “public policy” for a state’s justification for having its own law applied).

188 For a more expansive discussion of the matters at issue in conflict of law cases, see generally Mark P. Gergen, Equality and the Conflict of Laws, 73 Iowa L. Rev. 893 (1988) (explaining that conflict of laws is the body of legal doctrine that seeks to provide a basis for choosing a substantive rule, in tort or contract, over the conflicting rule of another state).

189 Baker v. General Motors Corp., 522 U.S. 222, 233 (1998) (finding that an injunction, entered by a Michigan county court pursuant to parties’ stipulation in an employee’s wrongful discharge action, barring a former employee from testifying as a witness did not reach beyond the controversy between the employee and the manufacturer to control proceedings elsewhere, and, therefore, the employee could testify in a Missouri products liability case without violating the Full Faith and Credit Clause). Id.

190 Id. at 234 (finding that there is no public policy exception to the Full Faith and Credit Clause). See also Kent County v. Shephard, 713 A.2d 290, 296-97 (Md. 1998) (stating that the forum state is not required to give Full Faith and Credit to the statutes of another state when contemplating an issue upon which the forum state is competent to legislate).

191 Baker, 522 U.S. at 234.
one that can be accepted or rejected in another jurisdiction based on a supposed divergent “public policy.”

Legislators misstated the law in the Congressional Report on DOMA, claiming that the “U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another state’s laws.” In fact, one of the two cases Congress relied upon was limited by the Supreme Court to mean only that “a court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy” in court. The case at issue, *Nevada v. Hall*, speaks only to choice of law. There, a vehicle owned by the State of Nevada was involved in a traffic accident in California. The law of Nevada limited the State’s liability for tort actions to $25,000. California law had no such limit, and the California state courts chose to apply California law in the case. Addressing the controversy, the Supreme Court stated that the “Full Faith and Credit Clause does not require one state

192 *Id.* This question is a matter of significant debate, and the Supreme Court has not established a bright-line rule for determining what matters will necessarily fall within the domain of mandatory recognition under the Full Faith and Credit Clause. See, e.g., Paulsen & Sovern, *supra* note 187, at 980-81 (noting traditional but dubious use of the term “public policy” to obscure “an assertion of the forum’s right to have its [own] law applied to the [controversy] because of the forum’s relationship to it”).

193 See H.R. REP. NO. 104-664, at 9 (1996). This statement was in reference to the Supreme Court’s decision in *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (noting the Full Faith and Credit Clause does not require States to apply another’s law in violation of the State’s own public policy). *Id.* at 9 n.27.

194 See *Baker*, 522 U.S. at 233. In *Baker*, the Supreme Court invoked *Nevada v. Hall* specifically for the proposition that “[a] court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.” *Id.* (citing *Hall*, 440 U.S. at 421-24). The Court immediately clarified this position, stating that Supreme Court precedent “support[s] no roving ‘public policy exception’ to the full faith and credit due judgments.” *Baker*, 522 U.S. at 233 (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).


196 *Nevada*, 440 U.S. at 411.

197 *Id.* at 412.

198 *Id.* at 411.
to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state . . .” in the context of a court proceeding.199

The second case specifically cited in DOMA report dealt with a similar conflict of laws.200 In Alaska Packers Association v. Industrial Accident Commission of California the conflict was whether, in the context of determining a worker’s compensation award for work-related injuries, “the full faith and credit clause [sic] require[d] the state of California to give effect to the Alaska statute rather than its own.”201 Public policy was not an issue, and the Court examined only which state had greater interest in the controversy.202 The Court rejected the argument that full faith and credit required application of Alaska law because the contract was signed in California and the accident at issue occurred there.203 Ultimately, California’s interest in enforcing its compensation act outweighed any competing interests of the State of Alaska.204

199  Id. at 422-23.
200  See H.R. REP. NO. 104-664, at 9 (1996) (citing Alaska Packers Ass’n v. Industrial Comm’n, 294 U.S. 532, 547 (1935), to support the proposition that “the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State’s laws”).
201  294 U.S. at 546 (1935). In Alaska Packers, an employer challenged a compensation award that was made in conformity with the statutes of California, where the contract of employment was entered into, rather than Alaska, where the employment was performed and the injuries occurred. Id. at 550.
202  Id. at 548-49. Specifically, the court noted that it was within the power of California’s legislature to enact the statute in question and that the state’s exercise of that power infringed no constitutional provision. Id. at 548. On the issue of conflicting state interests, the court stated that “[p]rima facie every state is entitled to enforce in its own courts its own statutes . . . One who challenges that right . . . assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.” Id. at 547-48.
203  Id. at 540.
204  Id. at 550 (concluding that “[t]he interest of Alaska is not shown to be superior to that of California. No persuasive reasoning is shown for denying to California the right to enforce its own laws in its own court.”).
The second sentence of Initiative 416, insofar as it attempts to invalidate domestic partnership unions and contracts entered into in other states, is therefore unconstitutional under current application of the Full Faith and Credit Clause. Supporters of the Vermont civil unions law have also recognized that problems may exist for nonresidents who obtain a civil union license in Vermont but seek to enforce in their home state the rights granted by the civil union in Vermont. See, e.g., Lambda Legal Defense and Education Fund, Vermont Civil Unions Law to Take Effect: Putting Fairness in Full Swing (June 30, 2000) (stating that it is unclear how home states will treat civil unions between residents obtaining a Vermont civil union), available at http://www.lambdalegal.org/cgi_bin/iowa/documents/record?record=656; Vermont Freedom to Marry Organization (cautioning that it is unknown how home states will respond to civil unions and encouraging nonresidents to continue using contractual means to protect their interests), at http://www.vtfreetomarry.org/civilunions.html (last visited Dec. 2, 2002). Additionally, the Vermont Secretary of State warns of potential problems nonresidents may encounter in the dissolution of a civil union. See Vermont Office of the Secretary of State, The Vermont Guide to Civil Unions, available at http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html (last visited Jan. 21, 2003) (warning that although dissolution of civil unions is handled by the Vermont Family Court, there is a residency requirement, and it is unclear how other states will handle civil union dissolutions).

Furthermore, it appears that states with statutes that conflict with the Vermont civil union law, or any law providing domestic partnership benefits, may have a slight barrier in applying state law to the enforcement of such contracts. The Supreme Court has held that a forum state does not violate the Full Faith and Credit Clause by electing to apply its own substantive law to a matter of contract interpretation as long as the forum state has sufficient contacts with the parties or occurrences that would not render the application of the law arbitrary or unfair. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (allowing Minnesota to apply its law to an insurance contract executed by Wisconsin drivers in Wisconsin); Carroll v. Lanza, 349 U.S. 408 (1955) (agreeing that an Arkansas court could apply Arkansas law to an employment contract executed between a Missouri employee and employer); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954) (upholding application of Louisiana law to an action against an insurer on a policy even though the contract was negotiated and issued in Massachusetts). The common theme in each of these cases is that the forum state had significant contacts with the parties, justifying application of its own law.

Another example is Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002). In Rosengarten, Connecticut residents obtained a civil union in
cannot refuse to recognize rights or benefits extended to homosexuals under valid, enforceable contracts enacted in other states. Supreme Court precedent sets forth a method to determine which state’s law to apply to adjudicate a controversy regarding an incident, instrument or contract from another state, but does not permit a state to deny recognition of a contract on the basis of its fundamental validity. There is no public policy exception to the Full Faith and Credit Clause that would permit them to do so.

Vermont and sought to dissolve the union under Connecticut family relations law. Id. at 172-74. The Connecticut court, applying Connecticut family law, found that the Vermont civil union was not a family relations matter as defined in the Connecticut statute, and, therefore, the court lacked jurisdiction to dissolve a civil union not recognized by Connecticut law. Id. at 175-76, 179-80.

As noted, the argument that such a decision would fall within the “public policy” exception of the Full Faith and Credit Clause is debatable, and some commentators have argued that only marriages performed in other states could be unenforceable if challenged. See, e.g., MERIN, supra note 7, at 231. But see L. Lynn Hogue, State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”: How Will States Enforce the Public Policy Exception?, 32 CREIGHTON L. REV. 29, 30, 36 (1998) (noting the continued vitality of the public policy exception to choice of law and the ability of states to refuse to recognize same-sex marriages using the exception as a moral objection to homosexual acts); Richard S. Myers, Same-Sex “Marriage” and the Public Policy Doctrine, 32 CREIGHTON L. REV. 45, 47 (1998) (arguing that a home state clearly has the right to refuse recognition of an out-of-state same-sex marriage using the public policy doctrine and that constitutional objections to such a conclusion based on violation of the Establishment Clause or discrimination against the sister state are unfounded).

Even if the public policy exception were well settled, it could be considered inconsistent with Supreme Court precedent to invoke the exception in the context of marriage. See MERIN, supra note 7, at 235. Merin points out that, even if the public policy exception in the Full Faith and Credit Clause were available to defend state and federal DOMAs, and these laws “passed constitutional muster, there are scholars who claim that states would still be obliged to recognize out-of-state marriages, building on precedents pertaining to recognition of interracial marriages, according to which it would be wrong to invoke a public policy exception for same-sex marriages.” Id. at 235 n.289 (citing Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 TEX. L. REV. 921 (1998); Mark Strasser, For Whom the Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriage, 66 U.
V. INITIATIVE 416 AND THE CONTRACTS CLAUSE

The Contracts Clause of the Constitution, mandating that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts” may also present fertile ground for legal challenges to Initiative 416. Gay couples routinely enter into contracts to provide a measure of security in their relationships. These contracts create, among other things, inheritance rights, powers of attorney and insurance rights. The sum result is a relationship commonly referred to as a “domestic partnership.” Some commentators fear that the second sentence of Initiative 416 would bar judicial enforcement of such contracts in the event that a court interprets them as creating a “domestic partnership” or “same-sex relationship.”

A. Current Application of the Contracts Clause

The Contracts Clause applies only to state laws that are very likely to implicate contracts, and the Supreme Court has

CIN. L. REV. 339 (1998)).

208 U.S. CONST. art. IV, § 1.

209 See generally, DUFF, supra note 91 (discussing “spousal equivalent” contracts); see also Lambda Life Planning, supra note 91 (exploring the various types of documents drafted to create legal rights and remedies to same-sex couples).

210 See Lambda Life Planning, supra note 91 and accompanying text (illustrating various contracts and legal documents protecting the rights of same-sex couples).

211 See Pam Belluck, Nebraskans to Vote on Most Sweeping Ban on Gay Unions, N.Y. TIMES, Oct. 21, 2000, at A9 (discussing fear that the amendment would dissuade employers and insurers from offering health benefits for same-sex partners, and that government agencies and institutions would interpret Initiative 416 in such a way as to prevent gays from making decisions about their hospitalized partners or adoption of their partner’s children); Leslie Reed, Gays Fear Measure’s Effect on Contracts, OMAHA WORLD-HERALD, Oct. 15, 2000. Reed analogizes marriage to a contract, and suggests that without honoring the relationship, you cannot honor the contract. Id. Similarly, contracts held by a gay partner providing benefits might be legally challenged by “anti-gay groups, by estranged family members or even by insurance carriers reluctant to pay on a large claim.” Id.
explicitly declared that it “will not strain to reach a constitutional question by speculating that [one state’s] courts might in the future interpret” the law to implicate contracts. There is, however, no leap of reasoning required to find that Initiative 416 will cover contracts between same-sex partners.

The Supreme Court has articulated two standards to examine claims of state imposed impairment of contracts. The more stringent rule was outlined in *Allied Structural Steel Co. v. Spannaus.* First, there must be a substantial impairment of contractual rights. To be upheld, the impairment must (1) address an emergency; (2) protect a basic societal interest and not a favored group; (3) be appropriately tailored; (4) impose only reasonable conditions on contracts; and (5) be of limited duration. *Allied* involved a challenge to a Minnesota state law that targeted a specific corporation and altered its pension

---

212 Exxon Corp. v. Eagerton, 462 U.S. 176, 189 (1983). In *Exxon*, Alabama oil and gas producers sought a declaration that an Alabama statute increasing severance tax on oil and gas extracted from Alabama wells while exempting royalty owners from the increase and prohibiting producers from passing the cost increase on to their consumer-purchasers was unconstitutional. *Id.* The Supreme Court held that the royalty-owner exception did not violate the Contracts Clause because the exemption did not suggest that any contractual obligations of which appellants were the beneficiaries would be nullified. *Id.*

213 438 U.S. 234 (1978). In *Allied Structural Steel* an employer challenged a state law, the Private Pension Benefits Protection Act, under which a private employer of 100 or more employees who provided pension benefits and met other specified requirements, was subject to a “pension funding charge” if he terminated the plan or closed the Minnesota office. *Id.* at 236. The Supreme Court found the statute unconstitutional as a violation of the Contracts Clause. *Id.* at 251.

214 *Id.* at 245 (“Severe impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation” in light of “the high value the Framers placed on the protection of private contracts.”). Here, the court found the Act severe because a basic term of the pension contract was substantially modified. *Id.* at 246. The change was one the company “relied on heavily, and reasonably . . . in calculating its annual contributions to the pension fund.” *Id.*

215 *Id.* at 242.
contracts, expanding the company’s payout obligations to retired employees. The Supreme Court overturned the statute, finding that it violated each of the requirements of the Contracts Clause and stating that Minnesota “grossly distorted” the contractual relationships of the corporation to its employees.

The second test applicable to laws allegedly impairing contracts was articulated in Energy Reserves Group, Inc. v. Kansas Power & Light Co. The Court did not overturn the Allied test, but modified it to incorporate the following three questions: (1) has a substantial impairment of contractual rights taken place; (2) is there a significant and legitimate public purpose; (3) if there is a valid public purpose, is the adjustment of contractual rights appropriate to that public purpose? The Court applied this test to a Kansas law placing price caps on the sale of natural gas that were more stringent than those to which suppliers and purchasers agreed. There, the substantial impairment had an important public purpose—protecting consumers from indefinite price increases due to energy deregulation. The law was appropriately tailored because it simply slowed price increases and supplemented federal regulation of intrastate gas prices. These cases demonstrate

---

216 Id. at 239. Specifically, the plaintiff employer challenged the Minnesota Private Pension Benefits Protection Act. The 1974 law provided that a private employer with at least 100 employees, among which at least one was a Minnesota resident, was subject to a pension funding charge if he terminated the pension plan or closed the Minnesota office. MINN. STAT. § 181B.01 (1974).

217 Id. at 240. The Minnesota law “substantially altered those relationships by superimposing pension obligations upon the company, conspicuously beyond those that it had voluntarily agreed to undertake.” Id.

218 Id. at 249.


220 Id. at 411-12.

221 Id. at 413-19.

222 Id. at 417. The Court specifically noted that “Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation.” Id.

223 Id. at 417. The Court reasoned that the state had a legitimate interest in “correcting the imbalance between the interstate and intrastate markets,”
that, while the Contracts Clause does not obliterate states’ police power, the Constitution limits the extent to which states can interfere with contracts.224

B. Application of Contracts Clause Principles to Initiative 416

Analysis of the Nebraska law begins with considering whether it actually impairs contractual rights. Scrutiny would then turn on whether adjustment of those contractual rights furthers a significant and legitimate public interest.

1. Substantial Impairment

The reality of gay couples in the United States is that contracts are essential mechanisms to delineate relationships, both between same-sex partners and gay employees and their employers.225 Therefore any court reviewing Initiative 416 need not “speculate” that the law will apply to same-sex relationships because it was “coordinating the intrastate and interstate prices by supplementing the federal Act’s regulation of intrastate gas.” Id. The Court further justified the Kansas act by stating that Congress had contemplated this type of supplementation, as evidenced in the House and Senate Conference Reports on the federal act. The court quoted the conference reports which stated that the federal act was not to invalidate any State’s authority to establish or enforce any maximum lawful price for sales of gas in intrastate commerce, including any indefinite price escalator clause, not exceeding the applicable maximum lawful price, if any, under Title I of the Act. Id. at 417 (quoting S. Conf. Rep. No. 95-1126, at 124-25 (1978); H.R. Rep. No. 95-1752, at 124-25 (1978)).

224 See Allied Structural Steel Co. v. Spannaus, 428 U.S. 234, 240 (1978) (noting that the Contracts Clause “is not, however, the Draconian provision that its words might seem to imply”); see also Samuel R. Olken, Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence, 72 Or. L. Rev. 513, 516 (1993) (providing a historical analysis of the Contracts Clause jurisprudence to suggest that the Supreme Court has tried to keep states from interfering with contracts while recognizing the importance of state governmental police powers).

225 See Lambda Life Planning, supra note 91 and accompanying text (discussing the use of contracts and other legal documents created to protect and define the rights and obligations of same-sex couples).
In *Keystone Bituminous Coal Ass'n v. DeBenedictis* the Supreme Court addressed a law that did not directly implicate contractual relations but had a substantial impact on them. The law at issue required coal-mining companies to leave fifty percent of coal in mines to prevent dangerous cave-ins at the surface. Coal mining companies routinely owned or leased subsurface mineral rights, and the surface owners faced the risk of cave-ins. Because the statute required that certain amounts of coal be

---

226 As noted, the Supreme Court has declared that it will refuse to speculate as to whether a legislative scheme will interfere with contract rights. See *Exxon Corp. v. Eagerton*, 462 U.S. 176, 189 (1983).

227 480 U.S. 470 (1987). The primary purpose of the law at issue in *DeBenedictis* was to impose financial liability on mine operators that caused damage. *Id.* at 486. Although this has a secondary effect on contractual negotiations because it prevented operators from holding surface owners to their contractual waiver of liability for surface damage, the Court found that Pennsylvania had appropriately exercised its police power. *Id.* at 488, 502.

228 *Id.* Specifically, the act mandated that fifty percent of the coal beneath certain structures remain in place and provided that if removal damaged these designated structures, the Pennsylvania Department of Environmental Resources could revoke the operator’s mining permit. *Id.* at 477. Coal companies challenged the Pennsylvania Subsidence Act as a violation of the Takings and Contracts clauses of the Constitution. *Id.* See also U.S. CONST. art. I, § 10; U.S. CONST. amend. V, § 6. To prevent revocation, operators had to either repair the damage within six months, satisfy any claims arising from the damage or deposit as security the cost of the repairs. *Keystone*, 480 U.S. at 477.

229 *Id.* When coal is mined and extracted, the strata and land surface lower. *Id.* at 474. This lowering can have adverse effects on the structural integrity of buildings and houses, as well as the ability to successfully farm land, and can cause losses to groundwater and surface ponds. *Id.* at 474-75. Since 1966, Pennsylvania has restricted the amount of coal that can be extracted in order to prevent these problems. *Id.* at 475-76. The Pennsylvania Subsidence Act furthered legislation by prohibiting mining that caused damage to “public buildings and noncommercial buildings generally used by the public, dwellings used for human habitation, and cemeteries.” PA. STAT. ANN. tit. 52, § 1406.6 (West 1986). The Court in *Keystone* held that Pennsylvania’s legislature had a legitimate interest in preventing this damage and the legislative response was a valid exercise of police power. *Keystone*, 480 U.S. at 486, 488.
left in the ground, mining companies could not reap the full benefits of the land rights they had purchased or leased, and the Court found that contract rights were indirectly, but substantially, affected. The Court upheld the law, however, because it addressed and was appropriately tailored to an essential public purpose—preventing dangerous subsidence. Similarly, although the text of Initiative 416 does not specifically mention same-sex contracts, the broad language and potential applications of the amendment threaten the enforceability of these contracts.

2. Public Interest

Initiative 416 is not founded upon the protection of a valid public interest, and consideration of whether it is appropriately tailored is therefore unnecessary. States are entitled to void contracts to uphold moral standards, but there is no such standard at issue in same-sex relationships. Non-marital cohabitation

---

230 Id. at 504-05. The Court agreed with petitioners’ claim that the statute substantially impaired contract rights because it prevented petitioners from waiving liability for land surface damage. Id. at 504. The Court also found a “significant and legitimate public purpose” in preventing the type of harm caused by the mining and extraction of coal. Id. at 505. To balance these competing interests, the Court followed its precedent of deferring to legislative judgment when the state is not a contracting party. Id. at 505 (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413 (1983); United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977)).

231 Id. at 505.

232 See supra Parts II.B, III.B (analyzing and rejecting any potentially arguable legitimate public interest furthered by Initiative 416 by exploring the legitimate intent and history of Initiative 416 and illustrating why the law could not pass the rational basis test under Equal Protection jurisprudence).

233 For example, a court can overturn a contract that is based on a promise to breach another contract, because the Contracts Clause would not be implicated. See Burgess v. Gateway Communications, Inc., 26 F. Supp. 2d 888 (S.D.W.V. 1998). Many courts and commentators have rejected the contention that homosexuality is “immoral” in any legal context. See, e.g., Williams v. Pryor, 220 F. Supp. 2d 1257, 1290 (N.D. Ala. 2002). The court noted that:

Social tolerance for non-coercive deviant sexual acts, such as heterosexual sodomy between spouses and homosexual activity
agreements are enforceable in Nebraska. The only moral issue presented to a Nebraska court enforcing cohabitation agreements is that they cannot be based on an exchange of money or lodging for sexual intercourse. Furthermore, Nebraska does not have a public policy against homosexuality in general, as evidenced by the fact that sodomy has been decriminalized, sexual orientation has been rejected as a factor in child custody cases and state non-discrimination laws are applied to harassment claims.

Although Nebraska’s courts have not addressed same-sex relationships or co-habitation agreements, courts in other jurisdictions have found them to comply with public policy.

between consenting adults, has increased to the point where these acts have been decriminalized in many nations and in many states of the United States. Even where they remain prohibited, efforts at enforcement are perfunctory at best.

Id. The Williams court also noted that the influential Kinsey sex studies revealed that “men and women regularly and widely engaged in . . . sodomy . . .” and that “[t]he findings of these studies served to demonstrate that what was once considered ‘deviant’ is in fact quite normal and common. As a result, American attitudes about sexuality changed drastically . . . .” Id.


235 Id. at 703 (noting that if a contract includes consideration of sexual intercourse it is void as against public policy).

236 See NEB. REV. STAT. § 28-704 (repealed 1978).

237 See Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997) (holding that “sexual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody there must be a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity”).

238 See Op. Neb. Att’y Gen. 96044 (1996) (stating that Nebraska’s non-discrimination law’s “gender-neutral definition demonstrates [that] there is nothing . . . to limit . . . sexual harassment to heterosexual harassment” because there is the “possibility [of] sexual harassment of men by women, or men by other men, or women by other women . . .”).

239 For example, many states have amended their laws to grant adoption and custody rights to gay couples or parents, and numerous judicial decrees have granted similar protection and rights to gays and lesbians throughout the country. See, e.g., In re M.M.D., 662 A.2d 837 (D.C. 1995) (holding that unmarried, cohabiting couples, whether heterosexual or homosexual, could
For example, the California Court of Appeals enforced a cohabitation agreement between same-sex partners.\textsuperscript{240} The court stated that “[a]dults who voluntarily live together and engage in sexual relations are competent to contract respecting their earnings and property rights.”\textsuperscript{241} There is little support, therefore, for the argument that Initiative 416 codifies existing public policy against homosexuality or non-marital relations. Initiative 416 does not rest upon any public purpose sufficient to justify denying recognition of contracts between gay partners.

\textsuperscript{240} See Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988) (reversing the trial court’s conclusion that an oral contract between homosexual partners was unenforceable and finding that, over the course of a seven year relationship, the plaintiff established “alleged consideration for the purported contract substantially independent of sexual services”). But see Shahar v. Bowers, 114 F.3d. 1097 (11th Cir. 1997). In Shahar, the Court of Appeals for the Eleventh Circuit permitted the rescission of an employment offer by the Georgia Attorney General based on the applicants lesbian “marriage.” \textit{Id.} at 1099. This decision is significant because it allowed a private solemnization of a relationship to dictate a legal outcome, inasmuch as the Georgia Attorney General’s disapproval and concerns about the lesbian relationship provided legal justification to fire the plaintiff. \textit{Id.} The Eleventh Circuit refused to recognize that intimate associational rights to extend to gay relationships. \textit{Id.} at 1106. The court questioned the plaintiff’s judgment, saying that she “seemingly did not appreciate the importance of appearances and the need to avoid bringing ‘controversy’ to the Department, the Attorney General lost confidence in her ability to make good judgments for the Department.” \textit{Id.} at 1105-06. The court analogized refusing employment to a partnered lesbian to refusing employment to a member of the Klu Klux Klan. \textit{Id.} at 1108.

The decision raises the possibility that Nebraska courts could find private agreements between contracting gay partners unenforceable. Hawaii foresaw just this type of interference with private relationships, and specifically exempted private solemnization of gay relationships from the purview of its laws. \textit{See} Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The drafters of Initiative 416 either did not foresee this potential or chose to ignore it.

\textsuperscript{241} See Whorton, 238 Cal. Rptr. at 407.
NEBRASKA’S INITIATIVE 416

CONCLUSION

Nebraska voters passed a law that some predict will bring the issue of equality for gays before the Supreme Court. Indeed, the questions presented by Initiative 416 are perhaps even more distinct than in *Romer v. Evans*. *Romer* pitted persons united

---

242 Immediately after Initiative 416 was passed, the American Civil Liberties Union (“ACLU”) began preparations to challenge the amendment. See John Barrette, *Bush-Gore Battle Not the Only Post Election Court Battle in the Works*, NEB. STATE PAPER, November 30, 2000; John Fulwider, *ACLU Hopes to Have 416 in Court by January*, NEB. ST. PAPER, November 19, 2000; John Fulwider, *Legal Challenge of 416 in Very Early Stage*, NEB. ST. PAPER, November 9, 2000. Progress on the lawsuit has moved slowly, however, and recent developments in the state have arguably frustrated the effort. For example, when the Nebraska Supreme Court barred the adoption of a lesbian woman’s child by her female partner in March of 2002, the ACLU decided to accept the ruling and abandon any option for appeal. See John Fulwider, *Lesbian Asks High Court OK to Adopt Partner’s Son*, NEB. ST. PAPER, October 2, 2001. After the decision, Executive Director of the Nebraska ACLU Tim Butz stated that the ruling, “when coupled with Initiative 416, just made the family feel like they were not wanted in this state. They decided not to fight it, and just move on.” See John Fulwider, *ACLU Won’t Appeal Gay Adoption Ruling*, NEB. ST. PAPER, March 18, 2002. Nevertheless, efforts to challenge the Amendment continue through the support of the ACLU and social-justice organizations in Nebraska such as Citizens for Equal Protection (CFEP) and Parents, Families and Friends of Lesbians and Gays (PFLAG). These groups have collaborated with attorneys from the Lambda Legal Defense and Education Fund in Nebraska as they prepare to address the law. Currently, their efforts include attempts to find examples of where the law is being applied and how it harms gay couples by banning recognition of their relationships. For further information about the efforts, see generally PFLAG Lincoln-Cornhusker, at http://pflag.ineb.org (last visited Jan. 22, 2003).

243 517 U.S. 620 (1996). It is interesting to note, however, that during the heated litigation of *Romer*, the plaintiffs sought to strike a sympathetic cord with the courts by stressing that the Colorado law was motivated primarily by philosophical opposition to homosexuality rather than any legitimate government interest. *Id.* For a thoughtful analysis of the efforts of the *Romer* litigants in the context of the contemporaneous religious conservative movement, see Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261 (2002). According
by sexual orientation against all other classes of people, whereas Initiative 416 makes a clear distinction between homosexuals and heterosexuals, with no basis that one group is more deserving of protection than the other. Thus, a court addressing Nebraska’s amendment would reach the heart of constitutional issues involving gays. Any decision striking down the second sentence of this broad law would limit states’ power to regulate gay marriage. It would also send a strong message to states that they must establish sound bases for legislation that distinguishes between homosexuals and heterosexuals. The Nebraska Amendment is vulnerable to a legal challenge; litigation would ensure that Initiative 416 is subjected to the scrutiny it merits and escaped in the popular initiative process.244

---

244 As noted, Initiative 416 was passed by popular referendum. See supra Part II (discussing the legislative background of Initiative 416 and margin by which Nebraska’s voters adopted the amendment).
AIMING FOR ACCOUNTABILITY: HOW CITY LAWSUITS CAN HELP REFORM AN IRRESPONSIBLE GUN INDUSTRY

Rachana Bhowmik*

INTRODUCTION

Imagine an industry that manufactures products responsible for the death and injury of thousands of Americans. These products are distributed through a system in which no party—neither the dealer, the distributor nor the manufacturer—takes responsibility or is held liable for the negligent sale of the product. The same distribution system guarantees that the product flows through the market to individuals that society has deemed unfit to possess and use such products. Despite the high number of deaths and injuries caused by the product, the manufacturers do not utilize reasonably available safety devices that would prevent accidental deaths and injuries, because there is no federal agency with authority to mandate such safety devices. Moreover, the manufacturers assume they will not be held liable under common law tort principles, so they continue to conduct business while innocent Americans continue to die from the foreseeable negligent use of the product.

*Rachana Bhowmik, J.D. University of Virginia School of Law; B.A. Yale College. The author was an attorney with the Legal Action Project of the Brady Center to Prevent Gun Violence, co-counsel to many cities that have filed suit against the gun industry. The views expressed in this article are solely those of the author. This article is in part a response to Robert A. Levy, Pistol Whipped: Baseless Lawsuits, Foolish Laws, 10 J.L. & Pol’y 1 (2001). The author wishes to thank Allen Rostron and Francis Grab for their assistance in reviewing this article.
While this may seem a far-fetched hypothetical, there is no need to imagine such an industry. One already exists: the United States gun industry. The industry’s manufacturing process is subject to no federal safety or health oversight. It is not subject to any federal manufacturing regulations and only occasional state regulation.¹

Despite the tangible impact that the gun industry has on American society, the American public is largely unaware of the protected status afforded gun manufacturers under current regulations. The American public does not realize that domestically manufactured guns are exempt from any consumer product safety oversight. One poll showed that about half of respondents mistakenly believed that guns are regulated by federal safety standards.² It is important for Americans to know this, and to understand that the gun industry uses a marketing and distribution system that knowingly funnels guns into the hands of

¹ For example, Maryland and Massachusetts have enacted legislation regulating the sale and storage of firearms. See Md. Code Ann., § 442(C)(c) (2002) (prohibiting a regulated firearm dealer from selling or transferring firearm until seven days from the time the application for purchase has been processed in triplicate and the original copy has been sent to the Secretary); Mass. Gen. Laws ch. 140, § 131L(a) (1998) (requiring that firearms be properly stored in a secured locked container or equipped with a safety device to render it inoperable by any person other than the authorized user). See also Stephen T. Bang, Crimes: Trigger Locks and Warning Labels on Firearms Become a Reality, 31 McGeorge L. Rev. 265 (2000) (discussing California’s strict gun control laws); Anne-Marie White, A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms, 30 Hous. L. Rev. 1389 (1993) (discussing state regulation of the gun industry and asserting that many state gun control laws are upheld as a reasonable exercise of the state’s police power).

² Susan B. Sorenson, Regulating Firearms as a Consumer Product, 286 Science 1481, 1482 (1999) (polling awareness and opinions on gun safety issues among various groups and finding that 51.3% believed safety was already federally regulated and 19.1% did not know whether it was). This poll also found that the overall support for government regulations on the design of firearms, by percent, was 74.9% for design safety standards, 36.9% for suits against manufacturers, 38.5% for banning personal possession, 87.9% for child-proofing and 72.2% for personalizing handguns. Id.
Gun manufacturers have declared for decades that they bear no responsibility for the accidental use or criminal misuse of guns, refusing to include safety devices on their weapons or correct the distribution system that ensures easy criminal access to guns. Recent litigation by cities, municipalities, and one state, however, seeks to hold the industry accountable for failure to provide reasonably available safety devices that would save lives and failure to implement even minimal restrictions on the sale of its products to prevent easy access to guns by minors and criminals.

---

3 See infra Part III (discussing the gun industry’s knowledge of an illicit gun market).

4 See Wayne LaPierre, Vice-President of the National Rifle Association (NRA), Address at the NRA Annual Meeting of Members (May 1, 1999) (remarking that the NRA “has never agreed that magazine capacity has any relationship to the criminal misuse of firearms” and “there is no evidence waiting periods work.”), available at http://www.nrahq.org/transcripts/denver_wlp.asp; see also National Rifle Association, NRA Gun Safety Rules, at http://www.nrahq.org/education/guide.asp (last visited Mar. 26, 2002) (stating that rules for gun safety are to merely “[k]now your target and what is beyond[,] . . . [k]eep your finger off the trigger until ready to shoot . . . [and] [n]ever use alcohol or over-the-counter or other drugs before or while shooting[,]” but not indicating that gun manufacturers should have any role in gun safety).

5 Litigation by states, cities and municipalities is a relatively recent phenomenon, and the plaintiffs’ pleading theories are relatively consistent. See Plaintiff’s Complaint, City of Chicago v. Beretta U.S.A. Corp., 2003 Ill. App. LEXIS 276 (Ill. App. Ct. 2003) (No. 1-00-3541) (claiming that gun dealers, manufacturers and distributors engaged in conduct that constituted a nuisance in Cook County by knowingly exploiting the market for illegal guns and designing and manufacturing firearms to stimulate demand of illegal firearms); Plaintiff’s Complaint, Archer v. Arms Tech., Inc., 72 F.Supp.2d 784 (E.D. Mich. 1999) (No. 99-912658) (claiming that gun manufacture’s business practices are calculated to exploit the illegitimate firearms market and have adopted a strategy of willful blindness); Plaintiff’s Complaint, City of St. Louis v. Cernicek (Mo. Cir. Ct. 1999) (No. 992-01209) (claiming gun manufacturers and distributors created a public nuisance, conspired to engage in unlawful acts and negligently failed to develop safety devices); Plaintiff’s Complaint, City of New York v. Arms Tech., Inc. (E.D.N.Y. 2000) (No. 1:00-cv-3641) (claiming that gun manufacturers failed to exercise control over production, marketing and distribution of guns, resulting in purchase of handguns by criminals and other...
As Americans, we know the great devastation that guns cause in our country. Recent statistics indicate that from 1981 through 1999, firearms caused 271,103 homicides, 337,954 suicides and 26,294 unintentional deaths in the United States. Studies show that for each gun death in our country there are three gun injuries.

Guns take a particularly heavy toll on the nation’s young people, as highlighted by the horrific school shootings in prohibited persons); Plaintiff’s Complaint, Morial v. Smith & Wesson Corp. 785 So.2d 1 (La. 2001) (No. 00-CA-1132) (claiming that gun manufacturers designed an unreasonably dangerous product, failed to include safety device and failed to provide adequate warnings in violation of the Louisiana Product Liability Act); First Amended Complaint, City of Boston v. Smith & Wesson (Mass. Super. Ct. 2000) (No. 1999-02590) (claiming gun manufacturers created a public nuisance, negligently distributed and marketed, defectively designed firearms and failed to warn); Plaintiff’s Complaint, State of N.Y. v. Arms Tech. Inc., No. 1-00-03641-JBW (N.Y. Sup. Ct. 2000); Plaintiff’s Complaint, District of Columbia v. Beretta U.S.A. Corp. (D.C. Super. Ct. 2000) (No. 00-0000428) (claiming gun manufacturers violated public nuisance laws and negligently distributed firearms); Plaintiff’s Complaint, City of Atlanta v. Smith & Wesson Corp. (Fulton County Ct. 1999) (No. 99VS014917J) (claiming that gun manufacturers defectively and negligently design their products, and failed to include safety devices and adequate warnings); Plaintiff’s Complaint, People of California ex rel. Hahn v. Arcadia Machine & Tool (Cal. Super. Ct. 1999) (No. BC210894) (claiming gun manufacturers designed handguns to appeal to criminals and have increased production to meet demand from illegal market, and failed to incorporate feasible safety technology); Plaintiff’s Complaint, City of Cincinnati v. Beretta U.S.A. Corp., 1999 Ohio Misc. LEXIS 27 (Ohio Ct. C.P. 1999) (No.381897) (claiming gun manufacturers violated strict liability and created an unreasonable dangerous product, failed to warn and engaged in unfair and deceptive advertising practices).

Studies show that for each gun death in our country there are three gun injuries.


GUN INDUSTRY ACCOUNTABILITY

Paducah, Kentucky, Springfield, Oregon and Littleton, Colorado. Studies show that a teenager in the United States is more likely to die of a gunshot wound than from all “natural” causes combined. Between 1993 and 1998, there was an average 22,000 nonfatal firearm injuries annually among people under 20. One recent study shows that a statistically significant

---

8 See Lynda Gorov & Brian Macquarrie, Oregon Youth Warned of Trouble, BOSTON GLOBE, May 23, 1998 at A1 (detailing shooting at Springfield, Oregon school where 15-year old Kip Kinkle killed two students, injured 22 others and also killed his mother and father); Paul Hoversten, In Kentucky, “Blood was Everywhere,” Teens Dismissed Suspect’s Vow of “Something Big,” USA TODAY, Dec. 2, 1997 at 3A (describing Paducah, Kentucky school shooting by 14-year old student, killing two and injuring six); Patrick O’Driscoll, Students Massacred in Colorado. Police Say 25 Killed; Shooters Stalked School on a “Suicide Mission,” USA TODAY, April 21, 1999 at 1A (discussing shooting by two high school students armed with high-powered rifles who took over school).  

9 LOIS A. FINGERHUT, CENTERS FOR DISEASE CONTROL AND PREVENTION, ADVANCE DATA FROM THE NATIONAL VITAL STATISTICS SYSTEM, FIREARM MORTALITY AMONG CHILDREN, YOUTH AND YOUNG ADULTS 1-34 YEARS OF AGE, TRENDS AND CURRENT STATUS, UNITED STATES: 1985-90 (1993) (finding that among black males 10 through 34 years of age, injuries from firearms are the leading cause of death), http://www.cdc.gov/nchs/about/major/dvs/mortdata.htm.  

10 KAREN GOTSCH ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, SURVEILLANCE FOR FATAL AND NONFATAL FIREARM-RELATED INJURIES—UNITED STATES 1993-1998, 1-32 (Apr. 13, 2001), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5002a1.htm. The Centers for Disease Control found that from 1993 to 1998, an estimated average of 115,000 firearm-related injuries, including 35,200 fatal and 79,400 nonfatal injuries, occurred annually in the United States. Males were seven times more likely to die or be treated in a hospital for a gunshot wound than females. The proportion of firearm-related injuries that resulted in death increased from younger to older age groups. Approximately 68% of firearm-related injuries for teenagers and young adults aged 15-24 years were from interpersonal violence and 78% of firearm-related injuries among older persons aged greater or equal to 65 years old were from intentionally self-inflicted gunshot wounds. Since 1993, firearm-related injuries and deaths have been declining steadily. In 1998, however, firearm-related injuries remained the second leading cause of death in the United States, accounting for approximately 31,000 deaths. The majority of these fatal and nonfatal firearm-related injuries result from interpersonal violence and intentionally self-inflicted gunshot wounds, but approximately 15,000 unintentional gunshot wounds are treated in U.S. hospital emergency
association exists between gun availability and elevated rates of suicide and homicide among children.\textsuperscript{11} Gun deaths and injuries not only cause American communities immense anguish and sorrow, they also exact a heavy financial toll on society. The burden borne by the American public as a result of gun violence is estimated at approximately $20 billion each year.\textsuperscript{12}

Addressing the costs and causes of gun violence requires a multi-faceted approach. The only regulation to date is on the sale of guns, and can be undermined, as manufacturers know, by savvy buyers. The Brady Bill, the most significant body of federal law on gun sales, established a five-day mandatory waiting period before the purchase of a firearm, required a background check to be made for any firearm purchase and created a national database to facilitate these background checks.\textsuperscript{13} While criminals and those who misuse or fail to departments each year. Although firearm-related injuries represent less than 0.5% of injuries treated in hospitals, they have an increased potential of death and hospitalization compared with other causes of injury. In 1994, treatment of gunshot injuries in the United States was estimated at $2.3 billion in lifetime medical costs, of which $1.1 billion was paid by the federal government. These factors emphasize the importance of firearm-related injuries as a public health concern. \textit{Id.}

\textsuperscript{11} Matthew Miller et al., \textit{Firearm Availability and Unintentional Firearm Deaths, Suicide and Homicide Among 5-14 Year Olds}, 52 J. OF TRAUMA 267 (2002) (finding that a disproportionately high number of 5-14 year olds died from suicide, homicide, and unintentional firearm wounds in states and regions where guns were more prevalent).

\textsuperscript{12} See Linda Gunderson, \textit{The Financial Costs of Gun Violence}, 131 ANNALS INTERNAL MED. 483 (1999), available at http://www.annals.org/issues/v131n6/full/199909210-00102.html. Gunderson states that because many victims of gun violence have no health insurance, taxpayers fund approximately 85% of their medical costs. \textit{Id.} Further, “[t]wo major factors contribute to the effect of gun violence on the overall costs of health care: the cost of long-term care for disabled victims and the cost of lost productivity.” \textit{Id.} For example, of the $20 billion gun violence cost taxpayers, “$1.4 billion was solely for expenses related to health care, $1.6 billion was for injury-related illness and disability (lost productivity), and $17.4 billion was for premature death (lost productivity).” \textit{Id.}

\textsuperscript{13} Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1543 (1993). The Brady Bill had its genesis in the 1981 shooting of James Brady by John Hinckley, Jr. during the unsuccessful attempted assassination of
adequately store firearms should be punished, those who manufacture and market guns should be held to the same standards of accountability as other manufacturers. The American taxpayer should not be left to foot the bill for foreseeable injuries caused by manufacturers’ irresponsible behavior.

The industry’s abject failure to implement even the most basic of preventative measures is due in large part to the fact that the industry has been exempt from common law tort liability for too long.14 Despite knowledge that it contributes to the underground criminal gun market, and despite the ability to implement design and distribution changes that would stem the tide of guns into this market, the industry has taken no action.15 Since the rise of city


14 See, e.g., Timothy Lytton, Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry, 65 MO. L. REV. 1, 7-8 (2000). Lytton points out that only four suits against the industry have survived pretrial dismissal or summary judgment. He further notes that “to date, claims against gun manufacturers for crime-related injuries based on design defect theory have been dismissed for plaintiffs’ failure to allege a defect in the gun that caused it to malfunction.” Id. Ultimately, he concludes that this immunity of “gun manufacturers highlights the importance of non-economic concepts of wrong—such as defect and breach of duty—in the adjudication of tort claims against gun manufacturers,” and argues that the reliance of economic analysis on complex statistical data, given the highly speculative nature of such data in gun cases, makes economic analysis unhelpful in finding workable answers to the questions posed by tort claims against firearms manufacturers. Id.

15 See David Kairys, Legal Claims of Cities Against the Manufacturers of Handguns, 71 TEMP. L. REV. 1, 6-7 (1998) Kairys states:

[the company and the industry as a whole are fully aware of the extent of the criminal misuse of firearms. The company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry position has consistently been to take no independent action to insure
suits against the gun industry, however, the special status enjoyed by the industry has begun to change.\textsuperscript{16}

Part I of this article debunks the arguments proffered by opponents of common sense gun regulations: that unregulated gun ownership actually helps reduce crime, and that any regulation of guns in the United States is an infringement on the Second Amendment. Next, Part II examines the fact that, despite studies indicating that guns are responsible for thousands of injuries and deaths in the United States each year, the industry enjoys a privileged status. The gun industry is specifically exempt from the most basic consumer product safety standards, and efforts are underway to further exempt the industry from basic common law tort claims. Part III discusses how the underground market in guns is regularly supplied by the gun industry and the ways in which the gun industry could implement simple, common sense design, marketing and distribution changes that would prevent gun sales to criminals, prevent child accidental shootings and help save lives. Lastly, Part IV examines minor changes the industry has made in response to the

on-going city-suit litigation. These suits have increased accountability and brought about the very same changes that the industry once claimed were both impractical and impossible.

I. ARGUMENTS AGAINST LIABILITY

Opponents of increased gun control and manufacturer liability advance myriad arguments to support their positions. Their conclusions, whether based in statistical or constitutional analysis, are fundamentally flawed.

A. “More Guns Mean Less Crime”: Questionable Statistics Used to Argue Against Common Sense Gun Laws

The gun industry and the National Rifle Association (“NRA”) regularly repeat the mantra “more guns mean less crime.” In his article “Pistol Whipped,” Robert Levy declares “the higher the number of carry permits in a state, the larger the drop [in crime].” These assertions are often based on research by American Enterprise Institute fellow John Lott, in conjunction with David Mustard. Their research showed that at the same time that states across the country enacted relaxed concealed weapons laws (“shall issue” laws), a national reduction in crime

17 See Wayne LaPierre, Address at the NRA Annual Meeting supra note 4 (remarking that “We believe that a lawful, properly-permitted citizen who chooses to carry a concealed firearm not only deserves that right, but is a deterrent to crime. We support the right to carry because it has helped cut crime rates in all 31 states that have adopted it”).
18 Robert A. Levy, Pistol Whipped: Baseless Lawsuits, Foolish Laws, 10 J.L. & Pol’y 1, 40 (2001) (citing John Lott’s research as proof that “[l]aws permitting the carrying of concealed handguns reduce murder by about 8% and rape by about 5%”).
19 John R. Lott Jr. & David B. Mustard, Crime, Deterrence, and Right to Carry Concealed Handguns, 26 J. LEGAL STUD. 1 (1997) (utilizing a cross-section of crime data for U.S. counties from 1977 to 1992, the authors found that states allowing citizens the right to carry concealed weapons deterred violent crimes and predicted that other states would have experienced a drop in violent crime had they adopted such a provision).
occurred. From that fact, they erroneously determined that the carrying of firearms among the general population causes a reduction in crime. Analyzing county-level crime data for the years 1977 to 1992, and relying upon statistical regressions of select datasets, Lott and Mustard concluded that the relaxation of concealed weapons laws deterred violent crimes, increased property crimes due to criminal substitution and had no effect upon the number of accidental deaths. They also claimed that, “[their] evidence implies that concealed handguns are the most cost-effective method of reducing crime thus far analyzed by economists, providing a higher return than increased law enforcement or incarceration, other private security devices, or social programs like early educational intervention.”

Lott and Mustard’s bold assertions led researchers to re-examine their data. While the gun lobby and its supporters have

---


21 Lott & Mustard, supra note 19, at 64.

22 Id.

23 Id. at 65.

24 See, e.g., Daniel Webster & Jens Ludwig, Myths about Defensive Gun Use and Permissive Gun Carry Law (1999) (describing problems with Lott and Mustard’s data such as variations in the estimated effects in their studies (8-67%), failure to account for other important factors, which affect state crime and homicide rates and the absence of expected effects, for example, the small effect of “shall carry” laws on robberies), at http://www.jhsph.edu/gunpolicy/myths.pdf; Franklin Zimring & Gordon Hawkins, Concealed Handguns: The
GUN INDUSTRY ACCOUNTABILITY

since quoted Lott and Mustard’s thesis as fact, they fail to acknowledge the numerous critical reviews of Lott and Mustard’s assertions which reveal either that concealed weapons laws have no effect on crime or, worse, that more guns equal more crime.25

Researchers Daniel Webster and Jens Ludwig pointed out that, “errors aside, the fundamental problem with Lott’s research can be summarized by the old science adage ‘correlation is not causation.’ Variables may be related to one another yet not cause one another.”26 Professor Franklin Zimring,27 determined that the datasets used in the Lott-Mustard Study included inherent biases that resulted in skewed results.28 Even Gary Kleck, an author whose own data regarding defensive gun usage is regularly used to argue against gun safety measures, is skeptical of Lott’s numbers.29 Kleck remarked that the Lott-Mustard results:


25 See, e.g., Levy, supra note 18, at 40-41 (relying on Lott and Mustard’s data without acknowledging methodological criticism).

26 Webster & Ludwig, supra note 24 (asserting arguments prepared for the “Strengthening the Public Health Debate on Handguns, Crime and Safety” meeting in October 1999, and clarifying that it would be erroneous to attribute differences in crime rate to the presence of permissive concealed-carry laws without considering other unmeasured differences).

27 Professor Franklin Zimring is the William G. Simon Professor of Law and Director of the Earl Warren Legal Institute at the University of California, Berkeley. His co-author Professor Gordon Hawkins teaches at the Institute of Criminology, University of Sydney. Id.

28 Many of Lott’s strongest critics believe that his work has stepped over the line of academic research into policy advocacy, which may have dulled his attentiveness to disconfirming evidence. Zimring & Hawkins, supra note 24, at 49-50. The authors noted that “[a]s a gauge of his blind belief in the power of concealed weapons, following the March 1998 Jonesboro massacre, Lott . . . argued in a Wall Street Journal op-ed that the best way to prevent such shootings was to arm teachers. Id. Wrote Lott, ‘[a]llowing teachers and other law-abiding adults to carry concealed handguns in schools would not only make it easier to stop shootings in progress, it could also help deter shootings from ever occurring.’” Id.

29 GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 372 (1997) (suggesting that Lott and Mustard’s conclusion that “shall carry” laws reduce crime and deter prospective criminals may be overstated because “if those who got permits were merely legitimizing what they were already doing
could be challenged, in light of how modest the intervention was. The 1.3% of the population in places like Florida who obtained permits would represent at best only a slight increase in the share of potential crime victims who carry guns in public places. . . . More likely, the declines in crime coinciding with relaxation of carry laws were largely attributable to other factors not controlled in the Lott and Mustard analysis.30

Even David Mustard, co-author of the Lott-Mustard study, admitted that the study did not include all factors that may have affected the decline in crime rates during the time period examined.31

Most researchers agree that the methods of the Lott-Mustard study were not scientifically sound.32 For example, the American Journal of Public Health published a criticism of the Lott-Mustard study highlighting significant flaws in the study, including “misclassification of gun-carrying laws, endogeneity of predictor variables, omission of confounding variables, and failure to control for the cyclical nature of crime trends.”33 These

before the new laws, it would mean there was no increase at all in carrying or in actual risks to criminals.”).  
  
30 Id. at 372. See also Albert W. Alschuler, Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime?, 31 VAL. U. L. REV. 365, 367 (1997) (discussing the faults of regression analysis as a methodology and noting discrepancies in the Lott-Mustard study, such as finding a negative correlation between murder, burglary, rape and large versus small cities).

31 See Klein v. Simon Leis , 767 N.E.2d 286 (Ohio Ct. App. 2002) (stating some of the variables not included in the study, such as family structure or wide spread state or county prison sentences). Mustard also conceded that “some experts in his field disagreed with his methodology, and that reasonable people might differ on the efficacy of various concealed-carry laws.” Id. at 296.


33 Webster et al., supra note 32, at 918-22. The authors criticized the methodology of the Lott-Mustard study, noting that the study attempted to classify the “shall issue” laws into two neat categories, without consideration of those falling somewhere in between. Id. This caused serious problems for their
flaws were so “substantial” that the researchers stated, “any conclusions about the effects of shall-issue laws based on this study are dubious at best.” Researchers Dan Black and Daniel Nagin reviewed Lott and Mustard’s data and determined that:

their results are highly sensitive to small changes in their model and sample. Without Florida in their sample, there is no detectable impact of right-to-carry laws on the rate of murder and rape, the two crimes that by the calculations of Lott and Mustard account for 80 percent of the social benefit of right-to-carry laws.  

Professor Robert Erhlich of George Mason University debunked Lott’s myth and gave Lott’s theories “three cuckoos” on a crazy scale of four cuckoos. 

Moreover, the conclusions of several independent studies directly contradict the Lott-Mustard thesis. Researchers Ian Ayers and John Donahue published a study in the Journal of American Law and Economics using the same trends analyzed by Lott and Mustard and found that the implementation of “shall
issue” concealed carry permit laws actually increased the rates of crime and violence. Similarly, research conducted by University of Chicago economics Professor Mark Duggan discovered that increases in gun ownership rates directly correlate with increases in gun crimes. Duggan specifically concluded that, correcting for improper variables, the Lott-Mustard research is incorrect.

The gun lobby and its supporters are similarly fond of quoting unreliable self-defense statistics. Gary Kleck estimates that civilians use guns in self-defense some 2.5 million times a year. While these numbers have been oft-cited by the NRA and other opponents of gun safety measures, these number are based...

38 Ian Ayres & John J. Donohue III, Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof, and Public Policy, 1 AM. L. & ECON. REV. 436, 436-70 (1999) (concluding that “[a]t the end of the day, we are concerned that Lott’s estimated coefficients for adopting states are not as robust as he claims and may be seriously biased because of omitted explanatory variables.”), available at http://islandia.law.yale.edu/ayers/pdf/lottreview.pdf.

39 Mark Duggan, More Guns, More Crime, 109 J. POL. ECON. 1086, 1089 (2001). Estimating annual rates of gun ownership at both the state and the county levels during the past two decades, Duggan demonstrates that changes in gun ownership are significantly positively related to changes in the homicide rate, with this relationship driven almost entirely by an impact of gun ownership on murders in which a gun is used. Id. The effect of gun ownership on all other crime categories is much less marked. Id. Recent reductions in the fraction of households owning a gun can explain one-third of the differential decline in gun homicides relative to non-gun homicides since 1993. Id.

40 Id. at 1086.

41 See Levy, supra note 18, at 42 (asserting that evidence suggests armed civilians in fact deter crime, and that proposed gun regulations will “strip law-abiding citizens of their most effective means of self-defense”).


43 Paul H. Backman, Armed Citizens and Crime Control, National Rifle Association Institute for Legislative Action, at http://www.nraila.org/media/misc/Blackman.htm (last visited Oct. 10, 2002) (citing Kleck & Gertz, supra note 42, at 167 in part for the premise that “firearms are used for self-protection about 2.5 million times annually”).
GUN INDUSTRY ACCOUNTABILITY

on self-reporting surveys and are grossly over-estimated. The Kleck study projects a number of assailants wounded by armed citizens in 1992 that is more than double the estimate from another study of the total number of people treated for gunshot wounds in a nationally representative sample of hospitals in 1994. In his efforts to externally validate Kleck’s estimate, researcher David Hemenway discovered that there were several problems with the Kleck study. Among those problems are difficulties in estimating a rare event and conflicts due to social desirability or personal presentation bias, whereby surveyed individuals misrepresent information because of the desire to “look good.”

Despite this substantial body of research challenging such statistics and conclusions, critics of gun safety laws and city-suit litigation repeatedly rely upon these controversial studies to justify not holding the gun industry responsible for their negligent behavior. Once these flawed calculations are laid aside,

44 See Kleck & Gertz, supra note 42, at 167.
45 Webster & Ludwig, supra note 24, at 7 (arguing that more guns will lead to more deaths).
47 See id. One methodology flaw in Kleck’s survey was that participants were posed questions in contexts where they were likely to misrepresent information in the hopes of “looking good.” For example, if they purchased a gun for self-defense purposes they will want to claim they used the gun for self-defense so that their intended use was realized. Id.
48 See, e.g., Levy, supra note 18, at 12-16 (arguing that the Second Amendment protects the rights of individuals to keep arms against tyranny); Lott & Mustard, supra note 19, at 1. See also H. Sterling Burnett, Suing Gun Manufacturers: Hazardous to Our Health, 5 TEX. REV. L. & POL. 433 (2001) (stating that societal benefits stemming from policies allowing less regulated gun use outweigh associated costs and therefore gun use should not be regulated in the ways suggested by several pending lawsuits against the gun industry). See generally Richard C. Ausness, Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing, 53 S.C. L. REV. 907 (2002) (identifying the theories of negligence on which lawsuits against gun manufacturers are based); Symposium, Guns and Liability in America, 32 CONN. L. REV. 1425 (2000) (discussing and debating issues of
however, one central truth emerges: Americans suffer from unreasonable levels of gun violence and something must be done to curb the epidemic of gun violence in our nation.

B. “The Right to Keep and Bear Arms”: Debunking the Myth that the Second Amendment Prohibits Common Sense Gun Safety Laws

The interpretation and application of the Second Amendment is a hotly debated issue. The Amendment reads “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

Robert Levy of the CATO institute contends that the Second Amendment “protects . . . each individual against the state.” With no supporting evidence, he argues that “disarmed societies tend to become police states” and maintains “the individual rights view [of the Second Amendment] establishes a

and relationships between gun safety policy, statistical studies, state laws, and pending lawsuits).

49 See generally, Symposium on the Second Amendment: Fresh Looks: The Second Amendment in Context: the Case of the Vanishing Predicate, 76 CHI.-KENT. L. REV. 403 (2000) (describing the controversy between the “individual rights” interpretation of the Second Amendment and the position that the Amendment was adopted to assure the states’ control over their local militias only). Compare Todd Barnet, Gun “Control” Laws Violate the Second Amendment and May Lead to Higher Crime Rates, 63 MO. L. REV. 155 (1998) (arguing that the Second Amendment creates an individual right to bear arms for personal protection, as opposed to a collective right, to bear arms and suggesting that gun regulation may increase crime rates), with Harold S. Herd, Re-Examination of the Firearms Regulation Debate and Its Consequences, 36 WASHBURN L.J. 196 (1997) (applying a textual analysis to the Second Amendment, and concluding that right to bear arms is a qualified one, recognized only in the context of the “people” forming a “well regulated Militia” to protect the security of the free states, and clearly does not provide for an individual right to bear arms independent of the “militia” clause).

50 U.S. CONST. amend. II.

51 See Levy, supra note 18, at 13.

52 Id.
presumption against gun control.” According to former Chief Justice Warren Burger, however, Robert Levy and other opponents of gun safety legislation continue to perpetrate a “fraud” on the American people when they argue that implementing or enforcing gun safety legislation upon the gun industry is prohibited by the Second Amendment. Indeed, the Second Amendment Foundation filed suit against mayors whose cities brought cases against the gun industry, citing a “conspiracy” and a violation of Second Amendment rights. Although the case was dismissed on jurisdictional grounds, it illustrates just how far gun advocates will go to perpetuate the “fraud.”

Contrary to gun lobbyists’ repeated assertions, the Second Amendment poses no barrier to reasonable gun safety laws. In

53 Robert Levy, Bearing Arms in D.C., LEGAL TIMES, July 22, 2002 at 42.  
54 McNeil-Lehrer Newshour (CNN television broadcast, Dec. 16, 1991) (establishing that Justice Berger was in support of gun control legislation which would impose a “thirty day waiting period so they could find out why this person needs a handgun or a machine gun.”). See Dick Stitz, Handgun Debate: Who’s Really Trying to Save Lives Here?, SEATTLE TIMES, Oct. 7, 1993, at 2 (referring to Burger’s comment on television on Dec. 16, 1991 that the NRA’s promotions about the Second Amendment have “been the subject of one of the greatest pieces of ‘fraud’ on the American people by special interest groups that I have ever seen in my lifetime.”).  
55 See Second Amendment Found. v. U.S. Conference of Mayors, 274 F.3d 521 (D.C. Cir. 2001). The Second Amendment Foundation brought civil conspiracy claims against the mayors of 22 cities that filed public nuisance actions against gun manufacturers and dealers. Id. The Second Amendment Foundation is an organization of firearm consumers dedicated to using legal action to protect “our Constitutional heritage to own firearms.” See Second Amendment Foundation, The SAF Web Site, http://www.saf.org (last visited Nov. 14, 2002).  
56 Second Amendment Found., 274 F.3d at 524. The district court dismissed the claims, concluding that the firearm consumers had not made the prima facie showing of personal jurisdiction because their allegations that the mayors conspired together represented nothing more than a legal conclusion. Id. The fact that multiple cities filed suit did not establish that the mayors had entered a conspiratorial agreement at the mayoral meeting because some cities had filed suit before that meeting. Id.  
57 While many special interest groups maintain that the Second Amendment is an absolute bar to any regulation of firearms, this is not the case.
fact, the Second Amendment does not necessarily provide an individual with the right to bear arms. The Supreme Court stated more than sixty years ago that the Second Amendment was designed “to assure the continuation and render possible the effectiveness” of the state militia and the Amendment “must be interpreted and applied with that end in view.” The federal courts have consistently echoed the view that the Second Amendment merely guarantees a right to be armed to those persons using the arms to serve in an organized state militia.  


See Rachana Bhowmik, Our Second Amendment Rights Are Not Eroded, but Our Understanding of Them Is, CHURCH & SOCIETY, May/June 2000 (characterizing the Second Amendment as not granting an individual right to bear arms independent of the “militia” clause and asserting that an unfortunate and “unrelenting campaign of misinformation by the N.R.A. whose opposition to any regulations on firearms in this country has given much of the American public a warped understanding of the Second Amendment.”). See also Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson’s The Embarrassing Second Amendment, 99 YALE L.J. 661 (1989) (explaining why the Second Amendment should be interpreted against providing an individual with the right to bear arms); Anthony Gallia, Your Weapons, You Will not Need Them, 33 AKRON L. REV. 131 (1999) (examining the history of the Second Amendment, and discussing the ambiguity in whether the Second Amendment grants individuals the right to bear arms); Andrew D. Herz, Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility, 75 B.U.L. REV. 57 (1997) (stating that “the individual right to bear arms for all legal purposes” is a “myth[ ] created by the gun lobby”).

U.S. v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not guarantee private citizens the right to keep and transport shotguns since it was not part of any ordinary military equipment and its use could not contribute to the common defense).

See, e.g., U.S. v. Napier, 233 F.3d 394, 402 (6th Cir. 2000) (holding that Second Amendment’s right to bear arms applies only to the right of the State to maintain a militia); Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1997), cert. denied, 519 U.S. 912 (1996) (holding that the Second Amendment does not
Erwin Griswold, Solicitor General to former President Nixon and former Dean of Harvard Law School, declared, “that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American Constitutional Law.”

When the Second Amendment was drafted, most states were grant an individual right to be armed); U.S. v. Wright, 117 F.3d 1265 (11th Cir. 1997), cert. denied, 525 U.S. 896 (1997) (concluding that there is a “well regulated militia” requirement for protection under the Second Amendment); U.S. v. Rybar, 103 F.3d 273 (3d Cir. 1996) (upholding firearms regulation against Second Amendment challenges), cert. denied, 525 U.S. 807 (1997); Love v. Peppersack, 47 F.3d 120, 124 (4th Cir. 1994), cert. denied, 516 U.S. 813 (1995) (holding that the Second Amendment does not confer an absolute right to bear any type of firearm); U.S. v. Hale, 978 F.2d 1016, 1120 (8th Cir. 1992), cert. denied, 507 U.S. 997 (1993) (stating that to succeed on a Second Amendment violation claim, claimant must prove possession of a firearm was reasonably related to a well regulated militia); U.S. v. Toner, 728 F.2d 115,128 (2d Cir. 1984) (recognizing that in absence of “some reasonable relationship to the preservation or efficiency of a well regulated militia,” the right to possess a gun is not a fundamental right); Quilici v. Village of Morton Grove, 695 F.2d. 261 (7th Cir. 1982) (upholding a village ban on handguns against Second Amendment challenges); U.S. v. Oakes, 564 F.2d 384 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978) (asserting that the purpose of the Second Amendment is only to preserve effectiveness and assure continuation of state militia and did not preserve a right to keep unregistered firearms in the home merely because he is technically a member of the Kansas militia); U.S. v. Johnson, 441 F.2d 1134, 1136 (5th Cir. 1971) (holding that the Second Amendment only guarantees the right to bear arms in some reasonable relationship to a militia).


to assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy. It is time for the NRA and its followers in Congress to stop trying to twist the Second Amendment from a reasoned, if antiquated, empowerment for a militia into a bulletproof personal right for anyone to wield deadly weaponry beyond legislative control.”

Id.
concerned chiefly with maintaining a viable state militia to defend the state against possible invasion. As the framers understood it, a “militia” was “an organized, state-sponsored group of individuals acting in defense of the whole.” Further, the Constitution grants Congress the power “to provide for organizing, arming, and disciplining, the Militia, and for governing such part of them as may be employed in the Service of the United States.” This grant of power necessarily implies governmental organization of the group. Alexander Hamilton acknowledged that, because a truly “well-regulated militia” would require frequent “military exercises and evolutions,” such a requirement would be a “serious public inconvenience and loss.” Hamilton believed a more reasonable approach would be to ensure that militia members were “properly armed and equipped” and to “assemble them once or twice in the course of a

---

62 See, e.g., Joseph Story, Commentaries on the Constitution of the United States 708 (Boston, Hilliard, Gray & Co. 1833) (recognizing the importance of the Second Amendment and elaborating that a militia is “the natural defense of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers); Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 Const. Commentary 221, 299 (1999) (discussing Pennsylvania’s “right to bear arms” within context of the Second Amendment to the U.S. Constitution); Richard Uviller & William G. Merkel, The Second Amendment in Context: The Case of the Vanishing Predicate, 76 Chi.-Kent L. Rev. 403, 509 (2000) (discussing the framers’ desire to preserve local power and commenting that the [Second] Amendment is concerned with preserving “states’ capacities to defend themselves against disorder, insurrection, and invasion”).

63 See Steven J. Heyman, Symposium on the Second Amendment: Fresh Looks: Natural Rights and the Second Amendment, 76 Chi.-Kent L. Rev. 237, 263 (2000) (discussing Virginia Bill of Rights which served as model for bill of rights and the right to arm the militia). See also Uviller & Merkel, supra note 62, at 552 (citing the consensus among scholars that the founding generation of Americans conceived of a militia as “a group . . . responding as needed for the common defense”).

64 U.S. Const. art. I, § 8, cl. 16.

GUN INDUSTRY ACCOUNTABILITY

year.” Similarly, James Madison described militia as a group of citizens “united and conducted by governments possessing their affections and confidence.”

That the framers selected the phrase “bear arms” further illustrates the military connotations of the Second Amendment. To “bear arms” means possession of weapons for military use. As historian Garry Wills stated, “one does not bear arms against a rabbit.” Indeed, both historical and contemporary definitions of the word “arms” have a distinctly military connotation; the term “arms” refers to instruments of war. Accordingly, the Second Amendment was not meant to protect the rights of hunters or sportsmen, but was purely a means of protecting a state’s right to maintain an organized armed force.

In addition to the historical definition of the terms “militia” and “bear arms,” we must understand why the Second

---

66 See id. at 185.
68 See U.S. v. Miller, 307 U.S. 174, 176 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”); U.S. v. Graham, 305 F.3d 1094, 1106 (10th Cir. 2002) (“We have previously held that a federal weapons restriction ‘does not violate the Second Amendment unless it impairs the state’s ability to maintain a well-regulated militia,’ and that the right to bear arms is a collective rather than individual right.”); U.S. v. Wright, 117 F.3d 1265, 1273 (11th Cir. 1997) (“The concerns motivating the creation of the Second Amendment convince us that the amendment was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states.”). See also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993) (defining “bear arms” as “1: to carry or possess arms and 2: to serve as a soldier”), available at http://www.m-w.com/cgi-bin/dictionary.
69 Gary Wills, To Keep and Bear Arms, N.Y. REV. OF BOOKS, Sept. 21, 1995, at 62 (debunking the myth that the Second Amendment protects the rights of individuals to be armed).
70 See AMERICAN HERITAGE COLLEGE DICTIONARY 74 (3rd ed. 1993) (defining “arm” as “a weapon, esp. a firearm.”). See also supra note 60 (discussing case law providing contemporary definitions of “arms”).
Amendment was passed. It is important to remember that the Constitution was drafted for a then untested federal power. Out of concern for a possible abuse of power by the federal government, the framers drafted the Bill of Rights to amend the Constitution “in order to prevent misconstruction or abuse of its powers.” The debates among the states reflected a fear that giving Congress excessive power over the militia would enable Congress not only to regulate the militia, but also to disarm it completely, leaving the states defenseless against the federal government. In this sense, the state militias were thought to function as the “bulwarks of liberties.” The state militias were properly preserved in the Bill of Rights as an important mechanism to enforce limits on the federal government.

Despite this well-established proposition, one recent aberrant decision has garnered significant media and public attention. In
**GUN INDUSTRY ACCOUNTABILITY**

**U.S. v. Emerson**, the district court for the Northern District of Texas rejected federal court precedent and held that a federal law prohibiting an individual under a domestic restraining order from possessing a firearm violates that individual’s Second Amendment right.75 The defendant, Timothy Joe Emerson, threatened his estranged wife and child with a firearm and threatened to kill his estranged wife’s friends.76 On appeal, the Fifth Circuit upheld the district court’s decision in part, and, contrary to every other appellate court in the country, found that the Second Amendment does provide an individual right to keep firearms.77 But the Fifth Circuit found that the indictment did not violate that right and reversed the decision overturning the indictment.78 The court went to great lengths to cite recent scholarship to support this novel decision on the Second Amendment.79 In a strongly worded special concurrence, Judge

---

Amendment does not protect individual’s right to keep and bear arms); U.S. v. Baer, 235 F.3d 561 (10th Cir. 2000) (refusing to apply Emerson’s conclusion that the Second Amendment protects rights of individuals to keep arms).

75 46 F. Supp. 2d 598 (holding that the federal statute under which defendant was indicted was unconstitutional since the defendant’s right under the Second Amendment was violated because the statute did not require any particularized finding of the threat of future violence by defendant toward his spouse or child).

76 See Ann LoLordo, *A Small-Town Doctor Caught in the Cross Fire*, BALTIMORE SUN, May 30, 2000, at 1A (describing the case where a doctor had gun in violation of a state restraining order and allegedly pointed it at his ex-wife in the presence of his daughter).

77 See Emerson, 270 F.3d at 203.

78 Id. at 261. The Fifth Circuit held that, under Texas law, a restraining order could not have been properly issued unless the issuing court concluded, based on adequate evidence at a hearing, that the party restrained would have otherwise posed a realistic threat of imminent physical injury to the protected party. Id. In such a case, the court concluded that the nexus between firearm possession by the husband and the threat of lawless violence was sufficient to support the deprivation, while the order remained in effect, of the husband’s Second Amendment rights. Id.

79 Id. at 227 (citing various scholarship produced by prolific individual rights professors such as Nelson Lund and Steven Halbrook to support their conclusion that the framers designed the Second Amendment to guarantee an individual’s right to arms for self-defense).
Robert M. Parker refused to join the panel opinion on the Second Amendment, stating that “it is dicta and is therefore not binding on us or any other court.”

Apart from the Fifth Circuit’s flouting of precedent, one central truth remains: no federal appellate court has overturned any form of gun regulation on the basis of the Second Amendment. Indeed, despite the gun lobby’s campaigns decrying the erosion of the Second Amendment, the NRA abandoned attempts to use the Second Amendment as a legal basis for challenging gun safety laws. They deserted this argument, realizing that the federal courts have long been in agreement that the Second Amendment does not prohibit reasonable regulation of firearms.

---

80 Id. at 273. Judge Parker stated:

whether ‘the district court erred in adopting an individual rights or standard model as the basis for its construction of the Second Amendment’ is not a question that affects the outcome of this case no matter how it is answered. In holding that § 922(g)(8) is not infirm as to Emerson, and at the same time finding an individual right to gun-ownership, the majority today departs from these sound precepts of judicial restraint.

Id.

81 See supra note 74 (citing cases finding that gun regulations did not violate the Second Amendment).


83 See U.S. v. Lopez, 514 U.S. 549 (1995) (challenging the Gun Free School Zone Act under the Tenth Amendment, rather than the Second Amendment); U.S. v. Murphy, 53 F.3d 93 (5th Cir. 1995) (claiming the Gun Free School Zone Act was outside Congressional power under the Commerce Clause). See also Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. Cir. 1999) (arguing that amendments to the Gun Control Act of 1968 violate the substantive due process guarantee of the Fifth Amendment by “unnecessarily and irrationally burdening important individual interests in possession of a firearm in the public interest, in serving the community, and in pursuing an
II. AN INDUSTRY EXEMPT: HOW THE GUN INDUSTRY HAS MANAGED TO EVADE OVERSIGHT

Despite Robert Levy’s claims that the gun industry is “friendless,” this industry’s ability to influence federal legislation and policy reveals its tremendous power and influence. One of the gun industry’s greatest allies is the NRA, an organization whose hostility toward federal intervention is evinced by its vice president’s reference to federal officers as “jack-booted thugs.” The NRA has successfully influenced federal legislation and worked to protect the gun industry from any significant federal oversight. For example, when Congress established career.”).

84 See Levy, supra note 18, at 1 (claiming that the city lawsuits against the gun industry are an attempt “to exact tribute from friendless industries.”).


86 Threats to Federal Law Enforcement Officers: Hearing Before the Subcommittee on Criminal Justice Oversight, 106th Cong. (May 16, 2000) (statement of Vermont Senator Patrick Leahy, Member, S. Judiciary Comm.), available at http://www.senate.gov/~judiciary/oldsite/51620pjl.htm. In April 1995 NRA vice president Wayne La Pierre sent a fund-raising letter to NRA members calling Federal law enforcement officers “jack-booted thugs” who wear “Nazi bucket helmets and black storm trooper uniforms.” Mr. La Pierre was referring to Federal Bureau of Investigation and Bureau of Alcohol, Tobacco and Firearms agents involved in law enforcement actions in Ruby Ridge, Idaho, and at the Branch Davidian compound in Waco, Texas; see also Dan K. Thomasson, NRA Call to Enforce Gun Laws Lip Service, DESERT NEWS, July 23, 2000, at AA-04 (describing the NRA’s anti-ATF campaign against Congress as efforts to paint ATF agents as “Nazis only interested in violating the constitutional rights of Americans”).

87 See BRADY CENTER TO PREVENT GUN VIOLENCE, THE ENFORCEMENT FABLE: HOW THE NRA PREVENTED ENFORCEMENT OF THE COUNTRY’S GUN LAWS (2002) (explaining how the NRA has maintained a strict policy of opposing any effort to strengthen gun safety laws since the passage of the 1968 Gun Control Act, including passage of Gun Owners Protection Act, McClure-Volkmer in 1986 and promotion of gun industry preemption laws today); see also Carl T. Bogus, Symposium on the Second Amendment: Fresh Looks: The History and Politics of Second Amendment Scholarship: A Primer, 76 CHI.-
created the Consumer Product Safety Commission ("CPSC") in 1972, it exempted firearms. All other consumer products, except tobacco, are regulated for safety. Thanks to the influence of the "friendless" gun industry, however, guns are not. When asked why the bill to include guns under the CPSC had failed in Congress, Senator Howard Metzenbaum said "[t]he NRA’s position is consistent. They’re opposed to any legislation that has the word ‘gun’ anywhere in it." When asked what would happen if the NRA were to refrain from opposing the bill,

88 See Consumer Product Safety Act, 15 U.S.C. § 2052(a)(E) (2002) (excepting any article from the definition of "consumer product, which would be subject to Consumer Product Safety Commission oversight, if such article is subject to the tax imposed by Internal Revenue Code § 4181, which imposes taxes on firearms, shells and cartridges"). Articles which are defined as ‘consumer products’ are regulated by the Consumer Product Safety Commission which promulgates performance requirements, requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions, and any requirements of such a standard shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product. Consumer Product Safety Act, 15 U.S.C. § 2056 (2002).

89 See Consumer Product Safety Act, 15 U.S.C. § 2052(a) (exempting tobacco, firearms, shells and cartridges from the Safety Commission oversight but the Act states that the other exempted categories—motor vehicles, pesticides, aircraft, boats, food, drugs, and cosmetics—are regulated under other federal acts). See also Jon S. Vernick & Stephen P. Teret, A Public Health Approach to Regulating Firearms as Consumer Products, 148 U. Pa. L. Rev. 1193 (2000) (advocating a consumer product-based regulatory scheme for firearms which would include the following: (1) standards for safe design; (2) closer regulation of firearm models that are particularly dangerous or attractive to criminals; (3) surveillance and recall authority; (4) improved manufacturer and government oversight of firearm dealers and distributors; (5) requirements for responsible advertising practices; and (6) no immunity from litigation for firearm manufacturers).

Metzenbaum replied, “[w]e would pass the bill overnight.”

This vacuum of gun safety standards has led to predictably tragic consequences. Without regulation, gun manufacturers lack any incentive to design safer firearms. Instead, manufacturers enjoy tremendous profits while producing products with a callous disregard for safety. Moreover, the illogical result of this specific exemption from regulatory oversight is that the CPSC has statutory oversight of trigger locks, holsters, and other products sold as accessories for firearms, but no oversight of the guns themselves.

In addition to supporting exemption of the gun industry from safety standards, the NRA has lobbied across the country for laws immunizing gun manufacturers from lawsuits brought by cities, and in some cases, consumers as well. In February 1999,

91 Id.

92 See, e.g., Rachana Bhowmik et al., A Sense of Duty: Retiring the “Special Relationship” Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns, 4 J. HEALTH CARE L. & POL’Y 41 (2000) (discussing the lack of incentives for gun manufacturers to design or distribute with safety in mind). See also Amy Edwards, Mail-Order Gun Kits and Fingerprint-Resistant Pistols: Why Washington Courts Should Impose a Duty on Gun Manufacturers to Market Firearms Responsibly, 75 WASH. L. REV. 941, 948 (2000) (arguing that not holding gun manufacturers strictly liable for injuries caused by criminal use allows them to continue to market products that are used for criminal purposes); Lytton, supra note 14, at 1 (arguing that tort liability can complement legislative regulations, providing gun sellers and manufacturers with incentives to take responsible measures to protect the public at large).


the Georgia State Legislature became the first to enact legislation prohibiting municipalities from bringing tort suits against any “firearms or ammunition manufacturer, trade association, or dealer,” subject to limited exceptions.\textsuperscript{95} Since then, over twenty other states have followed suit, passing legislation providing the gun industry with a blanket exemption from cities’ basic common law tort claims.\textsuperscript{96} The state of Colorado passed a law prohibiting

\textsuperscript{95} GA. CODE ANN. § 16-11-184 (2002) (reserving the right to sue manufacturers to the state alone); see also Sturm, Roger & Co. v. City of Atlanta, 560 S.E.2d 525, 529 (Ga. Ct. App. 2002) (noting that the state legislature, through the Georgia statute, intended for firearms regulation to take place on the state level). The state’s intent to preempt this area “can be inferred from the comprehensive nature of the statutes regulating firearms in Georgia,” among which is GA. CODE ANN. § 16-11-184.

\textsuperscript{96} ALA. CODE § 11-80-11 (2001) (reserving authority to bring and settle lawsuits involving firearms to the Attorney General, by and with the consent of the Governor); ALASKA STAT. § 09.65.155 (2001) (conferring immunity with the exception of negligent design claims); ARIZ. REV. STAT. § 12-714 (2001) (prohibiting any political subdivision from commencing a civil liability action against a firearm manufacturer in state court); ARK. CODE ANN. § 14-16-504 (2001) (prohibiting any local unit of government from commencing an action against a firearms manufacturer or dealer and reserving that right to recover to the State of Arkansas); COLO. REV. STAT. § 13-21-504.5 (2001) (stating “a person or other private or public entity may not bring an action other than a product liability action”); FLA. STAT. ch. 790.331 (2002) (declaring “the manufacture, distribution, or sale of firearms and ammunition . . . lawful activity and [ ] not unreasonably dangerous, and . . . that the unlawful use of firearms and ammunition, rather than their lawful manufacture, distribution, or sale, is the proximate cause of injuries arising from their unlawful use”); IDAHO CODE § 5-247 (2002) (requiring state legislature to approve suits brought by a governmental unit on behalf of any other governmental unit); IND. CODE ANN. § 34-12-3-3 (Michie 2002) (prohibiting nuisance suits by persons against firearms or ammunition makers, trade associations or sellers); KY. REV. STAT. ANN. § 65.045 (Michie 2001) (reserving to the Commonwealth the right to bring suit and recover against a firearms dealer on behalf of the state); LA. REV. STAT. ANN. § 40:1799 (West 2002) (reserving to the state the right to recover against a firearms dealer); MICH. COMP. LAWS § 28.435(9) (2002) (reserving to the state the right to bring suit against a producer of firearms or ammunition); MONT.
suits by individuals against those responsible for negligently sold guns. 97 For example, the law prevents victims of the Columbine school shooting from suing gun distributors, where prohibited purchasers used negligently sold guns to massacre their teachers and classmates. 98 As commentators have noted, “[t]his legislative strategy mirrors the NRA’s largely successful efforts in the 1980s

---

97 See COLO. REV. STAT. § 13-21-504.5 (2002) (establishing that a gun seller cannot be held liable for a third party’s injury, damage, or death, even if the injury is found to be foreseeable, unless the damages were proximately caused by a gun seller in violation of a state or federal statute or regulation).

98 See id. See also Charles Brennan, Columbine Lifts New Gun Rules to Victory in Colorado, DALLAS MORNING NEWS, Nov. 9, 2000, at 6A (discussing the Columbine shooting, in particular, the way in which shooters obtained guns sold at a gun show by a straw purchaser who was not subject to a background check).
and 90s to convince state legislatures to enact preemption laws that forbid localities from enacting their own gun control laws. Today more than forty states have some form of firearm preemption law.”

This unprecedented blanket exemption for a particular industry underscores the strength of the gun industry and its ability to encroach upon even the most basic consumer rights. This exemption also demonstrates the need for some behavior-enforcing mechanism to encourage the gun industry to act responsibly.

Recently, House Representative Bob Barr, who since lost his bid for reelection but remains an NRA board member, sponsored legislation that would further exempt the gun industry


Preemption laws forbid most cities from enacting their own gun control laws as an alternative to lawsuits. The courts have still not answered the question of whether state legislatures have the authority to forbid localities from bringing lawsuits against firearm manufacturers. Id.

100 See Brent W. Landau, State Bans on City Gun Lawsuits, 37 Harv. J. on Legisl. 623, 638 (2000). “State laws that prevent cities from suing the gun industry are . . . undesirable because they deny local governments the ability to have their day in court on the issue of who should bear the financial burden of gun violence.” Id. See also Kairys, supra note 15, at 6. Kairys stated:

[the] damages incurred by cities that directly result from the manufacturers’ conduct are wide-ranging and . . . can include medical costs and the range of expenses incurred by police, emergency personnel, public health, human services, courts, prisons, sheriff, fire, and other services. A city’s potential damages can begin with a 911 call, cleaning blood from the street, and emergency medical care, and continue through support of an orphaned child.

Id.

101 Dahleen Glanton, Georgia’s Barr Loses Seat; McKinney Falls in Democratic Race, Chi. Trib., Aug. 21, 2002, at 9 (discussing Bob Barr’s loss in the Republican primary to another conservative regarded as more low-key than the nationally renowned Barr).

102 Bob Barr, a former Assistant Majority Whip in the House, is a “life member” of the National Rifle Association and serves on its board of directors. See Bob Barr Leadership Fund, About Bob Barr, http://www.bobbarr.org (last visited Nov. 15, 2002).
GUN INDUSTRY ACCOUNTABILITY

from liability.103 The bill, first proposed in the 106th Congress, is called the “Firearms Heritage Protection Act.”104 The bill’s express purpose is to “prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.”105 The broadly worded House bill would effectively bar gun owners and any others from pursuing cases against the gun industry, even if the industry’s negligence is a clear cause of the harm suffered. Senators Zell Miller and Larry Craig, also an NRA Board Member, sponsored similar legislation in the Senate.106

103 Firearms Heritage Protection Act of 1999, H.R. 1032, 106th Cong. (1999). The purpose of the bill is “[t]o prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.” See Vito Magglio, Rep. Barr Aims to Ban Lawsuits Against Gun Manufacturers, CNN (March 9, 1999), available at http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/guns.barr. Barr charged that lawsuits brought by major cities against gun manufacturers to collect the costs for crimes committed with guns are in violation of a citizen’s Second Amendment right to bear arms and are an unfair burden on a legitimate industry. Id. Barr states that “[i]f these lawsuits are allowed to proceed, then it really will be ‘Katie bar the door,’ because there will be no industry in America that will be safe from these abusive and predatory laws.” Id. See also, Protection of Lawful Commerce in Arms Act of 2001, H.R. 2037, 107th Cong. (2001) (proposing similar legislation sponsored by Rep. Cliff Stearns “[t]o amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.”).


105 Id.

106 See Protection of Lawful Commerce in Arms Act of 2002, S. 2268, 107th Cong. (2002) (“To amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce.”). See also Clinton Takes Gun Control Message to School Children, CNN (Apr. 17, 2000) (stating that Larry Craig is a board member of the National Rifle Association who advocates that education, not legislation is the key to stopping gun violence), at http://www.cnn.com/2000/ALLPOLITICS/stories/04/17/clinton.guns; John DeVries, Weapons in the Cockpit, THE POLITICAL LANDSCAPE, June 23, 2002 (characterizing Democrat Zell Miller of Georgia as a member of the NRA Board of Directors who often aligns himself with Senate Republicans), at
Both the House and Senate bills would prevent cases similar to *Kitchen v. K-Mart*, where the plaintiff sued the retail chain under a theory of negligent entrustment for selling a gun to a patently drunk man who then immediately used the gun to shoot plaintiff, rendering her paraplegic. The Florida Supreme Court found that gun sellers could be held liable under negligence theories for sales that are entirely legal. The court noted that it “cannot close [its] eyes to this obvious danger or fail to impose some responsibility on those who control access to dangerous firearms.” The broad protections Bob Barr and other opponents


107 697 So. 2d 1200, 1204 (Fla. 1997). Kitchen was shot by her ex-boyfriend, Thomas Knapp, who testified that he had consumed a fifth of whiskey and a case of beer that morning and until he left a local bar around 8:30 p.m. *Id.* Knapp drove from the bar to a local K-Mart store where he purchased a rifle and a box of bullets. *Id.* He returned to the bar and, after observing Kitchen leave in an automobile with friends, followed in his truck. *Id.* He subsequently rammed their car, forcing it off the road, and shot Kitchen at the base of her neck. *See also* Angel v. F. Avanzini Lumber Co., 363 So. 2d 571 (Fla. 2d Dist. Ct. App. 1978) (holding that a dealer in firearms could have foreseen the probability of someone being injured after selling a firearm to an erratic purchaser); Howard Bros. of Phoenix City, Inc. v. Penley, 492 So. 2d 965 (Miss. 1986) (finding a gun retailer liable for negligently entrusting a pistol to a purchaser who was mentally deranged and under the influence of drugs and alcohol and who subsequently held another customer hostage).

108 *Kitchen*, 697 So. 2d at 1204. Under common law “zone of risk” analysis, respondent’s selling the gun to an intoxicated purchaser created a foreseeable risk that a third party might be injured with the gun. *Id.* Pursuant to the common-law doctrine of negligent entrustment, as the risk grew, so did respondent’s duty. *Id.* The court noted that a number of Florida appellate courts had already recognized liability in similar factual scenarios. *Id.*

109 *Id.* at 1207. *See also* Bernethy v. Walt Failor’s Inc., 653 P.2d 280 (Wash. 1982) (gun dealer liable for legal sale to man who had been on a two day drinking binge and then killed his wife); K-Mart Enters. of Fla. v. Keller, 439 So. 2d 283 (Fla. Dist. Ct. App. 1983) *reh’g denied*, 450 So. 2d 487 (Fla. 1984) (upholding judgment against gun dealer for negligent sale of gun to brother of man who later shot police officer); Decker v. Gibson Products Company of Albany, Inc., 679 F.2d 212 (11th Cir. 1982) (reversing a district court’s grant of summary judgment where the sale of a firearm to a former felon who used the gun to kill his ex-wife was a breach of the retailer’s duty); Cullum & Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442 (Ark. 1980) (finding sufficient
GUN INDUSTRY ACCOUNTABILITY

to such common sense liability seek represents unparalleled preferential treatment for an industry that “controls access to dangerous firearms.” Interestingly, even staunch gun safety regulation opponent Robert Levy opposes such legislation, arguing that such state common law causes of action are “none of the (federal government’s) business.”

The gun industry and the NRA have also found a strong champion in current Attorney General John Ashcroft. Ashcroft has long been a friend of the NRA, supporting NRA-supported initiatives to weaken gun ownership laws in his home state of Missouri and receiving the NRA’s highest grades when he served as a United States Senator. Ashcroft’s stance is in strong contrast to the Department of Justice’s (“DOJ’s”) position under the Clinton Administration, and directly contradicts the United States’ longstanding position on the Second Amendment.

Evidence of breach of common law duty where gun dealer violated no federal statute by selling a gun to a man who acted strangely and asked for a gun “that would make a big hole,” loaded the gun in his car and later shot a man for no reason); Angell v. F. Avanzini Lumber Co., 363 So. 2d 571 (Fla. Dist. Ct. App. 1978) (reversing dismissal where gun dealer sold rifle to woman who was acting strangely and then killed a man); Pavlides v. Niles Gun Show, Inc., 637 N.E.2d 404 (Ohio Ct. App. 1994) (finding negligent gun show owner liable for the subsequent criminal shooting of four teenagers who, due to lax security at gun show, stole several handguns form a gun show and shot bystander while driving stolen car; also held that reasonable minds could find that Pavlides’s shooting was a foreseeable consequence of the gun show’s negligent security).

110 See Kitchen, 697 So. 2d at 1207.
111 See Robert A. Levy, None of Their Business, NAT’L REV., May 22, 2002 (arguing that legislation which shields gun makers and sellers from liability lawsuits is an abuse of Congress’s commerce power, and that such legislation is more appropriately left to the individual states), available at http://www.nationalreview.com/comment/comment-levy052202.asp.
114 See U.S. DEPARTMENT OF JUSTICE, GUN VIOLENCE REDUCTION:
Despite promises to the Senate Judiciary Committee that he would uphold gun control laws, Ashcroft has continually sought to use his position to weaken federal firearm regulation. In 


The firearms industry must do much more to help solve our country’s firearms violence problem. Each gun manufacturer and distributor must do a better job of policing its own distribution chain to reduce the illegal supply of guns and keep them from falling into the hands of criminals, unauthorized juveniles, and other prohibited persons. And the industry must do much more to ensure that firearms are transferred only to persons who have the knowledge and experience to handle them safely. The firearms industry also must do everything it can to design its products to be as safe as reasonably possible. We are actively encouraging manufacturers to voluntarily improve their distribution controls, incorporate existing safety devices on their firearms, and devote significant resources to developing new safety devices and technologies to prevent accidental shootings.

Id.

See also the following cases in which United States supported application of the Miller decision. U.S. v. Lewis, 236 F.3d 948 (8th Cir. 2001) (refusing to apply Emerson decision’s finding that Second Amendment protects individual right to bear arms); U.S. v. Baer, 235 F.2d 561 (10th Cir. 2000) (refusing to apply Emerson decision’s finding that Second Amendment protects rights of individuals to keep arms); U.S. v. Napier, 233 F.3d 394 (6th Cir. 2000) (upholding finding that Second Amendment does not protect an individual’s right to keep and bear arms).

115 See, e.g., An Ominous Reversal on Gun Rights, N.Y. TIMES, May 14, 2002 at A18. The editorial discusses the Bush administration’s radical shift in policy towards the rights of Americans to own guns. By using a standard that equates gun ownership with free speech rights, Mr. Ashcroft and the Bush administration has made it extremely difficult for the government to regulate firearms in the manner it has for the last six decades. See also 147 CONG. REC. § 839 (2001) Senator Leahy stated:

[Contrary to the majority of the American public, Senator Ashcroft vigorously opposes stricter gun control laws. He addressed this issue during the hearing, where he seemed to change his long held beliefs and emphasized his commitment to enforce the gun laws and defend their constitutionality. He testified that “there are constitutional inhibitions on the rights of citizens to bear certain kinds of arms.” Saying he supported some controls, Senator Ashcroft referred to his
2001, Ashcroft proposed a policy of destroying Brady Act gun purchase records after merely 24 hours.\textsuperscript{116} This was despite a federal appeals court ruling that upheld maintaining those records for six months to audit the background check system.\textsuperscript{117} This same court supported the Federal Bureau of Investigation’s recommendation that the record retention period be increased to one year.\textsuperscript{118} Furthermore, a recently released Government Accounting Office (“GAO”) report released in July of 2002 indicated that the Ashcroft changes would “adversely affect some aspects of current [gun check] operations, which would have public safety implications.”\textsuperscript{119}

attempt to amend the juvenile justice bill to make semiautomatic assault weapons illegal for children. However, he neglected to mention that his proposed amendment was actually a weaker version of one proposed by Senator Feinstein. At the hearing, Senator Ashcroft also testified that the assault weapons ban, the Brady law, licensing and registration of guns, and mandatory child safety locks are all constitutional. Although Senator Ashcroft’s testimony was intended to ease our concerns about his willingness to enforce gun control laws, it is difficult to reconcile what he said last week with his rhetoric and his record.

\textit{Id.} \textsuperscript{116}


\textsuperscript{117} See \textit{NRA v. Reno}, 216 F.3d 122 (D.C. Cir. 2000) (holding that nothing in either 18 U.S.C.S. § 922(t)(2) or Brady Handgun Violence Prevention Act unambiguously prohibited temporary retention of the hand gun check records for allowed transactions). The court found that the appellee’s interpretation that the audit log regulation represented a permissible construction of the requirement to establish a system for preventing disqualified persons from purchasing firearms was reasonable. \textit{Id.}

\textsuperscript{118} \textit{Id.} at 124.

\textsuperscript{119} \textit{Potential Effects of Next-Day Destruction of NICS Background Check Records}, Government Accounting Office Report, GAO-02-653 (July 2002) (explaining how the FBI’s National Instant Criminal Background Check System (“NICS”) would be affected if records of sales of firearms by licensed dealers were destroyed within 24 hours of the transaction). The GAO study found that while routine system audits may not be adversely affected by the proposed requirement of next-day destruction of records, other uses of NICS records
In the midst of the United States continued war against terrorism, and despite the FBI’s specific request for review of Brady Act gun purchase records, Ashcroft unilaterally decided that these documents cannot be used to determine whether persons detained as suspected terrorists had recently purchased a gun.\textsuperscript{120} Ashcroft claimed that federal law did not permit the use of Brady Background check records as investigative tools.\textsuperscript{121} Reports show, however, that his contention directly contradicted an opinion released by the DOJ’s Office of Legal Counsel stating that the office saw “nothing in the National Instant Check System regulations that prohibits the FBI from deriving additional benefits from checking audit log records as long as one of the genuine purposes” is auditing the use of the system.\textsuperscript{122}

In addition to weakening gun background checks, Ashcroft has also reversed longstanding DOJ policy on the Second Amendment, which was in keeping with the United States Supreme Court’s finding that the Second Amendment does not protect an individual’s right to keep and bear arms.\textsuperscript{123} In footnotes to the United States’ briefs in two gun possession cases appealed to the United States Supreme Court, including \textit{Emerson v. U.S.}, the DOJ notes that “the Second Amendment ‘more broadly’ protects the rights of individuals to bear arms, and does not relate only to the operation of militias.”\textsuperscript{124}

\textsuperscript{120} John Meyer, \textit{Response to Terror Security Ashcroft Defends U.S. Anti-Terrorism Tactics, Saying That ‘We Are at War’ Law: Attorney General tells lawmakers he won’t support FBI background checks on gun buyers to aid attack inquiry}, L.A. TIMES, Dec.7, 2001, at A4 (reporting that Ashcroft did not support a change in the law that would allow the FBI to find out whether an illegal immigrant or suspected terrorist had purchased a gun).

\textsuperscript{121} \textit{Id.}.


\textsuperscript{123} \textit{See supra} note 60 (discussing U.S. Supreme Court decision in \textit{U.S. v. Miller}, finding Second Amendment protects the states’ right to arm the militia).

\textsuperscript{124} \textit{See} Brief for Government, \textit{Emerson v. U.S.}, 270 F.3d 203 (5th Cir.}
This change in the DOJ’s position has had predictable results. It has motivated challenges to even the most entrenched area of gun regulation: the criminalization of certain uses and types of possession. Criminal defendants now seek dismissal of gun charges, arguing that under the DOJ’s interpretation, the Second Amendment protects an individual’s right to possess a firearm. Indeed, Taliban member John Walker Lindh relied upon the Ashcroft DOJ’s interpretation of the Second Amendment as part of his defense. The change in policy has placed United States Attorneys in the unfortunate position of trying to advocate a position unsupported by precedent, while simultaneously attempting to enforce federal firearm legislation. For example, criminal defendants in the District of Columbia attempted to rely upon the DOJ’s interpretation of the Second Amendment as a defense to convictions under criminal possession laws. There,

2001) (No. 01-8780). Brief for Government, Haney v. U.S., 264 F.3d 1151 (10th Cir. 2001) (No.01-8272). In a strange twist of circumstances, in the opposition for a petition for rehearing of Emerson, Ashcroft’s DOJ refused to challenge an appellate argument that the Second Amendment provides an individual with the right to weapons. See Arthur Santana & Neely Tucker, Cases Take Aim at District’s Gun Law; Attorney Uses Bush Administration’s Second Amendment Stand in Attack on Ban, WASH. POST, June 3, 2002, at A20 (reporting that defense attorneys had filed about 30 motions in D.C. Superior Court asking judges to dismiss gun-carrying charges against their clients based on the Department of Justice and the Bush administration’s assertion that the Second Amendment gives them the right to bear arms).

125 See Government Opposition to Motion to Dismiss Count Ten of Indictment, U.S. v. Lindh, 2002 U.S. Dist. LEXIS 20863, n.12 (E.D. Va. 2002) (Crim. No. 02-37A) (responding to Lindh’s Second Amendment defense, the government asserted that the case cited by defendant, Wilborg v. U.S., 163 U.S. 632 (1896), is wholly inapposite and confined to the criminal status extent, and “whatever the defendant’s Second Amendment rights may be, they do not extend to carrying weapons in support of a terrorist organization bent on the violent destruction of the United States.”). See Stuart M. Powell, Lindh’s Right to Bear Arms Stops Short of Aiding Terror, SAN DIEGO UNION-TRIBUNE, June 6, 2002, at A11 (arguing that charging Lindh with a firearms violation would be an abridgement of his Second Amendment rights as an individual, Lindh pointed to a DOJ assertion of the same argument in a case then pending before the Supreme Court).

126 See Press Release, Roscoe C. Howard, Jr., U.S. Attorney for the District
United States Attorneys relied upon case law upholding the District’s laws prohibiting possession of unregistered handguns, but were forced to note that the opinion “contains reasoning that is inconsistent with the position of the United States as to the scope of the Second Amendment.” Ashcroft’s weakening of the nation’s gun laws, and reversal of the DOJ’s long-standing position on the Second Amendment underscores the lengths to which friends of the gun industry will go to protect it from liability.

III. ANALYSIS OF THE GUN INDUSTRY

Although guns in this country are exempt from most consumer product safety standards, they are subject to a body of laws regarding their sale. These laws are intended to keep “lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price to pay in danger for us all.” Unfortunately, this policy is regularly undermined by a...
GUN INDUSTRY ACCOUNTABILITY

vast, thriving underground market which regularly provides guns to those who are prohibited from buying them in retail markets. The underground market is largely supplied by guns diverted from licensed dealers.\textsuperscript{131} That is, guns purchased from licensed retailers with the intent to promptly resell or transfer them to prohibited purchasers.\textsuperscript{132}

Gun makers are fully aware that the retailers and distributors they supply often act as willing conduits that enable the continuing, thriving underground market in guns.\textsuperscript{133} Many of these trafficked guns, however, have design defects which, if remedied, would drastically reduce the likelihood that guns would be trafficked in the underground market.\textsuperscript{134}

Given that the primary sources for illegally trafficked guns have been well-known for decades, gun manufacturers are on notice that their design and distribution choices have a definite effect on the proliferation of the underground market.\textsuperscript{135} Furthermore, gun manufacturers are repeatedly notified that their

\begin{itemize}
  \item providing adequate and truthful information about firearms transactions”.
  \item See also Firearms Act, 18 U.S.C. § 922 (2002) (establishing that it is “unlawful for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms [or ammunition] or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce”).
  \item See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, YOUTH CRIME GUN INTERDICTION INITIATIVE, PERFORMANCE REPORT 6 (1999) [hereinafter PERFORMANCE REPORT] (reporting that half of the Bureau’s investigations involved guns trafficked by straw purchasers, 14 percent from other unregulated sellers, 10 percent from gun shows and other similar ventures and 6 percent from Federal Firearm License (“FFL”) holders), available at http://www.atf.treas.gov/firearms/ycgii/preport.pdf.
  \item Id. at 6.
  \item See Affidavit of Robert I. Hass, Hamilton v. Accu-Tek, 95-CV-0049 (E.D.N.Y. 1996) at 20-21 (describing familiarity with the distribution and marketing practices of the principal U.S. firearms manufacturers and stating that none of them investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure responsible distribution) [hereinafter Hass Affidavit].
  \item See infra Part III.B (discussing design changes that can reduce usefulness of trafficked or illegally acquired guns).
  \item See infra Part III.C (discussing tracing system).
\end{itemize}
guns are sold via the underground crime gun market. Yet they refuse to do anything to stem the tide of their products into the underground market. The combination of the gun industry’s negligence in manufacturing and designing weapons, coupled with willful blindness towards the distribution of guns into the underground market perpetuates the dangers of illegally held guns.

A. Proliferation of the Underground Gun Market: How the Use of “Multiple Sales” and “Straw Purchasers” Fuel a Dangerous Marketplace

Guns that flow into the underground market are often bought from retail firearms dealers in suspect transactions, such as multiple sales and straw purchasers. According to the Bureau of Alcohol, Tobacco, and Firearms (“ATF”), “virtually all new firearms used in crime first pass through the legitimate distribution system of federally licensed firearm dealers (“FFLs”).”

Studies indicate that “multiple sales” and sales of more than one gun in a transaction, are the most common sources of crime guns. The term “multiple sales” refers to any transaction

---

136 See id.


138 U.S. Dep’t of the Treasury, A Progress Report: Gun Dealer Licensing & Illegal Gun Trafficking (Jan. 1997) (discussing steps taken to reduce illegal availability of firearms to criminals and juveniles, such as more effective screening of firearms purchasers, strengthening the gun dealer licensing system and compliance with applicable laws and regulations), available at http://web.archive.org/web/19980129032256/http://www.ustreas.gov/enforcement/cover.html.

139 See Wachtel, supra note 137, at 221. When a licensed gun dealer sells two or more handguns to an unlicensed person within a five-day period, dealers
involving more than one handgun to a single purchaser or several sales of guns to an individual purchaser over a five-day period.\textsuperscript{140} In recognition of the significant role multiple sales play in supplying the underground market, federal law requires that any “multiple sale” be accompanied by a “multiple sales form” which is sent to the ATF to notify the law enforcement agency of the transaction.\textsuperscript{141} The very fact that an FFL engages in multiple sales is an indicator that the dealer is likely selling to gun traffickers.\textsuperscript{142}

Curbing such sales can have a significant effect on gun trafficking to criminals. For example, the Commonwealth of Virginia was traditionally a primary source state for crime guns.\textsuperscript{143} In 1993, however, Virginia banned multiple handgun sales,\textsuperscript{144} and in doing so, successfully eliminated a major source

are required to fill out and forward to the ATF a form listing the guns sold. See 27 C.F.R. §178.126a. There is no federal limit on the number of firearms that can be purchased in a single sale, and the only states that have such limits are Maryland, Virginia, South Carolina, and California. See Douglas S. Weil & Rebecca Knox, \textit{Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms}, 275 JAMA 1759 (June 12, 1996).


\textsuperscript{142} See \textit{COMMERCE IN FIREARMS IN THE UNITED STATES}, \textit{supra} note 140, at 22 (explaining that multiple sales or purchases are a significant trafficking indicator because crime guns recovered with obliterated serial numbers are frequently purchased in multiple sales).

\textsuperscript{143} See Weil & Knox, \textit{supra} note 139, at 1759 (describing Virginia as a ‘principal supplier of guns to the illegal market in the northeaster United States); see also Laura Parker, ‘It was Easy,’ \textit{Confessions of a Gun Trafficker}, U.S.A TODAY, Oct. 28, 1999, at A1 (discussing with a gun trafficker who was arrested after a gun he sold was used in a crime and traced back to him the ease of making multiple purchases and obtaining guns legally and redistributing them illegally without any one questioning the frequency and amounts of the purchases).

\textsuperscript{144} See Weil & Knox, \textit{supra} note 139, at 1759 (discussing a Virginia law limiting handgun purchases by an individual to one gun in a 30-day period).
of crime guns, as evidenced by the subsequent marked nationwide decrease in crime guns traced to Virginia. Accordingly, legislative prohibitions of multiple sales can prevent sales to the underground gun market.

Sales by licensed dealers to “straw purchasers” are another significant source of guns for the underground market. “Straw purchasers” are non-prohibited purchasers who fill out the paperwork and complete a firearm sales transaction, then hand the weapon over to a prohibited purchaser, such as a felon or minor. Data from tracing projects in 27 cities nationwide led the Chief of the ATF’s Crime Gun Analysis Bureau to conclude that:

The [most important] single source of firearms is still illegal traffickers who are acquiring firearms from retail outlets. It still appears that acquisition of firearms by false declarations and straw purchasers are still the method preferred by traffickers, both small and large.

Recent undercover investigations in Chicago, Gary, Indiana and Wayne County, Michigan, confirmed that many dealers blatantly engage in straw purchases – one gun dealer was caught on

---

145 Of all nationwide crime guns traced to stores in the Southeastern United States, the percentage of those guns originating from Virginia plummeted from 27 percent after the ban—even though gun trafficking from the Southeastern United States actually increased during that time. For crime guns in New York, the number of crime guns traced to Virginia dropped from 38.2 percent before the Virginia one handgun a month law to 15.3 after—a precipitous drop of more than 66 percent. See Weil and Knox, supra note 139, at 1760; see also Parker, supra note 143, at A1.

146 See, e.g., Polston, supra note 137. See also infra Part III.A.

147 See 18 U.S.C.S. § 922(a)(6) (2003) (prohibiting false statements when purchasing firearms); see also Anthony A. Braga & David M. Kennedy, Gun Control in America: Gunshows and Illegal Diversions of Firearms, 6 GEO. PUBLIC POL’Y REV. 7, 11 (2000) (discussing high percentage of crime guns that were straw purchased and defining term “straw purchase”); see also PERFORMANCE REPORT, supra note 131, and accompanying text (describing prohibited purchasers).

148 Joseph J. Vince, Jr., Memo from the Chief, CGAB SHOTS 2, Oct. 1998; see also PERFORMANCE REPORT, supra note 131, at 6 (stating that half of trafficked guns were straw purchases).
videotape selling to a straw purchaser while declaring the transaction to be “highly illegal.”149 Such sales are a significant problem.

In a congressional hearing on criminal gun sales, former gun trafficker Edward Daily explained the problem to the House Subcommittee on Crime and Criminal Justice in great detail.150 Daily described how he traveled to gun shows throughout Virginia and used straw purchasers to obtain multiple firearms, “I would basically point out the types of handguns that these straw purchasers would buy right in front of the gun dealers, and most of them didn’t even pay any attention to me. . . . [B]asically, a lot of them would hand the guns to me after I purchased them, and I would walk out with the guns myself and put them in my car.”151 Daily was able to purchase a total of 150 handguns, of which 146 were obtained by straw purchasers.152 He acknowledged that dealers usually recognized straw purchasers when they saw them but continued to sell the weapons to such people anyway.153 These guns were not only straw purchased but many were part of multiple sales. Daily noted that “[e]ach individual would buy anywhere from 6 to maybe 8, and as a

149 See Barry Meier, Cities Turn to U.S. Gun Tracing Data for Legal Assault on Industry, N.Y. TIMES, July 23, 1999, at A12. Both Chicago and Wayne County carried out undercover operations involving law enforcement officers posing as juveniles and criminals who were barred from legally buying guns, blatantly attempting to engage in straw purchases. The dealers overwhelmingly cooperated with the undercover officers’ attempts to obtain firearms through straw purchases. Id.

150 Federal Firearms Licensing: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong. 1st, sess. 8-14 (1993) (statement of witness Edward Daily, convicted gun trafficker) (detailing the ease with which illegal straw purchases were made from gun dealers in Virginia and North Carolina)[hereinafter Federal Firearms Licensing Hearing].

151 Id. at 9.

152 Id.

153 Id. at 8-9 According to Daily, the vendors who sold him guns recognized him as a repeat purchaser at these shows and understood that he was the actual purchaser in a sham transaction.
group, 12 to 20 a weekend.” Ultimately, the guns “were transported to New York City where they were traded for narcotics or sold individually.”

Daily’s dramatic testimony was echoed by Steve Higgins, then-Director of the ATF. Higgins stated that “the method by which criminals acquire firearms that is of most concern to us is the scenario where traffickers conspire with licensed dealers to divert firearms to criminal use.” Accordingly, the important role licensed dealers play in the underground market has been recognized by law enforcement for years.

Additionally, studies suggest that a small number of licensed gun dealers are the source for a disproportionately large percentage of traced crime guns. For example, in 1998, one percent of all licensed gun dealers were the source for 45 percent of the successfully-traced crime guns. As ATF research indicates, although corrupt FFLs account for a small proportion of trafficking investigations they are responsible for the largest portion of illegally diverted firearms per investigation. This is

154 Id. at 10 (explaining the purchasing patterns of individual straw purchasers).
155 Id. at 9.
156 See Federal Firearms Licensing Hearing, supra note 150, at 19 (statement of witness Steve Higgins).
157 See Glenn L. Pierce et al., The Identification of Patterns in Firearms Trafficking: Implications for Focused Enforcement Strategies, a Report to the United States Department of Treasury, Bureau of Alcohol, Tobacco & Firearms (BATF) (1996); Report of Senator Charles Schumer, A Few Bad Apples: Small Number of Gun Dealers The Source of Thousands of Crimes (June 1999) (analyzing raw data collected by the BATF regarding the small number of dealers responsible for selling the majority of crime guns).
158 See Dep’t of Treas. Bureau of Alcohol, Tobacco, & Firearms, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers 18 (June 2000) (noting that although 43 percent of the investigations involved 10 firearms or less, trafficking in large numbers of firearms does occur, indicated by the two largest numbers of firearms reported in connection with a single investigation, 10,000 and 11,000 firearms tracked respectively), available at, http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf.
159 Id. at 12. See also Commerce in Firearms in the United States
GUN INDUSTRY ACCOUNTABILITY

primarily due to their unfettered access to large numbers of guns.\textsuperscript{160} Gun dealers, distributors, and manufacturers are well aware of the role straw purchases and multiple sales play in the underground criminal gun market, yet they have refused to address these significant problems for too long. Despite the ability to place at the least minimal restrictions on the ways in which their products are sold, gun dealers, distributors and manufacturers have continued business as usual.

B. Defectively Designed Guns Facilitate the Flood of Guns into the Underground Market

In addition to the factors examined above, guns are easily trafficked due to significant design flaws. For example, serial numbers provide the most effective method to trace a gun and determine ownership, yet the weapons are manufactured in such a way that this vital piece of information can be easily removed or destroyed. Remedying this and other egregious manufacturing flaws would curb re-sale and trafficking of guns and prevent harm to innocent victims. Moreover, defective gun manufacturing results in numerous accidental deaths and injuries.\textsuperscript{161}

\textsuperscript{160} See Braga & Kennedy, \textit{supra} note 147, at 15 (explaining that gun shows provide licensed dealers access to a large volume of firearms and thus, a corrupt licensed dealer can illegally divert large numbers of firearms).

\textsuperscript{161} See, e.g., General Accounting Office Report, \textit{Accidental Shooting: Many Deaths and Injuries Caused by Firearms Could Be Prevented}, GAO-PEMD-91-9, at 2-3 (1991) (discussing safety devices that could have prevented accidental shootings and help save lives). The GAO examined 107 case records on accidental gunshot deaths during 1988 and 1989 from the randomly selected jurisdictions. It found that 8% and 23% of the deaths it examined could have been avoided with the presence of two design features, child-proof safety device and loaded-indicators, respectively.
1. Tamper-Proof Serial Numbers Would Curb the Underground Trafficking of Guns

The serial number on a gun allows regulators and law enforcement personnel to trace the weapon to its origin and determine ownership. Many guns, however, are sold with serial numbers that can be easily removed with household tools such as, hammers, drills or grinding wheels. Data from 1998 revealed that between 9 percent and 20 percent of all guns recovered by law enforcement agencies had their serial numbers tampered with in some fashion or form. In 1999, a survey of 11 cities indicated that up to 9 percent of recovered crime guns had obliterated serial numbers. ATF Studies show that traffickers regularly destroy serial numbers to prevent weapons from being traced, even though obliteration of a serial number is a federal crime, as is possession of a firearm with an obliterated serial number. Additionally, the ATF has recognized obliterated

---


163 See Martha Brognard, Obliterated Serial Number Restoration, 2 CGAB SHOTS Vol. 6, 1 (Aug. 1998).


165 See David M. Kennedy et al., Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy, 59 LAW & CONTEMP. PROBS. 147, 174 (1996) (providing the reasons people obliterate serial numbers: To avoid being tied to a crime which was committed while using that particular fire arm, and to avoid being identified as a seller or buyer of a gun involved in crime).

166 18 U.S.C.S. § 922(k) (2003) (making it unlawful to sell, transport, or deal with a firearm in which a serial number has been obliterated, removed, or altered); see also DEP’T OF TREAS. BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, CRIME GUN TRACE REPORTS: The Illegal Youth Firearms Markets in 27 Communities at 6 (1999) (investigating the illegal trafficking of firearms to
serial numbers as a “key trafficking indicator,” because the “intentional obliteration of a serial number is intended to make it difficult for law enforcement officials to identify the last licensed seller and first unlicensed purchaser of a firearm.”

Because of the prevalent use of guns with obliterated serial numbers in crimes, law enforcement has developed methods to restore obliterated serial numbers in an effort to curb gun trafficking. The most effective means of combating such destruction, however, is not restoration, but prevention through tamper-proof serial numbers. As a result, the ATF recently imposed standards requiring serial numbers “to meet minimum height and depth requirements that will make them more resistant to obliteration.” The Commonwealth of Massachusetts has implemented regulations requiring a second hidden tamper-proof serial number on each handgun sold in the state. Gun the youth and juvenile and directing the information at reducing illegal access to firearms in 27 communities in the United States [hereinafter ATF GUN TRACE REPORTS].

167 ATF GUN TRACE REPORTS, supra note 166, at 7 (explaining that obliterating serial numbers indicates trafficking because it, “shows that someone in the chain of possession assumes that the gun will be used for a crime, may have to be discarded by a criminal, or may be recovered by the police”).

168 Id. at 12-13. See also Kennedy et al., supra note 165, at 174.

169 See GUN VIOLENCE REDUCTION, supra note 114. One of these methods would require the restoration of obliterated serial numbers. Id. at 29. Another method would use ballistics technology to trace bullets or bullet casings to the guns from which they were fired. This would require that detailed characteristics of guns be recorded in a central system so that examiners would be able to electronically compare the bullets found at crime scenes to the guns recorded in the ballistics system. Id. at 28-29.

170 Id.

171 Id.; see also 27 C.F.R. § 178.92 (2002) (describing information that must be placed on firearm, including serial number); 27 C.F.R. § 179.102 (2002) (describing how firearms must be identified for firearms made on or after January 30, 2002, “for firearms manufactured, imported, or made on and after January 30, 2002, the engraving, casting, or stamping (impressing) of the serial number must be to a minimum depth of .003 inch and in a print size no smaller than 1/16 inch”).

172 MASS. REGS. CODE tit. 940, § 16.00 (1987) (mandating a handgun drop test, prohibiting sales of handguns made from inferior products and prohibiting
manufacturers have proven capable of meeting the new requirement, exhibiting that the gun industry can implement minimal changes in the design of guns that can greatly assist law enforcement.\footnote{Pamela Ferdinand, \textit{Massachusetts Gun Laws Take Heavy Toll on Sales}, \textit{WASH. POST}, Jan. 24, 2001, at A3 (discussing how new Massachusetts gun safety regulations, including a requirement that all guns sold have tamper resistant serial numbers, have reduced handgun sales in the state).}

2. Personalized Gun Technology Would Curb the Sales of Guns in the Underground Market

There are a number of other design changes that, if implemented, would prevent unauthorized gun use, decrease the number of accidental deaths and injuries and minimize illegal trafficking of guns.\footnote{See generally Bang, supr. note 1 (discussing new California firearm safety regulations, including laws requiring locks on firearms); James T. Dixon, \textit{On Lemon Squeezers and Locking Devices: Consumer Product Safety and Firearms, A Modest Proposal}, 47 CASE W. RES. L. REV. 979 (1997) (discussing firearm safety devices, including trigger locks, that can help prevent accidental shootings and unauthorized use of guns); \textit{Unintentional Firearm-Related Fatalities Among Children and Teenagers—United States 1982-1988}, 41 MORBIDITY AND MORTALITY WKLY. REP. 25 (Centers for Disease Control) June 26, 1992, at 445 (finding that “the addition of child proof safety devices would prevent children aged [six years and younger] from discharging a firearm”).} Ranging from basic locking devices to sophisticated user recognition technology, these modifications are affordable, reliable, and effective.\footnote{See \textit{NATIONAL INSTITUTE OF JUSTICE, SMART GUN TECHNOLOGY PROJECT- FINAL REPORT} (1996) [hereinafter \textit{SMART GUN TECHNOLOGY PROJECT}] (noting that this is the same technology used to detect shoplifting in department stores), available at http://infoserve.sandia.gov/sand_doc/1996/961131.pdf; See Joseph D’Agnese, \textit{Smart Guns Don’t Kill Kids}, \textit{DISCOVER}, Sept. 1999, at 90 (discussing personalization devices such as fingerprint lock, the magnetic lock, and the electromagnetic lock).} Most importantly, however, the majority of these mechanisms are currently available to gun manufacturers, should they wish to employ them.\footnote{But see Paul M. Barrett & Vanessa O’Connell, \textit{Personal Weapon: How...
Basic trigger locks are external additions to guns and include everything from pad-locks intended to immobilize the trigger to more advanced apparatus that replace the grip of the handgun and require a combination to release the lock. Integrated locks, such as those provided by the gun manufacturer Taurus, use an internal lock to secure the gun. This patented security system “engages with the turn of a special key to render the firearm inoperative, and is entirely contained within the firearm with no parts to misplace.” This is “the first integral system provided by a manufacturer to help prevent unauthorized use by children.” Even the most advanced forms of trigger locks, however, cannot prevent all accidents.

The most effective, sophisticated manufacturing modifications include personalization technology that enables a gun to
“recognize” the authorized user. Cost effective, reliable designs include radio frequency tags in the handgun and on the shooter, often worn as a ring or a bracelet. The tag in the gun must match that worn by the shooter for the gun to operate. Personalization technology, therefore, prevents gun use by anyone other than licensed, authorized users.

Wide-spread manufacturing of personalized guns would also curb the proliferation of criminal activity and illicit gun trafficking by drastically limiting the utility of stolen firearms. Because thieves are unable to use guns with personalized technology, this would also reduce the number of homicides. At least one study has shown that almost 50 percent of all shootings, both intentional and unintentional, could have been prevented if a personalization device was placed on the gun. This fundamental design change would both save innocent lives and decrease the threat that guns, and criminals, pose to society at

---

182 See Johns Hopkins Center For Gun Policy and Research, Personalized Guns: Reducing Gun Deaths Through Design Changes (Sept. 1996) [hereinafter Personalized Guns], at http://www.pcvp.org/pcvp/firearms/pubs/lock.shtml; see also MASS. REGS. CODE tit. 940, § 16.00 (1987) (discussing devises including magnetic resonance devices that require the user to wear a special bracelet or ring, radio frequency identification, and touch memory devices, among others); see also, SMART GUN TECHNOLOGY PROJECT, supra note 175.

183 See Personalized Guns, supra note 182.

184 SMART GUN TECHNOLOGY PROJECT, supra note 175.

185 See Jon S. Vernick & Stephen P. Teret, A Public Health Approach to Regulating Firearms as Consumer Products, 148 U. PA. L. REV. 1193, 1198-99 (April 2000) (positing that personalized guns may be used only by authorized user, and hypothesizing therefore that homicides could be prevented because those who steal the guns may not use them to murder others); Marianne W. Zawitz, Firearms, Crime, and Criminal Justice: Guns Used in Crime, Department of Justice, United States Department of Justice, July 1995, at 3 (citing statistics that “15% of the adult offenders and 19% of the juvenile offenders had stolen guns; 16% of the adults and 24% of the juveniles had kept a stolen gun, and 20% of the adults and 30% of the juveniles had sold or traded a stolen gun”; and citing studies of adult and juvenile offenders indicating that many offenders have stolen, possessed, or traded stolen fire arms).

186 See Center to Protect Handgun Violence, A School Year in the USA (Oct. 1988) (analyzing 137 reports of gun violence culled from newspaper reports and news websites across the country).
GUN INDUSTRY ACCOUNTABILITY

large.\(^{187}\)

Personalization technology is more than a fantastical item on the wish list of gun control advocates. Many inventors have developed workable prototypes that can be implemented on guns today to make them safer.\(^{188}\) A recent study by the National Institute of Justice described this technology as both affordable and available to gun manufacturers.\(^{189}\) At least one manufacturer has announced that it has a pistol “with user identifying technology,” using battery-powered fingerprint reader technology.\(^{190}\)

Not surprisingly, many in the gun industry have attempted to delay, if not derail, efforts to develop personalized gun technology.\(^{191}\) Rather than proactively implementing design changes that help reduce crime, assist law enforcement, and even save lives, the gun industry has stonewalled attempts at innovation and even tacitly supported boycotts of industry members who strayed from the party line.\(^{192}\) The industry refuses to provide consumers with the safest product possible and has failed to promote widespread technological advancement.

---

\(^{187}\) See Personalized Guns, supra note 182; see also Vernick & Teret, supra note 185, at 1204 (predicting that personalized guns might prevent some of the deaths caused by unauthorized users such as juveniles and criminals who disarm a police officer).

\(^{188}\) See Joseph D’Agnese, Smart Guns Don’t Kill Kids, DISCOVER, Sept. 1999, at 90 (describing gun manufacturers’ efforts to develop smart gun technology, such as fingerprinting, magnetic, electromagnetic and radio lock guns).

\(^{189}\) SMART GUN TECHNOLOGY PROJECT, supra note 175.

\(^{190}\) See Taurus News and Reviews, supra note 176 (explaining that the prototype is a polymer frame 9mm pistol).


\(^{192}\) See Ottaway, supra note 191, at A1 (noting gun manufacturers’ opposition, specifically Beretta U.S.A. Corp, to smart gun technology).
C. Gun Makers Know They Are a Substantial Factor in the Creation and Maintenance of the Underground Gun Market

The main sources for illegally trafficked firearms have been well documented throughout the past few decades and gun manufacturers are aware that their designs and methods of distribution facilitate the operation of the underground market. Moreover, gun manufacturers are repeatedly informed that their products are being sold to dangerous individuals through the underground market. They persistently refuse, however, to take simple, positive steps to curb the flow of their products into this illegal and hazardous forum.

1. Gun Tracing Serves as Notice to Gun Makers Regarding the Criminal Use of Their Products

Even with the problem of destroyed serial numbers and the loopholes present in record-keeping requirements, gun makers receive thousands of formal notices every year that the guns they manufacture and distribute are diverted to criminal misuse.

One important mechanism for notification is tracing, which is “the systematic tracking of the movement of a firearm recovered by law enforcement officials from its first sale by the

193 See Hass Affidavit, supra note 133, at 20-21 (explaining that although Smith & Wesson and the industry as a whole are fully aware of the extent of the criminal misuse of firearms, the industry’s position has consistently been to take no independent action to insure responsible distribution practices). Furthermore, none of the principal U.S. firearms manufacturers take additional steps to investigate, screen or supervise the wholesale distributors and retail outlets that sell their products to insure that their products are distributed responsibly. Id.

194 See Commerce in Firearms in the United States, supra note 140, at 19-20 (detailing crime gun tracing, which includes contacting the gun manufacturer to determine the first retail transaction); see also, Philip J. Cook & Anthony A. Braga, Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets, 43 ARIZ. L. REV. 277 (2001) (discussing the proper interpretation and use of data obtained from firearms tracing to affect gun control laws and criminal enforcement actions).

195 Id.
GUN INDUSTRY ACCOUNTABILITY

manufacturer or importer through the distribution chain (wholesaler/retailer) to the first retail purchase." 196 Law enforcement officials contact the ATF at the National Tracing Center ("NTC"), which then conducts a trace by checking out-of-business FFLs and multiple sales records. 197 If these sources do not uncover the first retail transaction, the NTC notifies the importer or manufacturer of the gun and tracks the recovered weapon through the wholesaler and retailer distribution chain "to the retail dealer, requesting the dealer to examine his records to determine the identity of the first retail purchaser." 198 Thus, the ATF contacts the manufacturer each time it initiates a trace of a gun used in crime. 199 This happens hundreds of thousands of times each year. 200

Comprehensive tracing data "can provide guidance to the regulatory—and criminal—enforcement activities of ATF and more generally provide a statistical basis for understanding the supply side of the gun violence problem." 201 Accordingly, this tracing data, much of which gun manufacturers, distributors and dealers, can access, can be used to determine who is consistently selling guns that end up in crime. 202 As Forest G. Webb, a special agent of the ATF in charge of the NTC, told Taurus International Manufacturing, "[i]f your corporation determines that there is an unusually high number of Taurus Firearms being traced to certain" wholesalers and dealers "we suggest you look

---

196 See COMMERCE IN FIREARMS IN THE UNITED STATES, supra note 140, at 19.
197 Id. The NTC is an agency that tracks guns recovered in crime. Id.
198 See id. at 20.
199 Although manufacturers are aware of traces about which they are contacted, they are not currently informed about traces resolved by searches of the out-of-business records or multiple sales report information. Id.
200 See Cook & Braga, supra note 194, at 278 (noting that law-enforcement agencies confiscate hundreds of thousands of firearms every year).
201 Id.
202 While access to the raw tracing data is only available via special request, annual reports digesting the trace data are available from the Bureau of Alcohol, Tobacco and Firearms. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CRIME GUN TRACE REPORTS, available at http://www.atf.treas.gov/firearms/ycgii/2000/ (last visited Mar. 16, 2003).
at their business practices more carefully.” Unfortunately, like others in the gun industry that refuse to take steps to stop the flow of guns to the underground market, Taurus never acted on this suggestion.

2. The Gun Industry Knows That It Has the Power to Curb the Underground Gun Market

Gun makers know the role their conduct plays in the proliferation of the underground market. As a former gun company executive, Robert Hass, who served as Senior Vice-President of Marketing and Sales for Smith & Wesson recognized in a sworn statement:

[Smith & Wesson] and the industry as a whole are fully aware of the extent of the criminal misuse of handguns. The company and the industry are also aware that the black market in handguns is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal handgun licensees.

Gun dealers acknowledge the industry’s refusal to take responsibility for their participation in the crime gun market. Hass noted in his sworn affidavit that “the industry’s position has consistently been to take no independent action to insure responsible distribution practices, to maintain . . . minimal federal regulation of . . . handgun licensees . . . and to call for greater criminal enforcement of those who commit crimes with

---

203 See Fox Butterfield, Letter Is Crucial in Lawsuit On Liability of Gun Makers, N.Y. TIMES, Sept. 30, 2002, at A17 (discussing letter from ATF to Taurus International instructing gun company Taurus to investigate wholesalers and dealers that repeatedly show up in crime gun traces).
204 Id. (noting that “Taurus never acted on Mr. Webb’s advice”).
205 18 U.S.C. §922 (1994). The Gun Control Act of 1968 grants gun makers and law enforcement officials the power to “determine the chain of commerce for a firearm from the point of import or manufacture to the first retail sale.” Id. See also Cook & Braga, supra note 194, at 277.
206 See Hass Affidavit, supra note 133, at 20.
GUN INDUSTRY ACCOUNTABILITY

guns as the solution to the firearm crime problem.” 207 One firearms dealer, named 1993 Dealer of the Year by the National Alliance of Stocking Gun Dealers, expressed similar sentiments in Shooting Sport Retailer, an industry trade magazine.208 He stated:

I’ve been told INNUMERABLE times by various manufacturers that they ‘have no control’ over their channel of distribution. I’ve been told INNUMERABLE times that once a firearm is sold to a distributor, there is no way a manufacturer can be held responsible for the legal transfer and possession of a firearm . . . . IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE ULTIMATELY BEING SOLD - YOU SHOULD HAVE KNOWN OR ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED. Let’s just get down and dirty. We manufacture, distribute, and retail items of deadly force. . . . Your arguments of yesterday regarding lack of accountability were pretty flimsy. Today, they are tenuous at best. Tomorrow, they are not going to indemnify you. We are going to have to get a whole lot better—and fast—of being in control of our distribution channel.209

Gun manufacturers nevertheless deliberately employ a “hands off” approach to distribution.210 This is largely because the underground market is an important source of revenue for gun makers and loss of these sales would mean a significant decline in profits for gun makers.211 Although the magnitude of the

---

207 Id.
208 See Robert Lockett, The Implications of New York City, SHOOTING SPORTS RETAILER, 18-20, July/August 1999. Lockett is the proprietor of the Second Amendment gun shop in Overland Park, Kansas. Id.
209 Id.
210 See Bhowmik, supra note 92, at 48-49 (noting that despite their knowledge of the criminal misuse of guns acquired in the underground market, gun makers continue to willingly supply the market).
211 Only 10% of the guns recovered by the ATF are stolen property. See Federal Firearms Licensing Hearing, supra note 150, at 31. Given the volume
underground market cannot be calculated with mathematical certainty, the significance of the primary market for provision of firearms to the illicit market is beyond refute.\textsuperscript{212}

What is and has been ascertainable, however, is the importance of the primary market for guns to the illicit market. One former ATF Director noted that “access to lawful channels of firearms in commerce is overwhelmingly attractive to criminals. Quantity and selection that cannot be provided consistently by home burglaries can only be obtained through the retail market.”\textsuperscript{213}

In light of the overwhelming evidence of negligently designed and distributed firearms, steps must be taken to abate the monumental effects of these hazards. The gun industry is in the best position to respond to this problem, because it has both knowledge of the issues and the ability to implement remedial changes. Gun manufacturers and retailers, however, continue to conduct business as usual, with express exemption from federal consumer product safety laws and absent the threat of potential liability. The industry’s refusal to act demonstrates a desire to maximize profits in utter disregard for human life and safety.

IV. AN ATTEMPT TO ESTABLISH ACCOUNTABILITY: THE RISE OF CITY SUITS AGAINST GUN MANUFACTURERS AND THE INDUSTRY’S RESPONSE TO THE LITIGATION

A new wave of city-suit litigation attempts to hold the gun
industry accountable for the negligent design and distribution of its products and is forcing the industry to implement changes in the way it does business.\textsuperscript{214} While these reforms are not a panacea, they mark an important first step towards altering the way gun manufacturers and retailers conduct their trade and demonstrate that the industry has the means to prevent the sale of guns to criminals and other prohibited purchasers.

These city suits have been met with mixed results.\textsuperscript{215} Some courts have dismissed claims for negligent design and distribution of guns.\textsuperscript{216} For example, in 1999, Wayne County, Michigan and the City of Detroit filed a lawsuit against gun manufacturers and distributors for public nuisance and negligent marketing and distribution of guns.\textsuperscript{217} Specifically, the plaintiffs alleged that the defendants used a policy of active encouragement and willful blindness to facilitate the creation of an illegal secondary market

\begin{footnotesize}


\textsuperscript{216} See Philadelphia v. Beretta U.S.A. Corp., 277 F.3d at 415. \textit{See also} Camden County Bd. Of Chosen Freeholders, 273 F.3d at 536.

\end{footnotesize}
They contended that, as a result of defendants’ active encouragement and reliance upon straw purchases, multiple sales, sales to minors, and diversion of guns to felons and unauthorized purchasers, thousands of firearms were placed in the hands of criminals, juveniles, and other dangerous people for the use in crimes. The court upheld the public nuisance claim. But the negligent marketing and distribution claim was dismissed because the court found that the defendant gun manufacturers did not owe the plaintiffs a duty to use reasonable care to prevent foreseeable injuries resulting from the negligent sale of their products.

Other courts have held gun manufacturers liable for negligent behavior that results in injury to a city. In *White v. Smith & Wesson, Corp.*, the City of Cleveland filed claims against gun manufacturer Smith & Wesson under the Ohio Products Liability Act, as well as state common law claims of negligent design, unjust enrichment, public nuisance, negligent distribution, and a statutory claim for nuisance abatement. The defendant argued that the case should be dismissed for “three overarching reasons” – (1) as a matter of public policy; (2) for failure to state a claim…

---

219 Id. at 3, 20, 50.
221 Id. at 6 (stating that crime prevention “is simply not a cognizable legal duty owed by these Defendants to these Plaintiffs.”).
222 White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 828 (N.D. Ohio 2000) (alleging that as a result of defendants’ unreasonably dangerous and negligently designed handguns that the city suffered harm, lost substantial tax revenue due to lower productivity and was obligated to pay millions of dollars in enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care).
224 White, 97 F. Supp. at 830.
225 White, 97 F. Supp. 2d at 819, citing Cleveland City Code § 203.01,
under Ohio law; and (3) because the claims encroached upon the United States Constitution. The District Court for the Northern District of Ohio denied the defendant’s motion in full, relying in part on state law precedent recognizing that the grave, foreseeable risk posed by guns warrants the imposition of a duty to prevent them from falling into the wrong hands. The court noted that “[a] duty of care for the protection of a plaintiff against an unreasonable risk of injury is owed to all people ‘to whom injury may reasonably be anticipated.’”

In another significant case, the City of Cincinnati claimed that gun manufacturers and distributors negligently distributed and marketed their products, resulting in both a public nuisance and injury to the city. The Supreme Court of Ohio overturned the

---

226 White, 97 F. Supp. 2d at 829-30. Regarding the public policy argument, the court held that it “does not dismiss cases based on public policy; rather, a case will be dismissed if it fails ‘to state a claim upon which relief can be granted.’” Id. at 820. The court analyzed each of the state law claims in detail and concluded that each stated a claim under Ohio law. Id. at 821-829. The court also rejected the defendants’ argument that plaintiffs’ claims were “an attempt to regulate a lawful national industry” and barred by the Commerce Clause and the Due Process Clause. Id. at 829. The court found that “[p]laintiffs . . . are attempting to protect their own citizens and economy, and to recover for their own injuries and losses. Plaintiff’s claims, like any other product liability claim that implicates a national manufacturer, are not barred by the United States Constitution.” Id. at 829-30.

227 White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 828 (articulating that the City of Cleveland alleged negligent design and distribution of guns by gun manufacturers and dealers caused injury and public nuisance). The court relied in part on Pavlides v. Niles Gun Show, Inc., in which the Ohio Court of Appeals held that a gun show operator could be liable for a criminal shooting by teenagers using a gun they stole from a dealer at the show. That court found that the operator negligently failed to prevent minors from entering the show and negligently failed to require dealers at the show to take appropriate security measures to prevent thefts. See also Pavlides v. Niles Gun Show, Inc, 679 N.E.2d 728 (Ohio Ct. App. 1996).

228 White, 97 F. Supp. 2d at 828; see also, OHIO REV. CODE ANN. §2307.71 (Anderson 1999) (citing instances in the state products liability code where a product is deemed defective due to inadequate warning or instruction).

229 See Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002). The City alleged that the gun manufacturers’ negligence violated the common right of Cincinnati residents to be free from conduct that interferes with their
lower court’s dismissal of the city’s case.\textsuperscript{230} The court summarized the city’s argument that “appellees created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market. Thus . . . appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury.”\textsuperscript{231} The court concluded that, “just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance.”\textsuperscript{232}

The Supreme Court of Massachusetts also denied gun manufacturers’ motion to dismiss a case brought by the City of Boston.\textsuperscript{233} Although defendants contended that they “did not owe Plaintiffs a duty to protect from the criminal acts of third parties,” the court recognized that this argument misconstrued the complaint.\textsuperscript{234} The court clarified its position by stating that the “[p]laintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs.”\textsuperscript{235} The court further explained that:

health, welfare, and safety. \textit{Id.} at 1141. The City further argued that appellees’ negligent conduct sustained a secondary, illegal market for firearms, ensuring that the firearms would end up in the hands of persons with criminal purposes. \textit{Id.}

\textsuperscript{230} \textit{Id.} at 1151 (overturning dismissal).
\textsuperscript{231} \textit{Id.} at 1143.
\textsuperscript{233} \textit{See} City of Boston v. Smith & Wesson Corp., 2000 WL 147 at 1 (Mass. Super. Ct. 2000). Although the City of Boston prevailed against defendants’ motion to dismiss, the high cost of litigation caused the City to voluntarily dismiss the case in March 2002. \textit{See} Raja Mishra, \textit{Boston Drops Lawsuit on Guns: Growing Cost Cited in Case vs. 31 Firms}, \textit{BOSTON GLOBE}, March 28, 2002, at A1 (reporting that budget cuts and legal costs of over $30,000 a month contributed to the city’s decision to drop the case).
\textsuperscript{234} \textit{Smith & Wesson Corp.}, 2000 WL 1473568 at *6 (rejecting defendants’ contention that the plaintiffs’ complaint asked the court to impose such a duty).
\textsuperscript{235} \textit{Id.} at 15 (explaining the plaintiffs’ allegation that the defendants engaged in affirmative misconduct).
Taking Plaintiffs’ allegations as true, Defendants have engaged in affirmative acts (i.e. creating an illegal secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus it is affirmative conduct that is alleged – the creation of the illegal secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this [knowing that the firearms would end up in that market, and] depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants’ conduct unreasonably exposed Plaintiffs to a risk of harm.236

While courts have reached different conclusions on the application of common law tort claims to the gun industry’s wrongdoings, lawsuits have helped reveal the means by which the gun industry knowingly supplies and profits from the underground gun market.237 Cities’ claims have eroded the shield of preemptive statutes and special treatment and, in response to demands for redress, the gun industry has made minor changes in the way it does business.238 Although, these changes are far from

236 Id.
237 See, e.g., Butterfield, supra note 203, at A17 (reporting that a central argument in the cities’ case against the gun industry alleging that gun manufacturers are liable for tort of public nuisance is bolstered by the discovery of a letter sent by ATF, urging the manufacturer to trace how and where its products were being sold, was ignored by the company). See also Richard C. Ausness, Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing, 53 S.C. L. REV. 907 (2002) (discussing the controversial tort of negligent marketing that is being put forth in cases against the gun industry and would impose a duty on gun manufacturers to more carefully market their products so as to prevent guns from falling into the wrong hands).
238 See Burnett, supra note 48, at 481 (describing changes in the gun industry, such as Colt Manufacturing Company’s decision to eliminate production of seven of its lines of consumer handguns and Smith & Wesson’s
adequate, they demonstrate the industry’s recognition of the role it plays in trafficking guns to criminals and minors. Sadly, however, if these changes had been made years ago, a great number of lives could have been saved.

As retailers’ sole source of handguns, gun makers are uniquely positioned to restrict or limit the manner in which guns are sold, thereby preventing guns from being obtained by criminals. Manufacturers could ask distributors and dealers to apprise them of any information, including multiple sales, trace requests or criminal indictments. Manufacturers, however, have refused to take precautionary measures. As a result of the municipal litigation against gun manufacturers, this behavior has begun to change.

For example, Smith & Wesson, one of the nation’s largest

---

pact with the U. S. Department of Housing and Urban Development, the Department of the Treasury, New York and Connecticut Attorneys General and the mayors of many of the cities suing the gun industry at that time). See Matt Bai, *Clouds Over Gun Valley*, NEWSWEEK, Aug. 23, 1999, at 34 (discussing gun industry’s overtures to the ATF, including signals that the industry would be willing to monitor sales to cut down on illegal trafficking).

239 See GUN VIOLENCE REDUCTION, supra note 114, at 26. The DOJ acknowledged the great importance of “industry self-policing” in the interest of public safety:

The firearms industry can make a significant contribution to public safety by adopting measures to police its own distribution chain. In many industries, such as the fertilizer and explosives industries, manufacturers impose extensive controls on their dealers and distributors. Gun manufacturers and importers could substantially reduce the illegal supply of guns by taking similar steps to control the chain of distribution for firearms. To properly control the distribution of firearms, gun manufacturers and importers should: identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers; develop a continual training program for dealers and distributors covering compliance with firearms laws, identifying straw purchase scenarios and securing inventory; and develop a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands, including policies to postpone all gun transfers until NICS checks are completed.

Id.
gun manufacturers, signed an agreement with various cities and federal agencies, agreeing to a marked change in the way they do business, including monitoring distributors and dealers for negligent behavior. Under the same settlement, Smith & Wesson agreed to use personalization technology in its new models within three years of the settlement, with curio and collectors’ models exempted from the requirement. Smith & Wesson also agreed to spend two percent of its revenues on developing personalization technology.

Even prior to that groundbreaking agreement, Smith & Wesson implemented some restrictions on their retailers’ conduct, and informed them that it might terminate sales to any dealer who did not agree to refrain from selling to straw purchasers or any other person whom the dealer had reason to believe made a false or misleading statement. After the City of Chicago videotaped and indicted two dealers engaging in straw purchases, Smith & Wesson terminated those dealers for violating the agreement. These actions clearly demonstrate that

240 See Smith & Wesson: Clarification: Settlement Document: Agreement (March 17, 2000) [hereinafter Smith & Wesson Agreement], at http://www.gunnerynetwork/files/agreement.html. Under the terms of the Smith & Wesson settlement, the company agreed to change its distribution practices, including the following: Smith & Wesson will only allow their guns to be sold by authorized dealers and distributors who must abide by a set of terms and conditions governing who they can sell guns to. Id. at 6. See also James Dao, Under Legal Siege, Gun Maker Agrees to Curbs, N.Y. Times, Mar. 18, 2000, at A1 (reporting the terms of Smith & Wesson’s settlement agreement, its significance and the impact it may, or may not, have on the gun manufacturing industry as a whole); Steven Wilmsen, Smith & Wesson, City Settle Lawsuit, Boston Globe, Dec. 12, 2000, at B4 (reporting the terms of a separate settlement with the City of Boston which, while it is less ambitious in its terms than the March 2000 agreement, is a binding agreement).

241 Smith & Wesson Agreement, supra note 240, at 2.

242 Id.

243 See David B. Ottaway & Barbara Vobejda, Gun Manufacturer Requires Dealers to Sign Code of Ethics, Wash. Post, Oct. 22, 1999, at A11 (detailing a code of ethics Smith & Wesson requires dealers selling its products to sign, pledging that they will avoid sales practices that facilitate the illegal flow of guns to young people and criminals).

244 See Protection of Lawful Commerce in Arms Act: Hearing on H.R. 2037
gun manufacturers can act to reduce the likelihood that criminals and other prohibited purchasers will obtain guns. Significantly, these actions were taken only after cities and municipalities began suing the gun industry.\(^{245}\)

Not surprisingly, the NRA and the gun industry responded negatively to Smith & Wesson’s settlement. They supported a boycott of the gun maker, and treated Smith & Wesson as a pariah.\(^{246}\) The boycott warned all gun manufacturers that no party could settle without first consulting with the rest of the industry.\(^{247}\) Gun sellers contended that they only had the responsibility to obey the laws regulating gun sales, nothing more.\(^{248}\) They argued that ATF and other law enforcement


\(^{245}\) See Ottaway & Vobejda, supra note 243, at A11 (Smith & Wesson first mailed letters to its registered dealers in July 1999, giving them 60 days to pledge that they would comply with the “Stocking Dealer Code of Responsible Business Practices,” committing dealers to obey all firearms laws; to only sell Smith & Wesson guns with safety locks; and to closely monitor buyers to avoid illegal purchases); See also Complaint, Morial v. Smith & Wesson Corp. (La. D.C. 1998)(No. 98-18575) (initiating first city suit).


\(^{247}\) Suprynowicz, supra note 246 (discussing boycott and Smith & Wesson’s reaction to now tow the party line).

\(^{248}\) See Butterfield, supra note 203, at A17. Specifically, Lawrence G. Keene, Vice President and General Counsel to the NSSF said that the gun makers are “complying with an extensive regulatory scheme.” Id. As a result, the manufacturers have no responsibility to monitor what dealers do with their guns, he said, and “it is absurd to suggest that if criminals get their hands on guns the companies should be held responsible.”
GUN INDUSTRY ACCOUNTABILITY

agencies did not want them to do more to prevent sales intended for the criminal market. This “party line” mentality has prevented true innovation in the industry.

Meanwhile, a gun industry trade association, the National Shooting Sports Foundation (“NSSF”) has implemented a program in response to the city suits, which underscores specific ways in which firearms dealers can exercise more responsibility in their sales. This program, popularly referred to as “Don’t Lie for the Other Guy,” recognizes that preventing straw purchases requires more than simply following federally-mandated procedures. Rather, the materials disseminated by NSSF advocate “go[ing] beyond the law,” and discuss the benefits of a “pre-sales screening” of prospective purchasers. Under the NSSF guidelines, it is not enough to simply demand that customers provide identification, fill out the required forms and undergo a criminal background check. An arms dealer is

249 Butterfield, supra note 203, at A17 (quoting the NSSF as saying that they had been told by the ATF that “law enforcement does not want manufacturers to play junior G-men and jeopardize investigations”).


251 National Association of Firearms Retailers, Don’t Lie for the Other Guy [hereinafter Don’t Lie for the Other Guy] (explaining that a federally licensed firearms dealer is responsible under federal law for determining the legality of any firearm transaction (18 U.S.C. §921-930; 27 CFR §178)), available at http://www.nafr.org/DontLie/index2.htm (last visited Jan. 20, 2003). The campaign is a coordinated effort designed to educate the public on the consequences of purchasing a firearm for someone who legally cannot and to train firearms retailers on better identifying potential straw purchases. Id. Before transferring any firearm, a licensed dealer must first establish and verify the identity, place of residence and age of the buyer to insure that individuals meet the requirements under applicable state and federal laws. Id.

252 Id.

253 Id. Under the federal law, licensed gun sellers not selling guns from their personal collection are only required to view government issued identification and submit information for a background check of the purchaser by law enforcement. Such a check, if not completed within three days, is then irrelevant and the purchaser can still purchase the gun. 18 U.S.C.A. §
also required to verify that the individual buying the firearm is indeed the actual purchaser.\textsuperscript{254}

The NSSF guidelines recommend that dealers ask prospective purchasers a number of questions, including the “intended use” of the gun.\textsuperscript{255} Dealers are advised to look out for “suspicious acting customers who may appear nervous or evasive in their communications,” or even “customers who appear confident” who “may inadvertently reveal something if the dealer asks enough pertinent questions.”\textsuperscript{256} NSSF recognizes that not only should a dealer adequately question prospective purchasers to weed out illegitimate customers, but the dealer should not complete a sale if they have suspicions about a customer.\textsuperscript{257}

922(t)(1)(B)(ii). See Gov’t Accounting Office Report, Gun Control: Opportunities to Close Loopholes in the National Instant Criminal Background Check System, GAP-020720 at 28 (July 2002) (recommending to Congress to remove the three day time limit as it does not provide the FBI with sufficient time in which to complete all background checks and as a result, many prohibited purchasers are obtaining weapons through this loophole).

\textsuperscript{254} See Don’t Lie for the Other Guy, supra note 251, at 2. The NSSF guidelines suggest:

Many retailers routinely engage their customers in a series of helpful questions to determine the customer’s wants and needs. By including a couple of questions regarding the identity of the actual purchaser in this pre-sales screening, retailers can provide a valuable service to law enforcement and to their community without offending a legitimate customer.

An effective way to do this is to establish a store policy that every potential firearm purchaser will be asked the same sequence of questions. You may even want to post a sign in your store that informs the customer of this policy. The sign may read: to assist law enforcement it is our policy to go beyond the law in verifying the identity of the actual purchaser of a firearm.

\textit{Id.}

\textsuperscript{255} \textit{Id.} (suggesting questions such as, “Is the firearm for you or someone else?”; “If someone else, is this a gift?”; “What is the intended use—personal protection, deer hunting, target shooting?”; and “What type of firearm are you interested in or most comfortable with?”).

\textsuperscript{256} \textit{Id.}

\textsuperscript{257} \textit{Id.} The materials state:

The key is to engage the customer and ask enough questions to draw
GUN INDUSTRY ACCOUNTABILITY

The materials also stress that a dealer is obligated to verify that the purchaser is the intended user.\(^{258}\) This means that, if a dealer is uncertain as to whether a transaction is a straw purchase, the dealer should not complete the sale. For instance, the materials list several hypothetical transactions. In one, a man “may simply be helping [his girlfriend] select her first handgun,” or he may be asking a woman to purchase a gun for him.\(^{259}\) In the view of the NSSF, the dealer should refuse the sale, even though he may be denying a legitimate sale.\(^{260}\)

Although the “Don’t Lie for the Other Guy” program could have been implemented much earlier and remains a voluntary program without great effect, it marks an important recognition on the part of the gun industry that their behavior can and does have an impact on the criminal trafficking of guns in this country. Because the ATF has recognized the importance of straw purchases on the underground gun market, any steps gun sellers take to impede–rather than promote–such sales, will mark a step in the right direction.\(^{261}\) City suits, public pressure and the threat of liability have forced the industry to reexamine the way it out information on their background and intentions. If suspicions arise, it is more prudent to follow the precautionary principle of politely refusing the sale to protect yourself from the risk of contributing to a possible illegal transaction. It’s not just good business. It’s your responsibility.

\(^{258}\) Id.

\(^{259}\) Id. (listing other examples of straw-purchases, such as when a person who can legally buy a firearm and wishes to do so arranges for a second person to pay for the gun and fill out and sign the paperwork in the second person’s name or when a person who is denied an approval returns to the store with a companion who asks to see the same firearm the man attempted to purchase and then the companion says that he or she would like to purchase the firearm).

\(^{260}\) Id.

\(^{261}\) See Weil & Knox, supra note 139, at 1761. Weil and Knox explain that straw purchasers’ ability to purchase large numbers of firearms with a street value that is much higher than their commercial price enables gun traffickers to make large profits and keep costs to a minimum, an important aspect of the underground gun market. Id. See also Braga & Kennedy, supra note 147 (discussing undercover operations in several cities demonstrating prevalence of dealer compliance in straw purchases).
does business. When the business involves the production of instruments of death and destruction, it is not too much to ask for extra precautions in the design, distribution and marketing of such products.

CONCLUSION

The gun industry has escaped liability for their negligent behavior for far too long. The nation pays the price—in lives lost and dollars spent—for easy access to guns by criminals and juveniles. Lawsuits filed by cities, municipalities and states aim to hold the gun industry accountable for its negligent behavior. Critics of these lawsuits rely upon questionable statistics regarding the benefits of unregulated gun ownership and revisionist history regarding the Second Amendment to argue against them. Nonetheless, the ways in which the underground market is supplied illustrate that gun manufacturers play a vital role in the underground crime gun market and that manufacturers knowingly financially benefit from the perpetuation of this market. The city suits have met with mixed results in the courts. While some courts have dismissed these lawsuits, the ongoing litigation has had definite effects on the way guns are sold in this country. The Smith & Wesson settlement and acknowledgement by the gun industry trade association that it can no longer hide behind a veil of denial mark the dawning of a new day—where the gun industry will finally be taken to task for its role in providing criminals and juveniles easy access to guns.
REPLACING POLITICS WITH DEMOCRACY: A PROPOSAL FOR COMMUNITY PLANNING IN NEW YORK CITY AND BEYOND

Amy Widman*

INTRODUCTION

Once an active port providing jobs for many New Yorkers, Brooklyn’s waterfront fell into disuse during the second half of the twentieth century as the city’s economy came to rely more heavily on roads for shipping. Miles of shoreline fell into neglect, leaving disrepair and environmental hazards. Revitalization of the waterfront entered the city’s agenda in the 1990s, but the resulting plans lacked vision and varied widely from one neighborhood to another. Some of the largest swaths of waterfront were completely left out of the revitalization process by city leaders and private developers who lacked political and financial incentive to work with certain local communities. This selective approach to revitalization placed an unequal burden on those communities and denied them a voice in important decisions regarding the delicate balance of environmental clean-up, cultivation of green space and protection of active industry and jobs.

* Law clerk to the Hon. Theodore H. Katz, U.S. Magistrate Judge, in the Southern District of New York. J.D., cum laude, New York University, 2002; B.A., Northwestern University, 1996. The author would like to thank Professor Vicki Been, the editorial staff of the Journal of Law and Policy and all those involved in community planning in Brooklyn who took the time to speak with the author about the practices and procedures of an informal process. She also would like to thank her friends and family, especially Dan, for their love and support.
This article tells two stories of community planning in Brooklyn to illustrate possible reasons for the divergent development of the waterfront and suggests ways in which local communities can be involved. It offers public participation as a solution to disparate treatment and examines whether the comprehensive planning process lives up to its ideal as a method of public participation. Part I provides a background to the debate and theoretical discussions underlying community planning. Part II explores the value of public participation in land use decision making. Part III chronicles the history of community-sponsored planning in New York City. Part IV sets forth two case studies of recent attempts to rezone neighborhoods through community-sponsored plans. The two communities studied, Vinegar Hill and Greenpoint, are located within a few miles of each other along the East River in Brooklyn. They share a common industrial past, and many manufacturing buildings still dot their waterfronts. The neighborhoods differ greatly in size, demographics and, most significantly for this analysis, experience with the land use decision-making process. Part V applies the two case studies to identify which factors help or hinder a community in its efforts to draft a comprehensive plan. Part VI explores policies that equalize the necessary resources and negotiating power among communities, encouraging more diverse public participation in land use decision making. Part VII proposes a legislative change that would reward communities for their planning efforts and encourage inclusive processes. Finally, this article concludes with a call to reevaluate the current land use decision-making process with the objective of including residents and workers in the process in a meaningful way.

The focus on New York City both grounds and restricts this article. The case studies are local in nature, and a comparison of only two experiences has inherent limitations. The diversity and density of Brooklyn, however, makes it a prime subject for examining how the land use process actually affects residents, and how failures of public participation occurs. Brooklyn’s diverse population requires consensus-building strategies, and its population density is integrally related to its problem of scarce resources. While the local government structure of New York
City may not mirror other jurisdictions, the purpose of this analysis is to explore how land use regulation can incorporate a real commitment to public participation by allowing and encouraging all communities to play an active role in the development strategies of their neighborhoods.

I. BACKGROUND

A controversy exists among planners, lawyers, policy makers and community leaders about how to formulate land use decisions. This dispute pits urban economics and democracy against one another as, at best, incompatible. Urban economists favoring a cost-benefit approach to land use decision making argue that this methodology is more efficient than focusing on public interest concerns because, at bottom, the primary social good is economic efficiency, not subjective notions of values.1 These scholars contend that public participation itself is inefficient.2


2 See NELSON M. ROSENBAUM, Citizen Participation and Democratic Theory, in CITIZEN PARTICIPATION IN AMERICA 43 (Stuart Langton, ed., 1978) (noting that public participation is costly and can result in lackluster solutions in order to accommodate all views); see also Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. REV. 741, 777 (1999) (arguing that public interests should not be followed to “protect members of our local communities from various forms of abuse”); Lior Jacob Strahilevitz, The Uneasy Case for
Public interest advocates respond that economic equations do not encourage democracy, and restricting policy guidance to economic factors limits the options available to decision makers. These theorists argue that land use decisions are ethical in nature, and economics should not play any role. This argument is commonly based on recognition of the deleterious and undemocratic effects that asymmetrical market forces have on land use.

Direct democracy is sometimes touted as a tool for public participation in land use decision making. Advocates of direct democracy argue that participation through initiative and referenda encourages accountability and government responsiveness. Critics claim that this so-called ballot box

---

Devolution of the Individual Income Tax, 85 IOWA L. REV. 907, 939 (2000) (discussing Nelson M. Rosenbaum’s perspective that public participation “itself is neither rewarding nor conducive to the growth of strong community bonds”); Adam N. Bram, Public Participation Provisions Need Not Contribute to Environmental Injustice, 5 TEMP. POL. & CIV. RTS. L. REV. 145, 158 (1996) (discussing skeptics’ views that public participation is inefficient because it is expensive, hinders implementation of decisions, and relies on decision making by the public, whose ability to make complex decisions is questionable).

See Nancy Perkins Spyke, Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence, 26 B.C. ENVTL. AFF. L. REV. 263, 294-95 (1999); see also John W. Ragsdale, Jr., Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory, 70 UMKC L. REV. 1, 16 n.78 (2001) (stating that “the thought that economics should determine land use undermines the ethical and scientific principles of ecological rationality”); John Arntz, Prairie Wetlands: A Reflection of Why We Need a Land Ethic, 1 GREAT PLAINS NAT. RES. J. 193, 204 (1996) (noting that “[c]ost-benefit analysis has acquired a negative reputation regarding land uses and our ecosystems because ecological processes are difficult to evaluate monetarily”).

See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 142-43, n.104 (1998) (noting that “in the absence of extensive planning in a liberal economy, the asymmetrical market forces which shape the city are hardly democratic.”).

See, e.g., THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 10-11 (1989) (stating that if voters become frustrated with the decisions of politicians and administrative agencies, a populist democracy will allow the people to make the desired law and this,
COMMUNITY PLANNING

zoning suffers from too much majoritarian public participation. Other scholars worry that direct democracy has no safeguards for capture by special interest groups.\(^6\) Other critics of direct democracy argue that lack of information and expertise causes citizens to make poor planning decisions.\(^7\) Both capture by special interest groups and lack of information can increase the prevalence of discriminatory measures that disadvantage the under-represented.\(^8\)

in turn, will encourage officials to extend greater deference to the voice of the people); see also CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (Shaun Bowler, Todd Donavan & Caroline J. Tolbert eds.) (1998) (examining whether the goals of direct democracy, providing voting mechanisms that allow citizens to get around legislators biased in favor of the wealthy and making politicians more responsive to the public will have been achieved); M. DANE WATERS, THE BATTLE OVER CITIZEN LAWMAKING (2001) (discussing the initiative process as a mechanism for influencing public policy at all levels of government).

\(^6\) See, e.g., DAVID B. MAGLEY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 145-51, 182, 198-99 (1984) (stating that special interest groups may frequently veto initiatives and that they are heavily involved in the referendum process since there is a direct correlation between greater expenditures and ballot proposition victories); CRONIN, supra note 5, at 198-99 (noting that large, organized groups and those groups that can raise vast sums of money are better situated to win, and even more so, to block, any ballot box measures); WATERS, supra note 5, at 59 (discussing the historical role of special interest groups in referendum and initiative ballot contests and analyzing the impact these well-funded groups have on campaign wins).

\(^7\) See generally MAGLEY, supra note 6, at 127-44.

\(^8\) See, e.g., David L. Callies et al., Ballot Box Zoning: Initiative, Referendum and the Law, 39 WASH. U. J. URB. & CONTEMP. L. 53, 94-95 (1991) (stating that “one of the most potentially troublesome problems with initiative and referendum is their tendency to dilute minority rights whether or not direct discrimination is intended”); John F. Niblock, Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny, 41 UCLA L. REV. 153, 189 (1993) (noting that initiatives and referendums can be a means to direct “bigotry, discrimination and prejudice” especially when they deal with the rights minority groups); Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality, 54 WASH. L. REV. 1 (1978) (explaining that racial minorities, fueled by frustration with their elected representatives, turned to “do-it-yourself” government using referenda to reject existing laws and enact new laws).
Nonetheless, New York City and its communities can use public participation as a planning tool to reconcile land use decisions with the democratic process. Advocates of public participation cite to the virtues of accountability, community and consensus building and the social efficiency engendered by informal debates and discussions that take place throughout the planning process. This article draws on that model of public participation, and argues that the public should have a more prominent voice in land use decisions. The city should reward public participation by adopting community-sponsored plans that evince concern for achieving harmony between environmental, economic and social factors—a balance that can be achieved only through an inclusive process.

II. PUBLIC PARTICIPATION

Public participation means many things; for purposes of this article the term refers to a change in process that improves democracy by fostering inclusiveness. If decision makers yield to public desires after an inclusive process, redistribution of power back into the hands of the people is possible. Effective participation can be achieved through education, access to useful information, meaningful interaction with government officials.

---

9 See, e.g., Carol Rose, The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on “Monarchism” to Modern Localism, 84 N.W. U. L. REV. 74, 96-97 (1989) (citing the virtues of “possibilities for constituent contact and civic participation” in local government as “structural restraints” on political power); Peter W. Salsich, Jr., Grassroots Consensus Building and Collaborative Planning, 3 WASH. U. J. L. & Pol’y 709, 712 (2000) (commenting that collaborative planning allows for residents to have a stake in the outcome of decisions and is an effective technique for information transfer).

10 See MARY GRIEZ KWEIT & ROBERT W. KWEIT, IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH 31 (1981); see also Tom Angotti, Race, Place and Waste: Community Planning in New York City, NEW VILLAGE, available at http://www.newvillage.net/angotti.pdf (1999) (noting that public participation in planning goes back to the 1930s, when tenant actions in New York City created rent control).
and open dialogue.\textsuperscript{11} Although the passage of the Administrative Procedure Act drafted a form of public participation into administrative decision making,\textsuperscript{12} this codification focuses exclusively on public hearings to insure that individual opinions are heard and merely brings views into the open at the decision-making stage.\textsuperscript{13} This inherently lacks focus on consensus building, and tends to polarize viewpoints at a juncture when only one view can ultimately prevail.

Meaningful public participation focuses on the process, rather than the ultimate decision. This article applies a process-oriented model to the case studies described herein and suggests legislative change that would reward consensus-building

\begin{footnotes}
\footnote{11}{See generally Paul Wilkinson, Public Participation in Environmental Management: A Case Study, 16 \textit{Nat. Resources J.} 117, 119 (1976) (explaining open planning’s use of education, review, and dialogue as an integral part of the planning and decision-making process).}
\footnote{12}{See 5 \textit{U.S.C.} §§ 551-559 (2002). The Federal Administrative Procedure Act provides, generally, for public participation in administrative decision-making process through the use of a public hearing. \textit{Id.}}
\footnote{13}{See generally Spyke, \textit{supra} note 3, at 269 (noting that public participation in governmental decision making emerged after passage of the Administrative Procedures Act, which formalized public participation at the federal level). In time, governmental agencies offered educational programs to the public, published news releases about their activities, and hired experts to develop participation programs, all in an effort to open the decision-making process to the public. \textit{Id.} See also Marco Verweij, Why is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?, 34 \textit{Law & Soc’y Rev.} 1007 (2000) (discussing the Administrative Procedures Act and its role in requiring federal agencies to seek public participation before enacting new water protection policies); Michael I. Jeffery, \textit{Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture}, 19 \textit{Ariz. J. Int’l & Comp. L.} 643, 649 (2002) (discussing the Administrative Procedures Act’s expansion of public notice and opportunity to obtain access to agency policies and decisions for inspection, participate in adjudication, and comment in national environmental rulemaking); Jim Rossi, \textit{Thirty-First Annual Administrative Law Issue: Politics and Policy: Presidential Administrations and Administrative Law: Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement}, 51 \textit{Duke L.J.} 1015, 1020-21 (2001) (comparing the inadequacies of the notice and comment rulemaking process underlying the Administrative Procedures Act with a consensus-based negotiated regulation).}
\end{footnotes}
participatory procedures. Inclusion of all community residents provides exposure to a healthy mix of perspectives, improving the decision-making process.\textsuperscript{14} This benefits the city by insuring fully informed decisions, and greater legitimacy and acceptance of decisions by the local population.\textsuperscript{15} The process itself also benefits communities by empowering residents and creating leaders.\textsuperscript{16}

Critics of extensive participation at the policy stage cite the deleterious result to administrative goals of efficiency, expertise and control.\textsuperscript{17} Agencies such as the City Planning Commission may criticize extensive public participation because it drains city resources. Indeed, public participation can be inefficient in economic terms.\textsuperscript{18} The challenge, then, is to devise a process that

\textsuperscript{14} See Spyke, \textit{supra} note 3, at 267-68. Spyke notes that “[b]ecause government is derived from the people, all citizens have a right to influence governmental decisions, and the government should respond to them. Widespread participation exposes decisionmakers to a healthy mix of perspectives, which is believed to improve the decisionmaking process.” (citations omitted). \textit{Id.}

\textsuperscript{15} \textit{Id.} at 271. (noting that agencies that engage in participation programs “strive to exchange information with the public, deal with diverse groups within the community, demonstrate a responsiveness to public concerns, and ultimately gain public acceptance of their decisions.”)

\textsuperscript{16} \textit{Id.} at 301. Spyke notes that “[t]oday, public participation increasingly is viewed not merely as a method by which well-informed decisions can be reached, but also a way to empower communities and create community leaders.” \textit{Id.} She further posits that “[t]he sense of efficacy that accompanies this empowerment, that arises when involved citizens see their participation activities as part of a ‘larger whole,’ is a secondary end-product that is taking on greater significance.” \textit{Id.} (citations omitted).

\textsuperscript{17} \textit{Id.} at 273. (noting that public participation’s “emphasis on the individual and direct access to decisionmakers conflicts with collectivist theory and republicanism. It also undermines the administrative goals of efficiency expertise, and control”).

\textsuperscript{18} See \textit{id.} (“On a more practical level, public participation is inefficient in terms of cost and time”). Admittedly, the money required for education, outreach, and meetings may seem burdensome for a process that is not guaranteed to produce results. See \textit{infra} Part IV.B (discussing the fact that access to resources is both a costly and necessary element of informed planning decisions). See also Interview with Eva Handhart, Director of Municipal Art Society’s Planning Center, in New York, N.Y. (Oct. 19, 2000)
COMMUNITY PLANNING

is consistent in its reliance on public participation without stripping agencies of all their resources.

Encouraging vulnerable communities to take an active role in the planning and zoning decisions affecting their neighborhoods may seem elementary, but the case studies below reveal myriad organizational stumbling blocks and political process failures that result from subtle forms of discrimination. These studies also reveal a potential downfall of community planning: it is not successful unless the city has independent reasons to assist communities with planning. Whether due to economic, political or social concerns, the Department of City Planning does not give enough respect to the process of community planning. Where a low-income community has undergone years of organizational struggle to transform an inclusive consensus-building process into a community plan, the department no longer has an excuse to favor communities that are more politically influential. Lack of respect for such plans may, therefore,

[hereinafter Handhart Interview] [transcript on file with author] (stating that prior to receiving technical assistance from the Pratt Institute, Greenpoint’s planning efforts were hindered by communication breakdowns, financial constraints and rifts between renters, homeowners and various ethnic groups).

19 See infra Part III (noting that the Commission weakened the potential impact of amendments to the City Charter by officially interpreting community plans as nonbinding policy guidelines). Relegating community-sponsored plans to nonbinding policy guides arguably illustrates lack of respect for the plans.

20 See generally Adam D. Schwartz, The Law of Environmental Justice: A Research Pathfinder, 25 ENVTL. L. REP. 10543 (1995) (noting that potentially harmful hazardous waste facilities often attract local opposition, so builders of such facilities prefer to locate them in communities that are politically weak and cataloguing recent state and federal legislation and case law on environmental justice issues); Rachel D. Godsil, Remedying Environmental Racism, 90 MICH. L. REV. 394, 398 (1991) (explaining that “minority communities are target[ed] for hazardous waste facilities and other environmental hazards because their residents are poor and politically powerless. Waste management firms find it politically expedient to site these facilities in minority communities who tend to be vulnerable to offers of compensation made in exchange for accepting hazardous environmental conditions”); Gregory H. Meyers, Developing a Cohesive Front Against Environmental Injustice, 8 U. BALTIMORE L. ENVTL. L. 27, 30 (2000) (quoting environmental justice advocate Luke Cole, Staff Attorney at the California
reflect a bias for communities with a higher income base.

III. A BRIEF HISTORY OF COMMUNITY PLANNING IN NEW YORK CITY

In New York City, the City Planning Commission and the City Council are responsible for deciding rezoning requests.\textsuperscript{21} Elected officials appoint the Commissioners.\textsuperscript{22} Community Boards can make recommendations to the City Planning Commission, but otherwise have no real authority when it comes to planning decisions.\textsuperscript{23} Indeed, the Commission’s processes seem designed to discourage public participation—public hearings take place at ten o’clock on Wednesday mornings, making the hearings inaccessible to those with daytime obligations such as work or family, and calendar notices and subscriptions are available at a large fee.\textsuperscript{24}

In 1963, at the beginning of a long trend toward decentralized planning, the City Council established Community Boards as advisory bodies.\textsuperscript{25} Borough Presidents appoint their Community Boards, that “poor people are . . . more likely than others to have multiple exposures to environmental dangers, facing more severe hazards on the job, in the home, in the air they breathe, in the water they drink, and in the food they eat”).

\textsuperscript{21} See \textit{New York City Department of City Planning, 197-A Plan Technical Guide} 1 (1997) (discussing the responsibilities and duties of the City Planning Commission and City Council).

\textsuperscript{22} For a full explanation of the composition and tasks of the Commission, see New York City Planning Commission Website, \textit{available at} http://www.nyc.gov/html/dcp/home.html (last visited Jan. 6, 2003) [hereinafter \textit{N.Y.C. Dep’t of City Planning Website}]. The Mayor appoints seven Commissioners; the five Borough Presidents and the Public Advocate each appoint one. \textit{Id}.

\textsuperscript{23} See generally \textit{N.Y.C. Charter} § 2800(d)(1)-(21) (2001) (setting forth the duties of community boards as largely advisory and bodies that assist city agencies in disseminating information to local residents).

\textsuperscript{24} See \textit{N.Y.C. Dep’t of City Planning Website}, \textit{supra} note 22. Individuals wishing to be placed on the calendar mailing list are advised to send a certified check of $100 to the Department of City Planning for a one year subscription. \textit{Id}.

\textsuperscript{25} See \textit{N.Y.C. Charter} § 1152(a) (2001) (“This charter shall take effect
Board members. Community Board membership is on a volunteer basis. A New York City Charter revision in 1977 created the Uniform Land Use Review Procedure (“ULURP”). ULURP mandates that Community Boards review and vote on all land use applications in their jurisdictions. The creation of Community Boards and ULURP signified the growing interest in bringing citizen involvement to planning decisions. Although ULURP introduced the possibility of Community Board sponsored plans under Section 197-a, it did not clarify the details of any such plans.

on the first day of January, nineteen hundred sixty-three.”). See also Thomas Angotti, New York City’s “197-a” Community Planning Experience: Power to the People or Less Work for Planners?, Pratt Institute Center for Community and Environmental Development, available at www.picced.org/advocacy/197a.htm (Oct. 19, 1995) (“Community Planning Boards were established as advisory bodies in 1963.”). Agnotti’s report on New York City community planning experience was presented to the 37th annual Conference of the Association of Collegiate Schools of Planning, October 19-21, 1995 in Detroit. Id. Agnotti’s research was conducted in conjunction with individuals receiving grants from the Municipal Arts Society of New York City. Id.

26 See N.Y.C. CHARTER § 2800(a) (2001) (“For each community district created pursuant to chapter sixty-nine there shall be a community board which shall consist of (1) not more than fifty persons appointed by the borough president for staggered terms of two years”); see also The Municipal Art Society of New York, The State of 197-a Planning in New York City 3 (1998) [hereinafter MAS, STATE OF 197-A PLANNING].

27 See N.Y.C. CHARTER § 2800(c) (2001). (“Members of community boards shall serve as such without compensation but shall be reimbursed for actual and necessary out-of-pocket expenses in connection with attendance at regularly scheduled meetings of the community board.”).

28 See generally N.Y.C. CHARTER § 197-c (2001). The New York City Charter created the Uniform Land Use Review Procedure in 1977, establishing community boards as advisory bodies in zoning and land use areas. Id.

29 See N.Y.C. CHARTER § 197-c(c) (2001) (“The department of city planning shall be responsible for certifying that applications pursuant to subdivision (a) of this section are complete and ready to proceed through the uniform land use review procedure provided for in this section.”)

30 See N.Y.C. CHARTER § 197-c(h) (2002) (“Not later than sixty days after expiration of time allowed for the filing of a recommendation or waiver
Demands from communities for greater control over land use decisions led to a revision of the Charter in 1989. These revisions encouraged community planning and active participation by the community in rezoning requests, and strengthened Section 197-a by providing a process by which communities could sponsor their own land use plans. The revised Section 197-a offered hope for community-sponsored plans by clarifying the steps to put together such a plan:

Plans for the development, growth, and improvement of the city and of its boroughs and community districts may be proposed by (1) the mayor, (2) the city planning commission, (3) the department of city planning, (4) a borough president, (5) a borough board with respect to land located within its borough, or (6) a community board with respect to land located within its community district.

The revised Section 197-a took an important step towards facilitating meaningful public participation by making planning

---

31 See generally N.Y.C. CHARTER § 197-a(a) (2001). See also Agnotti, supra note 25 (“Indeed, the establishment of community boards and a process for community planning are responses to decades of intense community opposition to official plans, many of which were stopped cold by neighborhood protests.”).

32 See N.Y.C. CHARTER § 197-a(a) (2001). The guidelines provide that [a] community board, borough board or borough president that proposes any such plan shall submit the plan together with a written recommendation to the city planning commission for determinations pursuant to subdivision b of this section. Any such submission may be made by a community board, borough board or borough president only after the board or borough president proposing such a plan has held a public hearing on the plan.

Id. See also N.Y.C. CHARTER § 197-a(c) (2001) (setting forth the documents required to accompany any such plans).

33 N.Y.C. CHARTER § 197-a(a) (2001).
available to communities through their Community Boards and Borough Presidents. It also removed the burden of environmental reviews from the Community Boards and gave this responsibility to the Department of City Planning.

Section 197-a mandated, however, that the City Planning Commission set its own standards for reviewing community proposals. The Commission proceeded to weaken the potential impact of the amendments by officially interpreting community plans as nonbinding policy guides. Now, the finished plans merely impose a requirement that future land use decisions be reviewed against them. The community bears the onerous burden of scrutinizing the Commission and exposing action that does not conform to the goals of the plan. Although the Commission encourages monitoring, this arguably creates an adversarial, defensive climate that may create conflict between communities and the agency.

These rules have not been subjected to legal or judicial scrutiny, though they would likely be deemed reasonable given

---

34 See Agnotti, supra note 25. Agnotti notes that, “prior to 1990, there was no explicit authorization in the City Charter for Community Boards to propose their own plans.” Id.

35 Id. (“After the Charter revision, the Department of City Planning took responsibility for the environmental review of community plans.”). This was significant because environmental review is both costly and highly technical, two factors that previously foreclosed involvement at the community level. Id.

36 See N.Y.C. CHARTER § 197-a(b) (2001). The amendments require that “[t]he city planning commission shall adopt rules establishing minimum standards for the form and content of the plans.” Id.

37 See 62 R.C.N.Y. § 6-01(b) (2001). The official interpretation states that “[a]n adopted plan shall serve as a policy to guide subsequent actions by city agencies. . . [t]he existence of an adopted 197-a plan shall not preclude the sponsor or any other city agency from developing other plans or taking actions not contemplated by the 197-a plan.” Id.

38 Id.

39 See generally MAS, STATE OF 197-A PLANNING, supra note 26, at 14. Currently, the City Charter has no provision setting forth internal review or monitoring methods. Id.

40 See Spyke, supra note 3, at 274 (noting that “[i]mplementing regulations may generate conflicts from the outset by providing only scant provisions cast in adversarial terms”).
that many community proposals lack necessary technical specificity and detail.\textsuperscript{41} The provisions, however, create a disincentive for communities to initiate the planning process and invest resources in a plan that ultimately has no authority.\textsuperscript{42} Moreover, 197-a plans have not proved entirely successful even as policy guides due to the lack of technical assistance, scarce financial resources and informational obstacles, resulting in plans that are piecemeal.\textsuperscript{43} These problems are exacerbated in low-income or politically marginalized neighborhoods, and may render the 197-a process inaccessible to some communities.\textsuperscript{44}

Another oft-scrutinized section of the 1989 amendments states that the Department of City Planning will “[p]rovide community boards with such staff assistance and other professional and technical assistance as may be necessary to permit such boards to perform their planning duties and responsibilities under this

\textsuperscript{41} See Angotti, supra note 25 (recognizing that, ultimately, many plans have these limitations whether or not they are formally stated because there is never guaranteed implementation of a plan).

\textsuperscript{42} See id. Angotti notes that, “some communities were quick to recognize the limitations of the 197-a process and chose not to invest their energy and resources.” Id. He further asks, “[w]hy should a community board spend at least two years to develop a plan, and another two years to get it approved, to end up with a document that may not have much legal effect on future land use?” See also Spyke, supra note 3, at 274. Spyke notes that, even when participation does take place, “[w]hoever is likely to participate is likely to experience a drain in terms of time and personal cost. Not only does it take time to become comfortable with the technical nature of many issues, but personal costs tend to come up-front and results can be a long time coming.” Id.

\textsuperscript{43} Id.; see also MAS, STATE OF 197-A PLANNING, supra note 26, at 8-10 (noting that plans received by the City Planning Commission are not always properly formatted or complete in substance).

\textsuperscript{44} This aspect of the Commission’s interpretation unnecessarily aggravates the problems of economic disparity and public action inherent in public participation programs. See, e.g., Spyke, supra note 3, at 274 (noting that “[w]hen participation does take place, studies have shown that participants tend to be from upper socioeconomic classes, leading to common charges of elitism”). See also infra Part V (discussing the demographic differences between Vinegar Hill and Greenpoint and the impact of those differences on the success of each community’s proposed plan).
chapter. 45 In fact, such assistance is rarely given. 46 Only a few planners who work with communities are on staff at the Department of City Planning, and they focus primarily on reviewing the plans rather than assisting with development. 47 Nor does the City provide consistent training programs for Community Board members who want to take on difficult or technical planning tasks. 48 Scarcity of technical assistance hinders low-income communities more than higher-income, because a higher-income community may have more access to professional planners and developers. 49 As the following narratives highlight,

45 N.Y.C. CHARTER § 191(5) (2001); see also MAS, STATE OF 197-A PLANNING, supra note 26, at 10 (reiterating this element of the City Charter).
46 Angotti, supra note 25. Angotti notes that “[i]f resources were available to community boards, perhaps more would consider the potential benefits of planning. The City Planning Department is the most likely agency to provide resources, and has provided very few.” Id. Further, he notes that staffing in borough offices has been “progressively cut since 1990.” Id. One commentator has noted that failure to provide assistance may also be a product of a “philosophical objection to loss of control, something that is inherent in public participation programs.” Spyke, supra note 3, at 274.

As recently as 2001, Community Board 1 continued to ask the city to allocate funds to develop 197-a plans and “urge the City to implement the Charter mandate of providing additional funding for each Community Board to have a planner on staff.” See DEPARTMENT OF CITY PLANNING, CITY OF NEW YORK, COMMUNITY DISTRICT NEEDS 22 (2001) [hereinafter COMMUNITY DISTRICT NEEDS].
47 Angotti, supra note 25 (noting that the Department has one planner city-wide to work part-time in reviewing and processing of 197-a plans and planners in Borough offices generally function as reviewers, not advocates).
48 Id. (noting that “[t]he City does not provide any consistent training in planning for community board staff or members”); see also Clarice E. Gaylord & Geraldine W. Twitty, Protecting Endangered Communities, 21 FORDHAM URB. L.J. 771, 782 (1994) (noting that responsibility to help residents take an active role in planning “also rests in the hands of state and local city planners, zoning officials, housing experts, and environmental officers who must provide more responsible protection for all communities”).
49 Angotti, supra note 25 (noting that higher-income communities can draw on local professionals to volunteer their time). Additionally, communities with little access or appeal to public interest groups are likely to suffer inordinately from this scarcity of resources. See Spyke, supra note 3, at 275 (examining the role of public interest groups in public participation
the city may be inclined to provide assistance to certain communities, while ignoring others. The City Planning Commission’s discretion in deciding which communities receive assistance strips the 197-a process of any real chance to encourage meaningful dialogue between the city and communities, especially if that discretion is abused.

The 197-a planning process suffers from an overall lack of emphasis on inclusive public participation. Of the pages of rules promulgated by the Commission, only a single sentence is devoted to public participation, requiring that “[p]lans shall be accompanied by documentation of the public participation in their formulation and preparation, such as workshops, hearings, or technical advisory committees.” This suggests merely that hearings or forums be held, but does not require inclusiveness. The rules do not mandate, for instance, that all members of the community are informed of the public forum or that all languages spoken in the community are employed at the meetings or in the announcements.

IV. TWO CASE STUDIES

The following case studies provide chronological narratives of two communities’ efforts to formulate and present workable zoning plans. The case study method has obvious shortcomings:

50 See infra Part IV (illustrating that Vinegar Hill received more support from the city in its planning process than Greenpoint and arguing that this was due to the relative, differing appeal of the communities).


52 The case studies examined in this article demonstrate the importance of meaningful public participation requirements that evince consensus building and inclusion to insure a democratic land use decision-making scheme and highlight that language barriers and dissemination of planning information can impact community efforts. See infra Parts IV.A-B (discussing population diversity).

53 The narratives set forth are based on planning documents, records from community meetings, area demographics, city decision-making standards, neighborhood histories, newspaper accounts of neighborhood transformations, and numerous interviews conducted by the author and other investigators with
COMMUNITY PLANNING

it is by definition narrow in focus and largely anecdotal. Additionally, these are only two of the sixteen 197-a plans in various stages of planning in New York City since the Charter amendment. Thus, these narratives do not purport to reflect the general outcome of 197-a plans. They do, however, point out weaknesses in the current 197-a process and the public participation mechanisms currently in place. If nothing else, these narratives illustrate that the current process has failed to live up to its goal of encouraging and fostering community-sponsored planning.

A. Vinegar Hill, Brooklyn

The community of Vinegar Hill is a relatively small neighborhood and part of Brooklyn’s Community Board 2. The community activists, city employees, planners and residents. The narratives are not exhaustive, but attempt to re-create the sequence of events from each community’s initial decision to actively plan neighborhood development to the official land use decisions that resulted from the community’s involvement.

54 See generally Carrie Menkel-Meadow, Case Studies in Legal Ethics: Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics, 69 FORDHAM L. REV. 787 (2000) (discussing the benefits of the use of the case study to enhance the examination of ethical and moral issues in the practice of law). Professor Menkel-Meadow describes the tension that exists between stories and rules, narratives and principles. Id. She questions, for example, the purpose of rules and principles if they can always be argued against in a particular instance. Id. at 794. She also acknowledges that the case study method raises the problem of choice of story and voice. Id. See also Kathryn Hendley, Economic, Legal and Political Dilemmas of Privatization in Russia: The Spillover Effects of Privatization on Russian Legal Culture, 5 TRANSNAT’L L. & CONTEMP. PROBS. 39, 51 (1995) (acknowledging that the case study approach yields limited data from which it is problematic to draw any general conclusions).

55 MAS, STATE OF 197-A PLANNING, supra note 26, at 24; see also NYC Dep’t of City Planning Website, supra note 22 (listing seven 197-a plans that have been adopted as of October 18, 2002: Bronx Community District 3, Chelsea, Red Hook, Stuyvesant Cove, Comprehensive Manhattan Waterfront, Greenpoint, and Williamsburg).

56 See NEW YORK CITY DEPARTMENT OF CITY PLANNING, VINEGAR HILL ZONING STUDY 2 (May 1996) [hereinafter NYC ZONING STUDY, VINEGAR HILL]. The Department of City Planning undertook and completed a zoning

area is just east of the Manhattan Bridge, and bordered by Bridge Street on the south, Plymouth Street on the west, the Brooklyn Navy Yard on the north and York Street on the east.57 Although close in proximity to downtown Manhattan and downtown Brooklyn, it is not well serviced by public transportation.58 The history of the neighborhood is a familiar one along Brooklyn’s waterfront—the neighborhood was predominantly an enclave for Irish workers in the 1800s, resulting in residential wood-frame houses and some brownstones lining the cobblestone streets next to light industrial warehouses along the East River.59 The general study of Vinegar Hill in 1996 to determine if it was appropriate to rezone areas within the neighborhood to a residential district with commercial overlays, in order to complement efforts of the Landmarks Preservation Commission. Id. at 1. The Department articulated that Vinegar Hill spans fifteen acres, or eight city blocks. Id. at 2. Community Board 2 is an area that contains many neighborhoods, including the Downtown Brooklyn Business District, Atlantic Center and six Historic Landmark Districts such as Brooklyn Heights, Boerum Hill and Fort Greene. See COMMUNITY DISTRICT NEEDS, supra note 46, at 47.

57 See NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 1.
58 See id. at 4 (noting that “mass transit access to the area is very limited. There is only one subway and three bus lines which directly serve the study area.”).
59 Id. at 2; see also MARCIA REISS, FULTON FERRY LANDING, DUMBO, VINEGAR HILL NEIGHBORHOOD HISTORY GUIDE (2001). Vinegar Hill’s origins date back to the early 1800s. By naming the neighborhood after Vinegar Hill in Ireland, the site of the 1798 Irish Rebellion against the British, the developer hoped to attract the large number of Irish immigrants flowing into the country. For an enlightening description of Vinegar Hill’s history, see New York Street Scenes, at http://www.forgotten-ny.com/STREET%20SCENES/Vinegar%20Hill%20Page/vinegar.html (last visited Jan. 1, 2003); see also Names of New York, Vinegar Hill, at http://www.newsday.com/features/custom/ny-namesofny-vinegarhill,0,1560754.htmlstory (last visited Nov. 11, 2002). In the twentieth century, the neighborhood enjoyed residual revenue from the nearby Naval yard. Id. But when the Navy decommissioned the yard in 1966, the neighborhood declined into poverty. Id. Today Vinegar Hill occupies only a small strip of land consisting of mainly nineteenth century row houses, located next to the DUMBO district of Brooklyn. Id. However, the neighborhood is thought to be on the rise again, as the area is now considered an enclave for artists. Id. A recent census shows that currently over 4,000 people live in the
decline of waterfront industry after World War II led to abandonment of the area, as was occurring in other waterfront sections of Brooklyn. 60 In the early 1970s, a burgeoning artists’ movement set up residential and working studios in the vacant industrial lofts and refurbished the nineteenth century row houses. 61 This resulted in a small, politically active group of inhabitants. 62 In 1998, the population of Vinegar Hill was estimated at around 225 residents. 63 The neighborhood has 12 businesses employing over 650 people. 64 Real estate advertisements in a recent New York Times listed two-bedroom cooperative apartments in the area as selling for over $1

Vinegar Hill area. See Enclave Links Its Political Fate to Its Rich History, N.Y. TIMES, Apr. 12, 2002, at B1; see also Real Estate Scene Vinegar Hill Aging Well, Downtown’s a Tiny Outpost of the Past, DAILY NEWS, Aug. 17, 2000, at 14.

60 See NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 2 (discussing the Navy’s abandonment of the Brooklyn waterfront as leading to “the gradual deterioration of the surrounding area”).

61 See Mary Miuccio, Vinegar Hill is Like a Small Town in New England, Its Residents Say, BROOKLYN PAPER, Oct. 3-15, 1979, at 12. Writing in 1979, Miuccio noted “approximately eight years ago, some artsy, speculative and gutsy people moved into [Vinegar Hill] and started purchasing abandoned buildings and warehouses.” Id.

62 See id. (noting that “besides investing manual labor and money, the new immigrants to the area joined with the few remaining original neighbors to fight industrial legal battle”); see also Peter Haley, They Put the Vinegar Back in the Hill, and Fought City Hall, PHOENIX, Nov. 30, 1978, at 11. Haley commented, “through the combined efforts of newcomers and longtime residents, this urban village of industrial lofts and three- and four-story brick buildings is making a comeback.” Id. He also noted that “[a]rtists seeking low rents and space turned out to be the secret weapon” in Vinegar Hill’s struggle, and his interviews with local residents “related how residents banded together” to protect local homeowners. Id. at 13

63 See Amy Waldman, The 2nd Battle of Vinegar Hill, N.Y. TIMES, Feb. 1, 1998 at CY8. “Vinegar Hill is roughly nine square blocks, with perhaps 225 residents and about 19 commercial or manufacturing buildings, a well as a sprinkling of mom-and-pop stores.” Id.

64 Jonathan Bowles, Zones of Contention, CITY LIMITS, Nov. 2000, at 21. Bowles noted that, at most recent count, “there were about 52 homes and 12 businesses employing roughly 650 people in this tiny neighborhood.” Id. at 24.
million.\textsuperscript{65}

The 2000 demographics for the surrounding areas of Community Board 2 revealed a primarily black and white nonhispanic total population of 98,620.\textsuperscript{66} Approximately 7,692 residents are not citizens.\textsuperscript{67} Seventy-four percent of the occupied housing units are rentals.\textsuperscript{68} Less than a quarter of the total Community Board speaks a language other than English at home, and fewer reported that they do not speak English “very well.”\textsuperscript{69} A small percentage of the population is assisted by government income support.\textsuperscript{70} Community Board 2 also includes some of Brooklyn’s most affluent communities, and the median household income is $44,180,\textsuperscript{71} compared to a city-wide median of $39,293.\textsuperscript{72}

Prior to 1998, Vinegar Hill was zoned primarily for industrial use with residential buildings existing as nonconforming uses.\textsuperscript{73}

\textsuperscript{65} Real Estate Classifieds, N.Y. TIMES, Dec. 8, 2002.

\textsuperscript{66} The black population is estimated at 40.5%, with white nonhispanic residents averaging 34.4%. See NYC Department of City Planning, Community District Profile, Brooklyn Community District 2 Website, available at http://www.nyc.gov/html/dcp/html/lucds/bk2lu.html (last visited Dec. 31, 2002).


\textsuperscript{68} Id. at 131.

\textsuperscript{69} A reported 23% speak a language other than English at home and 9.4% of the Community Board population reported that they do no speak English “very well.” Id. at 126.

\textsuperscript{70} 17.4% reported receiving government income support. Id.


\textsuperscript{72} Id.

\textsuperscript{73} See NEW YORK CITY PLANNING COMMISSION, Calendar no. 14, C980067 ZMK at 1 (Jan. 21, 1998) [hereinafter “CITY PLANNING COMMISSION FINAL REPORT”]. On January 21, 1998, the Department of City Planning issued a final report on the application for an amendment of the zoning map and regulations of Vinegar Hill as filed by the Department on July 31, 1997. Id. See also Bowles, supra note 64, at 24 (noting that “[r]esidents
COMMUNITY PLANNING

Two blocks were zoned for heavy manufacturing, M3-1, which allows for heavy industrial uses, more objectionable hazards and lower performance standards. The remainder of the neighborhood was zoned for light manufacturing, M1-2, which allows for a wide range of manufacturing but with higher performance standards. In addition to the nonconforming row houses, other zoning discrepancies exist, due largely to conversions of warehouses into live-work loft space.

This pattern persists in many areas along urban waterfronts, where zoning regulations are remnants of the era of industry on the rivers. Loft conversions are representative of today’s urban

and manufacturers managed to coexist for decades; while the area was long zoned M-3, clusters of 19th century rowhouses were allowed to stand amid the industry as a ‘nonconforming use.’

74 See generally CITY PLANNING COMMISSION FINAL REPORT, supra note 73, at 1. New York City is divided into three basic zoning district: residential (R), commercial (C), and manufacturing (M). The three basic categories are further subdivided by the intensity of use, whether for retail or manufacturing categories, parking, building bulk or residential density. Manufacturing uses and certain intense commercial uses are subject to performance standards that limit noise, air pollution and other nuisance-creating activity. These zoning controls provide minimum acceptable standards and are designed to provide building occupants and the general public with light, air and ventilation and a safer, more livable environment. For a full description of zoning regulations and standards in New York City, see NEW YORK CITY DEPARTMENT OF CITY PLANNING, NEW YORK CITY ZONING, available at http://www.nyc.gov/html/dcp/html/zone/zonetext.html (Sept. 25, 2002) (setting forth the Web version of the Zoning Resolution of the City of New York including all text amendments approved by the City Council).

75 See id. This zoning classification is often a buffer between residential and heavier manufacturing zones. Id.

76 NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 2-3.

77 Id. at 3 (“The predominant landuse in the area is industrial with a scattering of residential uses. However, over the years there have been residential conversions in the loft buildings.”). See also Haley, supra note 62, at 13 (pointing out that “[a]rtists seeking low rents and space turned out to be the secret weapon in the struggle for real estate” in Vinegar Hill).

78 See, e.g., Lisa Haarlander, Lofty Living: Eight Buildings in Downtown Area Being Converted Into New Apartments, BUFF. NEWS, Apr. 15, 2002, at C1 (noting the rise in the trend and frequency in conversion of industrial and warehouse space into residential lofts in urban areas); Benjamin Forgey,
society, where commercial shipping is more road-based and industrial installations along urban waterfronts are no longer necessary for industrial shipping. This is not to suggest that the manufacturing zones are obsolete; they do, and must continue to, house small manufacturers and essential noxious operations, but the importance of waterfront access is lessened. Vinegar Hill is also home to a waste treatment equipment storage facility, Con Edison property and various distribution and small manufacturing centers.

Discussion of changes in the area began appearing in the media in the late 1970s; one commentator characterized it as a neighborhood comeback generated by “the combined efforts of newcomers and longtime residents.” To orchestrate the comeback, area residents lobbied then City Councilman Abe Gerges and State Assemblyman Harvey Strelzin to include Vinegar Hill in Mayor Koch’s list of areas marked for low-interest federal renovation loans. This allowed many residents to buy and repair row houses in the area and establish a residential core.

Vinegar Hill residents faded from activism until the mid-1990s, when a waste treatment company bought the property of a

Uncovering the Waterfront, WASH. POST, Jan. 15, 1994, at G01 (commenting on the rise in conversion of Naval and industrial installations and stating that “[t]he urban waterfront is being transformed worldwide—and, in large part, for the better”); Robert Marchant, Housing Planned in Former Electric Plant: Developer Plans Waterfront Apartments in Vacant Structure, J. NEWS, Mar. 25, 2002, at B (noting urban trends towards “converting [ ] old industrial infrastructure on the waterfront to new uses—such as a new park, and a library and apartments converted from [ ] old factor[ies]”).

79 See generally supra note 78 (noting the rise in conversion of urban waterfront industrial fixtures into new uses).

80 NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 2-3.


82 Id. at 1-3 (noting that lobbying efforts convinced the mayor’s office to grant renovation loans to Vinegar Hill).

83 See generally id. at 1. Haley commented that the “most obvious sign of comeback has been Mayor Ed Koch’s announcement that Vinegar Hill will be among 22 neighborhoods in the city designated for a new federal housing loan program aimed at small homeowners.” Id.
135-year-old neighborhood church and demolished it to use the space for equipment storage. Though the church was defunct, the action generated neighborhood uproar that encouraged Community Board 2 to establish a special task force to explore possible 197-a plans for the area. The neighborhood began a 197-a planning process in 1995. Although the 197-a plan was never completed, the area won landmark status in 1997, when the Landmarks Preservation Commission (“LPC”) proposed historic designation for the area’s row houses. The Department of City Planning undertook a zoning study of the area “to determine if it is appropriate to rezone areas within Vinegar Hill to a residential district with commercial overlays, in order to compliment the efforts of the LPC.” This study was similar to a 197-a plan, but was sponsored by the Department of City Planning itself, rather than a community board. After formally studying the land use of the area at the residents’ request, the City Planning Commission proposed rezoning the area to residential.

84 Waldman, supra note 63, at CY8 (noting that the demolition generated public outcry and local rallying towards rezoning efforts); see also Merle English, A Sweet Little Place Called Home; Vinegar Hill Is Little Known But Well Loved By Residents, NEWSDAY, Sept. 20, 1992, at 2 (noting that “Vinegar Hill came into the limelight recently when residents expressed concern that St. Anne’s, a 132-year-old Catholic Church and the borough’s oldest parish, was to be demolished to make way, some had heard, for a garbage transfer plant”).

85 See Dennis Holt, Vinegar Hill and DUMBO are Subjects of CB2 Task Force, PHOENIX, Jan. 29, 1996. According to Holt, there was “no dispute as to why the study [was] under way,” and his articulation of the Task Force’s purpose statement reveals that razing of “historic buildings and streets” along with the desire to revise “outmoded zoning” for increased residential space prompted the organized effort. Id.

86 See MAS, STATE OF 197-A PLANNING, supra note 26, at 24.

87 See Bowles, supra note 64, at 23-24 (noting that city council members sought and achieved landmark status for Vinegar Hill architecture and that these efforts played a role in gaining official neighborhood recognition by the city); see also CITY PLANNING COMMISSION FINAL REPORT, supra note 73, at 2.

88 NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 1.

89 See generally CITY PLANNING COMMISSION FINAL REPORT, supra note 73, for a full review of the rezoning proposals adopted by the City Planning
reports, the City Planning Commission’s proposal was intended to block the possibility of subsequent sitings of waste treatment stations in the area, a major concern of the residents.90

Public debates and hearings on the rezoning included vocal groups representing various viewpoints.91 Area businesses vigorously opposed the rezoning proposal because they feared forcible relocation, loss of the right to expand and limitations on the resale value of their property.92 The rezoning was also controversial because of perceived ties to a separate plan to

90 Philip Lentz, Vinegar Hill Zoning Plan Puts Businesses in a Pickle, CRAIN’S N.Y. BUS., Dec. 15, 1997, at 16 (noting that “City Planning Commissioner Joseph Rose says the administration was motivated by the concern over greater transfer station activity in the neighborhood.”); see also Waldman, supra note 63, at CY8 (stating that “city officials said the rezoning was motivated in large part by the fear that Tocci Brothers would start treating waste on the lot, across the street from a row of historic houses.”).

91 See, e.g., Bill Farrell, Vinegar Hill Eyes Future Decisions on Zoning, N.Y. DAILY NEWS, Nov. 24, 1997. Farrell notes that “[b]uilders, residents and city planners all with separate visions [were] joining the debate about the area’s future.” Id. He quotes and articulates the varying concerns of each constituency, noting, ultimately, that “two proposed zoning changes being debated would spur dramatic changes, if approved, along a stretch of Brooklyn waterfront.” Id.

92 See Lentz, supra note 90 (noting fears of existing businesses that “rezoning would make it harder for them to obtain financing and grow, which could eventually force them to move.”); Bowles, supra note 64, at 24. According to Bowles, local manufacturers were “backed into a corner” by the rezoning and would “need special permits to expand.” Id. He cites comments by several industrial leaders as fearing growth limitations due to the rezoning, despite the fact that the businesses were “grandfathered in under the old zoning.” Id.

Such disputes between residents and businesses are common around plans that rezone from manufacturing to residential. See, e.g., Daniel Lee, Bi-Mart Project Faces New Challenges, COLUMBIAN, May 2, 2000 at b1 (noting that the building project “has followed a long road filled with council debate and challenges by rivals”); Martha Ezzard, Woman’s Touch Could be Just Right to Handle Growth, ATL. JOURNAL AND CONST., Dec. 13, 1998 at 1C (stating that plans envisioning mixed use zoning are being abused by developers who take advantage of mixed use zoning by developing the commercial and not the residential areas).
develop the waterfront area, thus worrying some newer residents that excessive revitalization would drive them out.93 Dissension came to a head at the Community Board meeting on October 8, 1997.94 The meeting ended without a vote.95 At a November 20, 1997 public hearing, held by then-Brooklyn Borough President Howard Golden, eighteen speakers testified in opposition to the proposed zoning amendment, twenty-four speakers testified in favor, and the Chairperson of Community Board 2 took no position.96 The City Planning Commission’s account of the final public hearing on December 3, 1997 reveals that the residents’ position was somewhat better represented, but a substantial amount of opposition from community businesses remained.97 The Commission adopted the rezoning on January 21, 1998.98

The Commission’s report summed up the residents’ concerns such as “the need to preserve the fragile but historic housing stock of Vinegar Hill, the friction between heavy truck traffic, related industrial uses, and the narrow residential-scale streets and street furniture, as well as the threat of expansion of waste transfer industry.”99 The report described the opposition’s concern that rezoning would have “a detrimental effect on the jobs in the area, and create hardships for the businesses that might want to expand or sell their property to other businesses in

93 See generally Lentz, supra note 90 (noting the varying, ultimately irreconcilable, visions and hopes of Vinegar Hill entrepreneurs and residents).
94 See Dennis Holt, Board 2 Unable to Resolve Condo Vinegar Hill Issues at Meeting, PHOENIX, Oct. 10, 1997 (noting the “futility and confusion” that haunted past meetings was present at the “stormy” October 8th meeting discussing the two controversial zoning issues).
95 Id. The board could not conduct any business at the meeting because it lacked a quorum. Id.
96 See CITY PLANNING COMMISSION FINAL REPORT, supra note 73, at 7-9.
97 See id. at 8-9. Specifically, speakers in favor included 14 residents of Vinegar Hill and the surrounding area, an owner of a business in the rezoning area, a representative of the Historic Council, and state senate and assembly members representatives. Id. There were 10 speakers in opposition. Id.
98 See id. at 13.
99 Id. at 8-9.
The Commission’s report stressed the historic designation of the area, claiming that the zoning amendments “would bring existing nonconforming residences into conformance; allow for the development of vacant property in keeping with the existing bulk and character of the area; and reinforce the historic character of predominantly residential buildings.” The final rezoning reflected some consideration of the businesses’ concerns as well, reducing the area to be down-zoned from light manufacturing to residential use. This reduction allowed four “light industrial/commercial” uses of twelve to remain active, including a toy manufacturing and import company, a moving company, an equipment storage business and a restaurant supply manufacturer. The report did not explain why these particular revisions were made, other than the Commission’s desire to retain “viable manufacturing jobs in the City.”

The community of Vinegar Hill never submitted a 197-a plan. The present zoning in Vinegar Hill is a direct result of

---

100 Id. at 9.
101 Id. at 10.
102 CITY PLANNING COMMISSION FINAL REPORT, supra note 73, at 12-13. The area was down-zoned from M1-2 to R6A and R6B. Id. Code designations are numbered levels within each zoning. Id. These numbers correspond to height, space, and other infrastructure-based requirements necessary for the zoning code. Id.
103 Id. at 11.
104 Id. at 10.
105 See COMMUNITY DISTRICT NEEDS, supra note 46, at 55. Community Board 2 is currently discussing a comprehensive plan for the entire waterfront, encompassing the Navy Yard, Empire State Park, Fulton Ferry Landing and Piers 1-5. Id. Moreover, there is much talk in the media of developing residential cooperative apartments and high-end retail and entertainment complexes in the areas immediately adjacent to Vinegar Hill. See Nadine Brozan, One a Rental, the Other Condo and Commercial, N.Y. TIMES, Mar. 4, 2001 (discussing real estate plans by developer David C. Walentas, who has owned large chunks of land in the area and worked to revitalize the community); see also Lore Croghan, Real Estate Watch: Secret’s Out About Move to Brooklyn, CRAIN’S N.Y. BUSINESS, Jan. 21, 2002, at 1 (identifying large industrial and business tenants moving to northern Brooklyn neighborhoods).
the alliance between residents and politicians, as well as a development trend that began in the mid-1990s.\textsuperscript{106} By 1995, most of the area was zoned for residential use, with a light manufacturing zone buffer occupying the former heavy manufacturing zoning designation.\textsuperscript{107} There remains a one-block commercial overlay.\textsuperscript{108}

\textbf{B. Greenpoint, Brooklyn}

Greenpoint is another Brooklyn community with a long history of planning activism, albeit with many more hurdles to overcome than Vinegar Hill. Set in Community Board 1, Greenpoint is bound by the East River on the west, Newton Creek on the north, the Brooklyn-Queen’s Expressway on the east and southeast, and McCarren Park on the south.\textsuperscript{109} The area is primarily comprised of three enclaves: the Polish community, the Latino community and a newer community of young artists attracted by low rents.\textsuperscript{110} Public transportation in and out of

\textsuperscript{106} See Bowles, \textit{supra} note 64, at 24 (noting that efforts to protect waterfront neighborhoods from industrial development by residential and mixed-use rezoning has locked out businesses helpful to the Brooklyn economy); see also Penny Lee, \textit{East River Information Session, East River Project}, Van Alen Institute, available at http://www.vanalen.org/forums/er_info.htm (highlighting several projects on the Queens waterfront that successfully incorporated both business and community interests).

\textsuperscript{107} \textit{NEW YORK CITY DEP’T OF CITY PLANNING, ZONING MAP 12c} (1995) (showing M3-1 zoning replaced by M1-2).

\textsuperscript{108} \textit{Id.} This commercial section is zoned C2-4. \textit{Id.}


\textsuperscript{110} See generally Tom Gilbert, \textit{Greetings from Greenpoint}, \textit{BROOKLYN BRIDGE}, Sept./Oct. 1999, at 90. Gilbert’s article describes the rich, vibrant Polish community of Greenpoint, including many Polish shops and restaurants, as well as the “significant” Hispanic community with “just under 20 percent” of the area’s residents identifying themselves as such in the 1990 census. \textit{Id.} at 90-95, 90. According to Gilbert “[n]ew settlers” in Greenpoint
Greenpoint is limited to two stops on the “G” train, one farther stop on the Manhattan bound “L” train and three bus lines.  

Greenpoint has a strong infrastructure—many neighborhood businesses, a thriving main street and multi-generational families. Greenpoint has roughly 36,700 residents, and its population is predominantly white, nonhispanic. Greenpoint’s workforce participation makes up a larger percentage of its total population than that of Brooklyn or New York City as a whole. It is considered a “working neighborhood,” and local residents staff many of Greenpoint’s manufacturing plants, mostly in the

are “often artists” that were ousted from Manhattan by high rents and there is a “burgeoning artist community” in the neighborhood. Id. at 96. See also PROPOSED GREENPOINT 197-A, supra note 109, at 18 (discussing the change in Greenpoint’s ethnic composition due to immigration in the 1990s); COMMUNITY DISTRICT NEEDS, supra note 46, at 17 (noting that “Greenpoint and Williamsburg contain within them an almost unparalleled variety of cultural, religious, racial and ethnic groups, who reside in several distinct communities”).

PROPOSED GREENPOINT 197-A, supra note 109, at 58.

See id. at 3. It has been noted that “Greenpoint has many families that have lived there for three or more generations. Those families sustain Greenpoint’s tradition and folklore.” Id.; See also Gilbert, supra note 110, at 90 (noting that although Greenpoint has experienced recent variations and shifts in demographics, these shifts are “merely variations on economic and cultural experiences familiar to both fourth-generation families and newcomers”).

See NEW YORK CITY DEPT’ OF CITY PLANNING, SOCIOECONOMIC PROFILES - 1980 / 1990 CENSUS, POPULATION AND HOUSING 126-31 (Mar. 1993) [hereinafter NYC PROFILE, COMM. BD. 1]. Greenpoint’s population was listed as approximately 73.2% white, nonhispanic in 1990. Id. “Although the percentage of Blacks and Asians in Greenpoint rose in the 1980s, their share of Greenpoint’s population “remains modest” and the number of Asians increased from 2.2% of the population in 1980 to 3.5% in 1990, and the Black population doubled its numbers in the same time, though it still remains small (only 1.2% and 3.5% of the total population respectively in 1990).” PROPOSED GREENPOINT 197-A, supra note 109, at 17. As of the date of publication, the 2000 Census reports broken down by neighborhood had not been released.

PROPOSED GREENPOINT 197-A, supra note 109, at 35. Greenpoint’s workforce is 65% of its total population, whereas that of Brooklyn is 58.9% and New York City as a whole is listed at 61.7%. Id.
According to the 2000 Census, Community Board 1 has a total population of 160,338, with a majority white, nonhispanic (48%) or Hispanic (37.7%) in origin. Of the residents of Community Board 1, 17% are not citizens. Roughly two-thirds speak a language other than English at home, and 38.5% report that they do not speak English “very well.” The average median household income in 2000 was $26,325. Roughly one-third of the population receives government income assistance. A majority of the community’s housing units are rentals.

Historically, the zoning designations along Greenpoint’s waterfront were similar to Vinegar Hill, with properties along the water zoned for industry, and residential properties located just inland from the industrial area. The entire stretch of

---

115 Id. The “businesses and jobs” profile of Greenpoint’s proposed 197-a plan stated that “among the many small-scale industries, it appears that craft-related manufacturing, in particular wood-working, thrives in Greenpoint.” Additionally, “other industries that currently prosper in Greenpoint include furniture manufacturers, lumber wholesalers, precision machinery makers, the textile industry, and others. Many of the jobs in these industries are filled by Greenpoint residents.” Id.


117 NYC PROFILE, COMM. BD. 1, supra note 113, at 126.

118 Id. Specifically, 69.7% speak a language other than English in the home. Id.

119 See NYC Dep’t. of City Planning Website, supra note 22. This figure is relatively low, compared to the city-wide median household income of $39,293.

120 Id. The percentage of the population receiving government assistance was reported as 32.9%.

121 See NYC PROFILE, COMM. BD. 1, supra note 113, at 131. Approximately 86% of the housing units are rentals.

122 See generally PROPOSED GREENPOINT 197-A, supra note 109, at 20-24 (reviewing the existing zoning and land use standards in Greenpoint). Such a mixed-use plan is typical of old New York, where industry depended on rivers for shipping and workers lived near their jobs. Id. Greenpoint’s proposed plan specifically points out that “a number of factors have left the waterfront underutilized, including the shift away from manufacturing towards a service-
Greenpoint’s waterways is zoned M3-1 for heavy manufacturing with a lighter manufacturing M1-1 buffer zone immediately inland. There is an R-6 residential zone approximately three blocks from all water access. As in Vinegar Hill, there are nonconforming residential structures in Greenpoint’s manufacturing zones. Ad hoc zoning decisions and illegal conversions have created environmentally unsafe and inefficient conditions. Many of the heavy manufacturing M-3 zones are vacant or illegal residential conversions, while the M1 “buffer” zones contain both light manufacturing and residential uses. There are also some pre-existing nonconforming uses of light manufacturing in residential zones. Compared to the rest of New York City neighborhoods, Greenpoint houses an inordinate amount of essential, yet locally undesirable, land uses. These

based economy, containerization of the shipbuilding industry, and trucking as a means of shipping.” Id. at 20.

123 See id. The buffer zone is occupied by both residential and light manufacturing uses. Id.

124 Id. at 22. (noting that “[a]t the core of the Greenpoint neighborhood lies the R-6 medium density residential zone”).

125 Id. at 20. The proposed plan notes that “an increasing amount of conversion from manufacturing to residential has taken place, in particular in the loft buildings near the East River.” Id. As noted, this pattern is consistent with that in Vinegar Hill and many urban waterfront installations. See supra note 78 (reviewing recent trends in development along urban waterfronts).

126 Id. at 32. According to the proposed plan, “recent conversion—illegal and legal—of manufacturing lofts to live and work lofts has increased the level of residential non-compliant uses.” Id. Rezoning these areas to mixed-use zones “would limit industrial expansion to those business[es] that enter into good neighbor agreements and that can demonstrate that they can meet strict environmental performance standards” and foster “a healthier and more desirable community.” Id.

127 See PROPOSED GREENPOINT 197-A, supra note 109, at 20. The occupied buffer zones are a distinct contrast to the largely vacant parcels of land along the East River waterfront and 20 vacant acres of land including piers and the Greenpoint Terminal Market site. Id.

128 Id. at 20. The proposed plan notes that “some light manufacturing still occurs in pre-existing non-conforming uses within residential zones.” Id.

129 See generally id. at 26-32. The proposed plan describes and catalogues a number of businesses that moved into the spaces abandoned by ship builders
include the city’s largest wastewater treatment facility, nine waste transfer stations, and numerous petroleum and natural gas storage facilities.\textsuperscript{130} Greenpoint won some historic designation status in 1982, but that designation did not seem to affect the community’s ability to rezone.\textsuperscript{131} At that point, the area was known as Greenpoint/Williamsburg.\textsuperscript{132} Community Board 1 began a planning process with local residents and Columbia University’s Urban Planning Studio in 1985.\textsuperscript{133} The results of this process were eventually compiled in a “Policy and Resource Handbook” which, despite providing residents with a helpful introduction to the idea of community planning, rendered no concrete results.\textsuperscript{134}

Community involvement in the Greenpoint/Williamsburg plan began in earnest in 1989 with open meetings facilitated by Community Board 1.\textsuperscript{135} Community involvement initially revolved around environmental issues, and the New York City Department of Environmental Protection initiated the

\textsuperscript{130} See id. at 28.


\textsuperscript{132} Williamsburg is the neighborhood just south of Greenpoint, also bordering the East River. See New York City Department of City Planning, Zoning Map 12d, 13b.

\textsuperscript{133} See generally COLUMBIA HANDBOOK, supra note 131. The completed handbook sets forth the planning goals and visions of Greenpoint’s residents and the desire to implement renovation efforts within the neighborhood. Id.

\textsuperscript{134} As noted, the handbook was a student project and, as such, had no binding authority on city agencies. Id.

\textsuperscript{135} See PROPOSED GREENPOINT 197-A, supra note 109, at 8. Five open meetings were held, “facilitated by a planning firm hired by the Community Board.” Id.
Environmental Benefits Program ("EBP") to assess the environmental health of Greenpoint/Williamsburg. The EBP was funded by a settlement with the Newton Creek Sewage Treatment Plant. This program was originally touted by all as a

136 See Nancy E. Anderson, Notes from the Front Line, 21 FORDHAM URB. L.J. 757, 768-69 (1994) (noting that this program was designed to address urban environmental issues in a community-based manner); see also Hillary Gross et al., Environmental Justice: A Review of State Responses, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 41, 62 (2001) (noting that the Environmental Benefits Program was a program that operated between 1991 and 1994, focusing exclusively on the Greenpoint/Williamsburg neighborhood). The EBP dealt with environmental justice concerns by attempting to engage area residents to help define, develop, and implement solutions to their environmental problems and by allowing them to participate in the city’s decision-making process. Id.; see also Robert W. Collin & Robin Morris Collin, The Role of Communities in Environmental Decisions: Communities Speaking for Themselves, 13 ENVTL. L. & LITIG. 37, 79-80 (1998) (explaining that the EBP operated from the office of a Community Watchperson and included resident-based monitoring and research using residents to collect information to supplement an epidemiological study of pollution, disease, and mortality in the neighborhood); Nancy E. Anderson, The Visible Spectrum, 21 FORDHAM URB. L.J. 723, 727-28 (1994) (describing that the EBP was undertaken by the New York City Department of Environmental Protection in order to address some of the inequities caused by local sources of pollution in New York City and that “[t]his program may serve as a model for other communities in the effort to address environmental inequities”).

137 See Anderson, supra note 136, at 769; see also In re City of N.Y. Dep’t Envtl. Prot., No. R2-3183-90-08, slip. op. at 3. In re City addressed overcapacity problems at the STP. Id. The STP’s sewage flow exceeded its permitted limit of 310 million gallons per day, and did not perform required “secondary” levels of sewage treatment. Id. The Consent Order was designed to solve these problems. Id. The North River case involved the problem of noxious odors emanating from the plant and the need to control them. Id.; see also Samara Swanston, Environmental Social Movements Since Love Canal, 8 BUFF. ENVTL. L. J. 283, 283-89 (2001). According to Swanston, the Watchperson Project was formed as a result of a community initiative to use an $850,000 fine imposed by the DEC on the Department of Environmental Protection for New York City’s operation of the Newtown Creek Sewage Treatment Plant in violation of the Clean Water Act. Id. Ultimately, the DEC imposed a fine as a result of communities’ vigorous complaints about the odors and other problems at the New York Creek sewage treatment plant. Id. The Project also intervened when the Department of Sanitation did not require
partnership effort between the city and the community, “the environmental version of government by the people and for the people.” It focused on information gathering and policy making, with efforts to document the environmental problems and enforce pollution prevention methods. Soon, however, residents, environmental experts and planning experts criticized the EBP as favoring evaluation over remediation. The residents wrote a letter to the Department of Environmental Protection expressing concern that the program was not working as a partnership and that community issues were not being addressed.

While the EBP continued to amass data and develop a cumulative risk methodology, residents concerned about immediate effects formed coalitions to fight for enforcement and remediation. Around this time, the Greenpoint/Williamsburg environmental impact statements and the Department of Environmental Conservation did not enforce the stipulation of settlement. Id.

See New York City Department of Environmental Protection, Greenpoint/Williamsburg Environmental Benefits Program, at 2. See also Gross et al., supra note 136, at 62 (discussing the EBP’s goal to involve residents of the Greenpoint/Williamsburg neighborhood in responding to environmental problems); see also Federal Funding Available for Environmental Justice Issues in the Bronx, 39 New York Voice, Inc./Harlem USA 19 (August 16, 1995), available at 1995 WL 1544343 (describing the environmental benefits program as a “community-led initiative” to become involved in environmental issues).

Id.

See, e.g., Manuel Perez-Rivas, Pollution Study is Muddy Issue, N. Y. Newsday, Feb. 23, 1992 (discussing criticism of the EBP plan to conduct a $850,000 survey to assess the environmental damage instead of working on prevention methodology); see also Anderson, supra note 136, at 728, 736 (discussing the debatable success of the EBP’s community mobilization effort and skepticism expressed by residents of the community).

Letter from Steering Committee, to New York City Department of Environmental Protection (May 7, 1993) (on file with author).

See Proposed Greenpoint 197-a, supra note 109, at 3. Since the late 1950s Greenpoint residents have responded to the adverse effects of certain public policies by filing petitions, testifying at hearings, and establishing working groups and advisory committees. Id. at 3. Their efforts resulted in the creation of the Greenpoint Plan, which provides a means for residents and city
alliance split into two separate groups, precipitated in part by the Department of City Planning’s identification of 22 subareas within Community District 1 to be studied for possible rezoning of manufacturing zones to permit residential development. One of these subareas was in Williamsburg and became the first area studied in detail by the Department of City Planning in 1996. With the help of a professional planner, Williamsburg residents created a 197-a plan focusing on the waterfront area. This plan, and the Department of City Planning’s study, led to the rezoning of a subarea in Williamsburg in 1998 from an M3-1 heavy manufacturing zone to a C4-3 high commercial area.

See also Elizabeth Hays, Power Plant Plan Jeered Greenpoint, Williamsburg Activists Berate Developer, N.Y. DAILY NEWS, June 25, 2001 (providing a contemporaneous account of critiques leveled by Brooklyn residents upon development plans to place a power plant in Greenpoint/Williamsburg); Elizabeth Hays, Greenpoint Backs Burner Board’s 1 Fights Dismantling of Shutdown Incinerator, N.Y. DAILY NEWS, Apr. 4, 2001 (indicating community support for efforts to decrease industrial waste in Greenpoint); Elizabeth Hays, Greenpoint Fears Power Play, N.Y. DAILY NEWS, Feb. 28, 2001 (expressing general suspicion by residents of political and economic motives of siting decisions).

See N. Y. CITY DEP’T OF CITY PLANNING, WILLIAMSBURG BRIDGE AREA ZONING STUDY, Sub-area 12, Phase II Report, May 1996, at 1 (describing the Department of City Planning’s identification of areas to be studied to determine if manufacturing areas should be down-zoned to permit residential development).

Id.

See PROPOSED GREENPOINT 197-A, supra note 109, at 14. Specifically, “[t]he Williamsburg 197-a Plan focuses on a linear stretch of three interconnected neighborhoods along the East River waterfront.” Id.

See NEW YORK CITY DEP’T OF CITY PLANNING, ZONING MAP 12d, 13b (indicating the zoning classifications for each section of Williamsburg). Greenpoint was not addressed in Williamsburg’s 197-a plan. See PROPOSED GREENPOINT 197-A, supra note 109, at 14. Community Board One and local community groups from Greenpoint and Williamsburg began to create a 197-a plan to synthesize views and ideas in response to the pressures of increasing demand for housing, decline of heavy manufacturing and increasing rents to do illegal conversions to residential lofts. Id. Eventually, however, “[g]iven the diversity of interests, issues, and the structural differences between the two communities, it was determined that two 197-a Plans covering the two geographically distinct areas of Williamsburg and Greenpoint should be...
COMMUNITY PLANNING

At the same time, Greenpoint’s residents were vigorously pursuing their own 197-a process with technical assistance and resources from the Pratt Institute Center for Community and Environmental Development.¹⁴⁷ Earlier attempts at community planning in Greenpoint were undermined by breakdowns in communication between different groups—ethnic divisions deepened, homeowners distanced themselves from renters, residents quarreled with industry and environmentalists were at odds with the labor force.¹⁴⁸ As a result, prior proposals lost momentum before reaching fruition.¹⁴⁹

Because of the history of dissension among residents, the 197-a Steering Committee expanded its efforts to include all members of the community throughout the 197-a process.¹⁵⁰ The

prepared.” Id.

¹⁴⁷ See PROPOSED GREENPOINT 197-A, supra note 109, at 8-13 (discussing the planning process undertaken by Greenpoint residents and community groups). Greenpoint’s 197-a plan “was refined and completed [ ] with technical assistance and resources from the Pratt Institute Center for Community and Environmental Development (“PICCED”) and with the energy, commitment and sustained participation of members of Greenpoint’s 197-a Committee.” Id at 8. Both the Pratt Institute and the Columbia Planning Studio have helped New York City neighborhoods compile data and prepare community-based plans that emphasize localized interests and strengths. See generally THE MUNICIPAL ARTS SOCIETY OF NEW YORK, THE WILL TO PLAN: COMMUNITY INITIATED PLANNING IN NEW YORK CITY (Winter 1989-90), at 20-28 (noting assistance given by these institutes to local residents, committees and advisory groups) (on file with author).

¹⁴⁸ See generally Handhart Interview, supra note 18 (commenting that efforts prior to contributions of technical assistance from the Pratt Institute were hindered by communication breakdowns).

¹⁴⁹ Id. (noting that no tangible results were reached by prior efforts); see also PROPOSED GREENPOINT 197-A, supra note 109, at 8 (noting the history of Greenpoint’s planning process, including public forums and workshops, to explore options and opinions as to what participants wanted to see develop along Brooklyn’s waterfront but acknowledging that these efforts did not result in a formal 197-a plan for Greenpoint).

¹⁵⁰ The Steering Committee, formed with volunteer assistance from the Pratt Institute, held numerous meetings, three major public forums, two meetings with the business community and made presentations at open meetings of Community Board One. Id. at 8-13. These events were advertised via local newspapers and fliers printed in English, Spanish and Polish. Id. at
Committee circulated a copy of the proposed plan door-to-door, and a public forum was held to debate it.\textsuperscript{151} The forum attracted about 150 participants and, in general, “the group expressed a great deal of support” for the plan.\textsuperscript{152} In addition, two meetings with the business community and two presentations at Community Board meetings evinced virtually unanimous support for the plan.\textsuperscript{153} Greenpoint’s final proposed plan innovatively relies on mixed-use zoning and, rather than polarizing commercial and environmental concerns, the community created a plan that retains industry while monitoring and enforcing environmental standards.\textsuperscript{154} Community Board One voted to approve Greenpoint’s 197-a plan in 1998.\textsuperscript{155}

12. Follow-up workshops were also conducted with Hispanic and Polish groups in their native languages. \textit{Id.} For a full chronology and description of these events, \textit{see id.} at 8-13.

\textsuperscript{151} \textit{See PROPOSED GREENPOINT 197-A, supra note 109, at 8, 12. Over 9,000 copies of the “newspaper edition of the plan” were distributed throughout the neighborhood. Id. at 12. In essence this distributed “almost one copy per household to Greenpoint residents and businesses.” Id. at 8. The forum was held on June 24, 1998. Id.}

\textsuperscript{152} \textit{See id. at 12 (describing meetings with business leaders, public forums and the support expressed for the plan).}

\textsuperscript{153} \textit{Id. at 8; see also Telephone Interview with Ron Schiffman, Director, Pratt Institute of Community and Environmental Development, (Nov. 22, 2000) [hereinafter Schiffman Interview] (explaining that the two dissenters to the plan were Williamsburg residents who felt that Greenpoint’s boundary should be extended to include them).}

\textsuperscript{154} \textit{See generally PROPOSED GREENPOINT 197-A, supra note 109, at 40-60. The recommendations included in the proposed 197-a plan were intended to “dramatically enhance Greenpoint’s environment by providing ecological benefits to the neighborhood and by mitigating the impact of existing pollution in accordance with the spirit and intent of the New York Charter [which] calls for Fair Share Siting Criteria.” Id. at 40. The “Detailed Recommendations” of the plan “are meant to encourage public access to the waterfront, low-rise housing and commercial development while protecting Greenpoint’s environment and quality of life.” Id. at 43. The proposed plan calls for reduction of pollutants within the Charter’s criteria levels, decontamination of hazardous sites, improvements of water quality as well as rezoning for future commercial development. Id. at 43.}

\textsuperscript{155} \textit{See DEPARTMENT OF CITY PLANNING, GREENPOINT 197-A PLAN Part I, i (as modified and adopted by the City Planning Commission and the City
City Planning received the final plan on February 3, 1999.\textsuperscript{156} Greenpoint’s 197-a Committee first met with city agencies on February 22, 1999.\textsuperscript{157}

At an August 23, 2000 public hearing on the Greenpoint plan, there were sixteen speakers in favor of the plan and none opposed.\textsuperscript{158} The plan was adopted on January 30, 2002, after considerable modification by the Department of City Planning.\textsuperscript{159} Among the city’s positive modifications were the sections calling for “halting expansion of the Greenpoint marine transfer station beyond 2,215 tons per day, and reuse of the adjacent incinerator site for public events and environmentally friendly purposes.”\textsuperscript{160} However, the city settled on terms that leave Greenpoint residents vulnerable to new industrial uses. While the Greenpoint community was lauded by the Department of City Planning for its “collaborative approach in developing a 197-a plan responsive to the concerns of Greenpoint’s residents and businesses and to

\textsuperscript{156} \textit{Id.} at Part I, 3 (noting that the plan was originally submitted on October 21, 1998 and, after revisions for formatting and “other deficiencies” were corrected, was submitted in revised format on February 3, 1999); \textit{See also} PROPOSED GREENPOINT 197-A, supra note 109, at i (indicating date received by Central Intake Department of City Planning as February 3, 1999).

\textsuperscript{157} For a comprehensive list of meetings with government agencies, \textit{see} PROPOSED GREENPOINT 197-A, supra note 109, at 13.

\textsuperscript{158} \textit{See} ADOPTED GREENPOINT 197-A, supra note 155, at Part I, 6. This is a striking comparison to Vinegar Hill’s final public hearing, which evinced considerable opposition. \textit{See supra} note 92 (noting the various dissenting speakers and viewpoints offered at public meetings pertaining to Vinegar Hill’s proposed rezoning).

\textsuperscript{159} \textit{See generally} ADOPTED GREENPOINT 197-A, supra note 155, at Part I, 7-11. The adopted plan commends “the Board and its Waterfront Committee for their collaborative approach in developing a 197-a plan” but specifically declines to adopt provisions pertaining to the siting of waste management facilities and substantially modifies the proposed plan as it pertains to lessening adverse effects of industry and waste management due to the “citywide implications” of these provisions. \textit{Id.} at Part I, 7-9.

\textsuperscript{160} \textit{Id.} at Part I, 9.
the issues raised by city agencies affected by the plan,” the city nonetheless took many opportunities to weaken the outcome of such a process.\textsuperscript{161} For example, it extended a moratorium on sitings of waste transfer stations in Brooklyn’s Community District 1 only until the adoption of the Department of Sanitation’s ("DOS") study of the city’s commercial waste stream.\textsuperscript{162} The city also delayed re-zoning until comprehensive city needs evaluations can be performed, leaving the waterfront zoned M3-1 for heavy manufacturing in the interim.\textsuperscript{163}

The present situation is chaotic as the community continues to organize against new industrial and commercial development.\textsuperscript{164} New York City, while subject to a “fair share” requirement dictating that publicly owned works be evenly distributed, does not have guidelines in place for privately owned facilities.\textsuperscript{165}

\textsuperscript{161} Id. at Part I, 9.

\textsuperscript{162} Id. at Part I, 3. The adopted plan notes that “City Council approval of the NYC Solid Waste Management Plan Modification Plan on November 29, 2000 was contingent upon DOS undertaking a comprehensive study of the city’s commercial waste stream. Id. at Part I, 9. In a separate agreement the administration placed a moratorium on permitting any new putrescible or nonputrescible waste transfer facilities in Brooklyn Community District One. Id. at Part I, 8. It is unclear how long this moratorium will remain in effect.

\textsuperscript{163} Id. at Part I, 10. (recognizing rezoning requests in the proposed plan but specifically declining to adopt these provisions and opting to establish and “interagency task force to study the principle of high performance zoning on a citywide basis”).

\textsuperscript{164} See Bowles, supra note 64, at 22. Bowles notes that “city planners have been conspicuous in their absence” in Greenpoint and “so far, city planning officials have resisted Greenpoint’s pleas for saner coexistence with industry.” Id. He further points out that “residents in industrial neighborhoods continue to stew amid a sea of M-3s—and increasingly, they are targeting manufacturing itself as the enemy.” Id.

Currently, Greenpoint faces the development of a private power plant.\textsuperscript{166} Thus, residents continue to organize and strategize, with little tangible reward for their hard-earned, inclusive land use decision-making process.

V. COMPARATIVE ANALYSIS OF NEIGHBORHOOD PLANNING EFFORTS

An examination of the planning strategies and efforts of Vinegar Hill and Greenpoint points out certain factors that may influence the success of public participation. These can be broken down into three categories: community demographics, community access to resources, and the goals of proposed plans. To encourage more public participation and comprehensive planning, these factors should be addressed in a way that equalizes each community’s ability to influence land use decisions. Equal access to resources and, ideally, equal consideration by the City Planning Commission could provide fairer outcomes. Closer analysis of how each community proceeded helps to suggest how such a solution might be structured legislatively.

\textsuperscript{166} Further details about the proposed 1,100 megawatt power plant on the Greenpoint/Williamsburg East River waterfront are available on the Greenport Waterfront Association for Parks & Planning (GWAPP) website, available at http://www.gwapp.org (last visited Oct. 25, 2002) (describing the proposal of the power plant as a “project [that] will have 300 foot smokestacks, spew well over a thousand tons per year of toxic emissions into our local environment, increase the area’s already heightened [sic] asthma levels and ruin New York City’s and New York State’s plans for parks and residential and commercial development on the Greenpoint/Williamsburg waterfront”); but see TransGas Energy Systems website, available at http://www.transgasenergy.com (last visited Nov. 12, 2002) (describing the proposal as “an environmentally responsible [project] . . . which meets all applicable regulatory standards”).
A. Demographics

A community’s characteristics—size, homogeneity and location—play a large role in the probability of marshalling a community-sponsored plan through the proper administrative channels. As the above case studies illustrate, the smaller, more demographically homogenous community achieved rezoning rather easily, whereas the larger, more diverse community had greater difficulty. One possible explanation is that smaller, more homogenous groups may encounter fewer obstacles in organizing, identifying leadership and agreeing on the most beneficial use of its land because of its shared beliefs and values.

It is important to note, however, that the demographic homogeneity in Vinegar Hill does not end the inquiry because there was a sharp division between residents and businesses throughout the planning process. Although demographic

167 Homogeneity can refer to many socioeconomic indicators. Although the term may to refer to race or class, this paper points out that the term can be misleading because it does not adequately include different segments of a community. For example, a person can interact within the community as a resident, a business owner, a worker, or some other combination of these categories.

168 This phenomenon is due, generally, to the acknowledged difficulties in collective action and organization of groups with varying interests as well as language barriers within a community. See, e.g., supra Part IV (comparing the barriers to collective action confronted by Vinegar Hill and Greenpoint in the planning process).


170 Holt, supra note 85 (covering a community board meeting where “futility and confusion” was present as rezoning arguments continued, with the business community in opposition to any zoning changes). See also supra
statistics portray a small, affluent group of residents, workers and business owners whose interests may differ from residents brought conflicting visions of the neighborhood to land use decisions. It is exactly this tension that was not adequately addressed throughout Vinegar Hill’s rezoning process. In contrast, Greenpoint, a demographically diverse community, actually emerged as a cohesive voice. Its cooperative process resulted in a unanimously supported plan. The discrepancy between demographics and cohesion clouds the simple conclusion that Vinegar Hill had an easier time merely because its residents were more demographically homogeneous and Greenpoint encountered greater difficulty due to demographic diversity.

Ironically, the results of these two case studies could be interpreted to discourage comprehensive community-sponsored planning and consensus building and instead encourage planning by small, elite groups of people without regard for their neighbors. The opposite needs to be true if New York City is

Part IV.A (illustrating the lack of unanimous support for proposed rezoning plans).

171 Although ethnically diverse, Greenpoint has a larger percentage of residents within its workforce, thus lessening the tension between residents and businesses seen in Vinegar Hill. See supra Part IV (setting forth the demographics and respective workforce percentages of Greenpoint and Vinegar Hill).


In general, the group [at a public forum advertised with door-to-door copies of the plan] expressed a great deal of support for the document with the major issue being expansion of the boundaries of Greenpoint. This was resolved in part by including the remainder of the area in the Greenpoint postal zip-code.

Id.; see also Schiffman Interview, supra note 153 (offering first-hand account of unanimous support at the later meetings); Telephone Interview with Said Ahmed, Brooklyn Office of the Department of City Planning, Nov. 8, 2000 [hereinafter Ahmed Interview] [transcript on file with author] (offering opinion that the Greenpoint plan was strongly supported throughout the community).

173 This conclusion could be drawn from the fact that Vinegar Hill’s relatively small group of residents effectively achieved rezoning without arriving at a unanimously approved plan whereas Greenpoint’s plan, which sought to incorporate input from all concerned constituents, was not adopted by the City Planning Commission. See, generally, supra Part IV (setting forth
to reinforce neighborhood pride, foster a communal sense of control and increase accountability in planning policies. In short, an equitable planning process respects all people affected by it. As difficult as such agreements may be to reach, consensus building should be the focal point of successful planning, regardless of the demographic homogeneity of the residents.

Instead, it is important to ask what role demographics play in community planning. Demographically homogenous groups may organize more easily and thus have more time to devote to political lobbying.\textsuperscript{174} If this is the case, the community with more effective organization and leadership could be perceived by city agencies as more likely to take issues to the ballot box, thus subtly (and perhaps wrongly) convincing political representatives that the goals of the politically savvy group reflect those of the community as a whole. Even though there were diverse viewpoints in Vinegar Hill, the homogeneity of the residential community provided a unified base to pressure politicians and create an appearance of cohesion. More organizational power enables a group to devote time and energy to lobbying and negotiating with city government. It may be that, although a consensus was finally reached in Greenpoint, the decade-long process of consensus building actually detracted from its potential political impact.\textsuperscript{175} In this way, Greenpoint’s diverse population may have been an obstacle to effective political power.

One way for the city to equalize communities’ abilities to successfully rezone is to address the organizational obstacles confronting New York’s neighborhoods. The Department of City Planning should assist diverse communities by encouraging the processes of each community’s rezoning).

\textsuperscript{174} It is self-evident that groups with few barriers to communication and collective action will not be required to devote substantial resources to ensuring inclusion of varying interests, whereas those composed of multiple enclaves will necessarily devote greater resources to communication between and amongst themselves, thus leaving fewer resources for garnering political support. See supra Part IV (comparing Vinegar Hill’s efforts with Greenpoint’s efforts to inform all concerned facets of the community).

\textsuperscript{175} See \textit{Handhart Interview}, supra note 18 (suggested that the potential impact of Greenpoint’s plan may have been hindered by the necessarily lengthy process of consensus building).
organization and cooperation. One possible solution is to strengthen the 197-a process by offering leadership assistance grants and consensus-building workshops sponsored by the city. This would bolster the organizational power of a diverse community like Greenpoint, freeing up time for developing the necessary political strategies and, eventually, increasing its chance of successfully rezoning.

Location is another factor that may influence the city’s determination of where to expend its resources. The city could perceive that assisting Vinegar Hill by down-zoning the area might encourage high-end residential development and, in turn, increase the city’s tax base.\textsuperscript{176} Although it is only served by one subway stop, Vinegar Hill is close to Manhattan and downtown Brooklyn, and surrounded by neighborhoods that are becoming tourist destinations.\textsuperscript{177} Greenpoint, on the other hand, suffers from a lack of convenient transportation to Manhattan and Brooklyn’s commercial core, as well as a perception of isolation because of two waterway boundaries, one highway boundary, and a southern stretch of vacant warehouses.\textsuperscript{178}


\textsuperscript{177} See supra Part IV.A (noting Vinegar Hill’s proximity to historical neighborhoods and other tourist attractions).

\textsuperscript{178} See Gilbert, supra note 110, at 90. Land use and circulation may be mismatched if development overwhelms the available transportation systems or if the configuration and location of transportation facilities do not correspond with the needs of that area. See Edward J. Kaiser, David R. Godschalk, F. Stuart Chapin Jr., \textit{Urban Land Use Planning} 230 (1995). Modern urban planners promote public transit and walking in an effort to reduce reliance on transportation by automobiles. See Gerald E. Frug, \textit{City Making: Building Communities Without Building Walls} at 151 (noting the importance of public transportation in “compact, walkable, multiuse neighborhoods [which are] built around transit stops”). Convenient and accessible transportation centers may even encourage residents to reside in a particular area. See Robert Cervero, \textit{Growing Smart by Linking Transportation and Urban Development}, 19 VA. ENVTL. L.J. 357 (2000) (describing a San
Finally, the housing stock and average income of a neighborhood may determine the city’s perception of it as a good investment of planning resources. In Vinegar Hill, the rapid response of the Department of City Planning and the area’s development since the zoning change suggest that goals other than the stated desire to preserve the area’s residential streets may have played a large role in the successful rezoning. The Francisco/Bay Area community where many residents “self-select to reside near transit nodes for the very purpose of economizing on commuting”). Considerations in community planning, however, must also be given to other forms of transit that promote efficient circulation. See Kaiser, supra, at 376 (describing a “multimodal” public transportation system that also incorporates taxicabs, bicycles, pedestrians, carpools and parking); see also Oliver A. Pollard III, Smart Growth and Sustainable Transportation: Can We Get There From Here?, 29 Fordham Urb. L. J. 1529 (2002) (asserting that community growth will be difficult to achieve without more sustainable transportation approaches and, likewise, significant transportation improvements will be difficult to achieve without more sensible development practices).

Scholars argue that municipality residents that do not live in exclusively residential districts, but in mixed-use districts are usually less affluent apartment dwellers whereas municipality residents in exclusively residential districts are usually owners of detached dwellings. See, e.g., Joel Kosman, Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning, 43 Cath. U. L. Rev. 59 (1993). Hence, the “desirable citizen” in purely residential districts is one that can afford his own home, and those who cannot are forced to live in mixed use districts. Id. at 84. Others argue that land use development in the absence of zoning is usually orderly and many uses will locate in the same place whether zoning is in effect or not. See, e.g., Bernard H. Siegan, Non-zoning is the Best Zoning, 31 Cal. W. L. Rev. 127 (1994). Siegan argues that, “[f]or those who are economically better off, zoning is a luxury. In its absence, reasonable protection of their urban environment can be accomplished by imposing and enforcing restrictive covenants and a limited number of laws.” Id. at 139. Siegan delivered a series of speeches urging voters to reject zoning and a proposed zoning ordinance in Houston, Texas and suggested that instead of forced zoning, the “city should make every effort to preserve and enforce deed restrictions.” Id.

See Brozan, supra note 105 (discussing real estate plans by developer David C. Walentas, who has owned large chunks of land in the area and has worked to revitalize the community); See generally, Patrick J. Skelley, Public Participation in Brownfield Remediation Systems: Putting the Community Back on the (Zoning) Map, 8 Fordham Envtl. L. J. 389, 406-12 (1997). Skelly notes that “governmental bodies are presumably equipped to determine not
COMMUNITY PLANNING

city was likely interested in encouraging high-end residential development and the retail-entertainment facilities that usually follow such development in this section of Brooklyn. This sort of development benefits both the city and the borough by drawing tourism and upper-middle class residents to the area. Neighborhood revitalization is attractive to Vinegar Hill residents as well because of the services that follow such as more transportation, stores, theaters and restaurants. Because organized residents of Vinegar Hill are predominantly homeowners, the increase in services could outweigh fears of increased rents. In real estate lingo, location is everything—

only whether a property owner’s use of land is appropriate in reference to neighboring uses, but whether such a use accords with regional needs and concerns, given a zoning entity’s familiarity with master plans and other comprehensive planning techniques.” Id. at 411. According to Skelley, zoning can also “be carried out to best promote the public health, safety, and general welfare.” Id.  See Bowles, supra note 64, at 23. Bowles explains that the city’s housing crisis brought many young professionals to the borough of Brooklyn, and these newer residents “favor[ed] new housing, shops and amenities.” Id. Furthermore, residents living in or near areas that had been zoned for heavy manufacturing “have been aggressively pushing city officials to rezone large swaths of those areas for residential use, usually with local political support. [Additionally,] [m]ounting political pressure from votes . . . is likely to keep the political momentum going.” Id.

See Brozan, supra note 105 (quoting local developer David Walentas as saying of the area, “[a] year ago, there was no retail in the neighborhood. Now we have a Korean market, a chocolatier, antiques shops, art galleries.”). 183 Homeowners with steady incomes will only be removed from their homes through eminent domain, which requires just compensation, or if property values increase so much as to make property taxes unaffordable to them. In contrast, renters can be forced to move due to rent increases. See David B. Fein, Historic Districts: Preserving City Neighborhoods for the Privileged, 60 N.Y.U. L. REV. 64 (1985). Fein notes that renters are more vulnerable residents because “[l]andlords may evict their tenants directly or may sell their buildings to people who will convert them to single-family use. Additionally, rehabilitation may lead to steep rent increases, which in turn may force low-income tenants to leave their homes.” Id. at 85. He further states that “[l]ow-income homeowners . . . may also be displaced by gentrification.” Id.; Ray Telles, Comment: Forgotten Voices: Gentrification and Its Victims, 3 SCHOLAR 115 (2000). Telles notes that “when the upper-
Vinegar Hill was in the right place at the right time, and in economic terms, its plan was efficient.

**B. Access to Resources**

While the city may look to a community’s income as a factor related to development incentives and overall economic promise, a community’s financial status is also a tool to gain access to resources including time, money and technical assistance. This is essential to a successful planning process.\(^{184}\) Without adequate resources, there is little chance that public participation will affect decisions in a meaningful way. As these two studies reveal, the fact that Vinegar Hill had an easier time rezoning than Greenpoint was due in part to the city’s direct assistance.

The City Planning Commission donated time and energy to Vinegar Hill by conducting a zoning study of the area and income inhabitants, instead of building new homes, relocate to the older neighborhoods previously lived in by lower income groups . . . new money is spent in renovation and repair.” Id. at 131. Once large scale renovation begins, with “more and more money being pumped into these older neighborhoods, property taxes increase. With increased property taxes, landowners find justification for increased rents. Accordingly, the few remaining low-income residents are displaced by skyrocketing rents, which are paid by incoming upper-income tenants.” Id.

\(^{184}\) See MAS, STATE OF 197-A PLANNING, supra note 26, at 9 (noting the amounts of funding and time required to develop a successful community zoning plan). Access to financial resources is required for towns undertaking any significant new construction. See NEW TOWNS SYMPOSIUM in JAMES A, LYONS JR. ET AL., NEW TOWNS AND PLANNED COMMUNITIES 243 (1971) (noting that constructing a town within the span of a few years raises financial problems not ordinarily faced by other towns which develop more slowly); JANE JACOBS, THE ECONOMY OF CITIES 122 (1969) (asserting that the problems of growing cities are only solved by new goods and services that increase economic abundance). Because zoning and environmental clean-up also involves scientific research and technological prowess, access to resources is also necessary to facilitate community understanding of the process and available information. See generally Spyke, supra note 3, at 293-95 (noting that environmental clean-up and rezoning “necessitates the compilation of enormous amounts of data” and that “participation programs demand large amounts of time, are difficult to manage”).
proposing the zoning changes itself at the community’s request.\textsuperscript{185} This assistance eliminated many potential pitfalls for the Vinegar Hill community, including financial and technical hindrances. In contrast, Greenpoint did its planning work without assistance from the city.\textsuperscript{186} Financial constraints played a role in working through the different viewpoints because everyone participated on a volunteer basis and, for most people, this meant after a long day of work.\textsuperscript{187} Such constraints slowed Greenpoint’s progress and detracted from the amount of time available for political lobbying and dialogue.\textsuperscript{188} Although it is admittedly unfeasible for the Department of City Planning to conduct zoning studies of every area requested, the city could provide grants or allow communities to apply for extra financial assistance.\textsuperscript{189} Financial aid could remedy the disparity between communities with access

\textsuperscript{185} See generally \textit{City Planning Commission Final Report}, \textit{supra} note 73 (indicating that city agencies conducted a zoning study and submitted proposals on behalf of the Vinegar Hill community); see also \textit{Bowles, supra} note 64, at 21, 24 (surmising that Council member Ken Fisher’s help in gaining historic landmark status for the Vinegar Hill district was instrumental in rezoning the district as residential).

\textsuperscript{186} See generally \textit{Schiffman Interview, supra} note 153 (noting the lack of municipal contribution to Greenpoint’s planning process); \textit{Handhart Interview, supra} note 18 (noting that Greenpoint residents and volunteer workers staffed many of the committees). Some commentators suggest that the city does not do enough to help industrial and commercial land users as well. See generally Jonathan Bowles, \textit{The Big Squeeze}, CENTER FOR AN URBAN FUTURE, available at http://www.nycfuture.org/content/reports/report_view.cfm?repkey=54\&area=realpol (May 1, 1999) (noting that a problem faced by industrial and commercial land users is “the failure to develop the large supply of unused city-owned land” and that although the city possesses a substantial amount of land, “little has been done to encourage its redevelopment for industrial use.”). \textit{Id.}

\textsuperscript{187} See \textit{Handhart Interview, supra} note 18. According to Handhart, even though all public participation is voluntary, there is an advantage to having one or two people take on full-time coordination and organization rather than requiring people to devote time to the process after they may have already completed a day of work at a full-time job. \textit{Id.}

\textsuperscript{188} See generally \textit{id.}

\textsuperscript{189} Funding could be made available to individual communities in the event that the city is unable to provide staffing for the actual work.
to funding and communities without such resources. This would also remove some of the city’s discretion as to which communities were economically desirable for rezoning, and lessen the impact of economic considerations and disparity in land use decision making.

Vinegar Hill also benefited from the city’s technical assistance. The fact that the Department of City Planning used its expertise to study the area and propose zoning changes relieved residents from struggling with the complications of environmental impact studies, statistical analysis and complex legal issues. Greenpoint, on the other hand, had to locate its own assistance. Over the years, local universities offered aid for Greenpoint’s planning efforts but, because of the temporary nature of student research projects, this assistance was often incremental. Lack of technical assistance exacerbated

---

190 See NYC ZONING STUDY, VINEGAR HILL, supra note 56 (noting that the city conducted zoning studies of the area, and such work was not undertaken at the community’s expense). See also Angotti, supra note 25 (discussing the difficulty of obtaining approval of a district’s 197-a plan without technical assistance from the City Planning Commission); Bowles, supra note 64 (suggesting that Vinegar Hill’s plan was approved over proposals from other districts because “they had the politicians’ ear”); Bill Farrell, Vinegar Hill Eyes Future Decisions on Zoning, N.Y. DAILY NEWS, Nov. 24, 1997, at 1997 WL 16053356 (describing certain rezoning proposals by the City Planning Commission).

191 See generally NYC ZONING STUDY, VINEGAR HILL, supra note 56 (including background information about existing land use and zoning of the area, recommendations for rezoning parts of Vinegar Hill, and statistical data and charts analyzing and highlighting the findings of the study). See also Angotti, supra note 25 (noting that developing a 197-a proposal is often prohibitively time-consuming and costly to the district if it does not receive at least some technical assistance from the City Planning Commission); Bowles, supra note 64 (suggesting that a community must gain the support of the City Planning Commission before developing a proposal because the assistance of the City Planning Commission increases the probability of a plan being approved).

192 See supra note 147 (noting the study completed by the Pratt Institute, which included an historical analysis, industrial and demographic profiles, a pilot real estate study, a telephone survey, an examination of zoning regulations and the impact of potential land use scenarios as well as a description of government programs affecting the neighborhood but pointing
organizational struggles, and the lack of consensus among Greenpoint residents frequently frustrated those trying to help in the early stages of the planning process. Greenpoint’s current 197-a plan was drafted with the support and expertise of the Pratt Institute’s Center for Community and Economic Development, which provided the organizational and consensus building techniques necessary to synthesize competing visions.

The burdens of community planning are great, and the Department of City Planning has acknowledged the importance of such assistance in the past. Revisions to the City Charter in 1989 attempted to lessen this burden by removing environmental impact assessments from the 197-a process and allowing community boards the freedom to hire planning consultants to assist with 197-a plans. Community Board requests to the
Department of City Planning for financial assistance to pay consultants, however, have been ignored.\textsuperscript{197}

Comparing the case studies, Vinegar Hill received substantial assistance from the Department of City Planning while Greenpoint received little. Without equal access to assistance, communities like Greenpoint will remain at a disadvantage when it comes to community-sponsored planning. Equitable sponsorship of communities is necessary to foster community-based 197-a plans from all communities, not just those that are effectively organized and politically savvy.

\textit{C. Each Community’s Stated Goals}

The success of the Vinegar Hill plan may also have stemmed from the limited goals of its efforts. The Vinegar Hill study encompassed a few blocks that the plan proposed to preserve as a residential area.\textsuperscript{198} The destruction of the 135-year-old Roman...
Community Planning

Catholic Church in the early 1990s by a waste treatment company was the main catalyst behind neighborhood organizing. That visible change made the residents fear that “the big and profitable business of garbage [would] rapidly destroy a small but beautiful area with great history.” The Department of City Planning

199 Waldman, supra note 63, at CY8 (explaining that the destruction of this church created fear among residents that the owners of the property would begin treating waste on the site, which was directly across the street from a row of historic houses); Choices Cover, Village Voice, Sept. 8, 1998, at 64 (noting that “with the destruction of the church, Vinegar Hill dug its heels into the ground and refused to budge”).

A strong reaction by one homogenous group to a particular action or siting decision, in this case the residents’ response to a waste treatment company moving in, is reminiscent of behavior known by the acronym NIMBY — “not in my backyard.” NIMBYism is a response seen when communities rally against a possible change in land use that is viewed as detrimental in some way. See generally Michael B. Gerrard, Fear and Loathing in the Siting of Hazardous Waste Facilities: A Comprehensive Approach to a Misperceived Crisis, 68 TUL. L. REV. 1047 (1994). Gerrand argues that “[a]lthough facility opposition is often trivialized with acronyms like NIMBY (“Not In My Backyard”), LULU (“Locally Undesirable Land Use”), or BANANA (“Build Absolutely Nothing Anywhere Near Anything”), even new, ‘state-of-the-art’ facilities pose real environmental hazards.” Id. at 1054. NIMBYism is often invoked to prevent sitings of LULUs in particular neighborhoods. Id.

The race and class ramifications of NIMBY actions are noted in the response acronym, PIBBY—“put in black’s backyard.” For an enlightening review of these and other environmental concerns in contemporary society, see Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality (1990). The siting of an undesirable facility in a minority neighborhood is seen as an example of inequity in environmental protection. See also Alice Kaswan, Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,” 47 AM. U.L. REV. 221 (1997) (noting that environmental laws may reveal that a site was selected despite its failure to meet the necessary qualifications and citing that the role of environmental justice in pursuing political justice ought to be explored in connection with environmental justice disputes involving the siting of undesirable land uses). The appearance of NIMBYism in Vinegar Hill’s process warrants concern because the community is not being represented in its entirety.

200 See Lentz, supra note 90, at 16 (detailing the nature of the dispute between local residents and business owners).
found those fears legitimate, and Commissioner Joseph Rose stated that the Department would “not do anything that has an adverse impact on the economic activity in the area, but [would] take action to prevent the area from being turned into a waste transfer focus.”

Greenpoint’s plan was also “a response to a series of ill-considered public and private actions. From the late fifties to today public policies have led Greenpoint’s eastern sector to become a ‘dumping ground’ for burdensome facilities.” However, Greenpoint’s plan differs from Vinegar Hill’s in many respects. Greenpoint’s plan encompasses a much larger area and calls for a re-evaluation of environmental standards, planned open space and more pedestrian-friendly streets. In contrast to

---

201 Id.


The community is host to: a large, antiquated incinerator burning garbage (including medical waste) from the entire city; numerous garbage “transfer stations,” often resulting in illegal dumping; and a massive waste water treatment plant, the Newtown Creek Water Pollution Control Plant (WPCP), which handles about 20% of the city’s waste water and has not been in compliance with state environmental regulations for years.

Id.

203 As noted, Vinegar Hill’s plan encompassed merely eight blocks. See NYC ZONING STUDY, VINEGAR HILL, supra note 56, at 1. Greenpoint’s plan, however, initially included fourteen census tracts and was later expanded to include an additional seventeen block area. See PROPOSED GREENPOINT 197-A, supra note 109, at 8.

204 See id. at 38 (recommending economic, social, environmental, as well as quality of life improvements for Greenpoint). Recommendations included
COMMUNITY PLANNING

Vinegar Hill’s call for down-zoning, Greenpoint seeks to remain a viable mixed-use district with a diverse residential population and cleaner industry. Greenpoint’s 197-a plan states that “[i]t is a plan to address the future of this community, to build upon its strengths, and to eliminate the impediments to the growth of a healthy and viable community.” The larger scope and the emphasis on mixed-use districts should be lauded as an innovative approach toward accepting and promoting responsible industry. Instead, the scope of Greenpoint’s plan may have initiating a charter calling “for Fair Share Siting Criteria to be used as a guideline in locating city facilities” so as to prevent the community from expanding burdensome facilities, and developing “an aggressive and sustained greening program for Greenpoint.”

The Greenpoint 197-a plan notes that planning involves providing job training for new young immigrants and developing community facilities such as schools and other educational institutions that respond to Greenpoint’s diverse population. It also includes building a new library that incorporates an expanded collection of books in foreign languages to meet the needs of Greenpoint’s diverse ethnic groups. The plan also involves creating a centrally located space for local community groups, which would allow and further encourage the development of a cooperative spirit among diverse groups. This space would also accommodate a harvest festival every summer to celebrate Greenpoint’s diversity.

The Greenpoint plan proposes mixed-use zones that would limit industrial expansion to businesses that enter into good neighbor agreements and demonstrate that they can meet strict environmental performance standards. Performance-based standards are ceilings on the amount of pollution a given manufacturer can emit and permit manufacturers to choose how to meet the applicable standard. For a thorough explanation of this and other regulatory controls, see generally Jonathan Remy Nash, Too Much Market? Conflict between Tradable Pollution Allowances and the “Polluter Pays” Principle, 24 HARV. ENVTL. L. REV. 465 (2000). Nash proposes that “[m]odern environmental regulations grow out of the understanding that, in their absence, manufacturers will externalize their costs and push them down the line to government or society-at-large.” He states that “[r]egulations seek to avoid this undesirable result by forcing prospective polluters to take measures, at their cost, to reduce their pollution emissions to an acceptable level and pay for damages caused by residual pollution emissions that occur despite these measures.”
stalled its progress. According to the Brooklyn Office of City Planning, the plan’s breadth most likely resulted in the City Planning Commission striking down many parts of the plan. Others suggest however, that plain economic efficiency prevented implementation of the plan.

Arguably, the city has little economic incentive to approve a plan like Greenpoint’s. A pure cost-benefit analysis might reveal that such a plan is economically inefficient due to the administrative costs of restructuring the environmental standards, the costs of monitoring compliance, and the economic burden placed on industries’ production levels as a result of stricter standards. Others, however, might suggest that the plan is efficient in the long-term because it reduces environmental harm and may bring new residents and businesses to the area; thus the up-front costs of restructuring and monitoring are balanced by the

208 See Ahmed Interview, supra note 172 (suggesting that the scope of Greenpoint’s proposed re-zoning areas and overall sweep of the plan had deleterious effects on the agency’s acceptance of the provision as a whole); see also Bowles, supra note 64, at 24. According to those that have worked on the plan, the Office of City Planning has not embraced many of the community’s recommendations. Id. at 25. Officials have informed the community that the changes they are calling for are not in accordance with city regulations. Id. Planners have theorized “that the Commission is motivated by a desire to reserve potential sites for essential services that can’t be located outside the city.” Id.

209 See Bowles, supra note 64, at 24. According to Bowles, some observers attributed the plan’s failure to “the agency’s coziness with real estate industry, which they say results in a bias toward zoning land for the most profitable uses possible.” Id.

210 See, e.g., Richard J. Lazarus, Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection, 87 Nw. U. L. Rev. 787, 793 (1992) (noting that “environmental protection requires governmental expenditures, the source of which varies from general personal and corporate income taxes to special environmental taxes. These expenditures necessarily decrease public monies available for other social welfare programs”); see also Wallace E. Oates, Symposium, Innovations in Environmental Policy: From Research to Policy: The Case of Environmental Economics, 2000 U. Ill. L. Rev. 135, 149 (2000) (noting the difficulty of placing monetary values on benefits, such as improved health and extended longevity, that result from reduced air pollution).
future benefit. Participation theory advocates would support Greenpoint’s plan because of the value of the consensus-building process itself in empowering communities and encouraging leadership. Thus, whether decision makers should be guided by an economic model or public participation model becomes an important question.

D. Conclusions Drawn from the Case Studies

Community demographics; access to technical, financial and political resources; and the development and economic needs of the city are all at play when a community seeks to organize and influence land use decisions. The case studies present two narratives that illustrate the disparate effects of the current decision-making scheme. While it is fair to allow the city a degree of input into community-sponsored plans to ensure that citywide agendas are not undermined, something more than economic analysis must guide the decisions of the Department of City Planning. Without an emphasis on public participation and inclusive decision making, there are no mechanisms in place to ensure that the Department of City Planning is accountable to disadvantaged communities whose interests may differ from those of the majority.

211 Cf. Nick Hanley et al., Environmental Economics in Theory and Practice 29 (1997). Other overlapping rationales that explain environmental problems include the Coase theorem (arguing that the failure or inability of institutions to establish well-defined property rights results in lack of economic incentives to prevent environmental degradation); “tragedy of the common” (arguing that when it is impossible or costly to deny access to an environmental resource, the preservation/conservation of the common resource is likely to be ignored); and Samuelson’s public goods theory (arguing that since everyone benefits from the services provided by a pure public good such as clean air, it is easy for a “free rider” to enjoy the benefits without paying for them). See generally id. at 22-57.

212 See, e.g., Spyke, supra note 3, at 271. Spyke notes that “although it may be true that the primary goal of some individuals is to convince decisionmakers to accept their solution to a problem, a secondary goal is to create feelings of self-confidence and shared control of government.” Id. Thus, the participation in the process is itself empowering and affords “a sense of control over one’s life and a feeling of political efficacy can also lead individuals to perceive the decisionmaking process as more democratic.” Id.
VI. TOWARD A NEW SOLUTION

The first step towards infusing land use decision-making processes with meaningful and inclusive public participation is to favor comprehensive plans, like the two examined above, over ad hoc zoning.213 The idea of comprehensive planning has long been considered integral to the idea of zoning and, within the province of state and local governments, as responsive to community needs.214 The Department of Commerce’s Standard Zoning Enabling Act (“SZEA”) of 1922 required that land use decisions be made “in accordance with a general plan.”215 Soon after the

213 See New York City Department of City Planning, 197-A Plan Technical Guide 7 (1997). The Technical Guide suggests that the 197-a process will work and be effective over time if the community offers its consensus on the principles that should guide future land use. Id. Those principles will in turn serve as a guide for the agencies and individuals in decision-making positions about the neighborhood. Id. Furthermore, the strong community support will convince those decision makers that the actions proposed by the community are necessary. Id. at 8.

214 See, e.g., Euclid v. Ambler Realty, 272 U.S. 365 (1926). Euclid involved a challenge to the comprehensive plan for the Village of Euclid, Ohio that regulated and restricted the location, size, and height of the companies, industries, apartment buildings, two-family houses, and single-family houses. Id. at 380. An owner of unimproved land within the corporate limits of the village, sought the relief upon the ground that, because of the building restrictions imposed, the ordinance operated to reduce the normal value of his property, and to deprive him of liberty and property without due process of law. Id. at 383-84. The Court noted that:

[i]f the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts.

Id. at 393, quoting State v. City of New Orleans, 97 So. 440 (La. 1923).

COMMUNITY PLANNING

SZEA was enacted, general plans were deemed inflexible and disruptive to growth. See, e.g., Lon L. Fuller, Freedom—A Suggested Analysis, 68 HARV. L. REV. 1305 (1955). Fuller offers narratives that explain the inflexibility inherent in the government planning of economic activity. Id. at 1325. One example is the planning of a road. Id. He claims that, while planning the road in advance would be beneficial in some respects, such as the ability to bring in experts to devise the best route, it would also have drawbacks because the planning would not take into account future utilization of the road. Id.

The Department of Commerce’s Standard Zoning Enabling Act (SZEA), first published in 1922 and adopted by most states over the next few years, required that local land use controls be “in accordance with” a general plan. Id. at 848. A general plan developed by each community considers its own locally defined goals and is then utilized to direct and guide future decisions affecting land use within that community. Id.

Courts have not consistently expressed a preference for one form over the other. Indeed, at least one state court went so far as to practically endorse “wait and see zoning.” See Snyder v. Bd. of County Comm’rs, 595 So.2d 65 (Fla. Dist. Ct. App. 1991) (finding individual rezoning requests, essentially ad hoc piecemeal re-zoning, legislative in nature and thus subject to deferential review by the courts).

See Bd. of County Comm’rs v. Snyder, 627 So. 2d 469 (Fla. 1993) (quashing a lower court finding that ad hoc zoning request should be given deferential review by courts). The problem with deferring to ad hoc zoning

Piecemeal Land Controls as Problem of Local Legitimacy, 71 CALIF. L. REV. 839 (1983) [hereinafter Rose, Planning and Dealing]. Rose notes that:

[the planning idea is not new, although it has only recently been taken seriously. In fact, the preference for 'structured' land decisions harks back to one of the oldest methods of assuring both fairness and due consideration in local land use regulation. The Department of Commerce’s Standard Zoning Enabling Act (SZEA), first published in 1922 and adopted by most states over the next few years, required that local land use controls be “in accordance with” a general plan. Id. at 848. A general plan developed by each community considers its own locally defined goals and is then utilized to direct and guide future decisions affecting land use within that community. Id.]

216 See, e.g., Lon L. Fuller, Freedom—A Suggested Analysis, 68 HARV. L. REV. 1305 (1955). Fuller offers narratives that explain the inflexibility inherent in the government planning of economic activity. Id. at 1325. One example is the planning of a road. Id. He claims that, while planning the road in advance would be beneficial in some respects, such as the the ability to bring in experts to devise the best route, it would also have drawbacks because the planning would not take into account future utilization of the road. Id.

217 See, e.g., Edward J. Sullivan & Thomas G. Pelham, The Evolving Role of the Comprehensive Plan, 29 URB. LAW 363 (1997) (noting that ad hoc zoning, “affect[s] the land of the few without proper regard to the needs or design of the community as a whole”). The essential purpose of the requirement that rezoning be in accordance with a comprehensive plan is to guard against ad hoc zoning, or “wait and see” zoning, which allows for small parcels to be rezoned one at a time. Id.

218 See Snyder v. Bd. of County Comm’rs, 595 So.2d 65 (Fla. Dist. Ct. App. 1991) (finding individual rezoning requests, essentially ad hoc piecemeal re-zoning, legislative in nature and thus subject to deferential review by the courts).

219 See Bd. of County Comm’rs v. Snyder, 627 So. 2d 469 (Fla. 1993) (quashing a lower court finding that ad hoc zoning request should be given deferential review by courts). The problem with deferring to ad hoc zoning
of a comprehensive plan remains the norm. Such plans, especially when they result from an inclusive process, do more to foster public participation and simultaneously decrease the potential for corruption because of the diversity of opinions shaping the decisions. Some argue that ad hoc zoning, in contrast, is vulnerable to domination by factions.

Ad hoc zoning does include a degree of public participation, but this participation is more likely to be at the decision-making stage when developers are attempting to obtain variances or special use permits. At this point, public opposition to the
rezoning is not economically efficient because it can result in delay or abandonment of a project in which developers and businesses are already invested.\textsuperscript{224} The form of inclusive participation that results in building consensus and empowering citizens directs attention to the process itself. Although Vinegar Hill’s process may seem like an example of successful public participation, it qualifies only insofar as residents are concerned.\textsuperscript{225} To be sure, public hearings are a form of public participation. It is troublesome, however, that the public hearings did not generate meaningful dialogue or affect the decision-making process, because the strong opposition by area business was virtually ignored.\textsuperscript{226} Vinegar Hill’s process, though

\textit{Review: Self Regulation in Environmental Law}, 16 \textit{Cardozo L. Rev.} 465 (1994). In the course of an “environmental review process,” the lead agency initially determines whether the specific project sought to be pursued will have a substantial environmental impact. \textit{Id.} The findings are presented to the agency and rigorous debate ensues among the related entities. \textit{Id.} This phase of the process is not open to the public. \textit{Id.} at 489. However, agency rules often require public participation with zoning variances and condemnation, in the course of which relevant environmental factors are often raised. \textit{Id.} For further analysis of regulation of the zoning process, \textit{see} Michel Gelobter, \textit{The Meaning of Urban Environmental Justice}, 21 \textit{Fordham Urb. L.J.} 841, 845 (1994) (discussing how both urban and rural areas have rules to regulate the balancing of exchange and use values of land, but cities have many more rules that factor into weighing these values, including public participation in variances to them).

\textsuperscript{224} \textit{See} John Vranicar, \textit{Streamlining Land Use Regulation: A Guidebook for Local Governments} 4-7 (1980) (considering problems with zoning systems, including that of “wait and see zoning,” zoning used to discourage homebuilding, delays and complicated rules for applications, and the turning of land use into a “lawyers’ game”).

\textsuperscript{225} \textit{See supra} Part IV.A (indicating that Vinegar Hill’s zoning process was largely a product of residential participation, at the exclusion and expense of commercial and industrial interests).

\textsuperscript{226} \textit{See} Lentz, \textit{supra} note 90. Lentz notes that the plan to rezone Vinegar Hill has been met with displeasure by many of the industrial inhabitants of the area, because it overtly favors local homeowners. \textit{Id.} The proposed zoning plan was initiated to protect residents from further industrial and commercial expansion. \textit{Id.} The city’s plan seeks to prevent more waste treatment stations from occupying Vinegar Hill to ameliorate some of the concerns of its residents. \textit{Id.} Conversely, local commercial entities fear this plan will hinder
successful in some respects, is reminiscent of a more individualized rezoning request and not a model for consensus building.

In contrast, consensus building was one of the main visions of Greenpoint’s plan:

The Greenpoint 197-a Plan identifies planning and development strategies that respond to the needs of the Greenpoint community and build on its assets. The Greenpoint Waterfront Committee, working together with local community groups and organizations, prepared the plan which reflects a consensus of different neighborhood interests. Through public forums, workshops, discussions, petitions, and local newspapers, collaboration between community-based groups, merchants, residents, manufacturers, new and old immigrants, and the young and the old began to revitalize the community by means of this local planning process.227

Evidence of an inclusive process is found in the unanimous consent for the plan from all groups: industry, businesses, homeowners and renters.228 The ultimate unanimity does not indicate that the process was easy. Rather, it highlights the important work that is done when all affected groups come together to determine the optimal usage for land in their neighborhoods.229 Such consensus building is much more likely to future business growth and eventually force them out of the community. Id. Currently, Vinegar Hill is zoned for manufacturing, with a majority of the homes listed as nonconforming uses. Id. The proposal would effectively rezone the area to make it predominately residential. Id.

227 PROPOSED GREENPOINT 197-A, supra note 109, at 6.

228 See supra note 172 (quoting the plan’s assertions, as well as first-hand accounts, of unanimity); see also Dennis Hamill, Writer’s a Fighter for Greenpoint, DAILY NEWS, Mar. 26, 2000, at 8 (detailing the activism of members of the Greenpoint community in forming the Greenpoint 197-a Waterfront Committee and suggesting reasons why these groups approved the Greenpoint Plan).

229 See, e.g., Lynn E. Blais, Environmental Racism Reconsidered, 75 N.C. L. REV. 75 (1996). A more inclusive process for land use decisions is recommended if a community’s process for comparing risks and benefits fails to capture all of the considerations believed to be relevant to its residents. Id.
COMMUNITY PLANNING

occur when the entire neighborhood is at issue rather than through piecemeal “wait and see” zoning.\textsuperscript{230}

The result of Greenpoint’s consensus building was an innovation proposal for mixed-use zoning which holds industry to performance-based standards.\textsuperscript{231} The plan rejects the notion that industry is categorically inconsistent with environmental health.\textsuperscript{232} Instead of exacerbating the divide between jobs and the environment or residents and industry, the Greenpoint community took responsibility for its industrial sites, recognized the large portion of residents whose livelihood depended on that industry, and incorporated industry’s needs into the plan.\textsuperscript{233}

The mixed-use zones proposed by the Greenpoint plan are to be preceded by performance-based standards that are meant to “guarantee that any enterprise that locates or functions in Greenpoint meets the highest environmental standards and

\begin{itemize}
\item \textsuperscript{230} See Rose, Planning and Dealing, supra note 215, at 841-42 (noting that piecemeal changes appear to have little effect outside the individual developer and the property’s neighbors, but that the effects have a significant “cumulative effect”). See also Spyke, supra note 3, at 296 (noting that “piecemeal enactment of federal laws has left the nation with a patchwork quilt of legislation.”).
\item \textsuperscript{231} See PROPOSED GREENPOINT 197-A, supra note 109 (discussing how collaboration between community-based groups, merchants, residents, manufacturers, and people of different demographic groups, relying upon public forums, workshops, petitions, and advertisements in local newspapers, resulted in a decade of planning and developing strategies to respond to the needs of the entire Greenpoint community through communication, negotiation, and eventually consensus).
\item \textsuperscript{232} Id. at 32. The plan promotes industrial development while simultaneously initiating conservationist and other environmental programs that work in conjunction with the new development. Id. The plan advocates “sustainable development,” defined as development that “maintains or enhances economic opportunity and community well-being while protecting and restoring the resource base and the life support systems upon which people and economies depend.” Id. This sustainability plan includes “integration of conservation and development efforts” and “maintaining ecological integrity.” Id. One example proposed in the plan is the promotion of tree planting, park creation, and the regreening of industrial zones. Id.
\item \textsuperscript{233} Id. at 35.
\end{itemize}
contributes to improving the area’s quality of life." The community would use tools like mandatory demonstration of ability to comply and good-neighbor agreements to implement such standards. Under this model, mixed-use zones become opportunities for both business and residential expansion, while at the same time bringing conversions and nonconforming uses into conformance.

Greenpoint’s process provides an excellent example of an innovative plan that reflects the needs of all members of the community. Reliance on mixed-use districts breathes new life into abandoned manufacturing zones along Brooklyn’s waterfront, and simultaneously retains the businesses and industry that are vital to many of the working class residents. The plan also encourages future compromise between residents and industry by performance standards developed in conjunction with good neighbor agreements. Instead of forcing out less desirable industry, it creates innovative monitoring stations in conjunction with the New York City Department of Environmental Protection. The monitoring stations would educate the public about environmental effects of the industry while measuring air and water quality to ensure compliance with existing regulations. Additionally, the plan provides for commercial

234 Id. at 32.
235 Id. Mandatory demonstration of ability and the Good Neighbor Agreements Program would guarantee community oversight of local industries in order to increase the performance standards at which local industries operate. Id.
236 These standards would of course have to allow for reasonable industry, so that the compromise does not disappear into the details. See PROPOSED GREENPOINT 197-A, supra note 109, at 56 (noting that the plan seeks to promote residential and economic development while protecting Greenpoint’s ecological balance).
237 PROPOSED GREENPOINT 197-A, supra note 109, at 42. In order to protect the residents and workers from environmental hazards, the Greenpoint plan proposes the use of environmental monitoring and education stations. These stations will be accessible to the public and located throughout the Greenpoint community. Id. Moreover, these stations will monitor air, water, and noise pollution in Greenpoint. Id.
238 Id. at 42. Monitoring systems would be in place to enforce the cleanup
COMMUNITY PLANNING

development while retaining a mix of both market rate and affordable housing units in an effort to satisfy both landlords and renters worried about gentrification.239

Nevertheless, the City Planning Commission’s response to Greenpoint’s plan focused inordinately on economic repercussions for the city and what the city’s role and expenses would be in implementing aspects of the plan.240 The Commission seemed most concerned about the aspects of the plan that could inhibit future industrial sites in the neighborhood.241 This response reflects an economic approach to decision making and indicates reliance on a short-term cost-benefit analysis rather than a long-term approach that would recognize the benefits inherent in a participatory process.242 Such a response undermines the importance of the planning process, and instead removes the

of the Mobil Oil Spill, develop an aggressive and sustained greening program, enforce existing air pollution controls, and enforce existing regulatory rules for currently polluting industries. Id.

239 Id. at 33; Handhart Interview, supra note 18 (discussing the need to account for the demands and fiscal realities of landlords as well as renters).

240 Handhart Interview, supra note 18. Other questions included where the waste would be deposited and to what extent the city policy would alter concerning the effective zoning regulations. Id.

241 Id. The commission’s concerns about the inhibition of industrial development in the neighborhood appears unwarranted. Greenpoint’s manufacturing zones lie in close proximity to its residential core. Id. Greenpoint desires to limit industrial expansion to those businesses that enter into “good neighbor agreements,” demonstrating that they can meet strict environmental performance standards. Id. An improved quality of life and healthy environment can generate future jobs. Id. The commission may also be concerned that the restrictions and regulations on traffic could deter development. Id.

242 It should be noted that the Commission could have been concerned about the possibility of Greenpoint’s plan being rooted in NIMBYism, but this explanation is unlikely, given the presence of industrial sites included in the plan. See PROPOSED GREENPOINT 197-A, supra note 109, at 38 (recommending, for example, that a plan “retain New town Creek as a ‘Significant Maritime and Industrial Zone’ and an Industrial Sanctuary”). Also, the Commission made reference to no such concerns with respect to Vinegar Hill, which tends to show that something else is driving the Commission. See NYC ZONING STUDY, VINEGAR HILL, supra note 56 (making no reference to NIMBYism).
people from their government.

VII. PROPOSED LEGISLATIVE CHANGE

Some planners and scholars have begun to think beyond short-term economics when it comes to planning decisions, providing models that can serve as guides to encourage development of neighborhood plans. One such example proposes creating community-building initiatives by combining public, private and community resources. For example, in Richmond, Virginia the Department of Community Development created a Division of Neighborhood Planning that “collaborates with residents, property owners, businesses, institutions and other city agencies to develop revitalization plans for specific neighborhoods that will serve as amendments to the City of Richmond Master Plan.”

243 One example uses private foundations as sponsors for comprehensive community planning initiatives. See, e.g., MUNICIPAL ART SOCIETY, THE WILL TO PLAN: COMMUNITY-INITIATED PLANNING IN NEW YORK CITY at 21 (noting that in addition to the contributions of private organizations, individual experts often “helped the board prepare the plan for less by donating a great deal of their time”). A second model creates federally funded partnerships between universities and communities. See e.g. Federal Funding Available for Environmental Justice Issues in The Bronx, N.Y. VOICE, Aug. 16, 1995. The Community/University Environmental Justice Grant awarded $299,939. Id. The Hostos Community College provided matching funds, making the total grant $328,939. Id.

244 See, e.g., MAS, STATE OF 197-A PLANNING, supra note 26, at 5 (reviewing and outlining this proposed method for encouraging community participation). Examples of this method can be found in Richmond, Virginia, Milwaukee, Wisconsin, and Portland, Oregon.

245 Id. at 7. There are several goals for housing and neighborhood development in Richmond, including: developing commercial and retail projects in designated areas to prevent encroachment into residential communities; building “cooperative relationships with city schools, community-based organizations, public facilities, and city government” to improve education, city image, and neighborhood vitality; and eliminating substandard housing while preserving architectural, historic, and cultural heritage. For a full review of Richmond’s city plan, including background information, goals and methods to include community input for housing and
uses Community Development Block Grant money to finance its Neighborhood Strategic Planning initiative that “serves as the mechanism for the development of comprehensive, community-based, long-term strategic plans for 17 planning areas in the City of Milwaukee.”246 Drawing leadership from the communities, the Milwaukee initiative utilizes the city’s technical and financial resources in its inclusive planning process.247 Portland, Oregon uses a “Community and Neighborhood Planning Program” to update its comprehensive plan.248 This program divides the city


246 For a full review of Milwaukee’s efforts and goals in implementing this program, see generally City of Milwaukee Community Development Block Grant Program, available at http://www.ci.mil.wi.us/citygov/doa/admin/cbga.htm (last visited Jan. 6, 2003) [hereinafter City of Milwaukee Website]. The Community Block Grant Administration “is responsible for applying for recommending the allocation of, and overseeing the effective use of approximately $30 million of federal funds or programs in targeted central city neighborhoods.” Id. “It is used for housing rehab programs, special economic development related to job and business development, and public service programs such as crime prevention, job training, housing for homeless, youth recreation programs and community organization programs.” Id. “The CDBG office works collaboratively with nonprofit groups, government agencies, and public/private coalitions to coordinate activity that increases home ownership and property values, reduces crime, and promotes greater employment and business activity.” Id. See also MAS, STATE OF 197-A PLANNING, supra note 26, at 7 (acknowledging the existence of this method of planning).

247 See generally City of Milwaukee Website, supra note 246, for a discussion of the inclusive nature of Milwaukee’s procedures. Milwaukee’s Community Block Grant Administration “is responsible for applying for, recommending the allocation of, and overseeing the effective use of approximately $30 million of federal funds or programs in targeted central city neighborhoods.” Id. The office “works collaboratively with nonprofit groups, government agencies, and public/private coalitions to coordinate activity that increases home ownership and property values, reduces crime, and promotes greater employment and business activity.” Id. To date, the office has worked with community leaders to develop neighborhood strategic plans in seventeen neighborhood planning areas. Id.

248 See generally City of Portland, Oregon, Bureau of Planning, available
into districts and encourages a participatory process in designing each district’s comprehensive community plan, focusing on both the neighborhood’s immediate and long-term goals as well as ongoing regional and citywide efforts. All of these programs encourage community involvement and help forge respectful relationships between city agencies and community groups. Although these programs are all relatively new, they indicate an interest in regulation directed toward encouraging, and sponsoring, comprehensive community planning.

This article draws on administrative law doctrines to propose legislative reforms that would place public participation at the forefront of the land use decision-making process. This

---

249 See generally COMPREHENSIVE PLAN GOALS AND POLICIES, City of Portland, Oregon, Bureau of Planning, 12-16 (1999), available at http://www.planning.ci.portland.or.us/pdf/ComprehensivePlan.pdf (last visited Jan. 6, 2003) (describing how Portland’s Bureau of Planning staff held meetings with neighborhood associations, civic groups, and trade organizations to discuss their concerns, and revised the planning process to incorporate their concerns). Citizen involvement in land use planning is mandated in Oregon state. See also OREGON’S STATEWIDE PLANNING GOALS AND GUIDELINES: GOAL 1, OREGON DEP’T OF LAND CONSERVATION AND DEVELOPMENT 1, available at http://www.lcd.state.or.us/goalpdfs/goal01.pdf (last modified Nov. 1, 2002).

250 See generally Federal Administrative Procedure Act, 5 U.S.C. §§ 551-552 (2003) (mandating that government agencies make available to the public information regarding organization, function, and overall activities). The purpose of Section 552, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to disclose certain agency information for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose.
COMMUNITY PLANNING

legislation should take the form of a modified deference rule. The City Planning Commission would be required to defer to comprehensive community plans that demonstrate the inclusive nature of its process. This legislation would thus reward comprehensive plans formed by all members of a community through consensus-building techniques.

A properly structured deference rule requires standards by which to gauge the amount of consensus building in a community planning process. This can be measured by efforts such as door-to-door canvassing and distribution of planning materials, but also by examining the resulting proposed plan. For example, a mixed-use plan proposed by a community with substantial industrial and residential bases may be indicative of attempts at consensus building. The same could be said for a plan that retains a percentage of existing housing stock or requires multiple types of residential zoning to curb gentrification. All of these elements could be deemed evidence that a dialogue took place, and that the community’s voices were heard and accounted for.

This reform would equalize the ability of all communities to influence decisions and temper the City Planning Commission’s discretion to decide such matters based solely on what is most efficient for the Commission and the city. It would also prevent administrative corruption and arbitrary decision making by creating an enforceable standard of review for 197-a plans.

---

251 The deference rule is commonly applied in the courts to administrative agency decisions. See, e.g., Consolation Nursing Home, Inc. v. Comm’r of N.Y. State Dep’t of Health, 648 N.E.2d 1326, 1328 (N.Y. 1995) (“An administrative agency’s exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise”); N.Y. State Ass’n of Counties v. Axelrod, 577 N.E.2d 16, 30 (N.Y. 1991) (stating that under the usual deference rule, the “challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary”).

252 An independent, preferably elected, body could conduct a review of each plan’s process to determine its inclusiveness.

253 197-a plans are currently relegated to mere “policy guidelines” and no official standard of review is in place. See supra Part III (noting that amendments to the City Charter weakened the impact of community-sponsored
Legislative ratification of inclusive participation would create respectful working relationships between local governments and their constituents, encourage accountability and restore integrity to a democratic system. It would discourage exclusionary actions by rewarding communities that accept and integrate their fair share of essential industrial uses. This, in turn, improves community acceptance of essential, yet undesirable, land use by fostering self-determination in siting decisions, thereby reducing negative reactions to industrial land use. This article also advocates for provision of funding for community planning. Distribution of funds and resources remedies disparity in community attempts at planning by removing obstacles faced by low-income communities. Moreover, the city should be involved, financially and technically, with the community from the outset to encourage such consensus building.

The 197-a process set forth in the City Charter should be amended to include this deference rule and funding allowance. Although such participation may be less efficient in the short-term, the long-term effects of community consensus and empowerment will benefit the city by restoring legitimacy to its process. The reform’s emphasis on the process rather than the

254 See supra Part IV (discussing the adverse effects that disparity in access to financial and technical resources has had upon the relative success of the case study plans).

255 See generally N.Y.C. Charter § 197-a (setting forth the current procedure for community-sponsored plans).

256 This legislative amendment could counter some of the criticisms of the current 197-a process. For example, one weakness of 197-a plans is that they are not legally binding, and therefore can serve as nothing more than “references for decision making in a particular area.” See Jocelyn Chait, Community-based Planning: Moving Beyond the Rhetoric, at http://www.plannersnetwork.org/htm/pub/archives/147/Chait.html (May/June 2001) (noting that “[d]espite the fact that ‘197-a plans’ must go through exhaustive public review and scrutiny prior to their adoption by the City Council, they are not legally binding. At best, they serve as references for decision making in a particular area.”). Another criticism is that inadequate funding for plans leads to “inefficiencies and delays, strains the energy and resources of community residents, and ultimately leads to burnout and disillusionment.” Id. See also New York League of Conservation Voters, 197-
result would provide an immediate reward for all communities that approach the planning process inclusively and openly. These reforms would most likely withstand judicial scrutiny. It would be difficult to challenge a policy of deference as arbitrary and capricious, in light of case law and statutes supporting land use decisions made “in accordance with a general plan.”

---

257 The proposed amendment could draw on judicial standards of review applicable in cases examining compliance with public participation requirements under the Federal Administrative Procedure Act. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The Supreme Court set forth the standard of review in such cases as follows:

The generally applicable standards of § 706 [of the Administrative Procedure Act] require the reviewing court to engage in a substantial inquiry. Certainly, the [agency’s] decision is entitled to a presumption of regularity. But that presumption is not to shield [the agency’s] action from a thorough, probing, in-depth review. The court is first required to decide whether the [agency] acted within the scope of [its] authority . . . Scrutiny of the facts does not end, however, with the determination that the [agency] acted within the scope of [its] statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. The final inquiry is whether the [agency’s] action followed the necessary procedural requirements. Such a requirement would make it more likely that the amendment would be enforceable, and not merely another vague nod to public participation.

Id. at 415-17.

258 See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (validating a zoning ordinance based upon its comprehensive plan for the community); City of Renton v. Playtime Theatre, Inc., 475 U.S. 41 (1985) (holding a zoning ordinance to be valid since it was designed to promote the interests of the city); Wulfsohn v. Burden, 150 N.E. 120 (N.Y. 1925) (upholding a zoning regulation that promoted the general needs and values of
Furthermore, laws that encourage public participation in land use advance a legitimate governmental interest by restoring democracy and consistency to the decision-making process.259 Because an adopted plan would remain a policy guide, the city would not be bound to the plan if implementation would have undue detrimental effects on neighboring communities or on the city as a whole.260 In the event that the city were to adopt neighboring 197-a plans that conflict at some future point, the city could retain authority to mediate and decide the best course of action after conducting public meetings to discuss mediation. Finally, if a community-sponsored plan were deemed exclusionary, it could be stricken. In short, a deference rule is just that—deferential. The city would remain in a position to rebut a presumption of deference to enforce equal protection considerations.

CONCLUSION

The 197-a process is a good starting point for democratizing land use decision making in New York City. However, as the case studies set forth above highlight, more effort must be expended to reward and encourage public participation. The City Planning Commission’s inconsistent review of 197-a plans indicates that some degree of reform is necessary. Public

259 Many statutes evince a government interest in public participation. See, e.g., N.Y. Town Law § 272-a(1) (McKinney 2003) (stating that public participation in the planning process promotes the most “optimum town comprehensive plan” for development); see also N.Y. Envtl. Conserv. Law § 27-0101 (McKinney 2003) (stating that the legislative purpose is best met when the public has knowledge and provides consent).

260 See e.g., Stanley D. Abrams, Flexible Zoning Techniques to Meet State and Local Growth Policies, 930 A.L.I. 537 (1994) (finding that flexible techniques in development plans are a more efficient way to meet the goals of community plans); Richard T. LeGates, The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area, 24 Loy. L.A. L. Rev. 1035 (1991) (discussing the effect rapid community growth has on development plans and concluding the “tempo control” allows planning goals to be met most effectively).
COMMUNITY PLANNING

participation and inclusive, consensus-building processes must be recognized as important elements of community planning. One way to recognize the importance of public participation in land use matters is for the city to make such participation more accessible by providing financial grants and planning workshops. Ultimately, however, an amendment to Section 197-a is the optimal method to mandate deference to plans developed through an inclusive community process. Such reform is the most effective means to encourage public participation and remove a degree of the City Planning Commission’s power to permit purely political or economic factors to control land use decision making.
I DID NOT WANT TO KILL HIM BUT THOUGHT I HAD TO: IN LIGHT OF PENRY II’S* INTERPRETATION OF BLYSTONE,** WHY THE CONSTITUTION REQUIRES JURY INSTRUCTIONS ON HOW TO GIVE EFFECT TO RELEVANT MITIGATING EVIDENCE IN CAPITAL CASES

David Barron***

“We were drowning and we wanted some kind of help. And when it’s that serious for God’s sakes, when you’re pleading for help, you have to give us something, we were reasonable people, intelligent people, making a very difficult decision, asking for help.”¹

¹ See Alan Berlow, A Jury of Your Peers? Only if You’re Clueless,
INTRODUCTION

Death is unique because of its irrevocability.\(^2\) Therefore, one of the most important decisions a person can make is whether another individual should live or die.\(^3\) Although mistaken decisions could cost people their lives, throughout history juries have been free to impose the death penalty on any individual convicted of a capital crime who they believed deserved a sentence of death.\(^4\) Over the past thirty years, however, the Supreme Court has placed restrictions on who can be sentenced to death.\(^5\) In doing so, the Supreme Court clearly stated that only very serious crimes such as murder permit the jury to impose a death sentence.\(^6\) As a result, the Supreme Court imposed

\(^2\) Gregg v. Georgia, 428 U.S. 153, 187 (1976) (discussing the need for reliability in capital cases because of the finality of the sentence).

\(^3\) See Mills v. Maryland, 486 U.S. 367, 383 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make.").


\(^6\) See Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty for rape unconstitutional on the basis that a death sentence is disproportionate to the crime of rape of an adult and, therefore, constitutes cruel and unusual punishment, violating the Eighth Amendment of the United States.
INSTRUCTING MITIGATION

requirements that death penalty statutes narrow the number of people eligible for a sentence of death, \(^7\) and provide for an individualized sentencing scheme. \(^8\) An individualized sentencing scheme requires jurors, prior to sentencing a defendant to death, to consider both “aggravating” circumstances—factors making the crime worse \(^9\)—and “mitigating” circumstances—factors

---

\(^7\) See Tuilaepa v. California, 512 U.S. 967 (1994) (requiring that the circumstances permitting a sentencing body to impose a death sentence apply only to a subclass of defendants convicted of murder rather than to every defendant convicted of murder). Under Tuilaepa, the Supreme Court required limitations on the “eligibility phase,” which determines who can receive the death penalty, but refused to require limitations on the “selection phase,” which determines whether an individual defendant receives the death penalty. Id. at 973. See also Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (holding that “the use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion”); Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that to pass constitutional muster, a capital sentencing scheme must “generally narrow the class of persons eligible for the death penalty”); James R. Acker & C. S. Lanier, Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death, 29 CRIM. L. BULL. 291, 297 (1993) (noting the “eligibility phase” and the “selection phase” as the two principle limitations on capital punishment legislation).


\(^9\) While the Supreme Court does not specifically define what constitutes
an aggravating factor, the Court requires disclosure to the defense of what aggravating factors will be presented to the jury prior to the commencement of trial. Lankford v. Idaho, 500 U.S. 110, 125 (1991) (reversing a death sentence because the defendant was not given sufficient notice that he might be subjected to capital punishment); see Louis D. Bilionis, Moral Appropriateness, Capital Punishment, and the Lockett Doctrine, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991) (providing a comprehensive analysis of individualized sentencing and the effect of Lockett upon the concept of aggravation and mitigation within the context of the death penalty). While aggravating factors have not been given a legal definition by either the courts or statutes, the term has been defined as “any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences.” BLACK’S LAW DICTIONARY 65 (6th ed. 1990); see Peter Meijes Tiersma, Dictionaries and Death: Do Capital Jurors Understand Mitigation?, 1995 UTAH L. REV. 1, 12-14 (1995) (defining aggravating factors in common usage as anything that tends to annoy or bother another person and discussing the likelihood that jurors use the “common” definition during deliberations); see also, e.g., 42 P.A. CONS. STAT. § 9711 (1998).

There is no exclusive list of what constitutes an aggravating circumstance, but the most common aggravating factors include the following: whether the victim was a police officer, was being held for ransom, was killed because he or she was to testify in a criminal trial or was tortured to death; or whether the defendant hired the killer, killed while committing a felony, subjected a third person to a grave risk of death, had a history of felony convictions or had been previously convicted of another murder. Id.

10 See Franklin v. Lynaugh, 487 U.S. 164, 188 (1988) (O’Connor, J., concurring) (referring to mitigating evidence as “facts about the defendant’s character or background or circumstances of the particular offense that may call for a penalty less than death”). While there is no agreed upon legal definition of mitigating circumstances, the Supreme Court has construed the concept of mitigation more liberally than aggravation and allows almost anything to be presented to the jury as mitigation. See Bilionis, supra note 9. While mitigating circumstances have not been given a legal definition by either courts or statutes, the term has been defined as those circumstances that “do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.” BLACK’S LAW DICTIONARY 1002 (6th ed. 1990). See also infra Part II (discussing mitigation in the context of the Lockett Doctrine). See infra Part III (analyzing jurors’ failure to understand the distinction between a common usage of the term mitigation and the use of the concept of mitigation in the legal forum). Some of the most common mitigating factors include lesser involvement in the crime, physical abuse as a
INSTRUCTING MITIGATION

Nevertheless, in order for an individualized sentencing scheme to ensure that only the worst criminals are given the death penalty, the jury must know how to “give effect” to relevant mitigating evidence presented to them at sentencing.\textsuperscript{11} Accordingly, the Supreme Court has interpreted the Eighth Amendment’s prohibition of cruel and unusual punishment to mean that a jury cannot be prevented from giving effect to mitigating evidence.\textsuperscript{12} Despite the Supreme Court’s unwavering dedication to the belief that a death sentence should be determined based upon consideration of aggravating and mitigating circumstances,\textsuperscript{13} cases such as \textit{Blystone v. Pennsylvania},\textsuperscript{14} as well as empirical studies,\textsuperscript{15} demonstrate that child and mental retardation, as well as defendant’s age, poverty and a lack of a criminal record.

\textsuperscript{11} See \textit{Penry v. Johnson}, 532 U.S. 782, 789-90 (2001) (referring to “giving effect” to mitigating evidence in terms of deciding how much weight the mitigating factors deserve and considering mitigating evidence in assessing the defendant’s personal culpability for the crime for which the defendant was convicted).

\textsuperscript{12} See \textit{McKoy v. North Carolina}, 494 U.S. 433 (1990) (holding that a death penalty statute cannot require juries to unanimously find the existence of mitigating evidence prior to considering whether the mitigating evidence is strong enough to spare the defendant’s life); \textit{Mills v. Maryland}, 486 U.S. 367 (1988) (holding that a death penalty statute cannot require juries to unanimously find the existence of mitigating evidence prior to considering whether the mitigating evidence is strong enough to spare the defendant’s life); \textit{Lockett v. Ohio}, 438 U.S. 586 (1978) (reversing the death sentence of a defendant who merely drove the getaway car during a robbery and murder because the applicable statute did not permit the jury to consider the defendant’s lesser involvement in the crime).

\textsuperscript{13} See, \textit{e.g.}, \textit{Buchanan v. Angelone}, 522 U.S. 269 (1998) (refusing to require jury instructions on particular mitigating factors, but reaffirming that a death sentence should be based upon a consideration of both aggravating and mitigating circumstances).

\textsuperscript{14} 494 U.S. 299 (1990) (upholding a death sentence despite both the jury’s expressed confusion about the definition of mitigation and desire not to impose a death sentence). See also infra Part III (discussing confused jurors in capital cases).

\textsuperscript{15} See, \textit{e.g.}, Bethany K. Dumas, \textit{Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues}, 67 TENN. L. REV. 701 (2000) (discussing juries’ lack of comprehension and suggesting ways to correct the
defendants may lose their life not for the crime they committed, but because the jury failed to comprehend the law and did not receive the guidance necessary to adequately evaluate mitigating factors. As a result, cases exist where the jury believed the defendant did not deserve the death penalty, but, nonetheless, imposed the death penalty mistakenly believing they either had found no mitigation or that the particular mitigating evidence was not legally sufficient to spare the defendant’s life.16

In 

Blystone

, the Pennsylvania death penalty statute, which requires a jury to impose a death sentence upon the finding of no problem). The author points out that “[s]yntactic and semantic bars to juror comprehension . . . can be made more comprehensible by simplifying sentence structure and by giving additional information about the meanings of abstract terms.” Id. at 701; see also Craig Haney, Taking Capital Jury Seriously, 70 IND. L.J. 1223 (1995) (discussing the reasons why juries impose the death sentence).

Th[e] decision-making process is . . .

governed by confusion, lack of understanding and even chaos. Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operations of capital punishment—sometimes unclear about the fundamental importance of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating).

Id. at 1224-25; Marla Sandys, Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines, 70 IND. L.J. 1183 (1995) (discussing the reasons why juries impose the death sentence).

16 Blystone, 494 U.S. at 312 n.3 (Brennan, J., dissenting) (describing the jury’s repeated requests for clarification); see also Prelim. Pet. for Writ of Habeas Corpus for Pet’r Blystone, Blystone v. Horn, No. 99-490 (W.D. Pa. filed Mar. 28, 2000). The jury asked the judge if they had to impose the death sentence if they found no mitigating factors. Id. at 68-69. Arguably, the jury’s repeated questions demonstrate not only a misunderstanding of the law but also a feeling that the aggravating circumstance was not severe enough to impose a death sentence. See Stephen P. Garvey et al., Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases, 85 CORNELL L. REV. 627 (2000) (discussing the jury’s ability to understand the law as stated in actual capital cases as compared with revised mock jury instructions and explaining the implications of the results).
mitigating factors but at least one aggravating factor,\textsuperscript{17} passed constitutional muster because the statute allowed the jury to take into account any and all factors about the defendant or the crime when considering mitigation.\textsuperscript{18}

Recent developments reaffirmed the notion that in addition to permitting juries to consider mitigating evidence, juries must have both the opportunity and the means within the law to consider and give effect to relevant mitigating evidence.\textsuperscript{19} In \textit{Penry II}, the Supreme Court held that the mere existence of a statute or a jury instruction allowing the jury to \textit{consider} all mitigating evidence is not necessarily enough to permit the jury to \textit{give effect} to the relevant mitigating evidence.\textsuperscript{20} Despite this notion, nothing has been done to correct the continuing problem of juries sentencing defendants to death under the mistaken belief they have not found the necessary mitigation to spare the defendant’s life.\textsuperscript{21}

This note focuses on the effect \textit{Penry II} has upon \textit{Blystone} and subsequent cases, and discusses situations in which the jury either was confused about mitigation or expressed a desire to sentence the defendant to life in prison, but nonetheless imposed a death sentence. This note does not argue that the U.S. Constitution requires courts to give all capital juries specific instructions on the law of mitigation or how to determine when

\textsuperscript{17} 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (1998) (requiring that “the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.”). Mitigating circumstances “include[] any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” \textit{Id.} at (e)(8).

\textsuperscript{18} \textit{Blystone}, 494 U.S. at 304; see also 42 Pa. Cons. Stat § 9711(c)(1)(iv) (1998).

\textsuperscript{19} \textit{See} Penry v. Johnson, 532 U.S. 782 (2001) (reversing defendant’s death sentence because the judge’s instructions did not permit the jury to consider and give effect to evidence of the defendant’s mental retardation).

\textsuperscript{20} \textit{Id.} at 793-96.

\textsuperscript{21} Research has found no statutes that have been amended or adopted to address what should be done when a jury appears confused on whether they found any mitigation.
mitigation exists. Rather, this note argues that, in light of Penry II, the U.S Constitution requires that a jury receive instructions and guidance on what constitutes mitigating evidence and how to proceed once they have found mitigating evidence when the jury expresses confusion about mitigation or a desire not to sentence the defendant to death.

Part I of this note provides a comprehensive overview of death penalty jurisprudence in the United States, from Furman v. Georgia to the present, and includes a discussion of guided discretion, individualized sentencing and mitigation. Part II

---

22 See Buchanan v. Angelone, 522 U.S. 269 (1988) (holding juries do not have to be instructed on the concept of mitigating evidence or a particular statutory mitigating factor). But see STATE OF ILLINOIS, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 141 (2002) [hereinafter, REPORT OF THE GOVERNOR’S COMMISSION] (suggesting revisions to the Illinois pattern jury instructions, to include providing detailed explanations of the concept of mitigation), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html. The high number of misconceptions by capital jurors demonstrates that instructing juries on the concept of mitigating evidence might be the better practice. See infra Part III (discussing both empirical studies pertaining to jury comprehension in capital trials and cases where the jury asked the judge for assistance in understanding the complicated terminology applicable in capital cases).

23 Cf. Buchanan, 522 U.S. at 272 (dealing with jury instructions when there is no evidence that the jury was either confused or desired to spare the defendant). The Supreme Court has never directly ruled on a judge’s duty to ensure that constitutional mandates for capital sentencing are upheld when the jury expresses either a desire to spare the defendant’s life or confusion pertaining to mitigation. See Berlow, Deadly Decisions, supra note 1 (referring to comments made by Paula Hannaford of the National Association of State Courts). Arguably, juries misunderstanding instructions lead to arbitrary death sentences, violating Furman v. Georgia, 408 U.S. 238 (1972).

24 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty in thirty-nine states, the District of Columbia, and the federal government by holding the death penalty as applied within the United States was unconstitutional because it allowed the sentencing body to arbitrarily impose a death sentence).

25 See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (describing guided discretion as directing and limiting the sentencing bodies’ authority to impose a death sentence in order to minimize the risk of arbitrary and capricious sentences); see also Lief H. Carter, Capital Punishment, in THE OXFORD
INSTRUCTING MITIGATION

discusses the Blystone and Penry II decisions. Part III demonstrates, through the analysis of empirical studies, that juries often do not understand how to give effect to mitigation. Part IV analyzes the effect of Penry II upon the future of capital punishment jurisprudence. Part V provides a brief summary on what the law now requires regarding jury instructions pertaining to mitigating evidence and what can be expected in the future. This note concludes that juries must be given specific guidance when the jury repeatedly expresses confusion on either the meaning of mitigation, how to determine whether mitigation exists, or what to do when mitigation has been found.

I. OVERVIEW OF DEATH PENALTY JURISPRUDENCE

Currently, thirty-eight states and the federal government sanction the death penalty as punishment for certain types of murder. A moratorium on executions exists in two of these states, and two judges have held the federal death penalty

COMPANION TO THE SUPREME COURT OF THE UNITED STATES 126 (Kermit L. Hall ed., 1992). Guided discretion can be defined as “statutory sentencing standards to guide sentencing bodies in making capital punishment decisions.” Id.


27 For a complete, current list of state death penalty statutes, see Death Penalty Information Center, State by State Death Penalty Information, at http://www.deathpenaltyinfo.org/firstpage.html (last visited Nov. 15, 2002). The states that sanction the death penalty are as follows: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Id.

28 See REPORT OF THE GOVERNOR’S COMMISSION, supra note 22. After discovering that more innocent people had been released from death row than
unconstitutional.\textsuperscript{29} The other twelve states and the District of Columbia do not permit the death penalty.\textsuperscript{30} Currently, guidelines must be followed prior to imposing a death sentence.\textsuperscript{31} For example, a death penalty statute must narrow the class of people eligible for the death penalty,\textsuperscript{32} and a jury must be able to give effect to relevant mitigating evidence.\textsuperscript{33} These guidelines, which are relatively new developments resulting from an evolving interpretation during the past quarter century of the Eighth Amendment’s prohibition against cruel and unusual punishment,

had been executed over the past twenty-four years, Illinois Governor George C. Ryan imposed a moratorium on executions beginning in 2000. \textit{Id. See also} Death Penalty Information Center, \textit{Innocence: Freed from Death Row}, \textit{at} http://www.deathpenaltyinfo.org/innoc.html (last visited Nov. 15, 2002). The problem in Illinois also plagues the entire country, as evidenced by the 102 wrongly convicted individuals released from death row since 1973. \textit{Id. See also} Press Release, State of Maryland Governor’s Press Office, Governor Glendening Issues a Stay of Execution in the Case of Wesley Eugene Baker (May 9, 2002) (staying one execution and stating an intent to stay all executions pending the release of a report detailing death penalty research conducted by the University of Maryland), \textit{at} http://www.gov.state.md.us/gov/press/2002/may/html/baker.html.

\textsuperscript{29} See United States v. Quinones, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002). In light of developing forms of technology, Judge Rakoff held the federal death penalty violates the Fifth Amendment of the United States Constitution because the finality of the death penalty deprives death row inmates of the procedural opportunities to prove their innocence as mandated by the Fifth Amendment’s Due Process Clause. \textit{Id. See also} United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002) (finding the Federal Death Penalty Act unconstitutional).

\textsuperscript{30} See Death Penalty Information Center, \textit{State by State Death Penalty Information}, \textit{supra} note 27. The states that do not permit the death penalty are as follows: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. \textit{Id.}

\textsuperscript{31} See, \textit{e.g.}, Gregg v. Georgia, 428 U.S. 153 (1976) (holding that Georgia’s “threshold” death penalty statute dispels with the \textit{Furman} concerns about arbitrarily and capriciously imposed death sentences).

\textsuperscript{32} See \textit{supra} note 7 (citing Supreme Court cases and secondary authority discussing class narrowing and individualized sentencing).

are constantly expanding.\textsuperscript{34}

\textbf{A. The Road to a New Error in Capital Punishment Jurisprudence}

Prior to 1972, the Supreme Court rarely discussed the death penalty in terms of cruel and unusual punishment.\textsuperscript{35} In 1972, in \textit{Furman v. Georgia}, the Supreme Court’s changing view on both the gravity of the death penalty and the analysis that would be applied in future capital cases became evident.\textsuperscript{36} For the first time, the Supreme Court applied the Eighth Amendment to invalidate capital sentencing statutes for violating the prohibition against cruel and unusual punishment.\textsuperscript{37} The Supreme Court was sharply divided on the reason for invalidating the statutes. This resulted in each justice writing an opinion, making \textit{Furman} one

\textsuperscript{34} See Trop v. Dulles, 356 U.S. 586 (1978) (establishing the evolving standards of decency method for determining cruel and unusual punishment and reversing a death sentence when the state law prevented the sentencing body from considering evidence of the defendant’s lesser involvement in the murder); see also infra Part IV (analyzing the meaning of “giving effect to relevant mitigating evidence”).

\textsuperscript{35} See Louisiana \textit{ex rel.} Francis Resweber, 329 U.S. 459, 463 (1947) (approving repeated electrocutions when the first attempt failed); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (approving public firing squads); Bedau, \textit{supra} notes 4, 5 (discussing the history and evolution of the death penalty within the United States).

\textsuperscript{36} 408 U.S. 238 (1972) (per curiam). In \textit{Furman}, the issue was the constitutionality of state death penalty statutes that permitted the jury to impose a sentence of anything from a brief term of years to death when the defendant had been convicted of either murder or rape. \textit{Id.}

\textsuperscript{37} \textit{Id.} at 239-40. “If the death penalty is limited by the fourteenth amendment’s equal protection clause as are other laws in this country then selectivity based on unpopular defendants is unconstitutional” because imposing the death penalty on a particular class of people violates the desire for equality that was implicit within the ban on cruel and unusual punishment. Jason M. Schoenberg, \textit{Making the Constitutional Cut: Evaluating New York’s Death Penalty Statute in Light of the Supreme Court’s Capital Punishment Mandates}, 8 \textit{J.L. & POL’Y} 337, 345 n.43 (1999); see U.S. CONST. amend. VIII (“nor [shall] cruel and unusual punishment [be] inflicted”).
of the longest Supreme Court opinions ever written. Moreover, the Court only addressed the statutes as applied rather than the constitutionality of capital punishment on its face. Despite the differing opinions, *Furman* invalidated all death penalty statutes throughout the country.

**B. The Beginning of Modern Death Penalty Jurisprudence**

Within four years of *Furman*, many states rewrote their death penalty statutes. Accordingly, cases began to appear before the Supreme Court challenging the constitutionality of three different types of statutes. The first type of statute, commonly referred to as a “weighing” type of “guided discretion,” requires the

The statutory schemes of Oregon and Texas do not fit within the categories of weighing or non-weighing statutes but have been held constitutional by the United States Supreme Court. See OR. REV. STAT. § 163.150 (1997); TEX. CRIM. PROC. CODE ANN. art. 37.01-.071 (Vernon 1992).
aggravating circumstance. Then, assuming the jury finds a statutory aggravator, the sentencing body must weigh the aggravating circumstances against the mitigating circumstances to determine whether the former outweighed the latter. The second type of statute is also a form of guided discretion but is considered to be a “threshold statute.”

---

44 See supra note 9 (discussing the meaning of aggravating circumstances); see also infra note 47 (citing Georgia’s threshold death penalty statute and discussing the meaning of “statutory aggravating circumstance”).

45 See supra note 10 (discussing the meaning of mitigating circumstances); see also Proffitt v. Florida, 428 U.S. 242 (1976) (upholding the constitutionality of a “weighing” statute).

INSTRUCTING MITIGATION

As in the “weighing” statute, the sentencing body is required to find the existence of at least one statutory aggravating circumstance, and it must consider aggravating and mitigating factors prior to imposing a death sentence. Yet, instead of weighing the aggravating factors against the mitigating factors, a “threshold” statute permits the jury to spare the defendant’s life for any or no reason at all. The third type of death penalty statute made the death penalty mandatory for certain types of crimes, such as murder in the first degree.

In reaching a decision on the constitutionality of these statutes for the first time, the Supreme Court, in a one paragraph per curium opinion, held that “the punishment of death does not invariably violate the Constitution.” In reviewing the “threshold” statute and the “weighing” statute, the Supreme Court concluded that the concern in Furman, exemplified by Justice Stewart’s statement that the death penalty was “wantonly
and freakishly imposed,”52 would be resolved as long as the sentencing body was given “adequate information and guidance.”53 In analyzing how this could be accomplished, the Supreme Court suggested a bifurcated proceeding,54 which would allow the sentencing body to first determine guilt and then, assuming the defendant was found guilty, determine the sentence in a separate proceeding.55

The Supreme Court reached a different conclusion on the constitutionality of mandatory death sentences in Woodson v. North Carolina56 and Roberts v. Louisiana.57 In invalidating this type of sentencing scheme, the Supreme Court realized the “need for reliability in the determination that death is the appropriate

52 Furman, 408 U.S. at 310 (Stewart, J., concurring).
53 Gregg, 428 U.S. at 195.
54 Id. The twin objectives of consistency and individuality are “best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.” Id. See also Death Penalty Information Center, State by State Death Penalty Information, at http://www.deathpenaltyinfo.org (last visited Nov. 15, 2002). The bifurcated system is now utilized in all states that permit the imposition of the death penalty. Id.
55 Death Penalty Information Center, State by State Death Penalty Information, at http://www.deathpenaltyinfo.org/firstpage.html (last visited Nov. 15, 2002). Arizona, Colorado, Idaho, Montana and Nebraska required the judge to determine the sentence, but this was recently held to be a violation of the Sixth Amendment right to a trial by an impartial jury. See Ring v. Arizona, 122 S. Ct. 2428 (2002). Alabama, Delaware, Florida, and Indiana permit the judge to override the jury’s recommendation of life. See Death Penalty Information Center, Developments Related to Ring, at http://www.deathpenaltyinfo.org/Ring. html#cases (last visited Feb. 5, 2002). It is currently unclear as to whether these override provisions are affected by the United States Supreme Court’s decision in Ring. Nonetheless, the Florida Supreme Court has stayed two executions, in light of Ring, to allow the court to hear arguments on the Florida override system. Phil Long, Florida Supreme Court Halts Two Executions, MIAMI HERALD, July 9, 2002, at A1.
56 428 U.S. 280 (1976) (invalidating a statute requiring the death penalty for first degree murder).
57 428 U.S. 325 (1976) (invalidating a statute requiring the death penalty for first degree murder).
punishment.” The Supreme Court held that a “mandatory death penalty statute does not meet the constitutional requirement of replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing death.”

Furthermore, in *Woodson*, the Supreme Court took the reliability element of sentencing to a higher level when it discussed the concept of individualized sentencing. The Supreme Court reasoned that “mandatory death penalty statutes unconstitutionally fail to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” Thus, a mandatory death penalty statute for certain types of murder prevents the consideration of “compassionate or mitigating factors serving from the diverse frailties of humankind” and results in a “faceless, undifferentiated mass [being] subjected to the blind infliction of the penalty of death.” Therefore, the Supreme Court concluded that mandatory death sentences would be inconsistent with the “fundamental respect for humanity underlying the Eighth Amendment.”

C. Every Human Being is Unique: The Requirement of Individualized Sentencing

Individualized sentencing means that the sentencing proceeding should be based on a consideration of “relevant facets of the character and record of the individual offender” and “the
circumstances of the particular offense.” Accordingly, if properly implemented, individualized sentencing would alleviate the problem of arbitrary death sentences.

This concept of individualized sentencing, first discussed as dicta in *Woodson*, did not have a major impact upon death penalty jurisprudence until *Lockett v. Ohio*. In *Lockett*, the Supreme Court declared unconstitutional a statute that did not permit the decision maker to consider as a mitigating factor the defendant’s lesser involvement in the crime. In doing so, the Supreme Court reiterated the need for a “greater degree of reliability when a death sentence is imposed” and handed down specific guidelines to ensure a death sentence is not applied in an “arbitrary and capricious manner.” These new guidelines require that the “sentencing body be able to [consider] as a mitigating factor, any [relevant] aspect of [a] defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” in order to ensure that the death penalty is not “imposed

---


67 See generally *Furman*, 408 U.S. 238 (1972) (discussing the importance of individualized sentencing in ensuring that the death penalty is not arbitrarily imposed).

68 428 U.S. 280 (1976) (holding mandatory death sentences unconstitutional while also discussing individualized sentencing).


70 *Id.* In *Lockett*, the defendant merely drove the getaway car and may not have been present at the time the robbery occurred. *Id.*

71 *Id.* at 604; accord *Furman v. Georgia*, 408 U.S. 238 (1972) (holding the death penalty, as applied in the United States, unconstitutional since the death sentences were unreliable due to there being no way to distinguish those who were sentenced to death from those whose lives were spared).


INSTRUCTING MITIGATION

in spite of factors which may call for a less severe penalty.\textsuperscript{74}

As a corollary to this requirement, the sentencing body must be given the means to consider mitigating evidence.\textsuperscript{75} This ensures that the sentencing body’s “ability to consider . . . relevant mitigating evidence” is more than merely a goal that cannot be achieved.\textsuperscript{76} Thus, the sentencing body’s decision should focus on the individual defendant rather than the crime or the impact of the crime.\textsuperscript{77}

The individualized sentencing requirement adopted and expanded upon in \textit{Lockett} has resulted in a large number of cases interpreting the extent of the \textit{Lockett} Doctrine.\textsuperscript{78} In \textit{Penry v. Lynaugh},\textsuperscript{79} as a natural result of \textit{Lockett}, the Supreme Court held

\textsuperscript{74} \textit{Lockett}, 438 U.S. at 605; \textit{accord} California v. Brown, 479 U.S. 538 (1987) (reversing a death sentence where the jury failed to address relevant mitigating factors in determining the sentence).

\[ \text{[E]vidence about the defendant’s background and character is relevant [as mitigation] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.} \]

\textit{Id.} at 545 (O’Connor, J., concurring).

\textsuperscript{75} \textit{Penry v. Lynaugh}, 492 U.S. 302, 319 (1989) (reversing a death sentence because the jury was not given the means to give mitigating weight to the defendant’s mental retardation).

\textsuperscript{76} \textit{Lockett}, 438 U.S. at 604.

\textsuperscript{77} See, e.g., \textit{Payne v. Tennessee}, 501 U.S. 808 (1991) (holding that victim-impact evidence is admissible at the sentencing proceeding of a death penalty case not because of the impact of the crime, but to enable the jury to get a clear picture of what happened so that the sentencing decision will be more focused on the individual defendant).

\textsuperscript{78} See \textit{infra} notes 79-95 (discussing cases applying and expanding the \textit{Lockett} Doctrine).

\textsuperscript{79} 492 U.S. 302 (1989) (reversing a death sentence because the jury instructions did not permit the jury to consider the defendant’s mental retardation as grounds to spare his life). Penry was retried by the state of Texas and convicted under the same statute, which was amended to include a supplemental instruction pertaining to mental retardation. \textit{Penry v. Johnson}, 532 U.S. 782, 786 (2001). Again, Penry’s death sentence was reversed by the United States Supreme Court. \textit{Id.} at 804. \textit{See} Harvey Rice, \textit{Penry Sentenced 3rd Time to Die: Jury Rejects Argument for Retardation}, HOUS. CHRON., July
that “[t]he sentencer must . . . be able to . . . give effect to [any mitigating evidence relevant to the defendant’s background or to the circumstances of the crime] in imposing [the] sentence.” 80 Therefore, the sentencing body must be “provided with a vehicle for expressing its reasoned moral response to mitigating evidence in rendering its sentencing decision.”81

As a result of Lockett and its progeny, the sentencing body cannot refuse to consider relevant mitigating evidence or refuse to give relevant mitigating evidence any weight. 82 Similarly, the judge cannot prevent the defendant from placing relevant mitigating evidence before the jury. 83 Finally, the Supreme Court has held that the sentencing body must also be allowed to consider non-statutory mitigating factors. 84

These expansive readings of Lockett have led to the presentation to a jury of myriad factors in an attempt to spare the defendant’s life. 85 As a result, many courts have held that, under Lockett, the defendant cannot be prevented from presenting mitigating evidence bearing upon the defendant’s age, 86 mental

4, 2002, at 1; Nightline (ABC television broadcast, July 11, 2002). The State of Texas sought the death penalty against Penry for a third time, and on July 3, 2002, the jury imposed a third death sentence on Penry after finding he was not mentally retarded. Id. See infra Part II (discussing the facts and law pertaining to the two Penry cases).

80 Penry I, 492 U.S. at 319.
81 Id. at 328.
82 Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (reversing a death sentence where the sentencing body refused to consider mitigating evidence pertaining to the defendant’s unhappy upbringing and emotional disturbance).
83 Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (reversing a death sentence when the judge refused to allow the defendant to offer evidence of his good behavior while in prison).
84 Hitchcock v. Dugger, 481 U.S. 393 (1987) (holding that the requirement that the “sentencer not refuse to consider or be precluded from considering any relevant mitigating evidence” applies to non-statutory mitigating evidence, quoting Skipper, 476 U.S. at 4).
85 See Bilionis, supra note 9 (discussing the impact of the Lockett Doctrine).
86 See Stanford v. Kentucky, 492 U.S. 361, 375 (1989) (plurality opinion) (reversing a death sentence because the trial court prevented the defendant
retardation, provocation by others, insanity, alcohol or drug usage, limited involvement in the actual homicide, neglect, child abuse, poverty and a minor criminal record.

D. Recent Developments Pertaining to the Individualized Sentencing Scheme and Jury Instructions

During the past decade, the Supreme Court started retreating from the principles of Lockett and handing down rulings that are from presenting age as a mitigating factor while holding that executing a defendant who was under the age of sixteen at the time of the commission of the crime constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. But see Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment prohibition of cruel and unusual punishment and, therefore, overruling in part Penry I, which permitted the execution of the mentally retarded). In light of Atkins, a debate currently exists as to whether executing a juvenile remains constitutional. See Patterson v. Texas, 123 S. Ct. 24 (2002) (Ginsburg, J., dissenting, joined by Breyer, J.).

87 Penry v. Lynaugh, 492 U.S. 302 (1989), overruled in part by, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment prohibition of cruel and unusual punishment); see also Ring v. Arizona, 122 S. Ct. 2428 (2002) (holding that juries must make findings of facts that could increase the sentence). In light of Ring, it appears as if the jury must both determine whether the defendant is mentally retarded, making him ineligible for the death penalty, and, in the alternative, whether a lower intellectual status not rising to the level of mental retardation constitutes sufficient mitigation to spare the defendant’s life.

88 Spinkellink v. Wainwright, 578 F.2d 582, 621 (5th Cir. 1978).
90 Robison v. Maynard, 829 F.2d 1501, 1511 (10th Cir. 1987).
91 Enmund v. Florida, 458 U.S. 782 (1982). But see Tison v. Arizona, 481 U.S. 137 (1987) (permitting the death penalty for a defendant who did not commit murder, but either had the mens rea necessary to commit the murder or acted with a reckless indifference towards the crime).
92 Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987).
94 See generally Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).
95 Coleman v. Risley, 839 F.2d 434, 453 (9th Cir. 1988).
less favorable to defendants. For example, the Supreme Court does not require the trial judge to instruct the jury with either an explanation of the terminology contained within the instructions or how to apply the principles of mitigation. This poses a problem for a confused jury because, absent an explanation, a jury that is unable to understand the instructions or does not know when it has found relevant mitigating evidence is incapable of adequately considering the mitigating evidence.

In Buchanan v. Angelone, the Supreme Court failed to directly address the issue of what to do with juries that are confused about mitigation when the Court held that a capital jury does not generally have to be instructed on the concept of mitigating evidence or on a particular statutory mitigating factor. In Weeks v. Angelone, decided prior to Penry II, the Supreme Court again dodged the issue of juries expressing a misunderstanding mitigation. Instead, the court only addressed the issue of what the judge should do when the jury asks if they are required to impose the death penalty upon finding that an aggravating factor has been proven beyond a reasonable doubt.

---

96 See, e.g., Buchanan v. Angelone, 522 U.S. 269 (1998) (holding that a judge does not need to give specific instructions pertaining to the law of mitigation when there is no reason to believe that the instruction is necessary).
97 See id. at 272.
99 Id. at 272.
100 528 U.S. 225 (2000).
101 Id. at 234. The existence of an aggravating factor is never sufficient in itself to sentence a person to death. Cf. Tuilaepa v. California, 512 U.S. 967, 972 (1994) (ruling that aggravating factors are those that only apply to a subclass of defendants and thus narrow the class of people eligible for the death sentence); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (holding that “the use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion”). Nevertheless, many jurors believe the existence of an aggravating circumstance requires the defendant to be sentenced to death. See William S. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L.J. 1043, 1091 (1995) (finding that many jurors “believed that they were required to impose the death penalty if they found that the crime was heinous, vile or depraved”); Theodore Eisenberg et al.,
Despite the jury’s obvious misunderstanding of the law,\(^{102}\) the Supreme Court held that the trial judge did not err by merely referring the jury back to the relevant portion of his original jury instructions since the jury “would have asked another [question] if it felt the judge’s response unsatisfactory.”\(^{103}\) Thus, the Supreme Court assumed that the jury was no longer confused because, unlike in \textit{Blystone}, the jury did not ask any further questions. While Supreme Court jurisprudence pertaining to jury instructions in capital cases has not been favorable to defendants, the Supreme Court has determined that jury instructions violate the principles of individualized sentencing established in \textit{Lockett} when “there [is a] reasonable likelihood that the jury . . . applied the instruction in a way that prevented consideration of constitutionally relevant [mitigating] evidence.”\(^{104}\)

\section*{II. Case Law Pertaining to Giving Effect to Relevant Mitigating Evidence}

During the past thirty years, the Supreme Court has begun addressing what it means to consider evidence in the sentencing

\textit{Jury Responsibility in Capital Sentencing: An Empirical Study}, 44 B UFF. L. REV. 339, 360 (1996) (stating that “[n]early one-third of jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness”); William S. Geiner & Jonathan Amsterdam, \textit{Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials}, 15 AM. J. CRIM. L. 1, 41 (1989) (finding a significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder).

\(^{102}\) See \textit{Tuilaepa}, 512 U.S. at 972 (holding that aggravating factors are necessary to impose the death penalty and, therefore, perform the required narrowing function, but are not enough, alone, to impose a death sentence). Therefore, the finding of an aggravating circumstance is not enough, in itself, to justify a death sentence. Cf. \textit{id.}; see also, Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that to pass constitutional muster, a capital sentencing scheme must “genuinely narrow the class of persons eligible for the death penalty”).

\(^{103}\) \textit{Weeks}, 528 U.S. at 234, 236.

phase of a capital murder trial. The Supreme Court eventually reached the conclusion that the word “consider” means the jury must not only weigh the mitigating evidence in their decision, but also must have a “vehicle” for giving effect to this mitigating evidence. Defining exactly what is meant by a “vehicle” for giving effect to mitigation became the subject of two landmark decisions pertaining to modern death penalty jurisprudence.

A. Blystone v. Pennsylvania

In Blystone v. Pennsylvania, Scott Blystone and his friends picked up a hitchhiker and robbed him. Upon request, the hitchhiker failed to hand over any money. Blystone pulled over to the side of the road and took thirteen dollars from the hitchhiker at gunpoint. After taking the money, Blystone then ordered the hitchhiker to lay face down and shot him six times in

---


106 Penry v. Lynaugh, 492 U.S. 302, 329 (1989) (referring to “vehicle” as a way for the jury to obey the law and still determine that the defendant should receive a life sentence based on the mitigating evidence presented at trial).

107 See Penry v. Johnson, 532 U.S. 782 (2001) (holding that a constitutional statute is not enough in itself to ensure that a sentencing body has an avenue to give effect to relevant mitigating evidence); Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (holding that a statute mandating death if no mitigating circumstances exist gives the jury an avenue to consider relevant mitigating evidence because the jury must consider the potential mitigating evidence in order to determine whether mitigating evidence exists).


109 Id. at 301.


111 See id. There is currently a dispute over whether Blystone actually obtained any money from the hitchhiker and, therefore, whether the aggravating circumstance of committing the murder in the commission of a robbery actually existed. Id. Moreover, the jury never considered whether the taking of only thirteen dollars constituted a mitigating circumstance. Id.
the head, causing his death.  

Blystone was charged with capital murder and represented at trial by a public defender. At the sentencing phase of trial, Blystone failed to present any mitigating evidence. Nonetheless, under Pennsylvania law, the failure to present mitigating evidence does not preclude the jury from finding mitigating evidence. In Pennsylvania, the entire guilt phase of the trial is incorporated as evidence into the sentencing phase. This means the jury must weigh any factors and evidence from the guilt phase along with the aggravators and mitigators presented at sentencing to determine whether the aggravators outweigh the mitigators. Then, if the jury finds at least one statutory aggravating circumstance and no mitigating circumstances, the jury must impose a death sentence.  

During the sentencing phase jury deliberations in Blystone, the jury asked for the definition of mitigation and was told that mitigating factors are commonly understood. The judge, then,

---

113 See Blystone v. Horn, Prelim. Pet. for a Writ of Habeas Corpus at 6. Blystone’s lawyer was a part time-public defender with little experience, funds, or assistance. Id. Each of these factors affects the outcome of capital cases. See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835 (1994) (analyzing how the quality of representation determines whether a defendant receives a death sentence).
114 Blystone, 494 U.S. at 306 n.4.
116 Id.
117 Id. at § 9711(c)(1)(iv).
118 Id. “[T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance . . . .” Id.
reread the initial instruction, which did not define mitigation. After further reviewing the evidence, the jury again asked about the definition of mitigating factors and more specifically asked the judge if they were required to sentence the defendant to death if they found an aggravating factor and no mitigating factor, to which the judge responded by rereading his initial jury instructions. Arguably, individuals who ask whether a particular act is required may not want to commit the act. Therefore, one may conclude that the jury’s question was based upon the hope of avoiding having to impose a death sentence. Thus, the jury may have been asking the judge to resolve the possible dilemma of either pretending to find the existence of an aggravating circumstance in order to impose a life sentence or imposing a death sentence when they did not believe death was the appropriate sentence. Since the judge neither explained that the desire to impose a life sentence may constitute mitigation nor provided any other guidance, despite the apparent desire to spare Blystone’s life, the jury sentenced him to death upon finding no mitigating circumstances and one aggravating circumstance: he “committed a killing while in the perpetration of a felony.”

Blystone appealed his conviction, claiming that Pennsylvania’s death penalty statute improperly limited the jury’s

---

120 Id.
121 Id.
122 See Penry v. Johnson, 532 U.S. 789 (2001) (discussing the presumption that juries obey the laws and the impossible task of asking jurors to choose between obeying the law as stated and imposing the sentence they believe is most justified); see also supra note 16. The bifurcated system employed in capital cases seems to prevent jury nullification from becoming a viable option in capital cases. The sentencing phase and the guilt phase are separate proceedings. Under this system, the jury determines whether a defendant is guilty of capital murder prior to hearing any potentially mitigating evidence. Therefore, a jury is not likely to find a defendant guilty of a lesser offense in order to avoid imposing a death sentence because the jury usually can impose a life sentence based upon the evidence presented at the sentencing phase of a capital trial.
123 Blystone v. Pennsylvania, 494 U.S. 299, 302 (1990); see also supra note 111 (noting the factual uncertainties with respect to the Blystone case).
INSTRUCTING MITIGATION

discretion by requiring the jury to sentence him to death.124 The magnitude of the claim and its potential impact upon the sentences of other death row inmates drew a great deal of attention,125 particularly after the Supreme Court agreed to hear the case.126

In analyzing the constitutionality of the Pennsylvania statute, the Supreme Court compared the mandatory portion of the statute with the list of enumerated mitigating circumstances.127 The Supreme Court concluded that the statute permitted the jury to hear and evaluate all mitigating evidence because the “catch all”

---

124 Id. at 306.
125 See generally Steiker & Steiker, supra note 26 (discussing the complexities of modern Supreme Court death penalty jurisprudence and the attention that is paid to death penalty cases).
127 Id. Compare 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1998) (describing the circumstances under which a death penalty is mandatory) with 42 PA. CONS. STAT. at § 9711(e) (providing an inclusive list of mitigating circumstances).

Mitigating circumstances—Mitigating circumstances shall include the following:
(1) The defendant has no significant history of prior criminal convictions.
(2) The defendant was under the influence of extreme mental or emotional disturbance.
(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(4) The age of the defendant at the time of the crime.
(5) The defendant acted under extreme duress . . . or acted under the substantial domination of another person.
(6) The victim was a participant in the defendant’s homicidal conduct or consented to the homicidal acts.
(7) The defendant’s participation in the homicidal act was relatively minor.
(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

Id.
mitigating factor permits the presentation of “any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” Moreover, the Supreme Court concluded that the combination of the “catch all” mitigator and the incorporation of the guilt phase of the trial into the sentencing phase of the trial required the jury to consider and evaluate the potentially mitigating circumstances in order to determine whether mitigating evidence existed. Therefore, the Supreme Court held that the mandatory aspect of Pennsylvania’s death penalty statute did not limit the jury’s discretion since the “catch all” provision afforded the jury a “vehicle for expressing its reasoned moral response to [the mitigating] evidence in rendering its sentencing decision.” As a result, the Supreme Court upheld Blystone’s conviction as well as Pennsylvania’s death penalty statute.

B. Penry I and Penry II

In Penry v. Lynaugh, John Paul Penry, who was mentally retarded, was charged and convicted of capital murder for the

---

128 Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990); see also 42 PA. CONS. STAT. at § 9711(e)(8) (allowing a finding of “[a]ny other evidence of mitigation”); infra Part IV (discussing the relation between Blystone and the Penry cases and noting that the “catch all” mitigator is merely a codification of the Lockett principle).

129 Blystone, 494 U.S. at 308-09; see also supra text accompanying notes 115-18 (explaining Pennsylvania’s death penalty scheme).


131 Blystone, 494 U.S. at 309.


133 Penry I, at 307-08. A full discussion of mental retardation and the death penalty is beyond the scope of this article. It should be noted, however, that the Supreme Court recently held that executing the mentally retarded violates the Eighth Amendment prohibition against cruel and unusual punishment. See Atkins v. Virginia, 536 U.S. 304 (2002) (holding that in light of evolving standards of decency, as exemplified by the growing trend among states to pass legislation barring the execution of a mentally retarded person,
brutal rape and murder of a young woman.\textsuperscript{134} At the sentencing phase, Penry’s lawyer introduced extensive evidence concerning Penry’s mental retardation and the abuse he suffered as a child.\textsuperscript{135} Despite the \textit{Lockett} principle that a jury must consider any and all mitigating circumstances,\textsuperscript{136} the \textit{Penry I} jury was never instructed that it could consider Penry’s mental retardation and abuse in determining his sentence.\textsuperscript{137} Moreover, Texas law, at the time of the first two Penry cases, required the judge to impose the death penalty if the sentencing body affirmatively answers three statutorily required questions:\textsuperscript{138} 1) “whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;”\textsuperscript{139} 2) “whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;”\textsuperscript{140} and 3) “whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any,

\textsuperscript{134} \textit{Penry I}, 492 U.S. at 307.
\textsuperscript{135} \textit{Id.} Penry was in and out of hospitals as a child and had an I.Q. below 63, which resulted in part from severe beatings as a child. \textit{Id.} at 307-09. Moreover, Penry was repeatedly locked in his room without access to a toilet for long periods of time and had scars from frequent beatings with a belt. \textit{Id.} At Penry’s trial, the defense psychiatrist testified that “anyone with [Penry’s] I.Q. is always incompetent.” \textit{Id.}
\textsuperscript{137} \textit{Penry I}, 492 U.S. at 310-312.
\textsuperscript{138} \textit{Id.} at 310, citing \textit{TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981 & Supp. 1989)}; see also infra infra note 151 (explaining the 1991 amendment to the Texas death penalty statute).
\textsuperscript{139} \textit{TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon 1981 & Supp. 1989)}.
\textsuperscript{140} \textit{Id.}
by the deceased.” Penry’s jury answered each of these questions in the affirmative and thereby required the judge to impose a death sentence.

Penry appealed his death sentence on the ground that the statute violated Lockett by not allowing the jury to consider relevant mitigating evidence. The Supreme Court granted certiorari and concluded that the three statutorily mandated questions did not adequately address the mitigating evidence of Penry’s mental retardation because a jury could reasonably consider Penry’s mental retardation as requiring an affirmative answer to one of the three statutory questions even if the jury desired to spare Penry’s life. Thus, in essence, Penry’s mental retardation could be construed as an aggravating circumstance rather than a mitigating circumstance. Moreover, the Supreme Court concluded that the trial judge did nothing to correct this problem. The Supreme Court then held that “a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” Consequently, the Supreme Court reversed Penry’s conviction.

In 1990, the state of Texas retried Penry and a jury found him guilty of capital murder for a second time. At the sentencing phase, Penry’s lawyer, again, offered strong evidence

---

141 Id.
143 Id. at 313. Penry’s counsel phrased the issue by stating that Penry’s death sentence violated the Eighth Amendment because “the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas ‘special issues’ [portion of the death penalty statute] were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering [the ‘special issues’].”
144 Id. at 320-23.
145 See id.
146 See id. at 320-28.
147 Id. at 326.
148 Id. at 323.
of Penry’s mental retardation and child abuse.\textsuperscript{150} Despite the Supreme Court’s ruling in Penry I, at the time of Penry’s second trial, Texas still employed the same three statutory questions in determining whether to impose a death sentence.\textsuperscript{151} In attempting to address the Supreme Court’s concern in Penry I, the trial judge told Penry’s second jury:

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial . . . . If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.\textsuperscript{152}

After deliberating for more than two hours, the jury answered each of the three questions affirmatively, resulting in the judge imposing the required death sentence.\textsuperscript{153}

For a second time, Penry appealed his death sentence. The Supreme Court granted certiorari to determine whether the judge’s supplemental instructions complied with the mandates of

\textsuperscript{150} Penry I, 492 U.S. at 307-11. As a child, Penry suffered from organic brain impairment and had an I.Q. hovering around sixty, meaning he had the mentality of a six-year-old. Id. at 308. In addition, Penry suffered numerous beatings, including instances where his mother beat him over the head with a belt buckle, resulting in brain injuries. Id. at 309; see also supra note 135 (discussing the abuse Penry suffered as a child).

\textsuperscript{151} See TEX. CRIM. PROC. CODE ANN. § 37.071(2)(d)(1) (Supp. 1991). In 1991, Texas amended its death penalty statute by repealing the third statutory question and adding:

[In deliberating on the [statutory questions], [the jury] shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant’s background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

Id.; see also supra text accompanying notes 138-41 (enumerating the statutory questions employed in Texas death penalty cases at the time of Penry’s trials).

\textsuperscript{152} Penry II, 532 U.S. at 790.

\textsuperscript{153} Id.
Penry I. ¹⁵⁴ Prior to directly addressing this issue, the Supreme Court clarified its holding in Penry I by stating that merely informing the jury that they may consider mitigating circumstances is not enough to ensure that the jury also has a “vehicle” to give effect to mitigating evidence in determining whether to impose a death sentence.¹⁵⁵ The Supreme Court then directly addressed whether the supplemental instruction satisfied the principle of Penry I as the Court had just clarified it.¹⁵⁶ After commenting that an instruction inviting the jury to do something contrary to the instruction poses an ethical dilemma to the jury, the Court held that inviting the jury to disregard the law violates the constitution.¹⁵⁷ Therefore, the mere existence of a statute or, in Penry’s case, an instruction allowing the jury to consider mitigation is not necessarily enough to grant the jury a “vehicle” to give effect to the relevant mitigating evidence, particularly when the statute restricts the scope of the jury’s consideration of mitigating evidence or confuses the jury about the manner in which they can use the mitigating evidence in determining whether a death sentence is appropriate.¹⁵⁸ As a result, the Supreme Court concluded that, despite the facial validity of the Texas death penalty statute,¹⁵⁹ under the circumstances

¹⁵⁴ Id. at 787.
¹⁵⁵ Id. at 792.
¹⁵⁶ Id.
¹⁵⁷ Id. at 793. The Supreme Court viewed the supplemental instruction as the equivalent of instructing the jury to disregard the law since none of the three questions pertained to mental retardation as a mitigating circumstance. Id. at 799-803.
¹⁵⁸ See generally id.
¹⁵⁹ See Jurek v. Texas, 428 U.S. 262 (1976) (upholding the Texas death penalty statute despite the provision requiring the jury to answer three statutorily mandated questions rather than permitting the jury to weigh the aggravating circumstances against the mitigating circumstances or impose a life sentence at will). The Texas statute permitted the consideration of mitigation in answering the three statutory questions. See generally id.; see also, Tex. Crim. Proc. Code Ann. § 37.071(b) (Supp. 1989). Texas still employs the “special issues” questions as the means to determine whether to sentence a defendant to death. Tex. Crim. Proc. Code Ann. § 37.071(b) (Supp. 1991).
surrounding Penry’s case, a “reasonable juror could well have believed there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death . . . .”\(^{160}\) Therefore, the court reversed Penry’s conviction for the second time.\(^{161}\)

### III. Studies Pertaining to a Jury’s Ability to Understand and Apply Relevant Mitigating Evidence

A backbone principle of the American justice system is the jury’s ability to follow and apply the law.\(^{162}\) Obviously, this principle is successful only if juries understand the instructions that the judge reads to them. There has long been concern about how a person with no knowledge of the law can follow the complicated language and rules stated by a judge.\(^{163}\) This concern


\(^{161}\) *Penry II*, 532 U.S. at 796. The State of Texas decided to seek the death penalty against John Penry for a third time. *See* Michael Graczyk, *Third Sentencing Hearing Set for Mentally Retarded Death Row Inmate in Texas*, ASSOCIATED PRESS NEWSWIRES, Apr. 29, 2002. During the sentencing phase of Penry’s third trial, the United States Supreme Court handed down their decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), barring the execution of the mentally retarded. In light of this decision, the state of Texas argued that, despite evidence of childhood trauma and a low I.Q., there was little conclusive evidence to prove that Penry was mentally retarded, claiming that mental retardation could be faked. *See* Harvey Rice, *Penry Sentenced 3rd Time to Die: Jury Rejects Argument for Retardation*, HOUS. CHRON., July 4, 2002, at 1; *Nightline* (ABC television broadcast, July 11, 2002) (discussing the recent prohibition against executing the mentally retarded while focusing on the *Penry* case, including interviewing Joe Price, the district attorney who prosecuted all three *Penry* cases). On July 3, 2002, a jury sentenced John Penry to death for a third time, thus, opening the door for a possible third *Penry* decision from the United States Supreme Court. *Id.*

\(^{162}\) *See* Richardson v. Marsh, 481 U.S. 200, 211 (1987) (discussing the presumption that juries follow instructions).

\(^{163}\) Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996) (discussing studies of juror comprehension from the Zeisel study in the early 1990s and the Chicago Jury Project in the late 1950s). The Zeisel study asked specific questions pertaining to mitigation to potential jurors who were waiting
has become even greater now that juries are expected to understand and apply complicated schemes pertaining to mitigating and aggravating evidence prior to passing judgment upon the life of another human being. As a result, researchers have begun to undertake comprehensive studies to better comprehend the jury’s ability to understand the confusing law of mitigation.

A. Capital Jury Project

The Capital Jury Project attempts to determine the extent to which jurors understand instructions in capital cases while also making recommendations for improving a jury’s understanding of the applicable law and instructions. A group of researchers from the Capital Jury Project interviewed 916 capital jurors in

in the courthouse. Id. at 225-29. The study concluded that 48% of jurors misunderstood the concept of mitigation. Id. at 230. The results of the Chicago Jury Project are reported in Harry Kalven, Jr., & Hans Zeisel, THE AMERICAN JURY (1966). See also Justice Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, Luncheon Address before the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999) (acknowledging the problem of jury confusion, stating that jurors are “read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began”).

See, e.g., California Pattern Jury Instructions, CA CALJIC § 8.85 (1996). “A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.” Id.; Illinois Pattern Jury Instructions-Criminal, ILCS 7C.06 (2000) (referring to mitigating factors vaguely by stating that mitigating factors are reasons why the defendant should not be sentenced to death); Oklahoma Uniform Jury Instructions-Criminal, OUJI-CR § 4-78 (2001). “Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame.” Id.; see also Steiker & Steiker, supra note 26 (discussing the complexities of current death penalty law).

See, e.g., Bowers, supra note 101 at 1044-45 (explaining the reasoning for undertaking the Capital Jury Project).

Id.
INSTRUCTING MITIGATION

eleven states. The overwhelming evidence resulting from this study demonstrates that juries do not understand the concepts of aggravation and mitigation, and do not follow the instructions of the court.

As part of the study undertaken by the Capital Jury Project, jurors were questioned about specific aspects of mitigation. Almost twenty-five percent of these jurors believed they could only consider the enumerated list of mitigating factors. Forty-two percent of the jurors incorrectly believed they had to unanimously agree to the existence of the mitigating factor.

---

167 Id.

168 See William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Juror’s Predispositions, Attitudes and Premature Decision-Making, 83 CORNELL L. REV. 1476, 1477 (1998) (discussing how capital jurors disregard judges’ instructions by deciding the sentence prior to the commencement of the sentencing phase of the trial); Diamond & Levi, supra note 163, at 225 (finding that few Illinois jurors understood that they could consider mitigating factors not specifically enumerated by the trial judge); Eisenberg et al., supra note 101, at 360 (finding “[n]early one-third of jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness”); Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instruction in Capital Cases, 79 CORNELL L. REV. 1, 10 (1993) (finding that “twenty percent of the jurors on death juries believe that an aggravating factor can be established by preponderance of the evidence or only to a juror’s personal satisfaction”); James Luginbuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 IND. L.J. 1161, 1167 (1995) (finding that “[j]urors were confused about the burden of proof and unanimity was poor”). Only fifty-nine percent understood that they could consider any evidence they desired as a mitigating factor. Id.; see also James Frank & Brandon K. Applegate, Assessing Juror Understanding of Capital Sentencing Instructions, 44 CRIME AND DELINQUENCY NO. 3 (1988). A mock jury study revealed that juror comprehension of sentencing instructions is limited, especially with regard to mitigation. Id.

169 See supra note 168.

170 Luginbuhl & Howe, supra note 168, at 1165-69. See Hitchcock v. Dugger, 481 U.S. 393 (1987). This view held by the jurors violates Supreme Court jurisprudence requiring the sentencing body to consider non-statutory mitigating factors. Id.

171 Luginbuhl & Howe, supra note 168, at 1165-69. This belief held by the jurors is an incorrect application of Supreme Court precedence. See Mills...
The most disturbing finding was that forty-eight percent of the jurors polled said they chose the death penalty despite conceding that the factors opposing the death penalty were stronger than the factors in support of the death penalty.\textsuperscript{172} Finally, more than twenty-five percent of those interviewed thought death was mandatory when it was not,\textsuperscript{173} and more than half failed to recognize situations in which life was mandated, such as where the jury failed to find the existence of any aggravating circumstance.\textsuperscript{174}

Pennsylvania provides an appropriate example. According to the Capital Jury Project, nineteen percent of Pennsylvania jurors interviewed concluded during the guilt phase that life imprisonment was the appropriate punishment for the defendant, although they later imposed a sentence of death.\textsuperscript{175} The juror’s admitted that their initial determination that life imprisonment was the appropriate sentence was based on the belief that the crime was not sufficiently heinous or gruesome to warrant death.\textsuperscript{176} Pennsylvania law allows a jury to impose a death sentence only if the aggravating circumstances outweigh the mitigating circumstances; therefore, a finding of a lack of gruesomeness could result in a life sentence.\textsuperscript{177} These jurors, however, still chose to impose a death sentence.\textsuperscript{178} This evidence demonstrates the point that juries fail to understand mitigation

\textit{v. Maryland}, 486 U.S. 367 (1988) (holding that a unanimity requirement for mitigating circumstances violates the \textit{Lockett} principle that the sentencing body must be able to consider all relevant mitigating evidence).

\textsuperscript{172} Luginbuhl & Howe, \textit{supra} note 168, at 1165-69.

\textsuperscript{173} \textit{Id.}; see also Craig Haney, \textit{Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death}, 49 \textit{Stan. L. Rev.} 1447, 1451 (1997) (stating that “[w]hen jurors are repeatedly asked whether they can follow the law and impose the death penalty, they begin to believe the law actually requires them to reach death verdicts”).

\textsuperscript{174} Luginbuhl & Howe, \textit{supra} note 168, at 1165-69.

\textsuperscript{175} \textit{See} Bowers et al., \textit{supra} note 168 at 1488, table 1.

\textsuperscript{176} \textit{Id.} at 1500.

\textsuperscript{177} 42 \textit{Pa. Cons. Stat.} § 9711 (1998) (requiring that a death sentence may only be imposed if aggravating factors outweigh mitigating factors).

\textsuperscript{178} \textit{See} Bowers et al., \textit{supra} note 168 at 1488-90.
INSTRUCTING MITIGATION

and, therefore, impose a death sentence upon defendants jurors do not believe deserve to be put to death.\textsuperscript{179}

The bifurcated system is one proposed way of addressing this problem, since bifurcated trials are often employed to ensure that evidence pertaining to sentencing does not infect the guilt phase and that jurors consider only the evidence presented at sentencing in determining whether to spare a defendant’s life.\textsuperscript{180} Even in this context, however, studies by the Capital Jury Project show that many jurors decide the appropriate sentence during the guilt phase of the trial.\textsuperscript{181} Thus, in addition to finding that jurors make uninformed decisions, the Capital Jury Project reveals they do so many times prematurely.\textsuperscript{182}

B. Additional Studies

As evidenced by the numerous occasions in which juries have asked the judge to help them understand mitigation, a jury’s inability to understand mitigation is a common situation in death penalty trials.\textsuperscript{183} In many of these cases, juries either asked the

\textsuperscript{179} Id.; See also Mem. of Law in Supp. of Writ of Habeas Corpus for Pet’r Blystone at 64, Blystone v. Horn, No. 99-490 (W.D. Pa. filed Mar. 29, 2000).


\textsuperscript{181} See, e.g., Bowers et al., supra note 168, at 1477, 1488 (stating that interviews with capital jurors in 11 states revealed that almost half believed they knew what the punishment should be before the sentencing phase of the trial).

\textsuperscript{182} See generally Bowers et al., supra note 168.

\textsuperscript{183} See Berlow, \textit{Deadly Decisions}, supra note 1 (quoting the jury foreman, Fred Baca). One of the most disturbing examples is the case of Bobby Moore. According to a post-trial interview with the jury foreman, the jury asked the judge to “tell them which evidence could be considered as mitigating, but the question went unanswered so often that they finally stopped asking.” Id.; see also, Deck v. State, 68 S.W.3d 418, 424, 431 (Mo. 2002) In Deck, the Missouri Supreme Court reversed a death sentence on grounds of ineffective assistance of counsel for failure to object when the judge responded to the jury’s inquiry regarding the “legal definition of mitigating circumstances” by saying, “any terms that you have not had defined for you should be given the ordinary meaning.” Id. at 424. The judge then denied the
judge to define aggravation and mitigation,\textsuperscript{184} or took it upon themselves to consult a dictionary.\textsuperscript{185} At least one Supreme Court justice has found this problematic because “mitigating evidence is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury.”\textsuperscript{186} The majority of the Supreme Court, however, has held that aggravation and mitigation are ordinary words that do not have to be defined.\textsuperscript{187}

To further support the proposition that jurors do not understand the concept of aggravation and mitigation, researchers compiled a list of instructions from actual death penalty cases, along with questions asked by jurors while deliberating in capital cases.\textsuperscript{188} Based on this list, and in conjunction with general jury’s request for a dictionary. \textit{Id.} at 431. \textit{See also} People v. Lang, 782 P.2d 627 (Cal. 1989) (discussing the trial judge’s decision to respond to the jury’s inquiry about the meaning of aggravation and mitigation by reading the dictionary definitions of the terms), \textit{cert. denied}, 498 U.S. 881 (1990); People v. Adcox, 763 P.2d 906 (Cal. 1988) (discussing whether a judge, in response to the jury’s request for a definition of aggravation and mitigation, can define aggravation and mitigation by reading from Corpus Juris Secundum), \textit{cert. denied}, 494 U.S. 1038 (1990); People v. McLain, 757 P.2d 569 (Cal. 1988) (discussing the jury’s request for a definition of aggravation and mitigation), \textit{cert. denied}, 489 U.S. 1972 (1989); People v. Hamilton, 756 P.2d 1348 (Cal. 1988) (discussing the jury asking the judge to read them the definition of aggravation and mitigation on three occasions during deliberations), \textit{cert. denied}, 489 U.S. 1040 (1989); State v. Jones, 451 S.E.2d 826 (N.C. 1998) (upholding a death sentence despite the judge reading to the jury the American Heritage Dictionary’s definition of “mitigate”).

\textsuperscript{184} \textit{See} McLain, 757 P.2d at 580 (upholding a conviction despite the jury requesting a definition of aggravation and mitigation to which the judge asked whether they wanted the legal or ordinary definition while telling the jury no legal definition of these terms existed); \textit{Hamilton}, 756 P.2d at 1362 (upholding a conviction where the jury asked for the instructions to be read to them three times and asked for a definition of mitigation in layman’s terms to which the judge responded by reciting the definition from a legal dictionary).


\textsuperscript{187} \textit{Id.} at 908-09.

\textsuperscript{188} \textit{See} Bowers, \textit{supra} note 101, at 1044-45 (discussing the manner in
constitutional principles pertaining to mitigation, researchers posed questions to a random sampling of the population.\textsuperscript{189} The results were astounding. The first question asked whether jurors could spare a person’s life if they found a mitigating factor not mentioned by the judge.\textsuperscript{190} An overwhelming sixty-four percent of the people polled incorrectly believed this was insufficient to prevent the imposition of a death sentence.\textsuperscript{191} The second question used an instruction that was given in a capital trial in reference to a weighing statute.\textsuperscript{192} The people polled were asked whether they had to impose a death sentence if they reached the conclusion that the mitigating evidence outweighed the aggravating evidence, but felt they were unable to find a mitigating factor that was sufficient to preclude the death penalty.\textsuperscript{193} An overwhelming fifty-eight percent of the people wrongly believed a death sentence had to be imposed.\textsuperscript{194}

The statistical analysis discussed above and the responses to which the data was compiled).

\textsuperscript{189} Luginbuhl & Howe, \textit{supra} note 168, at 1162-70 (discussing jurors’ inability to correctly respond to questions pertaining to the law of mitigation); see also Diamond & Levi, \textit{supra} note 163, at 230-33 (discussing the results of the Zeisel survey); Laurence J. Severance & Elizabeth F. Loftus, \textit{Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions}, 17 LAW AND SOC’Y REV. 153 (1982) (finding comprehension of jury instructions by college students generally poor); Walter W. Steele, Jr. & Elizabeth G. Thornburg, \textit{Jury Instructions: A Persistent Failure to Communicate}, 67 N.C. L. REV. 77 (1988) (observing the low comprehension level of pattern instructions by people called to jury service in Texas); Tiersma, \textit{supra} note 9, at 1 (discussing jurors’ ability to understand instructions given in capital trials by posing these questions to members of the population who had not heard the questions in the past nor served on a capital jury).

\textsuperscript{190} Luginbuhl and Howe, \textit{supra} note 168, at 1165-68.

\textsuperscript{191} \textit{Id.} All death penalty statutes and Supreme Court jurisprudence require the jury to consider all evidence offered in mitigation prior to imposing a death sentence. \textit{See}, \textit{e.g.}, Eddings \textit{v.} Oklahoma, 455 U.S. 104, 117 (1982). Moreover, the Supreme Court has held that non-statutory mitigators, which normally would not be mentioned by the judge, can be presented to and considered by the jury. \textit{See} Hitchcock \textit{v.} Dugger, 481 U.S. 393 (1987).

\textsuperscript{192} Luginbuhl and Howe, \textit{supra} note 168, at 1165-68.

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} \textit{Id.}
actual instructions and issues from real cases indicate a disturbing trend among juries in capital cases: an inability to follow the law that is based on a clear misunderstanding of what the law requires. That is, the Supreme Court has held that the presence of an aggravating factor is merely a threshold requirement to make a defendant eligible for the death penalty. Nevertheless, many jurors erroneously believe a death sentence is required. Furthermore, data suggests that the problem of jurors not understanding the law and not following jury instructions is more than an academic concern, because an overwhelming number of jurors “seem not to understand what they are to do with such evidence.” Moreover, in some instances, jurors “recognize that evidence in mitigation has been presented, but do not know what the law allows, or requires them to do with such evidence,” as was illustrated by more than fifty percent of jurors making the contradictory statement that mitigating evidence outweighed the aggravating evidence but was not sufficient to spare a defendant’s life.

IV. ELEVEN YEARS LATER, PENRY II ACHIEVED THE RECOGNITION BLYSTONE DESERVED

Both the principles of American society and the United States Constitution are based upon the fundamental belief that the rights of an individual should be protected from the opposition of the

195 Tuilaepa v. California, 512 U.S. 967 (1994); see also Steiker & Steiker, supra note 26 (discussing the threshold requirement to impose a death sentence).

196 Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; And Mitigation is No Excuse, 66 BROOK. L. REV. 1011 (2002) (discussing jury misconceptions about the sentencing phase of a capital case); see also, Bowers, supra note 101, at 1091 n.32. (finding that “many jurors believe that the death penalty is mandatory” when an aggravating circumstance is present).

197 Bentele & Bowers, supra note 196, at 1042.

198 Id. at 1043.

199 Id.
INSTRUCTING MITIGATION

masses.\textsuperscript{200} For most of American history, however, this principle has not found its way into the criminal justice system.\textsuperscript{201} Defendants were punished without any consideration of the reason why they committed the crime.\textsuperscript{202} Until recently, in determining the appropriate sentence, the sentencing body did not consider any aspect of the defendant’s life that would have made him less culpable.\textsuperscript{203} In the early 1970s, the Supreme Court began to recognize the inherent unfairness of imposing a sentence without considering the uniqueness of the individual defendant.\textsuperscript{204} In an attempt to eradicate the problem of arbitrarily imposed sentences, the Court adopted individualized sentencing.\textsuperscript{205} Despite criticism that individualized sentencing is contradictory to the aversion of arbitrary and capriciously imposed death sentences,\textsuperscript{206}

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{Reference} & \\
\hline
See The Federalist No. 10, at 81 (James Madison) (C. Rossiter ed., 1961) (discussing the need for the Constitution in order to protect individuals against the inherent problem of majoritarian government); see also Bedau, supra note 26 (explaining the reasoning for current death penalty laws and the high level of support for the death penalty in the United States in contrast to that of most of the rest of the world). & \\
\hline
See Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the right to counsel to the states and marking the beginning of the individual rights movement within the criminal context and the application of the Bill of Rights to the states). & \\
\hline
See, e.g., Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty partly because the failure to consider why an individual committed the crime gave the jury untrammeled discretion to determine who would be sentenced to death and, therefore, resulted in the arbitrary infliction of capital punishment). & \\
\hline
Id. & \\
\hline
See id. & \\
\hline
Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (discussing what has now become known as individualized sentencing when the Court referred to the necessity and requirement that a jury consider all “relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death” and “the circumstances of the particular offense”). & \\
\hline
Walton v. Arizona, 497 U.S. 639, 714-15 (1990) (Scalia, J., concurring) (explaining why he no longer can reconcile the Lockett Doctrine with the concern over arbitrary sentencing as expressed in Furman); see Scott E. Sundy, The Lockett Paradox: Reconciling Guided Discretion and Unguided & \\
\hline
\end{tabular}
\caption{Instructing Mitigation}
\end{table}
the Supreme Court has strictly adhered to its application. The Supreme Court, however, has failed to ensure that the individualized sentencing process is applied in a manner that guarantees the underlying principle that each person will be treated as uniquely individual human beings.

The Supreme Court has consistently stated that the sentencing body must be able and willing to consider all relevant mitigating evidence at sentencing in order to avoid a sentence that is both arbitrary and capricious. This right is meaningless, however, if the sentencing body is unable or incapable of giving effect to this evidence in determining a sentence. Therefore, implicit within the reasoning of *Lockett*, in order for a death sentence to pass constitutional muster, juries must be able to understand and recognize mitigation and know what the law requires them to do with any mitigating evidence they have found. Unfortunately, many juries are unable to accomplish these tasks.

The problem of a jury failing to understand the law of mitigation was first presented to the Supreme Court in

*Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147, 1185 (1991) (noting that the choice between these two principles depends on choosing between the risk of a death sentence based on an arbitrary factor and the risk of one imposed because mitigating evidence was excluded).

207 See Bilionis, *supra* note 9, at 283.

208 Woodson, 428 U.S. at 304.

209 See *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring the sentencing body to consider both aggravating and mitigating circumstances prior to imposing a death sentence); *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating Georgia’s death penalty scheme because the manner in which defendant’s were selected for the death penalty was arbitrary and capricious).

210 See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (requiring the sentencer’s guidance be channeled by “clear and objective standards that provide specified detailed guidance”).

211 See *Penry v. Johnson*, 532 U.S. 782, 803-03 (2001); see also *Teague v. Lane*, 489 U.S. 288 (1989) (establishing that new rules of criminal procedure cannot be made on a habeas case). Since this right falls within the principles of the *Lockett* Doctrine, it is not a new rule of criminal procedure. See *Lockett*, 438 U.S. 586 (1978). Thus, the *Teague* Doctrine, which prevents creating new rules on a habeas case, has no impact.

212 See *supra* Part III.B (discussing the jury’s inability to understand and adequately apply the principles of individualized sentencing).
INSTRUCTING MITIGATION

Blystone. Although unique in many respects, this case is perhaps most interesting for what was missing. Blystone’s lawyer interpreted the statute as unconstitutional on its face, arguing that the statute mandating the death penalty prevented the jury from considering mitigating evidence. Instead Blystone’s lawyer should have challenged whether the jury was capable of understanding and recognizing relevant mitigating evidence along with correctly applying the law to the relevant mitigating evidence. Due to the manner in which Blystone’s lawyer presented the issue, the Supreme Court never had the opportunity to address the jury’s ability to understand mitigation and apply the law to any mitigating evidence that they found.

After Blystone, litigation focused on whether juries were permitted to give effect to relevant mitigating evidence, rather than whether juries were capable of giving effect to relevant mitigating evidence. Additionally, when the issue of what to do about juries that did not understand the law of mitigation was eventually raised, the battle appeared lost when, in Buchanan v. Angelone, the Supreme Court held that juries neither need to be instructed on the concept of mitigating evidence generally nor on particular statutory mitigating factors. In Buchanan, however,

214 See supra Part II (discussing Blystone’s unusual facts and applicable statutory provisions).
215 Blystone, 494 U.S. at 302.
216 Id.
217 Cf. id. Since Pennsylvania’s death penalty statute clearly required the consideration of mitigating evidence in order to determine whether mitigating evidence existed, the real issue was whether the jury understood how to consider any potential mitigating evidence. Id.; see also 42 PA. CONS. STAT. § 9711 (1998) (providing the requirements to impose a death sentence).
219 See, e.g., Penry v. Johnson, 532 U.S. 782 (2001). While the Supreme Court’s opinion addressed the broader issue this note addresses, the case was presented to the Court as dealing with whether the supplemental instruction pertaining to mental retardation permitted the jury to consider mental retardation as mitigating evidence. Id.
221 Id. (discussing whether a judge must specifically instruct a jury on the
the jury did not express confusion pertaining to the meaning of mitigation or a desire to not sentence the defendant to death.\textsuperscript{222} Therefore, the Supreme Court again avoided dealing with the issue.\textsuperscript{223}

The Supreme Court finally dealt with the issue indirectly in \textit{Penry v. Johnson}.\textsuperscript{224} Thus, the Court differentiated between \textit{Blystone} and \textit{Penry II}. Despite the different results in the cases, the two cases are not inconsistent. \textit{Blystone} merely addressed a facial challenge to a death penalty statute on the basis that the statute prevented the jury from considering mitigation.\textsuperscript{225} As such, \textit{Blystone} was correctly decided because the statute required the jury to conclude, prior to imposing a death sentence, that mitigation either did or did not exist. Therefore, in determining that there was no valid mitigating evidence in support of Blystone, the jury had to consider the evidence presented at the guilt/innocence phase before considering any evidence presented at the sentencing phase.\textsuperscript{226} Thus, the Supreme Court correctly concluded that, on its face, the Pennsylvania statute met the constitutional mandate of \textit{Lockett}.\textsuperscript{227}

The Supreme Court, however, was unable to build upon the reasoning of \textit{Blystone} in \textit{Penry II} because the latter case raised an “as applied” statutory challenge based on the \textit{Lockett} principle.\textsuperscript{228}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{222} See id.
\item \textsuperscript{223} See generally id.
\item \textsuperscript{224} 532 U.S. 782 (2001). Research has found that the number of cases raising issues pertaining to confused juries drastically decreased after Buchanan.
\item \textsuperscript{226} See 42 PA. CONS. STAT. § 9711. This statute, which was at issue in Blystone, requires the entire guilt/innocence phase of the trial to be incorporated into the sentencing phase. Thus, any aspect of the guilt/innocence phase of trial could be considered sufficient mitigation to spare the defendant’s life. Id.
\end{itemize}
\end{footnotesize}
INSTRUCTING MITIGATION

*Lockett* stood for the principle that juries cannot be prevented from considering mitigating evidence, and must be willing and capable of considering mitigating evidence during the sentencing phase in order to ensure that each defendant receives an individualized sentence.\(^{229}\) Thus, analysis under *Lockett* is a three step process.\(^{230}\) First, the defendant must be permitted to present all mitigating evidence.\(^{231}\) Second, the jury must be permitted to consider the mitigating evidence.\(^{232}\) Third, the jury must be able to understand and recognize mitigation while also knowing what the law requires them to do with the mitigating evidence once they have found it.\(^{233}\) The first two aspects, but not the third, were addressed adequately in *Blystone*.\(^{234}\) The third step of the *Lockett* principle, however, was at issue in *Penry II*.\(^{235}\)

As in *Blystone*, the *Penry II* jury had to consider the mitigating evidence presented at both the guilt phase and sentencing phase in order to determine whether mitigating circumstances existed.\(^{236}\) As a result, the Texas death penalty statute, on its face, permitted the consideration of mitigating evidence, so the statute could not be considered unconstitutional across the board. The Supreme Court, however, did not end its analysis of the Texas death penalty statute here. Instead, the Supreme Court addressed the statute as it was applied to Penry’s

\(^{229}\) *Lockett* v. Ohio, 438 U.S. 586 (1978); see also Part I(C) (discussing the *Lockett* Doctrine).


\(^{231}\) *Skipper* v. South Carolina, 476 U.S. 1, 4 (1986) (reversing a death sentence because the judge refused to allow the defendant to offer evidence of his good behavior while in prison).

\(^{232}\) Id. (holding that the sentencing body cannot be precluded from considering any mitigating evidence).

\(^{233}\) Cf. *Penry II*, 532 U.S. 782 (2001) (reversing a death sentence because the jury was not clearly instructed on what sentence could be imposed if the jury found the defendant’s mental retardation mitigating).

\(^{234}\) See *Blystone* v. Pennsylvania, 494 U.S. 299, 305 (1990) (holding that the Pennsylvania death penalty statute permitted the defendant to present and the jury to hear all relevant mitigating evidence).

\(^{235}\) See *Penry II*, 532 U.S. at 803-04.

\(^{236}\) See *Tex. Crim. Proc. Code Ann.* § 37.071(b) (enumerating the procedures in a capital case).
specific characteristics, particularly his mental retardation. 237 As a result, in Penry II, the Supreme Court was able to reach the correct conclusion under Lockett without having to overturn Blystone. 238

While admitting that the Texas death penalty statute, on its face, was constitutional, the Supreme Court recognized that Lockett’s mandate that the jury be permitted to hear relevant mitigating evidence is rendered meaningless when the jury is unable to give effect to the mitigating evidence that is presented. 239 Therefore, the Supreme Court held that death penalty statutes permitting the jury to consider all mitigating evidence are still unconstitutional under Lockett when a “reasonable juror could well have believed that there was no vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death.” 240 Thus, Penry II confirmed that challenges to a death sentence on the basis of the jury’s consideration of mitigating evidence must be addressed under the three-prong test discussed supra. 241

In order to satisfy the requirement set forth in Penry II, the jury must be able to understand the law of mitigation, recognize mitigating evidence when it is presented, and know what the law requires them to do with this evidence once they have found it. 242 Unfortunately, it is impossible to analyze each individual juror to ensure the ability to accomplish these tasks. Therefore, the system necessarily operates under the presumption that juries understand the law as explained to them by the judge, including the instructions pertaining to mitigation. 243 As the statistical

238 Id.; see also Blystone v. Pennsylvania, 494 U.S. 299 (1990); Lockett v. Ohio, 438 U.S. 586 (1978). Arguably, the Supreme Court would have reached the same conclusion in Blystone as it did in Penry II if the statute was addressed as applied to the defendant rather than as a facial challenge.
239 See Penry II, 532 U.S. 803-04.
240 Id. at 791.
241 Id.; see also supra notes 230-35 and accompanying text (discussing the three-prong test).
243 See Richardson v. Marsh, 481 U.S. 200, 211 (1987) (discussing the
INSTRUCTING MITIGATION

analysis discussed in Part III of this note illustrates, though, many jurors are confused about the law of mitigation.\textsuperscript{244} Admittedly, this problem is not easily remedied. \textit{Penry II}, however, mandates that this problem be addressed when a juror has either expressly or impliedly indicated that he or she does not have a strong enough understanding of mitigation to ensure they impose a sentence that complies with constitutional mandates.\textsuperscript{245} At a minimum, to ensure that the defendant’s death sentence is constitutional under \textit{Penry II}, judges must give specific guidance to juries who express confusion on the law of mitigation.\textsuperscript{246} Only this safeguard will protect a defendant from an erroneous sentence due to a juror’s mistaken belief that they had not found mitigation where mitigating evidence actually existed.

CONCLUSION

During the past thirty-five years, death sentences have been called into question at an alarming rate.\textsuperscript{247} Thus, every effort should be made to ensure that the death penalty is more reliable at preventing people who do not deserve to be sentenced to death from receiving a death sentence. As was demonstrated by the presumption that juries follow instructions).

\textsuperscript{244} \textit{See supra} Part III (discussing juror confusion).
\textsuperscript{245} \textit{Penry II}, 532 U.S. at 803-04.
\textsuperscript{246} \textit{See} \textit{Ring v. Arizona}, 122 S. Ct. 2428 (2002) (holding that all findings of fact that could enhance a defendant’s sentence must be made by the jury). The importance of juries understanding mitigating evidence and correctly applying the law to the facts should take on greater significance in light of this United States Supreme Court’s ruling that juries must make findings of fact in capital cases.
empirical studies discussed in Part III, juries’ inability to understand the law of mitigation strongly contributes to the number of invalid death sentences. Therefore, requiring a judge to provide guidance to juries that are confused about the law of mitigation would substantially decrease the number of defendants wrongfully sentenced to death. These instructions are only one of many improvements within the criminal justice system that are necessary to ensure that an individual gets a fair trial. In light of the gravity and irreversibility of correcting a wrong sentence once an individual has been executed, however, this minimum safeguard must be employed. As long as the government continues to sanction the death penalty and allow the criminal justice system to take a person’s life, it is certainly not too much to ask that these judicially-imposed safeguards be properly applied.
IN RE WENDLAND: CONTRADICTION, CONFUSION, AND CONSTITUTIONALITY

Mary Ann Buckley*

This is the hardest case.¹

INTRODUCTION

The issue of medical treatment refusals for incompetent patients is a relatively recent phenomenon, primarily due to advances in medical treatment and technology that provide the capability to support biologic life, if not necessarily cognitive life, in circumstances that would have been impossible until recently.²

In In re Wendland, the California Supreme Court held that a conservator may not withhold artificial nutrition and hydration from a minimally conscious patient in the absence of clear and convincing evidence either that the patient had previously expressed wishes to forgo such treatment or that doing so is in

* R.N.; Brooklyn Law School Class of 2003; M.A. University of Virginia, 1995; B.A. St. Mary’s College of Maryland, 1986; A.A.S. Piedmont Virginia Community College, 1980. The author extends her heartfelt thanks to Rachel Wrightson, George Barry and Erin O’Connor for their invaluable editorial comments, and to Professor Marsha Garrison for her guidance.

¹ In re Wendland, 93 Cal. Rptr. 2d 550, 553 (Ct. App. 2000).
² Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 269 (1990); see also Ronald E. Cranford, Modern Technology and the Care of the Dying, in BIRTH TO DEATH: SCIENCE AND BIOETHICS 191-97 (David C. Thomasma & Thomasine Kushner eds., 1996) (exploring changes in the process of dying since the second World War).
the patient’s best interest.\(^3\) With *Wendland*, California joined a small but growing number of states that have adopted the clear and convincing standard in these circumstances.\(^4\) The *Wendland* court, however, was the first to determine that a lesser standard would be unconstitutional.\(^5\) Because of the profound effect this decision could have on a significant number of health care decisions, it is important to examine the court’s reasoning to test it for soundness.

This comment examines *Wendland*, challenging the court’s reasoning. Part I briefly explores case law regarding medical treatment refusals and legislative enactments based on the Uniform Health Care Decisions Act (UHCDA).\(^6\) Part II discusses the details of the *Wendland* case. Part III challenges the court’s reasoning, focusing on four problems with the decision: (1) Stating that its decision would affect only a “narrow class” of patients, the court misperceived the scope of the decision’s

---


\(^5\) See generally *Wendland*, 28 P.3d 151. The court examined the case in the light of Article I, section 1, of the California Constitution, which specifically lists privacy as an individual right, and noted that the constitutional privacy provision protects against private conduct. *Id.* at 165. While a full discussion of the issue of the existence of a federal constitutional right to privacy is beyond the scope of this article, it is possible that other state courts will adopt reasoning from *Wendland* when construing their own state constitutions. It is also conceivable that the court’s reasoning could be considered in examining the issue on a federal level.

applicability;\(^7\) (2) while the court’s decision was ostensibly made in the spirit of furthering individual autonomy, the opinion actually has the opposite effect, since Californians are now either forced to make decisions in a manner they would not have chosen themselves or suffer the consequences of a default they likely would not have chosen themselves;\(^8\) (3) the court’s dependence on the use of written advance directives is misplaced, as is its belief that oral appointment of surrogates adequately offsets the consequences of failure to execute written advance directives;\(^9\) and (4) clear and convincing evidence, in contrast to the court’s holding, is neither required nor appropriate for decisions to withdraw treatment from incompetent patients.\(^{10}\) Part III also proposes that the California legislature must now specify that the preponderance of the evidence is sufficient for surrogates to withdraw treatment from incompetent patients as long as other statutory requirements are met. Furthermore, the legislature must specify what procedural safeguards are sufficient to resolve

\(^7\) Wendland, 28 P.3d at 175.

\(^8\) Id. at 168.

\(^9\) Id. at 160-61, 172. The court relied on the use of advance directives and oral appointment of surrogates to provide guidance as to the patient’s wishes. Id. Advance directives are statements made by competent individuals directing the kinds of care they would like to receive in the event of their subsequent incapacity. See Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 152 (5th ed. 2001); see also David Orentlicher, The Limitations of Legislation, 53 Md. L. Rev. 1255, 1258-59 (1994). Advance directives are governed by state law; California’s governing provisions allow for written and oral advance directives and appointment of agents and surrogates. See Cal. Prob. Code §§ 4670, 4711, 4684, 4714 (West 2003). The United States Congress supported the use of advance directives via the Patient Self-Determination Act (PSDA). Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 Stat. 1388, § 4206 (1990) (codified as 42 U.S.C. § 1395 (1991)) (including as a budget amendment the PSDA, which requires healthcare providers to provide written information to patients regarding their right to make advance directives, and to provide additional education to staff and the community regarding advance directives).

\(^{10}\) See Wendland, 28 P.3d at 174 (concluding that clear and convincing evidence is required to prove that a conservatee either wished to refuse life-sustaining treatment or that it would be in his best interest).
disputes, in order to keep such disputes out of the courts.

I. LEGAL BACKGROUND

Prior to Wendland, California case law was clear that competent patients may refuse life-sustaining treatments, even when not terminally ill, based on the California Constitution’s Privacy clause. Prior to California’s adoption of its version of the UHCDA, decisions for incompetent patients were either made informally, or based on state laws governing advance directives and court-appointed conservators. After the adoption of the Health Care Decisions Act (HCDA), all treatment decisions for incompetent patients, regardless of how the decision maker came by that role, were to be guided by the same provisions of the act.

A. California Case Law

The right of competent persons in California to refuse medical treatment was upheld in 1972 in Cobbs v. Grant. In

---


12 CAL. CONST. art. I, § 1. “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” Id. See Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Ct. App. 1984); Bartling v. Superior Court, 209 Cal. Rptr. 220 (Ct. App. 1984).


14 Id.

15 Id.

16 502 P.2d 1 (Cal. 1972) (remanding a medical malpractice case for retrial on the basis that it was unclear on what theory the jury reached its verdict when there was insufficient evidence to show negligence but when it was possible that the patient had not given informed consent).
Cobbs, the court held that a patient has the right to disclosure of his choices in regard to treatment, and the risks inherent in those choices. The court based that right on the right of the patient to refuse treatment. The right of competent patients to refuse even life-sustaining treatments was subsequently upheld in Bartling v. Superior Court in 1984. In Bartling, a competent patient was being treated with mechanical ventilation due to chronic respiratory failure, emphysema, a lung tumor and other serious medical problems. He sought an injunction to order the hospital and his physicians to disconnect the ventilator, but the lower court refused, claiming that such treatments could only be withdrawn if the patient was comatose and only in the absence of a reasonable possibility of recovery. The appellate court reversed, noting that the right to refuse treatment is an “obvious corollary” to the notion expressed in Cobbs that treatment given in the absence of informed consent constitutes a battery.

The right to refuse feeding and hydration was extended to patients who are not terminally ill in Bouvia v. Superior Court of Los Angeles County. Elizabeth Bouvia was completely immobile as a result of cerebral palsy, quadriplegia and arthritis, and was dependent on others for all aspects of her care. Her physicians

\[\text{\textsuperscript{17}}\quad \text{id. at 10.}\]
\[\text{\textsuperscript{18}}\quad \text{id. at 9.}\]
\[\text{\textsuperscript{19}}\quad \text{209 Cal. Rptr. 220 (Ct. App. 1984) (holding that a patient has the right to have mechanical ventilation discontinued despite objections of physicians and hastening of his death).}\]
\[\text{\textsuperscript{20}}\quad \text{id.}\]
\[\text{\textsuperscript{21}}\quad \text{id.}\]
\[\text{\textsuperscript{22}}\quad \text{id.}\]
\[\text{\textsuperscript{23}}\quad \text{225 Cal. Rptr. 297 (Ct. App. 1986). The right to refuse treatment was also held to apply to prisoners in Thor v. Superior Court of Solano County, 855 P.2d 375 (Cal. 1993) (holding that, in the absence of evidence of a threat to institutional security or public safety, an inmate may not be denied the freedom to refuse all medical treatment). The Wendland court erred in referring to Elizabeth Bouvia as a terminally ill patient; she was paralyzed, confined to a wheelchair, and suffering from cerebral palsy, but was not terminally-ill. See GREGORY PENCE, CLASSIC CASES IN MEDICAL ETHICS 25, 29 (1990).}\]
\[\text{\textsuperscript{24}}\quad \text{Bouvia, 225 Cal. Rptr. at 299-300.}\]
inserted a feeding tube against her will and she sought an injunction requiring that the tube be removed. The trial court denied her request, but the appellate court granted her relief. In granting relief, the court relied in part on *Cobbs* and *Bartling*.

**B. Development of Case Law on the Use of the “Clear and Convincing” Standard**

Prior to *Wendland*, courts in Michigan, Missouri, New Jersey and New York had adopted the clear and convincing standard for refusal of medical treatment by surrogates. The United States Supreme Court upheld the right of a state to require the standard in *Cruzan v. Director, Missouri Department of Health*. With *In re Conroy*, New Jersey became the first state to require clear and convincing evidence of a patient’s previously-stated wishes to refuse medical treatment. Claire Conroy was a

---

25 *Id.* at 298.

26 *Id.* Despite the court’s decision, Ms. Bouvia did not elect to exercise the option granted by the court to starve herself. *See Pence*, supra note 23, at 44.

27 *Bouvia*, 225 Cal. Rptr. at 300-02. The court also relied on *Barber v. Superior Court of Los Angeles County*, 147 Cal. App. 3d 1006 (Ct. App. 1983) (issuing a writ of prohibition to restrain the lower court from proceeding on murder charges filed against physicians who discontinued medical treatment from a comatose patient) *The Barber* court held that the physicians had no legal duty to act and that failure to act, therefore, was not grounds for proceedings. *Id.* at 1022. Furthermore, the court found that withdrawal of treatment is equivalent to withholding it, *id.* at 1016, and noted that “a murder prosecution is a poor way to design an ethical and moral code for doctors.” *Id.* at 1011.


30 486 A.2d 1209 (N.J. 1984). Courts throughout the United States have looked to New Jersey for guidance in cases regarding medical treatment refusals, since New Jersey was often the first to confront the issues. *See In re
terminally-ill, elderly, incompetent patient living in a nursing home.31 She had a history of refusing medical care and expressing discomfort with hospitals and medical treatment.32 Her nephew had sought to withdraw artificial nutrition and hydration.33 Despite Ms. Conroy’s death during the course of litigation, the New Jersey Supreme Court seized the opportunity to attempt to clarify decision-making standards by defining three such standards: “subjective,” “limited objective” and “pure objective.”34 In an attempt to keep such decisions out of the courts, the Conroy court set up procedural methods by which such decisions could be made.35 The court rejected distinctions between death that results from treatment termination and death

Peter, 529 A.2d 419 (N.J. 1987) (allowing the withdrawal of feeding tube from a patient in a persistent vegetative state based on clear and convincing evidence of the patient’s wishes for such treatment to be withdrawn); Conroy, 486 A.2d 1209 (recognizing that the right to refuse treatment survives incapacity and prescribing procedural safeguards for patients in nursing homes); In re Quinlan, 355 A.2d 647 (N.J. 1976) (allowing withdrawal of ventilator treatment from a patient in a persistent vegetative state). New Jersey was the first explicitly to find a distinction between suicide and the refusal of treatment. In re Quinlan, 355 A.2d at 664 (noting “a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support or radical surgery, for instance”). See Cantor, supra note 11, at 183 (reviewing the history of treatment refusal cases).

31 Conroy, 486 A.2d at 1216.
32 Id.
33 Id. at 1218.
34 Id. at 1229-33. The court held that the subjective standard could be used to refuse treatment on an individual’s behalf when there is clear evidence that the individual would have made that choice; the “limited objective” test should be used when there is some trustworthy evidence that the individual would have wanted to terminate treatment and the burden of prolonging life, as a result of pain and suffering, significantly outweighed the benefits of a prolonged life; and the “pure objective” test would allow for the termination of treatment only when the individual’s physical suffering would make the treatment inhumane. Id. at 1231-33.
35 Id. at 1241-42. The procedures included determination of the incompetency of the individual, notification of the Office of the Ombudsman (an office designated to investigate allegations of abuse in nursing homes), and confirmation by two independent physicians confirming the attending physician’s assessment of the patient’s medical condition and prognosis. Id.
that results from allowing a person to die of his disease, and between artificial feeding and other life-sustaining medical treatments. Subsequently, the New Jersey Supreme Court noted that Conroy was limited to elderly, incompetent patients with some ability to interact with the environment.

Three years later, in In re Westchester County Medical Center ex rel. O’Connor, New York became the next to require clear and convincing evidence of a patient’s wishes to have treatment withdrawn. While continuing to recognize the individual’s right to refuse treatment, the court refused to allow one to make such an assertion for another on the basis that no court or other person should decide what is an acceptable quality of life for another. Over the objections of family members, the court allowed the hospital to continue providing artificial feeding to Mary O’Connor, who became incompetent after having several strokes. Here, the court failed to find clear and convincing evidence that O’Connor would have chosen to refuse the treatment, despite evidence of repeated expressions of her beliefs over a period of almost twenty years in response to the deaths of a number of her relatives. The court defined “clear and convincing” as the level of proof sufficient to convince the

36 Id. at 1236 (noting that “[c]haracterizing conduct as active or passive is often an elusive notion, even outside the context of medical decision-making . . . [t]he distinction is particularly nebulous, however, in the context of decisions whether to withhold or withdraw life-sustaining treatment”).
37 Id. at 1234. The court, however, recognized the “emotional significance” of food. Id. What the court did not specify was whether it considered the emotional significance to be for the individual being fed or for those doing the feeding, an important distinction in deciding the benefits and burdens for the patient of continuing artificial feeding. See id.
38 In re Peter, 529 A.2d 419 (N.J. 1987) (refusing to require the tests and procedures of Conroy prior to withdrawal of treatment for patients in a persistent vegetative state).
40 Id. at 613.
41 Id. at 608.
42 Id. (noting that O’Connor’s statements were primarily in response to deaths from cancer of her husband, stepmother and the “last two” of her nine brothers).
factfinder “as far as is humanly possible, that the strength of the individual’s beliefs and the durability of the individual’s commitment to those beliefs makes a recent change of heart unlikely.”43 Although the O’Connor court rejected the term “substituted judgment,” it utilized what is usually considered a substituted judgment standard.44

Missouri followed New Jersey and New York, requiring the clear and convincing standard in Cruzan v. Harmon.45 Nancy Beth Cruzan was in a persistent vegetative state (“PVS”) as a result of injuries sustained in an automobile accident.46 Here, the Supreme Court of Missouri found that evidence of the patient’s wishes to have artificial nutrition and hydration withdrawn was “inherently unreliable” and refused to authorize her parents to have such treatment discontinued.47 The court held that the state’s interest in preserving Nancy’s life and that of others like her, in the face of a minimal burden on Nancy to continue living, outweighed her right to have treatment discontinued.48 Additionally, the court noted that the issue of such decisions is one of policy, which is best left to the legislature, and that legislative action would be required in order to overcome the

---

43 Id. at 613 (emphasis added) (citations omitted).
44 Id.
45 760 S.W.2d 408 (Mo. 1988).
46 Cruzan, 760 S.W.2d at 410-11. Nancy’s parents requested that her artificial nutrition and hydration be withdrawn, but the hospital refused to do so without court approval. Id. at 268. The trial court authorized the termination of treatment but the State Supreme Court reversed, holding that the State Constitution—and probably the U.S. Constitution—provided no broad right to privacy that would allow for unfettered exercise of a right to refuse treatment, that the State had a policy strongly favoring the preservation of life and that Cruzan’s statements to her roommate were insufficient to establish her wish not to receive treatment under her current circumstances. Id. PVS is a state in which the patient has sleep/wake cycles but exhibits no cognitive awareness of or substantial reaction to the surroundings. PRINCIPLES OF NEUROLOGY 347 (Raymond D. Adams et al. eds., 6th ed. 1997).
47 Cruzan, 760 S.W.2d. at 426. The trial court found that “Nancy expressed, in ‘somewhat serious conversation’ that if sick or injured she would not want to continue her life unless she could live ‘halfway normally.’” Id. at 411.
48 See id. at 426.
The United States Supreme Court granted certiorari. In its subsequent opinion, the Court noted the confusion in the various courts over the basis of the right to refuse treatment and the appropriate standard to apply in cases involving incompetent patients. The sole question before the Court was “whether the United States Constitution prohibits Missouri from choosing the rule of law which it did.” In a plurality opinion, the Court held that the United States Constitution did not bar a state from requiring clear and convincing evidence of an incompetent’s wishes. The Court also recognized a liberty interest under the Due Process Clause for a competent person to refuse unwanted medical treatment, and assumed that such right would include the refusal of nutrition and hydration. Whether such a right has been violated must be determined by balancing the individual’s liberty interest against the relevant state interests.

49 See id. Specifically, the court stated, “[I]f there is to be a change in . . . policy, it must come from the people through their elected representatives.” Id.


51 Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990) (pointing out that the cases on the subject “demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones”).

52 Id. at 277.

53 See id. at 285. The Court did not explicitly state that the standard was constitutionally required, but discussed it approvingly. Id. at 283.

54 See id. at 284.

55 Id. at 279. The Court held that it was permissible for Missouri to apply a clear and convincing evidence standard when the individual interests at stake are particularly important. Id. at 283. The Court cited Missouri’s interest as a general interest in the protection and preservation of human life; the Court stated that Missouri may: 1) seek to “safeguard the personal element of [an individual’s] choice” between life and death; 2) guard against “potential abuses” by surrogates who may not act to protect the patient; 3) consider that “a judicial proceeding regarding an incompetent’s wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it;” and 4) decline “to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the
Additionally, the Court determined that the Constitution does not require a State to accept the substituted judgment of close family members without substantial proof that their views reflect the patient’s. The Court further noted that “favored treatment of traditional family relationships . . . may not be turned around into a constitutional requirement that a State must recognize” such decision making.

Justice O’Connor noted in her concurring opinion, however, that the plurality decision did not decide whether a State must give effect to the decisions of a surrogate. She concluded that, in order to protect the patient’s liberty interest in refusing medical treatment, the State may have a constitutionally required duty to do so. In a dissenting opinion joined by Justices Marshall and Blackmun, Justice Brennan stated that Cruzan had a fundamental right to be free of unwanted artificial nutrition and hydration that is not outweighed by any interest of the State. The dissenters found that the standard required by Missouri impermissibly burdened that right.

Michigan was the first state after Cruzan, and the last before Wendland, to apply the clear and convincing standard to treatment refusals by surrogates. In In re Martin, a case constitutionally protected interests of the individual.” Id. at 281.

56 See id. at 286. The Court did not discuss what might constitute “substantial proof.” See id.

57 Id. The Court, however, did not disallow states’ recognition of such decision making. Id.

58 Id. at 289 (O’Connor, J., concurring).

59 Id. Justice O’Connor’s suggested means of protecting the liberty interest in refusing medical treatment included durable powers of attorney and health care proxies, but she did not mention statutory appointment of family members or due process procedural safeguards in the absence of any of the above. Id. at 290-91.

60 Id. at 302 (Brennan, J., dissenting); see also id. at 350 (Stevens, J., dissenting) (opining that the best interests of the individual should prevail over general state policy).

61 Id. at 302 (Brennan, J., dissenting) (arguing that “Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State”).

remarkably similar factually to the Wendland case, Michael Martin suffered head injuries as the result of an accident, leaving him severely impaired, both physically and neurologically, although he was not in a vegetative state.\textsuperscript{63} His wife sought to discontinue artificial nutrition and hydration based on previous statements he had made, but was opposed by his mother and sister.\textsuperscript{64} The Martin court noted that a “necessary corollary of the . . . right to consent is the right not to consent.”\textsuperscript{65} Despite this acknowledgement, the court set the burden of proof for refusals by surrogates significantly higher than for consent.\textsuperscript{66}

Thus, by the time the California Supreme Court heard Wendland, four states had judicially-mandated standards that required clear and convincing evidence of a patient’s previously expressed wishes to have treatment withdrawn in circumstances

\textsuperscript{63} See id. at 402-03.

\textsuperscript{64} Id. at 402. In Martin, Michael Martin’s level of functioning may have been greater than that of Robert Wendland, and there is some question as to the motives of his spouse. See Andrew J. Broder & Ronald E. Cranford, “Mary, Mary, Quite Contrary, How Was I to Know?” Michael Martin, Absolute Prescience, and the Right to Die in Michigan, 72 U. DET. MERCY L. REV. 787 (1995) (describing Michael as “conscious but unable to communicate, except through head nods, and even then not in a consistent, meaningful manner;” and noting that “Mary consulted with nurses, doctors, lawyers, clergy and a bioethics committee regarding the withdrawal of Michael’s artificial means of life-support. Through those consultations, Mary sought to address all medical, ethical, religious, and legal aspects of the decision to withdraw life-sustaining medical treatment from Michael”). Cf. John H. Hess, Looking for Traction on the Slippery Slope: A Discussion of the Michael Martin Case, 11 ISSUES L. & MED. 105 (1995) (reporting that Michael’s abilities included smiling frequently, indicating his desire to participate in therapy, using a communication device until Mary transferred him to a different facility and enjoying recreational activities; describing Mary’s attempts to keep information from other family members; and citing others claims that she engaged in extramarital relationships even at the time of the court proceedings, that she had financial motives and that she was biased against persons with disabilities).

\textsuperscript{65} Martin, 538 N.W.2d at 405.

\textsuperscript{66} See id. at 407. The court accepted the notion that the right to refuse treatment could survive incompetency and be asserted on a person’s behalf, but allowed only a purely subjective standard. Id. at 407-08.
similar to what the patient was then experiencing. The United States Supreme Court allowed but did not require that standard in order to satisfy constitutional requirements.

C. California and the UHCDA

Legislatures have responded to confusion in the courts by enacting legislation regulating advance directives, health care powers of attorney and surrogate decision making. Every state has enacted either a health care power of attorney statute or a living will statute. Thirty-five states have enacted surrogate decision-making statutes of varying degrees of comprehensiveness. California enacted the HCDA in 1999.

---

67 See supra Part I.B (discussing the cases from those four states).

68 Cruzan, 497 U.S. 261 (1990). Justice Scalia raised the issue of treatment termination as a deliberate means to end life, stating that refusal of medical treatment is equivalent to suicide. Id. at 293-99 (Scalia, J., concurring). The Court rejected that position in 1997. See Vacco v. Quill, 521 U.S. 793 (1997). In Vacco, physicians challenged the constitutionality of New York statutes criminalizing the act of aiding a person to commit or attempt to commit suicide, on the basis that it violated the Equal Protection Clause of the Constitution. Id. at 798. They argued that since patients on life-sustaining treatment could request its discontinuance, knowing it would lead to their death, then patients who were not on life-sustaining treatments were thus treated differently. Id. Justice Scalia joined without comment in the majority opinion that rejected this argument, despite his comment to the contrary in Cruzan, 497 U.S. at 293-99 (Scalia, J., concurring) (equating decisions to refuse treatment with suicide).


70 Id. at 155 n.4 (citing American Bar Association Commission on Legal Problems of the Elderly).

71 Id. at 155-56, 168-78 (comparing surrogate statutes from Illinois, New Mexico and Ohio, as representative of the various types).

1. The UHCDA

The UHCDA was drafted and approved by the National Conference of Commissioners on Uniform State Laws in 1993 and was approved by the American Bar Association in 1994.\(^\text{73}\) The purpose of the Act was to achieve more uniformity in decision making from state to state, but it has had limited success due to the number of states that had previously enacted statutes.\(^\text{74}\) The UHCDA has been adopted in some form by six states, including California.\(^\text{75}\) All of the states other than California that have adopted the UHCDA include “comprehensive provisions” based on the UHCDA for decision making by surrogates.\(^\text{76}\)

---

\(^{73}\) UHCDA, \textit{supra} note 6.


\(^{75}\) \textit{Id.} at 20. The other states are Delaware, Hawaii, Maine, Mississippi, and New Mexico. \textit{Id.} Delaware restricts those eligible to use advance directives to patients who are terminally ill or permanently unconscious, and both Delaware and Maine restrict withdrawal or withholding of life-sustaining treatment decisions by surrogates to patients who are terminally ill or permanently unconscious. \textit{Id.} at 20-21. Hawaii prohibits the withdrawing or withholding of artificial nutrition and hydration by a surrogate unless two physicians certify that the treatment is “merely prolonging the act of dying and that the patient is unlikely to have any neurological response.” \textit{Id.} at 21.

\(^{76}\) \textit{Id.} at 20. Delaware provides a list from which a surrogate shall be chosen, in descending order of priority: spouse (with some exceptions), adult child, parent, adult sibling or adult grandchild. \textit{Del. Code Ann. tit. 16, § 2507} (2001). Hawaii requires a consensus among potential surrogates as to who will serve as surrogate, in the absence of which they may seek appointment as guardian. \textit{Haw. Rev. Stat.} § 327E-5 (2002). Maine provides a list similar to Delaware except that the list includes “an adult who shares an emotional, physical and financial relationship with the patient similar to that of a spouse” after spouse in priority, and adds at the end of the list adult nieces or nephews, adult aunts or uncles, and “another adult relative of the patient, related by blood or adoption, who is familiar with the patient’s personal values and is reasonably available for consultation.” \textit{Me. Rev. Stat. Ann. tit. 18-A, § 5-805} (West 2001). Mississippi also provides a list of surrogates similar to Delaware but without grandchildren. \textit{Miss. Code Ann.} § 41-41-211 (2001). New Mexico also provides a list of surrogates similar to Delaware, except that New Mexico also provides for significant others after spouses, and substitutes
2. California’s Adoption of the UHCDa

Prior to adopting a version of the UHCDa, California provided no formal rules for making decisions regarding medical treatment of incapacitated individuals.\(^{77}\) California adopted the Act to create uniform rules and standards for medical decision making for incapacitated persons so the same rules apply regardless of how the decision maker was chosen.\(^{78}\) California’s law does not include the UHCDa’s hierarchical ordering of family members for surrogate decision making when incapacitated patients have not named a health care proxy or surrogate, but does specify that domestic partners have the same rights as spouses to make medical decisions.\(^{79}\) California included provisions allowing for oral advance directives and oral appointment of surrogates, unlike some other states that have

---

\(^{77}\) Senate Rules Committee Hearing on A.B. 891, supra note 13.

\(^{78}\) Id. According to the California Law Commission, the impetus for the law was a series of cases in which decisions had been made for patients by providers either using or disregarding guidance from surrogates or family members. Health Care Decisions Act: Hearing on A.B. 891 Before the Senate Judiciary Comm., 1999-2000 Reg. Sess. (Cal. 1999) (hereinafter Senate Judiciary Comm. Hearing on A.B. 891). The cited cases included Duarte v. Chino Comm. Hosp., 85 Cal. Rptr. 2d 521 (Ct. App. 1999) (holding that since health care providers are immune from damages from failure to comply with advance directives they are therefore also immune when there is no directive); Barber v. Superior Court, 195 Cal. Rptr. 484 (Ct. App. 1983) (finding that failure to provide medical treatment when the patient has no chance of recovery is not an unlawful failure to perform a legal duty); and Cobbs v. Grant, 502 P.2d 1 (Cal. 1972) (finding that physicians have a duty of reasonable disclosure of available choices of medical therapies and the dangers both potential to as well as inherent in each choice, i.e., a duty of informed consent). The rules were intended to apply equally whether the surrogate is a family member or friend, a surrogate named in an advance directive, a public guardian, or a court “making health care decisions as a last resort.” Senate Judiciary Comm. Hearing on A.B. 891, supra.

\(^{79}\) CAL. PROB. CODE § 4716(a) (Deering 2001). See UHCDa § 5, supra note 6, at 167-68.
adopted the UHCDA.\footnote{Delaware omitted the provision recognizing oral instructions, and both Maine and New Mexico provided additional safeguards. See English, \textit{supra} note 74, at 20.} California also limited oral designation of a surrogate to the course of treatment, illness or other health care institution stay during which the designation was made.\footnote{\textit{Id.} at 23. The act was subsequently amended to limit the authority of orally appointed surrogates to “the course of treatment or illness or during the stay in the health care institution when the surrogate decision is made, or for 60 days, whichever period is shorter.” \textsc{Cal. Prob. Code} \S 4711(b) (West 2003).}

3. \textit{California Probate Code Section 2355}

California adopted the HCDA in 1999, four months after the appellate court filed its decision in \textit{Wendland} and before the California Supreme Court heard the case.\footnote{1999 Cal. Stat. 658 \S 12. The HCDA became effective July 1, 2000; the appellate court had filed its decision on February 24, 2000. \textit{Wendland}, 93 Cal. Rptr. 2d 550 (Ct. App. 2000).} The HCDA amended section 2355 of the \textit{California Probate Code}, governing decisions by conservators.\footnote{\textsc{Cal. Prob. Code} \S 2355 (Deering 2001). From the time of its enactment in 1979 to the effective date of its amendment in 2000, section 2355(a) provided:

If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, the conservator has the exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary and the conservator may require the conservatee to receive such medical treatment, whether or not the conservatee objects.

\textsc{Cal. Prob. Code}, \S 2355(a) (West 1998) (amended 1999), quoted in \textit{Wendland}, 28 P.3d at 163. After amendment, section 2355 provided:

If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary. \textit{The conservator shall make health care decisions for the conservatee in accordance with the conservatee’s individual health care instructions, if any, and other wishes to the extent known to the conservator.}
a. Section 2355 Prior to the HCDA

Prior to its amendment, section 2355 included no language regarding the applicability of informal statements made by the conservatee while competent. In In re Drabick, the California Court of Appeal accepted that the former section 2355 allowed a conservator to withhold artificial nutrition and hydration from a patient in PVS and interpreted section 2355 as restricting the role of courts in supervising conservators’ treatment decisions. The Drabick court also accepted that the conservator would be bound by the conservatee’s formal health care directions, but rejected the idea that a conservator would be bound to honor prior informal statements regarding continuation or cessation of treatment. Finally, the Drabick court concluded that the decision would be based on the conservator’s assessment of the conservatee’s best interests, while considering the conservatee’s prior statements as relevant and worthy of consideration in good faith.

Thus, as originally enacted, section 2355 provided that a conservator must follow the dictates of an advance directive, but made no provision for utilization of informal statements as to the patient’s wishes. After Drabick, conservators could utilize informal statements in determining a patient’s best interests but were not required to do so.

Otherwise, the conservator shall make the decision in accordance with the conservator’s determination of the conservatee’s best interest. In determining the conservatee’s best interest, the conservator shall consider the conservatee’s personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects.

CAL. PROB. CODE § 2355(a) (Deering 2001) (altered provisions italicized).

84 CAL. PROB. CODE § 2355(a) (Deering 2001); CAL. PROB. CODE § 2355(a) (West 1998) (amended 1999); see supra note 83 (quoting the older and amended provision).

85 245 Cal. Rptr. 840 (Ct. App. 1988).

86 Id. at 857-58.

87 Id. at 856.

88 Id. at 857.
b. Section 2355 After Amendment

After its amendment, section 2355 made both formal and informal statements of the conservatee binding on the conservator to the extent that they are known. It codified the provision of the UHCDA that required the conservatee’s personal values to be considered in determining his best interests when his wishes are unknown. The new version of section 2355, therefore, provides for decisional standards that utilize to the degree possible the knowledge the conservator has about the wishes and values of the conservatee.

Whereas the old section 2355 recognized only written advance directives, the amended version gives effect to oral directives as well. Lastly, the California Law Commission stated that the burden of proof for the determination of the conservatee’s wishes or best interests under section 2355 is met by a preponderance of the evidence.

---

89 CAL. PROB. CODE § 2355(a) (Deering 2001).
90 Id.; see also UHCDA, supra note 6.
91 CAL. PROB. CODE § 2355(a) (Deering 2001). The amended version adds a “substituted judgment” provision that not only shall the conservator “make health care decisions for the conservatee in accordance with the conservatee’s individual health care instructions, if any” but shall also use “other wishes to the extent known to the conservator.” Id.
92 Compare CAL. PROB. CODE § 2355(a) (Deering 2001) with CAL. PROB. CODE § 2355(a) (West 1998) (amended 1999); see supra note 83 (quoting both provisions). The apparent purpose of this change is to honor the wishes of an individual who has not executed a written advance directive. Id.
93 Wendland, 28 P.3d at 166.
II. IN RE WENDLAND

A. Facts and Procedural History

Robert Wendland was an auto parts salesman from Stockton, California. He developed a drinking problem after the death of his father-in-law, who had been maintained on a ventilator while dying from gangrene. While watching his father-in-law in that condition, Robert told his wife, Rose, “I would never want to live like that, and I wouldn’t want my children to see me like that, and look at the hurt you’re going through as an adult seeing your father like that.” Robert told Rose that her father “wouldn’t want to live like a vegetable” and “wouldn’t want to live in a comatose state.”

Both Rose and Robert’s brother, Michael, became concerned about Robert’s safety because of his drinking. Michael told him, “I’m going to get a call from Rosie one day, and you’re going to be in a terrible accident.” Upon Michael’s warning that he would end up laying in bed “just like a vegetable,” Robert responded, “Mike, whatever you do[,] don’t let that happen. Don’t let them do that to me.” According to one of his children, Robert said during that conversation that “if he could not be a provider for his family, if he could not do all the things

---

94 This comment will follow the convention used by the Wendland courts, referring to the members of the Wendland family by their first names. See 93 Cal. Rptr. 2d 550 (Ct. App. 2000); see also 28 P.3d 151. The purpose of this convention for this comment is to be consistent with the convention in the Wendland cases, to distinguish one family member from another, and to distinguish references to the court’s opinion from references to the individuals involved.


96 Wendland, 28 P.3d at 157.

97 Id.

98 Id.

99 Id.

100 Id.

101 Id.
that he enjoyed doing, just enjoying the outdoors, just basic things, feeding himself, talking, communicating, if he could not do those things, he would not want to live." Rose testified that Robert “made clear” to her that under no circumstances would he want to live if he had to have diapers, if he had to have life support, if he had to be kept alive with a feeding tube or if he could not be a “husband, father, provider.”

Robert was severely injured in an automobile accident in September 1993, as a result of his driving while intoxicated. He remained in a coma for sixteen months. Although he eventually regained consciousness, he was left both mentally and physically disabled.

Prior to regaining consciousness, Robert received fluid and nutrition through a surgically-placed feeding tube inserted into his small intestine. He first began to show signs of

---

102 Id.
103 In re Wendland, 93 Cal. Rptr. 2d 550, 557-58 (Ct. App. 2000).
104 Wendland, 28 P.3d at 154.
105 Wendland, 93 Cal. Rptr. 2d at 554. Coma is “a state of profound unconsciousness from which one cannot be roused.” Stedman’s Medical Dictionary 385 (27th ed. 2000); see also Principles of Neurology, supra note 46, at 346-47 (defining coma and PVS). While Robert was in a coma, Rose visited him daily, sometimes with their children. Wendland, 28 P.3d at 154.
106 According to a medical report submitted to the court, Robert had the following medical conditions:

[S]evere cognitive impairment that is not possible to fully appreciate due to the concurrent motor and communication impairments . . . ; maladaptive behavior characterized by agitation, aggressiveness and non-compliance; severe paralysis on the left; severely impaired communication without compensatory augmentative communication system; severe swallowing dysfunction, dependent upon non-oral enteric tube feeding for nutrition and hydration; incontinence of bowel and bladder; moderate spasticity; mild to moderate contractures; general dysphoria; recurrent medical illnesses, including pneumonia, bladder infections, sinusitus; and dental issues.

Wendland, 28 P.3d at 155.
107 Wendland, 93 Cal. Rptr. 2d at 554-55.
responsiveness in late 1994 and early 1995.\textsuperscript{108} Between January and July of 1995, Robert’s feeding tube dislodged four times.\textsuperscript{109} Rose authorized surgical replacement of the tube the first three times but refused the fourth.\textsuperscript{110} Dr. Kass, Robert’s physician, inserted a nasogastric feeding tube while awaiting review of the situation by the hospital ethics committee.\textsuperscript{111} The hospital ethics committee stated no objection to the removal of the feeding tube, and both Dr. Kass and the county patient ombudsman supported the decision.\textsuperscript{112} Robert’s estranged mother, Florence, and sister were not consulted, however, and filed for a temporary restraining order to block removal of the feeding tube after learning of the decision.\textsuperscript{113} Rose then petitioned to be appointed as Robert’s conservator and asked the court to confirm her authority to withhold nutrition and hydration.\textsuperscript{114}

The court appointed Rose as conservator but delayed deciding whether to authorize her to have the feeding tube removed and ordered her to continue the current course of therapy for sixty days.\textsuperscript{115} Sixty days elapsed with no change in Robert’s condition, and Rose again asked the court for authority to remove the feeding tube.\textsuperscript{116} Florence asked the court to appoint independent counsel for Robert, but the trial court declined and the appellate court denied her petition for writ of mandate.\textsuperscript{117}

\textsuperscript{108} Wendland, 28 P.3d at 154 (citing the medical report submitted to the court, but not specifying what signs of responsiveness were noticed).
\textsuperscript{109} Wendland, 93 Cal. Rptr. 2d at 555.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{114} Wendland, 28 P.3d at 155.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. A writ of mandate is “an order from an appellate court directing a lower court to take a specified action.” \textsc{Black’s Law Dictionary} 973 (7th ed. 1999).
Supreme Court ultimately granted review and transferred the case to the appellate court, which directed the trial court to appoint counsel for Robert; his counsel subsequently supported Rose’s decision.\textsuperscript{118}

Despite support for Rose’s decision by his counsel, his physician and the ethics committee, the trial court found that Robert’s statements to his wife and brother while he was competent were not enough to show by clear and convincing evidence that he would have wanted to die if he were minimally conscious.\textsuperscript{119} The trial court held that a conservator could withhold artificial nutrition and hydration from a minimally conscious conservatee if shown by clear and convincing evidence to be in the conservatee’s best interest, considering any wishes the conservatee may have previously expressed.\textsuperscript{120} The court found that Rose had not met her burden.\textsuperscript{121} Nonetheless, the court found that Rose had acted in good faith and allowed her to continue as conservator, though she would not be permitted to withdraw nutrition and hydration.\textsuperscript{122}

The appellate court reversed, upholding the lower court’s burden of proof standard but finding that the trial court erred in substituting its own judgment as to Robert’s best interest.\textsuperscript{123} Applying \textit{In re Drabick},\textsuperscript{124} the court noted that the conservator must make the final treatment decision “regardless of how much or how little information about the conservatee’s preferences is available.”\textsuperscript{125} The appellate court then held that the trial court’s sole role should have been to determine whether Rose had

\begin{itemize}
  \item \textsuperscript{118} \textit{Wendland}, 28 P.3d at 155.
  \item \textsuperscript{119} \textit{Id.} at 157; \textit{see supra} text accompanying notes 97-103 (discussing Robert’s statements).
  \item \textsuperscript{120} \textit{See Wendland}, 28 P.3d at 156.
  \item \textsuperscript{121} \textit{Id.} at 156-57.
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{In re Wendland}, 93 Cal. Rptr. 2d 550, 579 (Ct. App. 2000).
  \item \textsuperscript{124} 245 Cal. Rptr. 840 (Ct. App. 1988).
  \item \textsuperscript{125} \textit{Wendland}, 93 Cal. Rptr. 2d at 562 (quoting Drabick, 245 Cal. Rptr. at 857). The court did not explain why a clear and convincing standard was appropriate in this case; the California Supreme Court later noted that the usual standard is preponderance of the evidence. \textit{Wendland}, 28 P.3d at 166.
\end{itemize}
considered Robert’s interests in good faith but remanded to permit Florence to present evidence rebutting Rose’s case.\textsuperscript{126} The California Supreme Court granted review of the decision.\textsuperscript{127} Robert died of pneumonia in July 2001.\textsuperscript{128} His death occurred after oral argument but prior to the issuance of an opinion.\textsuperscript{129} The California Supreme Court retained the case for decision because it raised “important issues” that tend to “evade review” due to the health of those the cases typically concern.\textsuperscript{130}

\textbf{B. The Wendland Opinion}

In \textit{Wendland}, the California Supreme Court reaffirmed a fundamental right to refuse medical treatment but was clearly reluctant to authorize the exercise of that right through a third party.\textsuperscript{131} The court held that a conservator may not withhold artificial nutrition and hydration from a minimally conscious patient in the absence of clear and convincing evidence either that the patient had previously expressed wishes to forgo such treatment or that doing so is in the patient’s best interest.\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{126} \textit{Wendland}, 93 Cal. Rptr. 2d at 579-80.
\item \textsuperscript{127} \textit{Wendland}, 28 P.3d at 158.
\item \textsuperscript{128} Chiang, \textit{supra} note 95. It appears that Rose may have had the authority to refuse to authorize the provision of antibiotics to Robert, given her continued conservatorship, thus allowing him to die from bacterial pneumonia. \textit{Wendland}, 28 P.3d at 157 (noting that Rose had been retained as conservator and that her authority to remove life sustaining medical treatment was restrained by the lower court in regard to withholding nutrition and hydration, without mention of other life sustaining treatments). No mention is made in any source, however, as to whether his pneumonia was viral or bacterial or whether he received antibiotics. Requests by the author for references to public sources for such information from attorneys in this case went unanswered.
\item \textsuperscript{129} \textit{Wendland}, 28 P.3d at 158.
\item \textsuperscript{130} \textit{Id.} at 151 n.1.
\item \textsuperscript{131} \textit{Id.} at 174. The court held that a conservator must prove, “by clear and convincing evidence, either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would have been in his best interest.” \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 175.
\end{itemize}
Throughout its decision, the court repeatedly characterized the issue as the intentional killing of the patient against his will.\textsuperscript{133} This emphasis illustrates the court’s disregard for the United States Supreme Court’s explicit distinction between killing and allowing the patient to die.\textsuperscript{134} Instead of framing the issue as a conflict between the fundamental interest in refusing medical treatment versus a fundamental interest in life, with the state’s interest in protecting the individual’s choice as operating on both sides of the conflict, the court pitted the decision to withdraw treatment against the state’s interest in preserving life.\textsuperscript{135}

After reviewing constitutional and common law issues, starting with the principle that a competent person may refuse even life-sustaining treatment,\textsuperscript{136} the court noted that California’s Constitution also protects against “obvious invasions of . . .

\textsuperscript{133} \textit{Wendland}, 28 P.3d 151, \textit{passim}. For example, the court uses such language as: “a conservator’s proposal to end the life of a conscious conservatee,” \textit{id.} at 156; “the conservator has claimed the authority to end the conservatee’s life,” \textit{id.} at 158; “the statute would be understood as authorizing a conservator to deliberately end the life of a conservatee,” \textit{id.} at 163; “conservators . . . contemplating a conscious conservatee’s death,” \textit{id.} at 166; “permitting a conservator deliberately to end the life of a conscious conservatee,” \textit{id.} at 167; “[t]he ultimate decision is whether a conservatee lives or dies,” \textit{id.} at 169; “where a conservator proposes to end the life of a conscious but incompetent conservatee,” \textit{id.} at 174; “[t]he result would be to permit a conservator freely to end a conservatee’s life,” \textit{id.;} and “medical decisions . . . intended to bring about the death of a conscious conservatee,” \textit{id.} at 175; see also Glenn Griener, \textit{Stopping Futile Treatment and the Slide Toward Non-Voluntary Euthanasia}, 2 \textit{Health L.J.} 67 (1994) (arguing that courts use the same rationale for setting high evidentiary standards for withholding of treatment as they do for maintaining the prohibition against assisted suicide; i.e., to protect vulnerable persons); Adam J. Hildebrand, \textit{Masked Intentions: The Masquerade of Killing Thoughts Used to Justify Dehydrating and Starving People in a “Persistent Vegetative State” and People with Other Profound Neurological Impairments}, 16 \textit{Issues L. & Med.} 143 (2000) (arguing that all decisions to withdraw nutrition and hydration are based on the intention to kill).


\textsuperscript{135} \textit{Wendland}, 28 P.3d at 160, 163.

\textsuperscript{136} \textit{Id.} at 158.
interests fundamental to personal autonomy." Following this, the court concluded that the decision of a competent adult to refuse life-sustaining treatment must be considered fundamental. Furthermore, the court noted that federal law does not oppose a competent adult’s refusal of medical treatment. Applying *Cruzan*, the California court inferred a constitutionally protected liberty interest in refusing unwanted medical treatment, including the refusal of artificial nutrition and hydration. Consequently, the right to refuse unwanted medical treatment may only be infringed if the state’s interest in preserving life outweighs the interest of the individual.

Accepting that the right of a competent adult to refuse medical treatment would survive that adult’s incapacity, the court limited that survival to instances where it is “exercised while competent pursuant to a law giving that act lasting validity.” Comparing California’s former Natural Death Act with its new HCDA, the court concluded that the new law “give[s] effect to the decision of a competent person, in the form either of instructions for health care or the designation of an agent or surrogate for health care decisions.”

The court, however, distinguished decisions made through an advance directive from those made by court-appointed conservators. Agreeing with the appellate court that the

---

137 Id. at 159 (quoting Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633 (Cal. 1994)).
138 Id.
139 Id. at 159-60.
141 Id. at 159; see supra Part I.B (discussing *Cruzan*, 497 U.S. 261).
142 *Wendland*, 28 P.3d at 160.
143 Id. But see infra note 241 (arguing that the court confused the issue of the survival of the right with the issue of the sufficiency of the means utilized to prove the patient’s prior wishes).
exercise of a right through another is a “legal fiction,” the court reviewed the alternative basis for treatment choices for incompetent patients offered by the Court of Appeal. That is, while most courts accept the idea that a patient’s right to choose or refuse medical treatment survives incompetence, what actually survives is the patient’s right to have appropriate medical decisions made for him by others in his own best interests. Wendland took issue with this position, reasoning that any decision should reflect the conservatee’s own interests and values, that treatment refusal by a court-appointed conservator is not the equivalent of a conservatee’s refusal, and that any decision by a conservator does not necessarily take precedence over the conservatee’s right to life or the state’s interest in preserving life.

[hereinafter Assembly Hearing on A.B. 891] (concurring in Senate Amendments and describing one of the purposes of the Act as “establish[ing] a uniform standard of decision-making for adults without decision-making capacity so that the same rules apply whether the decisionmaker is an agent under a PAHC [power of attorney for health care], another surrogate appointed by the patient, a conservator or a court”). Here, the court closely examined the Court of Appeal’s decision in Drabick, 245 Cal. Rptr. 840 (Ct. App. 1988) (authorizing removal of a nasogastric feeding tube from a patient who was not terminally ill but who was in PVS) stating that the court had confused the two concepts. Wendland, 28 P.3d at 161. The court examined In re Drabick closely because the decision had played a prominent role in both the Wendland parties’ arguments and the revision of California Probate Code section 2355, the statute governing Wendland. Id. The Court of Appeal viewed Drabick as a conflict between the right of the conservatee to life and his right to terminate unwanted treatment, and that the choice of those rights was to be vicariously exercised through the conservator. Id. at 162. Advance directives are statements, either oral or in writing, in which an individual expresses his wishes in advance as to what kinds of treatments he would or would not like to receive and the circumstances in which he wants those wishes honored. Thaddeus Mason Pope, The Maladaptation of Miranda to Advance Directives: A Critique of the Implementation of the Patient Self-Determination Act, 9 HEALTH MATRIX 139, 149 (1999). See infra Part III.B (discussing advance directives).

Wendland, 28 P.3d at 162-63.

Id.

Id. at 163. In essence, without so stating, the court rejected the “best interests” standard. See infra note 232 and accompanying text. The court then
IN RE WENDLAND

The court next turned its attention to California Probate Code section 2355 and noted that the Law Review Commission explicitly incorporated some of Drabick’s construction of the former statute into the new statute.\textsuperscript{149} It compared the language of the former section 2355 with the new language of amended section 2355.\textsuperscript{150} The court construed the new language as making informally expressed wishes dispositive rather than merely a factor to be considered.\textsuperscript{151} Accepting that the revised section 2355 could be construed as allowing a competent person to use an advance directive to direct all aspects of his or her future health care, not just the withdrawal of life support when the patient is terminally-ill, the court additionally determined that such wishes would be a constitutional basis for withdrawal or withholding of treatment since they would be based on the patient’s own wishes.\textsuperscript{152}

Nonetheless, the court contrasted decisions made based on statements in an advance directive with decisions made by a conservator, since the conservator is not appointed by the conservatee and cannot be presumed to have special knowledge of the conservatee’s wishes.\textsuperscript{153} The court briefly noted that the

pointed out that while no subsequent decision has rejected Drabick’s reasoning, neither had any court extended that reasoning to any conservatee who was not in PVS, and Drabick itself limited its decision to patients “for whom there is no reasonable hope of a return to cognitive life.” \textit{Id.} (quoting \textit{Drabick}, 245 Cal. Rptr. 840, 861 n.36 (Ct. App. 1988)). But see \textit{In re Grant}, 747 P.2d 445 (Wash. 1987) cited in \textit{In re Wendland}, 93 Cal. Rptr. 2d 550, 566 (Ct. App. 2000), a case in which the court allowed the withdrawal of artificial nutrition and hydration from a patient who had never been competent and who was not comatose or in PVS but who was terminally ill.

\textsuperscript{149} \textit{Wendland}, 28 P.3d at 163. The court characterized \textit{Drabick}’s conclusion as holding that “incompetent persons have a right . . . to appropriate medical decisions that reflect their own interests and values.” \textit{Id.}
\textsuperscript{150} \textit{Id.} at 164. \textit{See supra} note 83 (quoting the former and amended versions of section 2355).
\textsuperscript{151} \textit{Wendland}, 28 P.3d at 165. \textit{Drabick} utilized the latter approach, using informally expressed wishes as merely a factor for consideration. 245 Cal. Rptr. 840, 857 (1988).
\textsuperscript{152} \textit{Wendland}, 28 P.3d at 160, 168.
\textsuperscript{153} \textit{Id.}
law gives preference to spouses and other relations who might have knowledge of the person’s wishes but focused on the fact that not all conservators have knowledge of those wishes.\footnote{Id.} Regarding the standard of proof, the court agreed that the default standard in civil cases is the preponderance of the evidence, the same standard cited by the Law Review Commission’s explanatory comments.\footnote{Wendland, 28 P.3d at 166, 169.} The court, however, found such comments merely persuasive, as opposed to determinative, evidence of the intent of the legislature.\footnote{Id.}

Whereas the United States Supreme Court held only that it was constitutionally permissible under the United States Constitution for a state to require clear and convincing evidence of an incompetent’s wishes,\footnote{Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990).} the California Supreme Court leapt forward and said that it would be unconstitutional under the California Constitution not to require clear and convincing evidence in the case of a minimally conscious patient.\footnote{Wendland, 28 P.3d at 170.} The

\begin{footnotes}
154 Id. By doing so, the court dismissed the stated intent of the legislature in the HCDA to set a uniform standard for decisions by all surrogates, regardless of the means by which they came to be the decision makers. \textit{Assembly Hearing on A.B. 891, supra note 145, at Summary § 5.}

155 Wendland, 28 P.3d at 166, 169.

156 Id. The court based its dismissal of such intent on lack of evidence that the legislature had read every statement in its 280 page report. \textit{Id.} at 166. But, the explanatory comments merely pointed out that the standard is always the preponderance of the evidence in the absence of specification otherwise; the court does not explain why the legislature would not have known that and would have assumed instead that the clear and convincing standard would apply. \textit{See generally id.}


158 Wendland, 28 P.3d at 170. The court resisted Florence’s argument that section 2355 was unconstitutional on its face if read to permit a conservator to “end the life” of a conscious conservatee using only the low preponderance of the evidence standard. \textit{Id.} at 166. Florence’s argument was based on Article I, Section 1 of the California Constitution. \textit{See generally id.} Instead, the court construed the statute as requiring clear and convincing evidence to “minimize the possibility of its unconstitutional application” and supported the clear and convincing standard when necessary to protect important rights. \textit{Id.} The court explained that its construction “does not entail a deviation from the language of the statute.” \textit{Id.} While the language of the statute remains intact, however, the court has made the best interests standard impossible to apply. \textit{See infra}
\end{footnotes}
IN RE WENDLAND

court rejected Rose’s argument that her decision did not entail state action and, therefore, did not implicate any constitutional rights.159 Noting that the state constitutional right of privacy protects against private conduct, the court compared decisions to withdraw life support with issues such as homicide, mercy killing, assisted suicide and euthanasia.160 Furthermore, the court stated that the issue involved was whether a conservatee lives or dies, and the risk involved is that the conservatee would be subjected to starvation, dehydration and death against the conservatee’s wishes, the consequences of which a conscious conservatee would perceive.161

Part III.C.2 (discussing this issue). The court stated that it had previously found that such important rights included the right to reproduce, parental rights, the discipline of judges, the appointment of a conservator to provide for a person’s personal needs and involuntary electroconvulsive therapy. Wendland, 28 P.3d at 169. Additionally, the court listed fundamental liberty interests recognized by the U.S. Supreme Court, which requires a clear and convincing standard for termination of parental rights, commitment to a mental hospital and deportation. Id. According to the court, the standard to be used depends on the “gravity of the consequences that would result from an erroneous determination of the issue involved.” Id. (quoting Weiner v. Fleischman, 816 P.2d 892, 898 (Cal. 1991)).

159 Wendland, 28 P.3d at 165 n.10.
160 Id.
161 Id. at 169. While the court accepted the possibility that a conservatee might perceive unwanted efforts to keep him alive as an “unwanted intrusion,” it distinguished the two problems by stating that the decision to treat was reversible, but the decision to withdraw is not. Id. at 169-70. Technically, this is not true in the case of withdrawal of nutrition and hydration since death would not immediately follow; however, there would most likely be a narrow window in which to reverse the decision. In addition, while the decision to treat is reversible, the unwanted treatment received before treatment termination could not be reversed. See Nelson & Cranford, supra note 113, at 446-49. The court supported its position with a review of cases from other states that are consistent with its opinion, including In re Martin, 538 N.W. 2d 399 (Mich. 1995) (requiring the clear and convincing evidence standard for withdrawal of artificial nutrition and hydration from a minimally conscious patient); see supra notes 62-66 and accompanying text (discussing the case), and Conroy, 486 A.2d 1209; see supra Part I.B (discussing the case). Wendland, 28 P.3d at 170-172. The court also noted that Wisconsin has refused to extend its earlier decisions giving conservators of patients in PVS
After addressing the “primary” substituted judgment standard in section 2355, the court turned to the alternative “best interest” standard.\textsuperscript{162} This standard requires that a decision be made “in accordance with the conservator’s determination of the conservatee’s best interest . . . consider[ing] the conservatee’s personal values to the extent known to the conservator.”\textsuperscript{163} The decision must be made in good faith based on medical advice.\textsuperscript{164} Rose argued that the trial court had applied too high a standard of proof, in that section 2355 gave the court the power only to verify that she has made a good faith decision based on medical advice and in consideration of the conservatee’s personal values.\textsuperscript{165} The court rejected that argument.\textsuperscript{166}

In its holding and throughout the decision, the court was careful to refer to the issue as that of decisions by conservators to refuse life-sustaining treatment for conservatees.\textsuperscript{167} Given the court’s attention to the issue of whether court-appointed conservators could be assumed to have special knowledge of the personal beliefs and values of the conservators, one could conceivably interpret Wendland\textsuperscript{168} as applying only to conservators and not to other surrogates’ decisions. This interpretation is

the power, as a matter of law, to withhold life-sustaining treatments. Wendland, 28 P.3d at 171 (discussing In Re Edna M.F., 563 N.W.2d 485 (Wis. 1997) (finding that a woman with Alzheimer’s dementia, who had previously stated she would rather die from cancer than lose her mind, had not made a sufficiently clear statement of a desire to refuse treatment)). But, the Wendland court acknowledged that the Wisconsin court had only required a preponderance of the evidence standard. \textit{Id.} But see Kathleen M. Boozang, \textit{An Intimate Passing: Restoring the Role of Family and Religion in Dying}, 58 U. PITT. L. REV. 549, 577-78 (1997) (noting other courts that have rejected or altered the clear and convincing standard for medical decisions).

\textsuperscript{162} Wendland, 28 P.3d at 173-74.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 174.
\textsuperscript{166} Id. The court rejected Rose’s position despite her recitation of the language of the section and the Law Revision Commission commentary supporting her position. Id.
\textsuperscript{167} Wendland, 28 P.3d 151 \textit{passim}.
\textsuperscript{168} Id. Other surrogates could be those family members making medical
unlikely to be accurate, however; while the court specified that the decision applied only to “conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment for the purpose of causing their conservatees’ deaths,” the court then proceeded to list those who would not be affected. The list failed to include patients with nonappointed surrogates. The list also failed to include the terminally ill. Given the above and the rarity of patients’ use of advance directives and oral appointment of surrogates, Wendland will reach a vast number of medical decisions and will have a profound effect on health care decisions in California.

III. THESIS

There are four problematic issues with the court’s decision. First, the Wendland court underestimated the sweeping effects of its decision, which will affect a much greater number of patients


Our conclusion does not affect permanently unconscious patients, including those who are comatose or [in PVS] . . . , persons who have left legally cognizable instructions for health care . . . , persons who have designated agents or other surrogates for health care . . . , or conservatees for whom conservators have made medical decisions other than those intended to bring about the death of a conscious conservatee.

Id.

Id.

Id.

See discussion infra Part III (arguing that the combination of a greater number of affected patients than the Wendland court apparently realized, the rarity of advance provisions by patients for health care decisions and the contrast between the Wendland standard and the understanding of most patients will lead to a major change in the way health care decisions are made in California).
JOURNAL OF LAW AND POLICY

than the court acknowledged. Second, the court’s reliance on patient-provided directives to afford incompetent patients the care they would have chosen for themselves was misplaced. Third, the court’s understanding of the means by which patient autonomy is promoted is extraordinarily limited. Fourth, as a result of the court’s incorrect balancing of the interests involved, the court erroneously concluded that protecting patients’ interests requires application of the clear and convincing evidence standard.

The result of Wendland is that family members in California are proscribed from making many decisions for their loved ones when those loved ones did not have the requisite foresight or knowledge to appoint them as surrogates. Wendland essentially

173 See infra Part III.A (arguing that the court misperceived the frequency of the need for decisions for life-sustaining treatment for patients in a minimally conscious state).

174 See infra Part III.B (noting the rarity of the execution of advance directives and appointment of surrogates).

175 See infra Part III.C. Studies have shown that most people in this country prefer to have their families make medical decisions for them when they are incapacitated. The Wendland court, however, intervened and removed the decision making ability from the family out of the contradictory fear that the decision is not what the patient would have wanted. See generally Wendland, 28 P.3d 151. In doing so, the court failed to recognize its own conflict of interest. That is, the standard the court applies in the instant case must be designed to protect future patients, even if that results in a decision in the instant case that may not have been what the patient wanted.

176 See infra Part III.D (arguing that the clear and convincing standard is not constitutionally required). See also Marybeth Herald, Until Life Support Do Us Part: A Spouse’s Limited Ability to Terminate Life Support for an Incompetent Spouse with No Hope of Recovery, 24 T. JEFFERSON L. REV. 207, 212 (2002) (arguing that Wendland “places a nearly insurmountable burden of proof on the conservator of a person in a minimally conscious state” and that “[t]he court’s decision makes it virtually impossible to stop feeding and hydration when the family member has not made any written advance directive”).

177 Wendland, 28 P.3d 151. In addition to the insufficiency of the means on which the court relied to mitigate the adverse effects of the court’s decision, there are other unintended effects that the court appears not to have anticipated. For example, a person appointed as conservator by the patient but who has only a professional relationship with the patient and/or who is a
IN RE WENDLAND

coerces patients to exercise their autonomy, a contradictory concept.178

To protect the rights of patients, the California legislature must now amend the HCDA. The amendments should clearly state that those closest to the patient are the appropriate decision makers, absent evidence to the contrary. In addition, the amendments must specify the procedural safeguards to be used, and must clearly identify “preponderance of the evidence” as the desired standard for decisions made in the face of such

relative stranger to him, would be free under the court’s interpretation to withdraw or withhold treatment with little to no beneficial knowledge of the patient’s wishes or values. See id. Yet, ironically, family members with an intimate understanding of the patient would still be subject to the clear and convincing standard. See id. Lastly, the opinion’s reliance on the distinction between unconscious patients and those who are minimally conscious leaves the door open to terminate treatment while the patient is comatose. See id. at 175. A surrogate’s hesitation—most likely in hopes that the patient will awaken to a life of greater functioning—thus leads to the inability to honor a patient’s wishes once the surrogate becomes convinced it is time to do so. The unspoken, and likely unintended, message the court has thus sent to surrogates is that they should discontinue support for their unconscious family members as soon as a claim for “permanent” unconsciousness can be made, rather than risk them waking into what they believe the patient would consider to be an unacceptable state. The court’s opinion glossed over the fact that Rose had authorized treatment for Robert during the period in which he was not conscious. Id. In the California Supreme Court’s recitation of the facts, it referred to Robert’s coma as lasting only “several months.” Id. According to the appellate court, however, Robert was in a coma for sixteen months. In re Wendland, 93 Cal. Rptr. 550, 554 (Ct. App. 2000).

178 Autonomy is the voluntary exercise of a personal choice. BEAUCHAMP & CHILDRESS, supra note 9, at 58. The choice of most adults is to have their family make whatever medical decisions they deem necessary on their behalf in the event of incapacity. See infra Part III.C.2. In addition, most adults resist executing advance directives. See infra Part III.C.2. Wendland severely restricts the choices available to decision makers that have not been appointed by the patient. See generally Wendland, 28 P.3d 151. In order to avoid such restriction under Wendland, potential patients will be forced to appoint a surrogate or execute an advance directive; as a result, the voluntary aspect of the choice is missing, and the choice is, therefore, coerced.
safeguards.

A. Applicability of Wendland

Despite the court’s assurances that its decision affects only a “narrow class of persons” and not “the vast majority of health care decisions,” Wendland will affect more individuals than the court anticipated. Wendland will have a profound impact on decisions for the terminally-ill, those suffering from dementia but who are not considered terminally-ill, all adults who have never been competent and all minors. Given the low rate of execution of advance directives and the inability of many to utilize the options of oral directives and appointment of surrogates, it is reasonable to assume that surrogates other than those appointed by the patient will make the majority of the decisions in these cases and will be subject to Wendland’s constraints.

Of the approximately six thousand deaths that occur daily in the United States, it is estimated that approximately seventy percent involve decisions to forgo life-sustaining treatment. Many, if not the majority, of such cases involve terminally ill patients for whom, therefore, a different legal standard might logically apply. Still, there would remain a significant number

179 Wendland, 28 P.3d at 166. “[W]e see no constitutional reason to apply the higher evidentiary standard to the majority of health care decisions made by conservators not contemplating a conscious conservatee’s death.” Id.

180 See infra Part III.B (discussing the limited utilization of advance directives and oral appointment of surrogates).

181 See Rebecca Dresser, Missing Persons: Legal Perceptions of Incompetent Patients, 46 Rutgers L. Rev. 609, 614 (1994) (citing estimates from the American Hospital Association, the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, and other authors). The percentage may be as high as seventy-five percent. Steven Miles, Personal Dying and Medical Death, in BIRTH TO DEATH: SCIENCE AND BIOETHICS 163, 167 (David C. Thomasma & Thomasine Kushner eds., 1996)

182 Cantor, supra note 11, at 184. The purpose of a higher standard is to avoid the risk of erroneous decisions. Wendland, 28 P.3d at 170. Terminally ill patients will die in a short time whether treatment is withheld or not; therefore, the risk of an erroneous decision is less and courts presumably
of cases that would not involve terminally ill patients.\textsuperscript{183} For
example, patients with dementia often retain some level of
cognitive functioning before they are deemed terminally ill, yet
after questions of life-sustaining treatments arise.\textsuperscript{184} In addition,
given the rarity of PVS, it is reasonable to assume that the
majority of such decisions involve patients who are at least
minimally conscious.\textsuperscript{185} As a result, the “narrow class” that
\textit{Wendland} affects in fact includes a significant number of
would be willing to utilize a lower standard. It is not clear, however, that the
court intended a different standard for those cases, since the court exempted
“permanently unconscious patients, including those who are comatose or in a
persistent vegetative state,” but did not exempt the terminally ill. \textit{Id.} at 175.
\textsuperscript{183} See infra notes 184-85.

\textsuperscript{184} Dresser, \textit{supra} note 181, at 614. Dementia may occur as a result of
chronic conditions such as chronic liver or renal disease, Parkinsons disease or
metabolic problems. \textit{Neurology for the Non-Neurologist} 233-41
(William J. Weiner & Christopher G. Goetz eds., 4th ed. 1999). Dementia as
a result of AIDS, cerebrovascular injury and Alzheimer’s disease affects an
increasing number of people, and the incidence is likely to increase with the
aging of the population and the increasing ability of medical technology to
prolong biologic life. See Dresser, \textit{supra} note 181, at 614. The mean
incidence of moderate to severe dementia in persons over the age of sixty in
the U.S. has been calculated at 4.8 \%. \textit{Principles of Neurology}, \textit{supra} note
46, at 1049. Alzheimer’s alone was the eighth leading cause of death in both
1998 and 1999, with 35,306 and 44,536 deaths per year, respectively. \textit{Nat’l
Ctrs. for Health Statistics, Ctrs. for Disease Control and
data/nvrs/nvrs49/nvrs49_11.pdf. Alzheimer’s disease is progressively
debilitating, leading to the gradual loss of cognitive ability and diminishing
ability to care for one’s own needs, including feeding. \textit{Principles of
Neurology}, \textit{supra} note 46, at 1050-51; \textit{see also Neurology for the Non-
Neurologist}, \textit{supra}, at 234-35. Decisions relating to the care of those in the
later stages of Alzheimer’s alone warrant concern over the applicability of the
court’s decision.

\textsuperscript{185} See Cranford, \textit{supra} note 2, at 196. It is estimated that there are
approximately 15,000 to 35,000 patients in PVS in the United States. \textit{Id.} Such
patients may linger for many years. \textit{Id.} It is estimated that there are
approximately 2,190,000 deaths per year in the United States. Dresser, \textit{supra}
note 181, at 614. Therefore, even if all PVS patients were suddenly to die in
the same year, it would still only represent .7 to .16 \% of the deaths for that
year.
individuals. While the court’s holding specifically referred to conservators and did not mention other surrogates, the reasoning of the court indicates that its holding applies to all surrogates making treatment refusals. In addition, minors, who are not legally competent, and never-competent adults would always be subject to the heightened standard of “best interests,” which the court declined to define. As a result, such cases will be decided on an individual basis, despite the legislature’s finding that courts are the decision-makers of last resort.

B. The Court’s Attempt to Mitigate the Decision’s Effect

Wendland’s reliance on patient-provided directives and appointment of surrogates is unjustified. The Wendland court...

---

186 Wendland, 28 P.3d at 175. The court rejected the argument that genuine treatment desires would be frustrated, basing the rejection on the availability of advance directives and oral appointment of surrogates; the court appears to assume that all decisions will either be made by conservators or surrogates appointed by the patient. Id. at 172. But see infra Part III.B (explaining that few adults have appointed surrogates or made advance directives).

187 Wendland, 28 P.3d at 174. “We need not in this case attempt to define the extreme factual predicates that, if proved by clear and convincing evidence, might support a conservator’s decision that withdrawing life support would be in the best interests of a conscious conservatee.” Id.

188 CAL. PROB. CODE § 4650 (Deering 2001).

(b) Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

(c) In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment.

Id. at § 4650(b)-(c).

189 See Wendland, 28 P.3d at 172. In order for such reliance to be justified, there would have to be evidence that the vast majority of such
focused heavily on written advance directives as a means for competent individuals to plan for their care in the event they become incapacitated. 190 Advance directives, also known as Living Wills, were proposed for just such purposes. 191 Nevertheless, only ten to twenty-five percent of adults in the United States have executed advance directives. 192 Despite legislative and academic support, aggressive programs to increase their use have failed. 193

Decision are made for adults who were once competent, that competent adults are aware that they are available, are aware of the importance of executing them, are not resistant to executing them and do not assume that their families will be able to make whatever choices seem appropriate to them. See infra notes 192-95, 229-31 and accompanying text (arguing that such conditions do not exist).

190 Wendland, 28 P.3d at 160-61. The court discussed advance directives extensively and dismissed the contention that a high evidentiary burden of proof would “frustrate many genuine treatment desires,” based on the availability of advance directives, including oral health care instructions. Id. at 172. But see Dresser, supra note 181, at 632 (noting the inevitable general nature of the instructions in advance directives and the failure of even aggressive programs to increase the use of advance directives). See also Patricia D. White, Appointing a Proxy Under the Best of Circumstances, 1992 UTAH L. REV. 849 (1992). White argues that a living will is a very crude instrument to use for making actual medical decisions . . . . [A]ll it can express is what a competent person thought she would want were she to become incompetent and be in a situation generically like the one she turns out actually to be in . . . . [I]t is a mistake to conceive of an advance directive as expressing an incompetent patient’s autonomous choice in any specific circumstance. Id. at 857.

191 See Orentlicher, supra note 9, at 1256.

192 Pope, supra note 145, at 154. Some studies show that the percentage may be as low as five. See Orentlicher, supra note 9, at 1270. Even health care professionals tend not to complete advance directives. Id. at 1273. In addition, African-American patients are more likely to fear that executing an advance directive will adversely affect their care. Orentlicher, supra note 9, at 1276.

193 See, e.g., The SUPPORT Principal Investigators, A Controlled Trial to Improve Care in Seriously Ill Hospitalized Patients: The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments,
Even when executed, advance directives often fail to provide clear guidance; they are often vague and do not address the specific circumstances of the patient. In any case, such directives reflect only what the competent person thinks he may want in a situation he is not then experiencing. In addition, strict adherence to statements in advance directives may frustrate the state’s interest in preserving life in cases where the family

274 JAMA 1591 (1995) (describing a study in which the interventions were designed to improve communication between patients and physicians on end-of-life decision making but which failed to improve the incidence or timing of discussions relating to patient wishes for cardiopulmonary resuscitation); see also Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 Stat. 1388, § 4206 (1990) (codified as 42 U.S.C. § 1395 (1991)) (including as a budget amendment the PSDA, encouraging the execution of advance directives by requiring healthcare providers to provide information to patients regarding advance directives); see generally Edward J. Larson & Thomas A. Eaton, The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act, 32 WAKE FOREST L. REV. 249 (1997) (discussing the PSDA).

Dresser, supra note 181, at 632 (stating that “[i]n most real cases, our knowledge of the incompetent patient’s past is limited to fuzzy comments and ambiguous behavior”); accord, Linda C. Fentiman, Privacy and Personhood Revisited: A New Framework for Substitute Decisionmaking for the Incompetent, Incurably Ill Adult, 57 GEO. WASH. L. REV. 801, 824 (1989) (blaming in part “the pervasive use in the living will statutes of vague and sometimes circular definitions of such crucial terms as ‘terminally ill,’ ‘imminent death,’ [and] ‘artificial’ life sustaining treatment”); see also Cantor, supra note 11, at 190 (describing “the imprecision or vagueness frequently present in advance directives”).

See White, supra note 190, at 857 (describing any choice made in a living will as “a choice which the patient has necessarily made on the basis of incomplete information”); see also Susan Adler Channick, The Myth of Autonomy at the End-of-Life: Questioning the Paradigm of Rights, 44 VILL. L. REV. 577, 610 (1999) (arguing that “the potential for mistake or abuse is compounded by the possibility that the advance directive no longer represents the patient’s wishes”). Evidence suggests that even competent adults cannot accurately predict what their wishes will be in a given situation until they actually experience it. See Dresser, supra note 181, at 632 (noting that “even the most carefully considered advance choices are not as informed as we would like them to be, since typically the patient has never actually faced the situation that eventually emerges”).
believes the patient would have changed his mind.\textsuperscript{196} Courts should rely on written advance directives only if competent adults actually execute such documents, if the directives are unambiguous and if individuals can both accurately predict what type of care they would or would not want in the future and be unlikely to change their minds.\textsuperscript{197}

\textsuperscript{196} In re Westchester County Med. Ctr. \textit{ex rel.} O’Connor, 531 N.E.2d 607, 613 (N.Y. 1988) (noting that “human beings are incapable of perfect foresight”); accord Dresser, \textit{supra} note 181, at 632 (discussing a “risk that uninformed people will inadvertently issue directives that substantially threaten their interests as incompetent persons”); White, \textit{supra} note 190, at 857 (arguing that the problems inherent in advance directives make “it [ ] a mistake to conceive of an advance directive as expressing an incompetent patient’s autonomous choice in any specific circumstance”). Absolute reliance on advance directives requires family members to withhold treatment based on a loved one’s advance directives, despite their current belief that the condition the patient is in is not as distasteful as the patient had anticipated. Dresser, \textit{supra} note 181, at 631 (arguing that “[e]ven when people exercise due diligence and provide an explicit indication of their wishes, those who remain still may be uncertain of what the patient ‘would want’ in treatment situations that later materialize”). Written advance directives also allow patients to appoint someone to make decisions for them; however, there is no guarantee that the choices made by that appointee would be any more consistent with what the patient would have wanted. The New York State Task Force on Life and the Law, New York State Dep’t of Health, When Others Must Choose: Deciding for Patients Without Capacity 7 (1992) [hereinafter Task Force]. In fact, studies have shown that choices made by surrogates often differ from those the patient would have made; however, in most cases, the surrogates would have accepted the treatment while the patient would have refused it. Orentlicher, \textit{supra} note 9, at 1279; see also Cantor, \textit{supra} note 11, at 189 (arguing that advance directives are most useful for evidence of “well developed and enduring notions of dignity, religion, and consideration for loved ones, which they want reflected in their future medical handling”); Task Force, \textit{supra}, at 7.

\textsuperscript{197} But see Cantor, \textit{supra} note 11, at 189 (noting that some commentators “doubt the utility of advance directives” due to the need for a “declarant [to] anticipate a multitude of possible medical scenarios” and “project how he or she will feel in a variety of inherently unknowable incompetent mental states”); Dresser, \textit{supra} note 181 (arguing that competent persons’ statements on death and dying are only “a piece of the puzzle, for their situations and experiences are now vastly altered” and proposing a revised “best interests” standard looking at their current experience more than what their predictions
In addition to the limited utility of advance directives, the high evidentiary burden set in 
Wendland frustrates the ability to honor genuine treatment desires, particularly in the case of the young and the poor. 198 The court dismissed these concerns, pointing out that the law allows for oral instructions and oral appointment of surrogates. 199 While oral appointment of surrogates and oral instructions may mitigate the problem in some cases, it is not clear that it will do so in a significant percentage of cases. Since oral instructions and designations are valid in California only during the course of treatment, illness or health care institution stay in which the designation was made, the court apparently assumed that the patient will be competent when treatment is initiated and that either the patient or the physician will initiate a conversation for the purpose of eliciting such statements. 200 To the contrary, studies show that neither physicians nor patients do, in fact, initiate discussions about patients’ wishes for future treatment, even when they are seriously ill. 201 Moreover, it is reasonable to assume that a significant number of patients arrive at health care facilities incompetent due to the severity of their illness or injury. Since young people are more likely to be injured than to be taken ill,
they may be disproportionately affected by an inability to make an oral instruction. Additionally, as a result of lack of health insurance, the poor may be more likely to delay seeking health care until they are past the point of being able to make decisions for themselves. There is also evidence that nonwhite patients are less likely to discuss treatment preferences with their physicians.

Given that written advance directives and oral appointment of surrogates are not available to all patients, are not widely used and are often ambiguous, these means of expressing choices are unlikely to pass the Wendland court’s high standard of proof and reliance on them as a means to protect patients from burdensome treatments is misplaced. The result of the court’s interpretation of advance directives is that patients will be forced to appoint proxies or execute advance directives to avoid decisions they would not necessarily approve later.

202 See Fentiman, supra note 194, at 803 (noting that the young are less likely to suffer from chronic disease and disability). Accidents were the fifth leading cause of death in the U.S. in both 1998 and 1999, with 97,835 and 97,860 deaths per year, respectively. NAT’L VITAL STATISTICS REPORT, supra note 184.


204 Orentlicher, supra note 9, at 1276 (noting that the studies showed that the disparity persists even after correcting for income and education).

205 By definition, advance directives are executed by competent adults; minors and developmentally disabled adults thus cannot make advance directives. Cantor, supra note 11, at 189-90; see also Ardath A. Hamann, Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney, 38 VILL. L. REV. 103, 124 (1993).

206 See generally In re Wendland, 28 P.3d 151 (Cal. 2001). In addition, the reliance on advance directives, even oral directives, to correct the potential for providing unwanted care is not only unwarranted, it could also leave Wendland’s interpretation of section 2355 open to attack on Equal Protection grounds. In an Equal Protection Analysis, the court must utilize strict scrutiny when assessing the validity of state intervention in decisions affecting suspect classifications such as race or affecting fundamental rights. GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 630 (13th ed. 1991). Here, it could be argued that the de facto requirement of Wendland that a competent adult must complete an advance directive in order to avoid unwanted life-
C. The Court’s Attempt to Honor Autonomy

The Wendland court based its reasoning on the need to honor Robert’s autonomy. Throughout its opinion, however, the court neglected to acknowledge that the exercise of autonomy involves the choice between two fundamental rights directly opposed to each other: the fundamental right to life and the fundamental right to refuse life-sustaining treatment. Instead, the court focused on the state’s interest in preserving life as measured against each of those choices. As a result, the court clearly gave greater weight to the state’s interest, despite the apparent equality of the individual’s conflicting rights. The court failed to reconcile these rights.

1. Basis for the Court’s Concern

The Wendland court’s emphasis on the need for stringent protection of Robert’s right to life appears to have been based on assumptions about the nature of the minimally conscious state and the motives of those choosing to withdraw treatment in that sustaining medical care when incompetent not only has a disparate impact on minorities, since they are more resistant to completing such directives, but additionally affects the fundamental right to privacy on which the Wendland court based the right to refuse medical care. Wendland, 28 P.3d at 165 n.10.

See Wendland, 28 P.3d at 159, 168.

Id., passim. To avoid unconstitutional application of section 2355, the court construed the statute to require proof by clear and convincing evidence. Id. at 166. But, the court had earlier accepted the notion that an individual also has the fundamental right to refuse treatment and that such right would survive incapacity “if exercised while competent pursuant to a law giving that act lasting validity.” Id. at 160. The court specifically refused to equate the right to refuse treatment with the “right to an appropriate decision by a court-appointed conservator.” Id. at 163.

Id. But see Hamann, supra note 205, at 141-46 (arguing that the state’s interest in preserving life does not extend to personal decisions by an individual regarding his own life).

See generally Wendland, 28 P.3d 151. The court did note that neither may be infringed unless clearly outweighed by the state’s interest. Id. at 160, 163.
The court appeared convinced that there is a distinct, relevant difference between PVS and a minimally conscious state and stated concern that “a person whose permanent unconsciousness prevents him from perceiving that artificial hydration and nutrition are being withdrawn arguably has a more attenuated interest in avoiding that result than a person who may consciously perceive the effects of dehydration and starvation.” The potential that a minimally conscious patient will perceive physical or psychological discomfort during treatment, however, has led some to claim that a minimally conscious patient has an even greater interest in having treatment withheld. Moreover, some have argued that there is more similarity than dissimilarity between PVS and a minimally conscious state.

The court also assumed that Robert’s statement that he wouldn’t want to live “like a vegetable” meant that he was referring specifically to PVS. Not only is there no evidence that Robert understood the distinction or intended to limit his request to PVS, but he specifically made statements that would indicate otherwise. The court also distinguished Robert’s

---

211 See Hamann, supra note 205, at 138-59 (listing numerous assumptions courts tend to make when deciding cases involving personal medical decisions).

212 Wendland, 28 P.3d at 163.


214 See, e.g., Nelson & Cranford, supra note 113, at 449 (arguing that the two states are more alike than dissimilar, where both states offer little more than biological existence, neither offers a reasonable chance of recovery, most patients would desire release from that state, and both lead to the wish “not to kill the patient but to let nature take its course by removing unwanted and nonbeneficial treatment”).

215 Wendland, 28 P.3d at 157, 173.

216 Id. at 157. His daughter recalled Robert saying that “if he could not do all the things that he enjoyed doing, just enjoying the outdoors, just basic things, feeding himself, talking, communicating, if he could not do those things, he would not want to live.” Id. Robert’s description is consistent with
situation from that of the terminally-ill patient, yet at the same time the court recognized the precarious health of those whom the cases typically concern. In addition, the court appears to have assumed that the motives of family members who request treatment termination for their incompetent relatives are suspect and the motives of family members who choose to treat are not. The court, however, provided no support for any of its

a minimally conscious state and not as limited as PVS. See supra note 46 for a description of patients in PVS.

217 Id. at 153.

218 Id. at 154 n.1. “[A]s this case demonstrates, these issues tend to evade review because they typically concern persons whose health is seriously impaired.” Id.

219 See generally Wendland, 28 P.3d 151. Some commentators share the court’s concern. See, e.g., Aaron N. Krupp, Health Care Surrogate Statutes: Ethics Pitfalls Threaten the Interests of Incompetent Patients, 101 W. Va. L. Rev. 99 (1998). However, based on personal experience as a consultant on a tertiary care hospital’s Ethics Consultation Service, the author believes this assumption to be the opposite of the norm. While there are undoubtedly some instances where family members are operating out of suspect motives in asking to withdraw treatment, the more common scenario in the author’s experience is that it is the estranged family member and the one with the strained relationship with the patient who is most likely to resist termination of treatment. While the author is not aware of any studies specifically looking at this issue, there are cases in the literature where the decision maker may have insisted on continuing treatment as a result of a strained relationship. See, e.g., “Code Him ’Til He’s Brain Dead!,” in INTRODUCTION TO CLINICAL ETHICS 169-70 (John C. Fletcher et al. eds., 1995) (hereinafter CLINICAL ETHICS) (describing a case in which the estranged daughters of an abusive alcoholic insisted on providing aggressive treatment for their father despite his physicians’ recommendations to the contrary). One commentator argues that there has not been one case in which it has been shown that the family was “motivated by financial considerations,” despite courts’ frequent mention of this potential problem. Hamann, supra note 205, at 152. In addition, family members could simply “walk away” if they wish to avoid financial or emotional burdens of caring for the patient. Id. at 153. In contrast to the courts’ concern, studies have shown that family members are less likely to discontinue treatment for another than they would be for themselves. Id. at 152. In the Wendland case, it was Robert’s estranged mother and sister who opposed treatment termination; neither had visited Robert’s home for ten years, neither acknowledged or celebrated birthdays or holidays with him, and Robert had refused to attend his sister’s wedding. Nelson & Cranford, supra
assumptions.220

2. The Court’s Application of the Concept of Autonomy

The Wendland court concluded that the guiding principle underlying the changes to section 2355 was a respect for personal autonomy.221 The court’s decision, however, has the anomalous effect of limiting that autonomy. The court struggled with somewhat competing goals: to respect and protect Robert’s autonomy by ensuring that any decisions made for him are made based on his own wishes, not for the benefit of others,222 and to protect future, similarly situated individuals.223 These goals are fundamentally at odds inasmuch as it is difficult, at best, to honor the idiosyncratic choices of one individual while simultaneously striving to achieve consistent results in future cases of other idiosyncratic individuals.224 Similarly, it is contradictory to claim that an individual requires protection from choices made for the benefit of others and simultaneously apply a next-to-impossible standard to the instant case in order to protect future individuals.225 Such a standard may be a reflection of the court’s

---

220 See generally Wendland, 28 P.3d 151.
221 Id. at 168 (noting that the “only apparent purpose of requiring conservators to make decisions in accordance with the conservatee’s wishes, when those wishes are known, is to enforce the fundamental principle of personal autonomy”).
222 Id. at 172. Granted, this is a legal fiction since Robert had already died at the time of the decision; however, the same argument could be made for each case decided under the court’s standard. See id. at 158.
223 JANE C. GINSBURG, LEGAL METHODS at 1 (1996).
224 See White, supra note 190, at 860 (arguing that “a presumption in favor of a specified family decision maker would at least allow for the possibility that different decisions would be made for different patients, and thus acknowledge the fact that people’s preferences, as expressed when they are competent, differ.”)
225 See generally Wendland, 28 P.3d 151.
own worldview and desire for a particular outcome rather than those of the patient.226

Autonomy, according to the court, is exercised only through specific statements of a competent adult.227 This is unnecessarily strict. Autonomy may be equally exercised by delegating one’s choices to another.228 For example, studies indicate that most patients trust their family members to make decisions for them.229 Additionally, many patients prefer to have surrogates determine the patient’s best interests rather than decide on the basis of the surrogate’s view of the patient’s preferences.230 After Wendland,

226 Id. at 170 (referring to providing care against the patient’s wishes as the “less perilous result” when compared to withdrawing treatment). See Boozang, supra note 161 (arguing that courts have taken either a “vitalist” stance, favoring life above all other considerations, or a “qualitist” stance, considering quality of life issues in the determination of best interests); see also Matthew S. Ferguson, Note, Ethical Postures of Futility and California’s Uniform Health Care Decisions Act, 75 S. Cal. L. Rev. 1217, 1244 (2002) (arguing that the Wendland court was interested “in the results, rather than the process of patient decisionmaking” and “focused on the ends, not means”). The court is not alone in viewing the case with an eye toward future patients; eight amicus briefs were filed on behalf of Rose and Robert and thirteen amicus briefs were filed on behalf of Florence. See Wendland, 28 P.3d 151. But see Hamann, supra note 205, at 165-66 (arguing that “strangers with political agenda[s]” should not be allowed to intervene in cases involving personal medical decisions since such groups “do not see the patient as a person but as a symbol of a cause”).

227 Wendland, 28 P.3d at 172 (noting that requiring clear statements is for the purpose of effectuating the patient’s right to refuse).

228 See Orentlicher, supra note 9, at 1280 (arguing that “[t]he important point is that the patient has decided how the decision will be made”). Such delegation need not be formal, as with legal appointment by adults of surrogates. Id.

229 TASK FORCE, supra note 196, at 6-7. One survey showed that eighty-five percent of those polled believed that the family and the patient’s physicians should make end-of-life treatment decisions for incapacitated patients. Id. at 6 n.2 (citing a Time Magazine/CNN poll conducted in October of 1989).

230 Orentlicher, supra note 9, at 1280 nn.156-57 (noting various studies showing that greater than ninety percent of those surveyed preferred to have family members serve as surrogates, and that greater than fifty percent favored the best interests standard over the substituted judgment standard). Studies
however, failure to name a health care proxy must be interpreted as an indication that decisions by family members would be unwelcome.\(^{231}\) This interpretation fails to honor the autonomous wishes of the majority to have their families choose for them.

The anomalous result of *Wendland* is that the very changes to section 2355 that embodied the principle of respect for autonomy have been eliminated. In effect, the court rejected the best interest standard of section 2355 by requiring a standard of proof that cannot be met in any case in which section 2355 would apply.\(^{232}\) By requiring clear and convincing evidence and ignoring the amended statute’s attempt to increase the use of the conservatee’s wishes and values in decisions when his wishes in the instant situation are unclear, the court clearly favored the right to life over the right to refuse treatment.\(^{233}\) In effect, this

have also shown that most patients would want family members to have at least “a little leeway” to override their directives if necessary to protect their future interests. Dresser, *supra* note 181, at 631 (citing a study of dialysis patients, in which “sixty-one percent wanted surrogates to have ‘a little leeway’ to override the directives if necessary to protect their future best interests, while thirty-one percent wanted surrogates to have ‘complete leeway’”). Such future interests could include the interest in preserving life when the individual actually enjoys a quality of life greater than what he had anticipated. *Id.* at 624 (citing the hypothetical example of a musician who executed an advance directive requiring discontinuance of treatment in the event of incapacity and inability to experience music but who later appears to be enjoying her life in the face of senile dementia and a curable illness; citing also the opposite hypothetical of a person who had directed that all efforts be expended to prolong her life but who subsequently suffers “unremitting, unremitting pain and distress,” while incompetent, toward the end of her terminal illness).

\(^{231}\) See generally *Wendland*, 28 P.3d at 174. The court rejected subjective proof of Robert’s best interest, despite the fact that the best interest standard is only applied when there is no objective proof of the patient’s wishes. *Id.* (stating that Rose had “no basis for such a finding other than her own subjective judgment that the conservatee did not enjoy a satisfactory quality of life and legally insufficient evidence to the effect that he would have wished to die”).

\(^{232}\) *Id.* at 172. In effect, the court reset the standard to the degree of the old section 2355 prior to *In re Drabick*, 245 Cal. Rptr. 840 (Ct. App. 1988), only without any best interest standard at all.

\(^{233}\) *Wendland*, 28 P.3d at 174 (noting that the decision “threatens the
favors the state’s interests in preserving life over the individual’s interests to choose between life and forgoing treatment. As such, the court’s decision fails to honor the autonomy it admits the statute sought to enhance.\footnote{Id. at 161, 168.}

**D. The Court Erred as to the Appropriate Standard of Proof**

There are various approaches to the issue of safeguards for decision making for incompetent patients. Such approaches include different standards of proof,\footnote{Id. at 169-70 (discussing the use of the clear and convincing evidence standard when fundamental rights are implicated).} family health care decisions acts\footnote{See, e.g., Hamann, supra note 205 (arguing that families had always been the locus of medical decisions for incompetent patients until the advent of medical technology, and that returning the decisions to families is appropriate). See also A.B. A6315, 2003-2004 Reg. Sess. (N.Y. 2003) (proposing the Family Healthcare Decisions Act), at http://www.assembly.state.ny.us/leg/?bn=A06315&sh=t.} and alternative ways to view the needs of incompetent patients.\footnote{See, e.g., Dresser, supra note 181, at 627-30 (arguing that competent persons do not have a right to make advance choices that lead to serious harms); see also Nelson & Cranford, supra note 113, at 447-48 (arguing that, contrary to the opinions judges tend to hold that patients in PVS have a greater interest in having treatment withdrawn than those who are minimally conscious, patients in the minimally conscious state have a greater need to avoid the pain and humiliation of continued treatment because they may be able to perceive such problems).} These approaches share with \textit{Wendland} the common element of indirectly addressing issues related to a due process analysis: the rights and interests of the individuals, the interests of the state and procedural safeguards.\footnote{Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For state interests in cases involving withdrawal of medical care, see \textit{In re Grant}, 747 P.2d 445 (finding four state interests that might weigh against termination of treatment: preservation of life, protection of “innocent third parties,” suicide prevention, and maintaining the integrity of the medical profession).}

Despite language relating to individual rights balanced against the state’s interest, \textit{Wendland} never fully addresses the issue of conservatee’s fundamental rights to privacy and life\footnote{\textit{Wendland}'s fundamental rights to privacy and life}).

\begin{itemize}
\item \textit{Wendland}'s fundamental rights to privacy and life
\item See, e.g., Hamann, supra note 205 (arguing that families had always been the locus of medical decisions for incompetent patients until the advent of medical technology, and that returning the decisions to families is appropriate). See also A.B. A6315, 2003-2004 Reg. Sess. (N.Y. 2003) (proposing the Family Healthcare Decisions Act), at http://www.assembly.state.ny.us/leg/?bn=A06315&sh=t.
\item See, e.g., Dresser, supra note 181, at 627-30 (arguing that competent persons do not have a right to make advance choices that lead to serious harms); see also Nelson & Cranford, supra note 113, at 447-48 (arguing that, contrary to the opinions judges tend to hold that patients in PVS have a greater interest in having treatment withdrawn than those who are minimally conscious, patients in the minimally conscious state have a greater need to avoid the pain and humiliation of continued treatment because they may be able to perceive such problems).
\item Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For state interests in cases involving withdrawal of medical care, see \textit{In re Grant}, 747 P.2d 445 (finding four state interests that might weigh against termination of treatment: preservation of life, protection of “innocent third parties,” suicide prevention, and maintaining the integrity of the medical profession).
\end{itemize}
due process.\textsuperscript{239} Instead, the court implicitly stated that due process in the case of a fundamental right to life requires a higher standard of proof than is normally required for civil matters as a safeguard against erroneous deprivation of a fundamental right.\textsuperscript{240} The disadvantage of this approach in the case of refusal of medical care for incompetent patients is that avoiding the risk of violating the fundamental right to life creates an equal risk of violating the fundamental right to refuse medical care.\textsuperscript{241} In such cases, the risk of error will always be borne by the patient. As such, this issue is different from many other due process situations, where the purpose of higher standards of proof and increased procedural safeguards is to transfer the risk of error.

\textsuperscript{239} \textit{Wendland}, 28 P.3d at 160.
\textsuperscript{240} \textit{Id.} at 169.
\textsuperscript{241} \textit{Id.} at 160. See \textit{In re Drabick}, 245 Cal. Rptr. 840 (Ct. App. 1988) (noting that the state’s interest is in protecting the patient’s right to have appropriate decisions made on his behalf and further noting that “[t]he problem is not to preserve life under all circumstances but to make the right decisions. A conclusive presumption in favor of continuing treatment impermissibly burdens a person’s right to make the other choice”). According to \textit{Wendland}, the right to refuse medical treatment survives incapacity only “if exercised while competent pursuant to a law giving that act lasting validity.” \textit{Wendland}, 28 P.3d at 160. In that determination, the court confused the survival of the right with procedural safeguards to determine the validity of the choice made in exercising the right. The court, in essence, converted advance directives into a new form of statute of frauds with a choice to receive all medical treatment as the default in the absence of compelling evidence (usually written) to overcome the default. \textit{Id.} See \textsc{Black’s Law Dictionary} 1422 (7th ed. 1999) (defining “statute of frauds” as a statute “designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged”).
from the individual to the state.\footnote{Santosky v. Kramer, 455 U.S. 745, 755, 760 (1982) (refusing to apply the preponderance of the evidence standard for fact findings in proceedings to terminate parental rights, since the interests of the parents and the child are not in conflict with each other prior to a finding of parental neglect but are instead in conflict with the interests of the state).} 

The preponderance of the evidence standard, on the other hand, results in a roughly equal allocation of the risk of error between litigants.\footnote{Grogan v. Garner, 498 U.S. 279, 286-87 (1991) (applying the preponderance of the evidence standard in Chapter 11 reorganization proceedings in order to balance the conflicting interests of the creditor in recovering full payment and the debtor’s interest in a fresh start).} Such a standard creates a “fair balance” between conflicting interests.\footnote{Herman & Maclean v. Huddleston, 459 U.S. 375, 390 (1983) (noting that other standards “express[] a preference for one side’s interests” and applying the preponderance of the evidence standard in a class action suit seeking recovery for violations of section 10(b) of the Securities Exchange Act, in order to balance defendants’ risk of “opprobrium that may result from a finding of fraudulent conduct” with the plaintiff’s risk of inability to recover under the act).} Other standards, by design, favor the interests of one side.\footnote{Rivera v. Minnich, 483 U.S. 574, 577 (1987) (applying the preponderance of the evidence standard in paternity proceedings in order to balance the conflicting rights of the individuals involved, as distinct from balancing the rights of an individual against the interests of the state).} Preponderance of the evidence is the standard applied “most frequently in litigation between private parties in every State.”\footnote{Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (noting that adherence to a standard by the majority of jurisdictions reflects “a profound judgment about the way in which law should be enforced and justice administered”). California, however, is one of only five states to require clear and convincing evidence in treatment termination decisions for incompetent patients. See supra Part I.B.} The preponderance of the evidence may be considered insufficient if the majority of jurisdictions have adopted a stricter burden of proof.\footnote{Minnich, 483 U.S at 581.} Higher standards of proof may be required when the competing interests are those of an individual and the state.\footnote{Id. at 287.}
which risks of an adverse ruling for private individuals exist regardless of the ultimate outcome of the case.\textsuperscript{249} In such cases, the “equipoise of the private interests that are at stake . . . supports the conclusion that the standard of proof normally applied in private litigation is also appropriate for these cases.”\textsuperscript{250} Standards of proof are designed to protect against the risk of error in the majority of cases, rather than the “rare exceptions.”\textsuperscript{251} In addition, practical considerations may affect the choice of a constitutionally based burden of proof.\textsuperscript{252} That is, imposing a burden that cannot be met erects an “unreasonable barrier,”\textsuperscript{253} and it may be appropriate to use lower standards of proof when evidentiary problems could arise using a higher standard.\textsuperscript{254} In addition, “professional review” is sufficient to mitigate risks created by lower standards of proof.\textsuperscript{255}

In \textit{Wendland}, Rose’s decision to withdraw nutrition and

\textsuperscript{249} \textit{Id.}

\textsuperscript{250} \textit{Id.}

\textsuperscript{251} See Matthews v. Eldridge, 424 U.S. 319, 344 (1976) (stating that “procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions”); \textit{supra} note 219 (arguing that there is no reason to assume that a family member seeking to terminate medical treatment for an incompetent relative is doing so out of inappropriate motives).

\textsuperscript{252} See Addington v. Texas, 441 U.S. 418, 430 (1979) (allowing a lower standard of proof for civil commitment of minors since “[p]sychiatric diagnosis . . . is to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician”).

\textsuperscript{253} \textit{Id.} at 432.

\textsuperscript{254} Santosky v. Kramer, 455 U.S. 745, 769 (1982) (refusing to require evidence beyond a reasonable doubt in parental rights termination proceedings because of evidentiary problems); \textit{see also} Addington, 441 U.S. 427-31 (refusing to require evidence beyond a reasonable doubt in civil commitment proceedings because of a question as to whether a state could ever meet such a high standard and because of the inherent lack of certainty in diagnosis); \textit{supra} Part III.B (arguing that \textit{Wendland} requires a level of proof that can rarely be met).

\textsuperscript{255} Addington, 441 U.S. at 428-29 (noting that “layers of professional review and observation of the patient’s condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected”).
hydration met all of the requirements of due process, and should have been honored by the court. Rose based her decision on what she believed Robert would have wanted, considering his values, beliefs and statements about medical care.\footnote{in re Wendland, 28 P.3d 151, 174 (Cal. 2001) (recognizing that “[t]he trial court . . . found by clear and convincing evidence that [Rose] had acted ‘in good faith, based on medical evidence and after consideration of the conservatee’s best interests, including his likely wishes, based on his previous statements’”). See supra Part II.A (describing Robert’s statements to Rose and the support she received from the medical hierarchy).} Her evidence was more than sufficient to show by a preponderance of the evidence that Robert would have wanted his treatment discontinued,\footnote{See supra text accompanying notes 97-103 (describing Robert’s statements). In addition, Rose was Robert’s wife and presumptively knew his wishes and values better than anyone else. See Hamann, supra note 205, at 165. Hamann states that what is unclear to the judge, who is a stranger, may be obvious to a family member who understands the person’s attitudes towards medical care and general view of life and the world. The family knows “the motives and considerations that would control the patient’s medical decisions.” There is a special bond between family members based on their shared experience that allows them to understand each other much better than those outside the family understand them. Nonetheless, this knowledge is often intuitive, causing difficulties when family members attempt to translate this knowledge into evidence to be presented at a hearing. Id. (citations omitted).} and a preponderance of the evidence is all that should have been required.\footnote{See supra notes 240-55 and accompanying text (discussing the purposes for different standards of proof and concluding that clear and convincing evidence is neither required nor desirable to effectuate a patient’s wishes).} The family members who supported her decision had demonstrated the strongest emotional ties to Robert, while those opposed were estranged from him.\footnote{See supra note 113 and accompanying text (describing Robert’s relationship with his family).} His physician, the institutional ethics committee, his guardian \textit{ad litem} and the county patient ombudsman all supported the decision.\footnote{Wendland, 28 P.3d. at 155-56 (acknowledging such support but choosing to downplay the support of the guardian \textit{ad litem} by referring only to}
IN RE WENDLAND

Rose met the burden that is appropriate in such cases and Robert had the safeguard of multiple layers of professional review.\textsuperscript{261}

The \textit{Wendland} court, however, misperceived its role and set a standard designed to allow for withdrawal of treatment only when there is little, if any, doubt that the decision is precisely what the patient would have chosen.\textsuperscript{262} Such exactitude is not required by due process,\textsuperscript{263} and the attempt to achieve it violates the very autonomy on which the court based the standard.\textsuperscript{264} This attempt to honor autonomy has the contradictory result that patients who would have refused treatment no longer have the right to have their family assert that choice on their behalf.

\textbf{E. Recommendations to the Legislature}

California’s legislature must respond to \textit{Wendland} to protect incompetent patients from receiving care they likely would have refused.\textsuperscript{265} The legislature should amend the HCDA to specify

\textsuperscript{261} See \textit{Addington v. Texas}, 441 U.S. 418, 432 (relying on professional review to decrease the possibility of erroneous decisions).

\textsuperscript{262} See \textit{Wendland}, 28 P.3d at 172 (noting that the purpose of requiring clear statements is to effectuate the wishes of the patient).

\textsuperscript{263} See Hamann, \textit{supra} note 205, at 146-47 (noting that courts often refuse to discontinue medical treatment because of the risk of error, but that absolute certainty is not required by the law).

\textsuperscript{264} \textit{Wendland}, 28 P.3d at 168.

\textsuperscript{265} See \textit{supra} note 196 (citing sources noting that studies show that patients would choose to refuse treatment more often than their surrogates would refuse it for them). In amending the act, the legislature should address the areas of decision making that satisfy due process concerns but that keep such cases out of court. While there are currently procedural safeguards in place in California, many of those safeguards are optional or apply only in limited circumstances. \textit{See, e.g.}, \textit{CAL. PROB. CODE} § 4659 (Deering 2001) (prohibiting persons with certain conflicts of interest from serving as agents under a power of attorney for health care or acting as surrogates); \textit{CAL. PROB. CODE} § 4674 (Deering 2001) (prohibiting persons with certain conflicts of interest from serving as witnesses to written advance directives); \textit{CAL. PROB. CODE} § 4675 (Deering 2001) (requiring the signature of a patient advocate or ombudsman to written advance directives executed by patients in skilled
that, absent proof to the contrary, the family is the basic unit within which health care decisions should be made. The legislature should specify a process for selecting surrogates for patients who have not appointed surrogates and give validity to the informal decision-making process that is in place in California.

It should be made clear that the same process applies to all types of decisions, including the refusal of life-sustaining medical treatment for minimally conscious patients. Section 2355, providing for the use of the patient’s prior instructions and wishes and values, to the extent known, should be reaffirmed. Amendments to section 2355 could include guidance for the

nursing facilities); CAL. PROB. CODE § 4677 (Deering 2001) (prohibiting health care providers, insurers, etc., from requiring or prohibiting the execution of advance health care directives as a condition for providing service or coverage); CAL. PROB. CODE § 4697 (Deering 2001) (automatically revoking the designation of a spouse as agent to make health care decisions on the dissolution or annulment of the marriage). Nothing in the Probate Code provides for physician or ethics committee review of decisions to refuse treatment on behalf of incompetent patients. See generally CAL. PROB. CODE §§ 4600-4805 (constituting the state’s Health Care Decisions Law).


268 See generally CAL. PROB. CODE § 2355 (Deering 2001).
determination of a patient’s best interests. The legislature should specifically recognize advance directives and health care proxies as merely an opportunity for those few who desire to control their future treatment or identify a specific decision maker to do so. This schema would respect the choice of the majority who want their family to make decisions for them, and also protect those for whom this is not the best choice.

Amendments to the HCDA could mandate safeguards to prevent decisions made with suspect motives. Such safeguards

---

269 See, e.g., In re Conroy, 486 A.2d 1209 (N.J. 1985) (stating that treatment may be withdrawn without any evidence of the patient’s wishes when the patient is in “recurring unavoidable and severe pain”). Best interests considerations could include the “relief of suffering, the preservation or restoration of functioning and the . . . extent of life sustained.” Boozang, supra note 161, at 581. Other considerations could include:

- Patient’s present level of physical, sensory, emotional, and cognitive functioning . . . the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.

270 Provision already exists for those who wish to prevent participation in decisions by certain people. See CAL. PROB. CODE § 4715 (Deering 2001) (providing for the patient’s disqualification of specific individuals from serving as surrogates). See supra note 230 and accompanying text (noting that most adults would choose to have family members make treatment decisions in the event of incapacity).

271 But see Hamann, supra note 205, at 151-54 (arguing that “there is no evidence . . . that families are allowing financial concerns to override the best interests of the person when making medical care decisions”).
could include mandatory involvement of healthcare providers in assessing the motives of the decision maker,\textsuperscript{272} ethics committee involvement in assisting the parties to consider the issues in assessing motives,\textsuperscript{273} and mediation of disputes.\textsuperscript{274} Additionally,

\textsuperscript{272} See Boozang, \textit{supra} note 161, at 554 (arguing that “[h]ealth care teams are well-attuned to such issues and have legal and ethical consultants as well as bioethics committees at their disposal for consultation in case of any question about the family’s motivation or decision”). In essence, this would simply be a variation on the ethical concept of informed consent, adding the requirement that surrogates express their reasons for the decisions they choose. See \textit{Clinical Ethics}, \textit{supra} note 219, at 89-100 (discussing the concept of informed consent). To address the court’s concern about the basis for the decisions, the legislature should provide guidance for determining whether a surrogate is acting in good faith, and define what would constitute abuse of discretion. Other considerations may include “preservation or restoration of functioning, quality and extent of life sustained, satisfaction of present desires, opportunities for future satisfaction, and the possibility of developing or regaining the capacity for self-determination.” Deborah K. McKnight and Maureen Bellis, \textit{Forgoing Life-Sustaining Treatment for Adult, Developmentally Disabled, Public Wards: A Proposed Statute}, 18 AM. J.L. & MED. 203, 210 (1992). For example, the legislature could require clinicians who receive requests from surrogates to withhold or withdraw life-sustaining treatment to “ensure that an accurate diagnosis and prognosis has been made, that the family is truly representing the patient interests, and that those patients without close family members or friends to act on their behalf are not abandoned.” Fentiman, \textit{supra} note 194, at 856. For an example of legislation incorporating safeguards against inappropriate treatment refusals by surrogates, see N.Y. PUB. HEALTH LAW §§ 2963, 2965, 2972 (2002) (requiring physicians to assess the capacity of the patient prior to accepting a surrogate’s decision to refuse to consent to the provision of cardiopulmonary resuscitation [CPR] in the event of cardiac and pulmonary arrest; limiting the circumstances under which the decision can be made; requiring a second physician’s concurrence that those circumstances exist; requiring witnesses to the decision; and providing for dispute resolution procedures prior to court intervention). For safeguards required by courts, see \textit{In re Conroy}, 486 A.2d 1109 (N.J. 1985) (requiring ombudsman approval for decisions to forgo treatment made on behalf of nursing home residents); \textit{In re Grant}, 747 P.2d 445 (Wash. 1987) (requiring that two physicians agree that the patient is in an advanced stage of a terminal and permanent illness).

\textsuperscript{273} See Boozang, \textit{supra} note 161, at 553 (noting that bioethics committees are available for consultation in case of “any question about the family’s motivation or decision”).
appointment of a guardian ad litem could be required for those cases in which the procedures fail to resolve a dispute. The legislature should provide that the role of the courts in disputes should be limited to ascertaining whether the procedural safeguards were met, and that the court should not substitute its own determination of the best decision when due process safeguards are in place.

CONCLUSION

The Wendland court misapprehended the scope of its decision, the means necessary to honor autonomy, the usefulness of advance directives to mitigate the decision’s negative effects and the need to require clear and convincing evidence. The court failed to recognize that its perception of individual autonomy in the context of health care decisions for incompetent patients is out of sync with that of the majority of adults in this country. As a result, the court incorrectly balanced patients’ right to life and right to refuse medical treatment and violated the very autonomy it sought to protect.

The California legislature must now respond and amend the HCDA to restore the role of those closest to the patient in the decision making process. The amendments should focus on the family as the proper locus for such decisions, make a clear statement that the preponderance of the evidence is sufficient, and rely on procedural safeguards to detect rare decisions made out of improper motives. Such a framework is consistent with the

---


275 Herald, supra note 176, at 214 (arguing that independent attorneys can be appointed to stand up for the patient’s rights).

choices of most patients and would reduce the risk of error.
IS KENDRA’S LAW A KEEPER? HOW KENDRA’S LAW ERODES FUNDAMENTAL RIGHTS OF THE MENTALLY ILL

Erin O’Connor*

INTRODUCTION

In 1999, New York enacted legislation mandating involuntary outpatient commitment for mentally ill individuals with a history of noncompliance with treatment who are “unlikely to survive safely in the community without supervision.”¹ Outlining an Assisted Outpatient Treatment (AOT) program that includes intensive community-based treatment under the court-ordered supervision of a team of mental health professionals, the law, commonly known as “Kendra’s Law,” was passed in response to the tragic death of Kendra Webdale.² Ms. Webdale was killed when an individual with a long history of mental illness pushed her onto the New York City subway tracks in front of an oncoming train.³ Her death raised questions about the efficacy of

* C.S.W.; Brooklyn Law School Class of 2004; M.S.S.W., Columbia University, 1998; B.A., American University, 1996. The author would like to thank her friends, colleagues at The Legal Aid Society – Capital Division, the staff of the Journal of Law and Policy and her family for their support and encouragement. A special thanks to her husband Brian for his unending love, support, patience and cooking and cleaning.

¹ N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2002). See also infra Part I.B (discussing Kendra’s Law and outlining additional eligibility requirements).

² § 9.60. See also discussion infra Part I.B (describing AOT in detail).

³ See, e.g., Maggie Haberman et al., Woman, 32, Is Pushed to Her Death in Subway Horror, N.Y. POST, Jan. 4, 1999, at 4; Bill Sanderson, Horror on the Tracks: Woman Killed in Subway Nightmare, Pushed from Platform by
the mental health system, and public outrage spurred the law into effect.\(^4\)

Legislators designed Kendra’s Law to prevent future, similar tragedies involving individuals with mental illness who are noncompliant with treatment.\(^5\) Despite this effort, another woman was seriously injured in 2001 when a severely mentally ill individual pushed her onto the subway tracks in New York City’s Grand Central Station.\(^6\) This incident, given the factual similarities with Ms. Webdale’s death, naturally and justifiably

---

\(^4\) Richard Lezin Jones, *Suspect in Subway Attack Has a History of Violence*, N.Y. TIMES, Nov. 17, 2001, at D1 (recalling incidents of subway riders pushed to their deaths by individuals with mental illness, most notably the death of Ms. Webdale, which led to Kendra’s Law).

\(^5\) See Press Release, Office of New York State Attorney General Eliot Spitzer, Speaker Silver Joins Attorney General Spitzer in Calling for Passage of Kendra’s Law (May 19, 1999), http://www.oag.state.ny.us/press/1999/may/may19c_99.html. Assembly Speaker Sheldon Silver stated that “the specific incident that inspired Kendra’s Law accurately depicts this as a public safety issue,” but additionally the bill will assist “the thousand of families who have nowhere to turn when a loved one is refusing to participate in medical treatment plans.” *Id.* Attorney General Eliot Spitzer added, “[t]he way things stand now, we must wait for a tragedy to take place before we can get the mentally ill the help they need.” *Id.*

\(^6\) Jones, *supra* note 4. On November 15, 2001, Jackson Roman pushed Latchmie Ramsamy into the path of an oncoming train at Grand Central Station. *Id.* Ms. Ramsamy lost a foot and suffered other injuries. *Id.* Mr. Roman had been released in October 2001 from a psychiatric hospital after a yearlong stay. *Id.* It was unknown if he was under an AOT order at the time of this incident. *Id.* He was supposed to be in a supervised outpatient mental health program, but he had left it without authorization. *Id.* The directors of the program had been looking for him but had not yet contacted the police. *Id.* See also discussion *infra* Part III.C (examining the effectiveness of Kendra’s Law).
implicated the effectiveness of Kendra’s Law and New York’s AOT program.\(^7\)

Although beneficial to many individuals with mental illness, New York’s AOT provision extends beyond protecting society from dangerous mentally ill individuals to infringing upon the rights of those with mental illness who pose no threat. Although Kendra’s Law provides legal representation for all individuals at hearings, the right to counsel is diminished by other aspects of the law.\(^8\) By subjecting an individual who refuses treatment to serious consequences, including arrest and hospitalization, the law infringes on an individual’s right to determine his own course of treatment, particularly the right to refuse medication.\(^9\)

\(^7\) See Sean Gardiner, *Psychiatric Motive? Subway Suspect Tells Cops He Pushed Woman to Get Mental Help*, NEWSDAY, Nov. 17, 2001, at A7 (stating that Mr. Roman told investigators that he pushed Ms. Ramsamy because he was desperate for psychiatric help); Patricia Hurtado, *History of Convictions, Treatment: Subway Suspect Had Been in Jail, Also Spent Time in Mental Facilities*, NEWSDAY, Nov. 17, 2001, at A26 (comparing the history of Mr. Roman and Mr. Goldstein and suggesting that, despite Kendra’s Law, hospitals discharge dangerous patients without court orders); see also Robert Kolker, *Diagnosis: Insanity*, CITY LIMITS, May 2000 (arguing that the mentally ill want to go to jail in order to receive mental health services), http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=824.

\(^8\) N.Y. MENTAL HYG. LAW § 9.60(g) (McKinney 2002). See also discussion *infra* Part II.B (discussing how the right to counsel is eroded by the limitations placed on the ability of counsel to effectively represent the interest of patients).

\(^9\) § 9.60(n).

Where in the clinical judgment of a physician, the patient has failed or has refused to comply . . . such physician may request the director . . . to direct the removal of such patient to an appropriate hospital . . . . [I]f such assisted outpatient refuses to take medications as required by the court order, . . . such physician may consider such refusal or failure when determining whether the assisted outpatient is in need of an examination to determine whether . . . hospitalization is necessary. Upon the request of such physician, the director . . . may direct peace officers . . . or police officers . . . to take into custody and transport any such person to the hospital . . . .

*Id. See also* discussion *infra* Part II.C (explaining the right to determine the course of one’s own treatment).
Moreover, the law abridges the physician-patient privilege by allowing treating psychiatrists to testify at AOT hearings. Additionally, studies suggest Kendra’s Law is not only ineffective but also counterproductive.

This note provides a critical analysis of Kendra’s Law and suggests areas for careful scrutiny and possible reform. Part I provides a brief history of involuntary treatment of the mentally ill through the use of outpatient commitment. Next, it explains the development of New York’s AOT law. Part II discusses both the minimal protections Kendra’s Law provides and the various infringements the law imposes on the rights of mentally ill people. Specifically it discusses how Kendra’s Law erodes the right to counsel, the right to refuse treatment and the right to privileged, confidential treatment. Part III discusses the general effectiveness of involuntary outpatient commitment and the effectiveness of New York’s AOT law. Finally, this note concludes that if Kendra’s Law is to survive past 2005, when the sunset provision takes effect, the law’s impact on fundamental rights as well as its effectiveness need to be considered prior to its renewal.

I. INVOLUNTARY MENTAL HEALTH TREATMENT

Involuntary outpatient commitment refers to the use of court orders to compel mentally ill individuals to participate in community treatment. Involuntary outpatient commitment takes
one of three forms: (1) conditional release from inpatient hospitalization; (2) outpatient treatment as a less restrictive alternative to hospitalization; or (3) preventive commitment.\(^\text{15}\) With the passage of Kendra’s Law, New York began to utilize the third type—preventive commitment. Although this method presents more constitutional issues than the alternatives, Kendra’s Law has survived equal protection and due process challenges in the lower courts.\(^\text{16}\)

that Kendra’s Law “impermissibly infringes upon an individual’s right to liberty, privacy, and freedom from bodily harm” and that it fails to address mentally ill individuals’ mental health needs). One criticism of outpatient commitment laws is that rehospitalization is often the only sanction available when patients refuse to comply with treatment. Ronald L. Wisor, Jr., *Community Care, Competition, and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J.L. & MED. 145, 165 (1993) (arguing that current outpatient commitment statutes are ineffective in reducing hospital readmissions); see also Jillane T. Hinds, *Involuntary Outpatient Commitment for the Chronically Mentally Ill*, 69 NEB. L. REV. 346, 358 (1990) (discussing the development of and need for involuntary outpatient commitment). The failure of the deinstitutionalization movement, a public policy initiative developed in the 1960s to transfer less severely mentally ill individuals from state psychiatric hospitals to the community, led to the trend of involuntary outpatient treatment. Id. Deinstitutionalization’s failure also led to a phenomenon known as the “transinstitutionalization” of the mentally ill, meaning that the majority of the mentally ill are now housed and treated in jails, prisons, and homeless shelters as opposed to being treated by state psychiatric hospitals or community mental health programs. Ilissa L. Watnik, Comment, *A Constitutional Analysis of Kendra’s Law: New York’s Solution for Treatment of the Chronically Mentally Ill*, 149 U. PA. L. REV. 1181, 1186 (2001); see also Kolker, *supra* note 7 (discussing the revolving door syndrome in New York City).


\(^\text{16}\) See *In re Martin*, 225 N.Y.L.J. 6, Jan. 9, 2001, at 31 (N.Y. Sup. Ct. Jan. 8, 2001) (holding Kendra’s Law constitutional, as well as finding an additional hearing is not required prior to arrest or hospitalization in order to satisfy due process); *In re Urcuyo*, 714 N.Y.S.2d 862 (N.Y. Sup. Ct. 2000) (holding that Kendra’s Law does not violate the fundamental right to choose the course of one’s own medical treatment under the due process and equal protection clauses of state’s constitution); see also *infra* Part I.B.3 (discussing
A. Outpatient Commitment

The state-imposed treatment of individuals with mental illness is justified by the state’s police power to protect its citizens from harm and the state’s parens patriae power to protect those who cannot help themselves. Police power relates to a state’s duty to protect its citizens’ health, safety and general welfare. Recognizing that some mentally ill individuals pose a danger to themselves or others in society, states justify involuntary inpatient commitment through their police powers. Parens patriae power, however, is derived from the state’s paternalistic responsibility to care and protect those that it deems unable to care for themselves. The different rationales lead to different standards for forced medication. With regard to the state’s police power, the state has the authority to forcibly medicate when an individual poses a danger to himself or others. The state’s parens patriae power, on the other hand, justifies forceful administration of medication for individuals that lack the capacity how Kendra’s Law has withstood constitutional challenges in the lower courts thus far); infra Part II (discussing how Kendra’s Law infringes on various rights of those with mental illness).

17 Watnik, supra note 14, at 1187 (concluding that the state’s police power and parens patriae power outweigh the patient’s liberty and autonomy interests and arguing that Kendra’s Law does not violate substantive and procedural due process). See also Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986) (discussing the state’s police and parens patriae powers and involuntary treatment and ultimately concluding that involuntarily committed mentally ill individuals have a fundamental right to refuse anti-psychotic medication under the Due Process clause of the state constitution). Parens patriae literally means “parent of the country.” BLACK’S LAW DICTIONARY 712 (6th ed. 1996).

18 Watnik, supra note 14, at 1187.
19 See Rivers, 495 N.E.2d at 343.
20 Watnik, supra note 14, at 1187.
21 Rivers, 495 N.E.2d at 495-96.
22 Id. at 495. “Where the patient presents a danger to himself or other members of society or engages in dangerous or potentially destructive conduct within the institution, the State may be warranted, in the exercise of its police power, in administering antipsychotic medication over the patient’s objection.” Id.
to decide for themselves.23

Conditional release is a type of outpatient commitment that requires an individual to follow the hospital’s treatment plan upon discharge from involuntary civil commitment.24 Conditional release is hospital-oriented and often without judicial proceedings.25 When an individual’s condition improves and hospitalization is no longer necessary, the hospital may place conditions on the discharge prior to the release.26 Under conditional release, the hospital or physician generally determines the terms of the release.27 If the individual does not comply with the terms of the release, the doctor decides whether

23 Id. at 496.
Therefore, the sine qua non for the state’s use of its parens patriae power as justification for the forceful administration of mind-affecting drugs is a determination that the individual to whom the drugs are to be administered lacks the capacity to decide for himself whether he should take the drugs.

24 Hinds, supra note 14, at 356-58; McCafferty & Dooley, supra note 15, at 279. In some jurisdictions, such as Georgia, the court may require conditional release as part of the initial involuntary commitment order. Id. at 279. The dynamics of conditional release vary from state to state. Id.

25 Hinds, supra note 14, at 358 (comparing the differences between conditional release and other forms of outpatient commitment and finding that the decision to place an individual on conditional release is solely the discretion of the inpatient facility or treating physician). Generally, the treatment facility or the treating physician also creates the terms of the release and courts are notified after the fact. McCafferty & Dooley, supra note 15, at 279.

26 McCafferty & Dooley, supra note 15, at 279. “Typical conditions include periodic reporting [follow-up care]; continuation of medication and submission to testing; and restrictions on travel, consumption of liquor or drugs, associations with others, and the incurrence of debts and other obligations.” Id. The length of time on conditional release varies among the states. Id.

27 Id.; Hinds, supra note 14, at 356. When the hospital or physician, as opposed to the court, creates the plan, the hospital or physician can create an individualized treatment plan geared towards the best interests of the patient, for whom the hospital or physician may have previously provided help. Hinds, supra note 14, at 356.
rehospitalization is appropriate. Most states, including New York, authorize conditional release.

As a dispositional alternative, outpatient commitment allows a court discretion to order outpatient commitment in lieu of hospitalization after finding that the standard for involuntary inpatient commitment is met. Most states authorize outpatient

---

28 McCafferty & Dooley, supra note 15, at 279.

29 N.Y. MENTAL HYG. LAW § 29.15 (McKinney 2002). “A patient may be conditionally released, rather than discharged, when in the opinion of staff familiar with the patient’s case history, the clinical needs of such patient warrant this more restrictive placement . . . .” Id. As of 1990, forty-three states authorized conditional release. McCafferty & Dooley, supra note 15, at 279 n.41; see also ALA. CODE § 22-52-57 (2001); ALASKA STAT. § 47.30.795 (Michie 2001); ARIZ. REV. STAT. ANN. § 36-540.01 (West 2002); CAL. WELF. & INST. CODE § 5305 (West 2002); CONN. GEN. STAT. ANN. § 17a-509 (West 2002); DEL. CODE ANN. tit. 16, § 5131 (2001); FLA. STAT. ANN. § 394.469 (West 2002); GA. CODE ANN. § 37-3-85 (2002); HAW. REV. STAT. § 334-75 (2001); IDAHO CODE § 66-338 (Michie 2002); ILL. REV. STAT. ANN. 1705/15 (West 2002); IND. CODE § 12-26-14-7 (2002); IOWA CODE ANN. § 229.15(4) (West 2002); KY. REV. STAT. § 202A.181 (Banks-Baldwin 2002); LA. REV. STAT. ANN. § 28:56(G) (West 2002); ME. REV. STAT. ANN. tit. 34-B, § 3870 (West 2002); MD. CODE ANN., HEALTH-GEN. § 10-806 (2002); MASS. GEN. LAWS ANN. ch. 123 § 4 (West 2002); MINN. STAT. ANN. § 235B.15 (West 2002); MISS. CODE ANN. § 41-21-87 (2002); MO. ANN. STAT. § 632.385 (West 2002); MONT. CODE ANN. § 53-21-183 (2002); NEB. REV. STAT. § 83-1046 (2002); NEV. REV. STAT. 433A.380 (2002); N.H. REV. STAT. ANN. § 135-C:49 (2002); N.J. STAT. ANN. § 30:4-27.15(c) (West 2002); N.M. STAT. ANN. § 43-1-21 (Michie 2002); N.Y. MENTAL HYG. LAW § 29.15 (McKinney 2002); N.C. GEN. STAT. § 122C-277(a) (2002); N.D. CENT. CODE § 25-03.1-30 (2001); OHIO REV. CODE ANN. § 5122.20 (West 2002); OKLA. STAT. ANN. tit. 43A, § 7-101 (West 2002); OR. REV. STAT §§ 426.130, 426.126 (2001); 50 PA. CONS. STAT. ANN. § 7304 (West 2002); S.C. CODE ANN. § 44-22-210 (Law Co-op. 2002); TENN. CODE ANN. § 33-6-202 (2002); TEX. HEALTH & SAFETY CODE ANN. §§ 574.061, 574.082, 574.086 (2001); UTAH CODE ANN. § 62A-15-637 (2002); VT. STAT. ANN. tit. 18, § 8007 (2002); VA. CODE ANN. § 37.1-98 (Michie 2002); WASH. REV. CODE ANN. § 71.05.340 (West 2002); W. VA. CODE § 27-7-2 (2002); WIS. STAT. ANN. § 51.35 (West 2002). Some states refer to conditional release as “convalescent status.” See, e.g., KY. REV. STAT. § 202A.181 (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 34-B, § 3870 (West 2002); N.M. STAT. ANN. § 43-1-21 (Michie 2002).


Preventive commitment is a type of outpatient commitment that does not require a finding of dangerousness in order to
commit involuntarily an individual to treatment.\(^{33}\) As of 1990, only three states authorized preventive commitment.\(^{34}\) Preventive commitment statutes mandate treatment for individuals who do not meet the high standards for inpatient commitment but who are likely to face inpatient commitment in the near future if they do not receive immediate treatment.\(^{35}\) Preventive commitment is an attempt to remedy the problem of “revolving door” patients, i.e., patients who, after being released from a hospital, subsequently stop taking medications, deteriorate and are

\(^{33}\) Mark Moran, *Coercion or Caring?*, AM. MED. NEWS (Apr. 17, 2000) (debating whether outpatient commitment benefits the severely mentally ill or whether it is a “cop-out” for a failed mental health system), available at http://www.ama-assn.org/sci-pubs/amnews/pick_00/hlsa0417.htm. North Carolina is considered a pioneer in outpatient preventive commitment because it was the first state to enact an involuntary outpatient treatment statute in 1983. Wisor, Jr., *supra* note 14.

\(^{34}\) McCafferty & Dooley, *supra* note 15; see also GA. CODE ANN. §§ 37-3-90, 37-3-1 (Supp. 1989); HAW. REV. STAT. § 334-127 (1985); N.C. GEN. STAT. § 122C-263 (1989). According to a more recent survey, the following ten states allow outpatient commitment without a finding of dangerousness: Alabama, Georgia, Hawaii, Mississippi, Montana, New York, North Carolina, Oregon, South Carolina and Texas. Moran, *supra* note 33.

\(^{35}\) § 9.37. Preventive commitment statutes often apply a “grave disability” standard, which is a major shift in focus from commitment laws that require a standard of current dangerous behavior. M. SUSAN RIDGELY ET AL., RAND ORG., *THE EFFECTIVENESS OF INVOLUNTARY OUTPATIENT TREATMENT: EMPIRICAL EVIDENCE AND THE EXPERIENCE OF EIGHT STATES* (2001) (providing a comprehensive analysis of state outpatient commitment statutes), at http://www.rand.org/publications/MR/MR1340/. A grave disability standard requires only that an individual is dangerous because of an inability to care adequately for himself. *Id.* at 2. Current dangerousness, which is frequently the standard for inpatient hospitalization, requires a finding that an individual is overtly dangerous to himself or others. *Id.* Under North Carolina’s statute, for example, an individual is eligible for outpatient commitment if, “[b]ased on the respondent’s psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness . . . .” N.C. GEN. STAT. § 122C-263(d)(1) (1989). See also Nisha C. Wagle et al., *Outpatient Civil Commitment Laws: An Overview*, 26 MENT. AND PHYSICAL DISABILITY L. REP. 179 (2002) (discussing the similarities and differences between the New York and North Carolina statutes).
KENDRA'S LAW

rehospitalized. It is also a reflection of the state’s parens patriae powers and the conflict between medical paternalism and individual autonomy. Coerced medication compliance is the most important factor in preventive commitment. Preventive commitment, however, has been criticized as simply a “form of judicial intimidation [because] [c]ompliance is achieved only if the person fears rehospitalization or mistakenly believes that the court’s order must be obeyed.” As one commentator noted, “[p]reventive commitment is a backlash to the gains in mental patient autonomy over the past two decades.” Another critic noted that:

[T]he courts [now] have the power to decide the essential details of many mentally ill people’s lives long after they have left the hospital. A judge can now rule on . . . which medications a patient must take to whether they spend their days learning word processing or taking pottery classes. Even such basic decisions as where to live and work can now be controlled by the courts.

36 Wisor, supra note 14, at 159-60 (discussing the “revolving door” dilemma and appropriate community responses to stop it).

37 Id. at 168-69. One commentator has described medical paternalism as “the caring parent who nurtures and protects a child without waiting for permission.” Mark J. Hauser & Archie Brodsky, Paternalism in Mental Health Facilities: Resolving Conflicts over Telephone Access, Mail, and Visits, at http://www.psychiatry.com/advocacy/paternalism.html (last visited Nov. 5, 2002). Medical paternalism refers to the notion that doctors can make decisions for their patients. Id.

38 Wisor, supra note 14, at 161, 169.

39 Id. at 171.

40 Id. at 166.

41 Wendy Davis, Insanity Pleas, CITY LIMITS, May 2000 (arguing that Kendra’s Law and mental hygiene courts generally have significant power, including the power to erode the rights of the mentally ill, especially the right to refuse medication), http://www.citylimits.org/content/articles/articleView.cfm?articleNumber=326. Davis discusses the example of John Sharpe, who has a psychotic disorder and history of numerous hospitalizations and, at the time Davis wrote her article, was a patient at Kingsboro Psychiatric Hospital. Id. Mr. Sharpe told the judge that he refused the medication because of the severe side effects, such as twitching. Id. The judge authorized the forcible
B. New York’s Response—Kendra’s Law

New York’s support of outpatient commitment is a recent development. Prior to the 1990s, New York was the only state with a law that explicitly prohibited outpatient commitment. One purpose of New York’s shift was to close the loophole of lack of services to the mentally ill due to the high standard of dangerousness required for involuntary inpatient commitment. Without involuntary outpatient treatment, the only mandated treatment available, inpatient hospitalization, required a finding by two physicians that the individual was currently a danger to himself or others, a difficult standard to meet. Unlike statutes that utilize a grave disability standard, New York’s pilot project administration of the medication anyway, and Mr. Sharpe was then injected with Prolixin, an anti-psychotic that can cause muscle spasms, eye paralysis and permanent neurological damage. Id.

42 Watnik, supra note 14, at 1191. New York does not authorize outpatient commitment as an alternative if an individual meets the criteria for civil inpatient commitment. N.Y. MENTAL HYG. LAW § 9.37 (McKinney 2002). Before Kendra’s Law, New York required a finding of immediate danger of serious harm to oneself or others prior to initiating commitment proceedings. Id. Involuntary inpatient hospitalization requires a finding that an individual “has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others . . . . The need for immediate hospitalization shall be confirmed by a staff physician of the hospital prior to admission.” Id. If the patient is to be retained involuntarily beyond seventy-two hours, the certificate of another examining physician concluding that the patient is in need of involuntary care and treatment must be filed. Id. If a New York court determines that an individual meets the civil inpatient commitment criteria, the individual must be hospitalized. Id. See also McCafferty & Dooley, supra note 15, at 279 n.70 (listing states which do authorize outpatient treatment as an alternative to inpatient hospitalization).

43 See Gutterman, supra note 14, at 2409; Watnik, supra note 14, at 1191.

44 § 9.37. Inpatient hospitalization is only appropriate when two physicians find an individual is likely to commit serious harm to himself or others if not committed. Id.

45 See discussion supra note 42 (explaining the requirements of involuntary inpatient hospitalization).
KENDRA’S LAW

and Kendra’s Law employ the “likelihood of physical harm to self or others” standard. This lower standard is easier to meet, thus leading to a greater number of individuals eligible for involuntary commitment.


In 1994, New York enacted legislation that created an outpatient commitment program at Bellevue Hospital in New York City—the Bellevue Pilot Project. Only those who met nine criteria were eligible for involuntary outpatient treatment under the project, which was the precursor to Kendra’s Law:

(i) the patient is eighteen years of age or older; and (ii) the patient is suffering from a mental illness; and (iii) the patient is incapable of surviving safely in the community without supervision, based on a clinical determination; and (iv) the patient is hospitalized at [Bellevue] . . . ; and (v) the patient has a history of lack of compliance with treatment that has necessitated involuntary hospitalization at least twice within the last eighteen months; and (vi) the

---

46 RIDGELY, supra note 35, at 33, 37-38.
47 N.Y. MENTAL HYG. LAW § 9.61 (repealed 1999). Opponents of New York’s outpatient commitment statute argued that section 9.61 was a “political maneuver intended to appease a frightened and frustrated public.” POLICY RESEARCH ASSOCIATES, INC., FINAL REPORT: RESEARCH STUDY OF THE NEW YORK CITY INVOLUNTARY OUTPATIENT COMMITMENT PILOT PROGRAM 16 (1998) [hereinafter PRA REPORT]. The Legislature enacted section 9.61 after a decade-long effort to extend the state’s parens patriae power to include “gravely disabled” mentally ill individuals living on the street. Id. The majority of these individuals were more dangerous to themselves due to their environmental circumstances, but occasionally they became a public nuisance and received media attention. Id. For example, Larry Hogue was cited as a prime example of the necessity for outpatient commitment. Id. Hogue was “a homeless veteran who was both actively psychotic and a crack cocaine addict” and who allegedly terrorized the Upper West Side of Manhattan. Id. Neither police nor the mental health system were able to help him or the neighborhood. Id. Hogue, ironically, would most likely not have been eligible for services under the pilot project due to concerns regarding liability for his dangerousness. Id.
patient is, as a result of his or her mental illness, unlikely to voluntarily participate in the recommended treatment pursuant to the treatment plan; and (vii) in view of the patient’s treatment history and current behavior, the patient is in need of involuntary outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the patient or others . . . ; and (viii) it is likely that the patient will benefit from involuntary outpatient treatment; and (ix) the involuntary treatment program of such hospital is willing and able to provide the involuntary outpatient treatment ordered.48

Interestingly, studies of the Bellevue Pilot Project showed that mandatory treatment did not make a significant difference in a patient’s recovery.49 Two groups of researchers studied the project: Policy Research Associates (PRA) and Bellevue Hospital.50 The PRA study assigned individuals randomly to either the control group or the experimental court-ordered group.51 Researchers interviewed subjects prior to discharge from the hospital and in the community at one, five and eleven months.52 The key findings of the PRA study are:

[1.] No statistically significant differences were found between the experimental and control groups for acute or state rehospitalizations in terms of the proportion rehospitalized or the amount of days spent hospitalized in the 11-month follow-up. [2.] For both the experimental

---

48 § 9.61(c). The eligibility criteria did not focus on patients with a documented history of violence, the supposed targets of the legislation. PRA REPORT, supra note 47, at 47.


51 See TELSON, supra note 50. Those in the control group received outpatient treatment as part of their discharge plans. Id. at 12. The study consisted of 78 patients under an AOT and 64 control patients. PRA REPORT, supra note 47, at i.

52 PRA REPORT, supra note 47, at i.
and control subjects, a statistically significantly smaller proportion were rehospitalized during the 11 month follow-up in OCP as compared to the year preceding the target admission. [3.] Arrests during the follow-up period revealed no violence against persons for either group and relatively few subjects arrested overall, 16% for controls and 18% for experimentals. There were no differences between the control and experimental group on indicators for any arrest, multiple arrests, number of arrests, or most serious charge. [4.] The control and experimental groups overall were not significantly different on any quality of life or symptomatology outcome measures. [5.] There were no significant differences in the number of clients in the two groups who discontinued treatment—27% for the experimental group and 26% for the control group.53

Notably, the researchers found “[t]here is no indication that, overall, the court order for outpatient commitment produces better outcomes for clients of the community than enhanced services alone. However, both groups appeared to profit from the enhanced services . . . ”54

While New York’s legislature was still exploring the issue, Kendra Webdale’s death occurred, spurring the state to expedite the implementation of outpatient commitment throughout the state

53 PRA REPORT, supra note 47, at ii (references to Tables omitted). “For the experimental subjects the proportion went from 87.1% to 51.4% and for the controls from 80% to 41.6% with a hospitalization.” Id. at ii. Critics have argued that the PRA study has its limitations as well. RIDGELY, supra note 35, at 26. For example, providers were unclear as to who was under an AOT order and therefore did not consistently enforce the orders. Id. Also, more individuals under a court order also suffered from substance abuse as compared to the control group (56% and 39% respectively). Id. Critics additionally assert that the study suffers from small sample size. Id. PRA acknowledges that the pilot project “never reached the fully executed, clinicians-working-with-law-enforcement-officers, preventive detention version intended by the legislature.” PRA REPORT, supra note 47, at 46.

54 PRA REPORT, supra note 47, at ii.
in only eight months.\footnote{Jones, \textit{supra} note 4. In addition to Kendra’s death in January of 1999, other similar incidents occurred that same year. See Nisha C. Wagle et al., \textit{Outpatient Civil Commitment Laws: An Overview}, 26 MENT. \& PHYSICAL DISABILITY L. REP. 179 (2002). In April 1999 two incidents of violence by men with mental illness occurred: a man swung a sword on the Long Island Rail Road and a man pushed another man into an oncoming subway train. \textit{Id.} at 179. Tragically, subway pushing is not a new phenomenon since similar incidents occurred in prior years. Kirsten Danis, \textit{Horror on the Tracks: Flashback to Terror of Days Gone By}, N.Y. POST, Jan. 4, 1999, at 4. In February of 1996 a teen with mental illness pushed a young woman to her death from a train. \textit{See id.} In January of 1995, an escaped mental patient pushed an elderly woman in front of a train, causing her death. \textit{Id.}} In enacting Kendra’s Law, the legislature found:

there are mentally ill persons who are capable of living in the community with the help of family, friends, and mental health professionals, but who, without routine care and treatment, may relapse and become violent or suicidal, or require hospitalization . . . . The legislature further finds that some mentally ill persons, because of their illness, have great difficulty taking responsibility for their own care, and often reject the outpatient treatment offered them on a voluntary basis.\footnote{1999 N.Y. Laws 408, § 2. “Effective mechanisms for accomplishing these ends include[] the establishment of assisted outpatient treatment . . . .” \textit{Id.} “The legislature further finds that if such court-ordered treatment is to achieve its goals, it must be linked to a system of comprehensive care . . . .” \textit{Id.}}

This legislative finding particularly reflects the state’s assertion of its paternalistic parens patriae power.\footnote{See \textit{supra} Part I.A (discussing the state’s parens patriae power in outpatient commitment).} Prior to Kendra’s Law, the real problem was lack of available treatment for individuals with mental illness. For example,
KENDRA’S LAW

Andrew Goldstein, the man who pushed Kendra Webdale in front of the train, ironically, would not likely have been subject to an AOT order, which is limited to individuals who are noncompliant with treatment.58 In fact, Mr. Goldstein had sought commitment or supervised living no fewer than thirteen times.59 Each time, he was discharged and denied help due to a lack of funding.60 In reality, “the contemporary problem [in mental health treatment] is obtaining treatment, not refusing its imposition.”61

The Legislature enacted Kendra’s Law, disregarding the significant research findings from the Bellevue Pilot Project suggesting that court orders are ineffective.62 Additionally, research shows that only a small number of people with severe and persistent mental illness are at risk of becoming violent.63 Kendra’s Law is, therefore, a hasty enactment that is unresponsive to the real problem of providing community treatment to individuals with mental illness.

2. Kendra’s Law in a Nutshell

Kendra’s Law authorizes an AOT program,64 which provides case management services or assertive community treatment to an individual with mental illness and may include other services ordered by the court.65 Case management is a method of

58 Moran, supra note 33; see N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2002).
59 Gutterman, supra note 14, at 2439.
60 Id.
62 Moran, supra note 33; RIDGELY, supra note 35. See supra text accompanying notes 49-54 (discussing the findings of the researchers who studied the Bellevue Pilot Project).
64 N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2002).
65 Moran, supra note 33. Other services that the court may include in an AOT order are:
coordinating treatment and care in the community. It entails a case manager “develop[ing] care plans, arrang[ing] for services to be provided, monitor[ing] the care provided, and maintain[ing] contact with the individual.”66 Aimed at keeping individuals in contact with a variety of services, assertive community treatment (“ACT”) is a model of treatment that uses a team approach to provide comprehensive, community-based psychiatric treatment, rehabilitation, and support.67

In order to obtain an AOT order in New York, an individual authorized by the statute to file a petition must state the facts that support the belief that a patient meets all of the criteria.68

N.Y. MENTAL HYG. LAW § 9.60(a)(1) (McKinney 2002).

66 RIDGELY, supra note 35, at 29.

67 Id. at 28. An ACT team typically includes psychiatrists, nurses, social workers, peer advocates, and other professionals working together. Id.

68 N.Y. MENTAL HYG. LAW § 9.60(e) (McKinney 2002). Under Kendra’s Law, a petition may be initiated by:

(i) any person eighteen years of age or older with whom the subject of the petition resides; or (ii) the parent, spouse, sibling eighteen years of age or older, or child eighteen years of age or older of the subject of the petition; or (iii) the director of a hospital in which the subject of the petition is hospitalized; or (iv) the director of any public or charitable organization, agency or home providing mental health services to the subject of the petition in whose institution the subject of the petition resides; or (v) a qualified psychiatrist who is either supervising the treatment of or treating the subject of the petition for a mental illness; or (vi) the director of community services, or his or her designee, or the social services official, as defined in the social services law, of the city or county in which the subject of the petition is present or reasonably believed to be present;
Whereas the Bellevue Pilot Project established nine criteria for determining the eligibility of a patient, under Kendra’s Law a patient qualifies for an AOT order if seven criteria are met:

1. The patient is eighteen years of age or older;
2. The patient is suffering from a mental illness;
3. The patient is unlikely to survive safely in the community without supervision, based on a clinical determination;
4. The patient has a history of lack of compliance with treatment for mental illness that has: (i) at least twice within the last thirty-six months been a significant factor in necessitating hospitalization . . . or receipt of services in a . . . mental health unit of a correctional facility . . . or; (ii) resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others within the last forty-eight months . . . ; and
5. The patient is, as a result of his or her mental illness, unlikely to voluntarily participate in the recommended treatment; and
6. The patient is in need of assisted outpatient treatment in order to prevent a relapse or deterioration which would be likely to result in serious harm to the patient or others; and
7. It is likely that the patient will benefit from assisted outpatient treatment.

A physician’s affirmation or affidavit must accompany the
petition. At the hearing, the examining physician must then testify and provide the court with a proposed written treatment plan. A court may then order assisted outpatient treatment only if the court finds by clear and convincing evidence that a patient meets the criteria, but it must dismiss the petition if any one of the criteria is not met.

Once ordered, a patient must accept the treatment. Failure to comply with an AOT order may lead to involuntary hospital admission for up to seventy-two hours for observation, care and treatment. Efforts must first be made to solicit compliance, though. And, involuntary retention beyond seventy-two hours is

---

72 § 9.60(e)(3). If the petitioner is the treating physician, the affirmation must be from a different physician. Id. “The petition shall be accompanied by an affirmation or affidavit of a physician, who shall not be the petitioner . . . .” Id.

73 § 9.60(h)(2). “The court shall not order assisted outpatient treatment unless an examining physician . . . testifies in person at the hearing.” Id. “The court shall not order assisted outpatient treatment unless an examining physician . . . develops and provides to the court a proposed written treatment plan.” § 9.60(i)(1).

74 § 9.60(j). “If after hearing all relevant evidence, the court finds that the subject of the petition does not meet the criteria for assisted outpatient treatment, the court shall dismiss the petition.” § 9.60(j)(1). If the court “finds by clear and convincing evidence that the subject of the petition meets the criteria . . . , and there is no appropriate and feasible less restrictive alternative,” the court shall authorize AOT. § 9.60(j)(2); see also infra Part I.B.4 and accompanying notes (discussing the court’s authority to dismiss the petition or order alternatives).

75 Watnik, supra note 14, at 1199.

76 § 9.60(n):

Where in the clinical judgment of a physician, the patient has failed or has refused to comply with the treatment ordered by the court, and in the physician’s clinical judgment, efforts were made to solicit compliance, and, in the clinical judgment of such physician, such patient may be in need of involuntary admission to a hospital . . . , or for whom immediate observation, care and treatment may be necessary . . . such physician may request . . . the removal of such patient to an appropriate hospital . . . .

Id.

77 Id.
KENDRA’S LAW

permissible only when the individual meets the grounds for involuntary civil commitment.\textsuperscript{78}

Kendra’s Law takes away some of the procedural safeguards and protection of rights that were in place under the Bellevue Pilot Project.\textsuperscript{79} These differences effectively increase the number of individuals eligible for AOT.\textsuperscript{80} Additionally, under the pilot project, the proposed written treatment plan was part of the application.\textsuperscript{81} Kendra’s Law requires only that the treatment plan be submitted before the court can order AOT, which means that the individual who is the subject of the petition and his lawyer may not learn about the plan before the hearing.\textsuperscript{82} This change

\textsuperscript{78} § 9.60(n). Involuntary civil commitment requires a finding by two physicians that a person “has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others.” N.Y. MENTAL HYG. LAW § 9.37 (McKinney 2002).

\textsuperscript{79} Compare N.Y. MENTAL HYG. LAW § 9.61 (repealed 1999) with § 9.60. One of the differences is in the fourth criteria. Compare § 9.61 with § 9.60. The pilot project required that a subject be currently hospitalized; under Kendra’s Law, the subject may now be in the community. Compare § 9.61 with § 9.60. The third criteria also changed. Compare § 9.61 with § 9.60. The pilot project required a finding that the “patient is incapable of surviving safely in the community”; Kendra’s Law lowered the standard to a finding of “unlikely to survive safely in the community.” Compare § 9.61 with § 9.60. Additionally, the hospitalization “lookback period,” the length of time that the court may consider prior acts of noncompliance, increased. Compare § 9.61 with § 9.60. Under the pilot project, the lookback period was only eighteen months; Kendra’s Law extends the period to thirty-six. Compare § 9.61 with § 9.60. Also Kendra’s Law offers an alternative avenue—not available under the pilot project—for a finding of lack of compliance if the subject does not meet the hospitalization requirement: violent behavior within the last forty-eight months. Compare § 9.61 with § 9.60. Lastly, under the pilot project, only the director of a hospital could petition for an AOT order, but Kendra’s Law authorizes petitions from a number of different individuals. Compare § 9.61 with § 9.60; see also Kristina M. Campbell, Note, Blurring the Lines of the Danger Zone: The Impact of Kendra’s Law on the Rights of the Nonviolent Mentally Ill, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 173 (2002) (discussing the differences between sections 9.60 and 9.61).

\textsuperscript{80} Compare § 9.61 with § 9.60; see also Campbell, supra note 79.

\textsuperscript{81} § 9.61(d)(2)(iii).

\textsuperscript{82} § 9.60(i ).
significantly limits the ability of the individual to contest any aspects of the treatment plan. Furthermore, Kendra’s Law narrows the time frame for a hearing from five days to three. These changes seriously limit a respondent’s ability to challenge an AOT petition, thereby lessening substantive due process protections.

3. Constitutional Challenges to Kendra’s Law

Thus far, Kendra’s Law has withstood constitutional challenges in the lower state courts. The first case to challenge the constitutionality of the law was In re Urcuyo, in which the respondents argued that Kendra’s Law violated both the Due Process Clause of the New York Constitution and the Equal Protection Clause of the New York and United States constitutions. Relying on the fact that patients have the capacity to participate actively in the treatment plan, the court held that the law did not violate a patient’s fundamental constitutional due process right to choose the course of his treatment. Specifically, the court noted that, under Kendra’s Law, “there is no forcible

83 Compare § 9.61(f)(1) with § 9.60(h).
85 714 N.Y.S.2d 862, 865 (N.Y. Sup. Ct. 2000). Outpatient mental health treatment providers sought declaratory relief regarding the constitutionality of Kendra’s Law. Id. The court rejected arguments that Kendra’s Law violates an individual’s due process rights without a finding that an individual lacks the capacity to make a reasoned treatment decision. Id. The court also rejected the argument that it violates equal protection because it treats AOT subjects differently from individuals subject to guardianship proceedings and involuntary inpatients. Id.
86 Id. The court drew on its own experience in presiding over Kendra’s Law hearings in Brooklyn, stating specifically that individuals facing an AOT order usually have the capacity to make treatment decisions. Id. The court noted “[t]he practical result of requiring a lack of capacity component to be added to the statutory scheme would be to eliminate the option of an Assisted Outpatient Treatment order for many patients.” Id. at 869. See also discussion infra Part II.C (discussing the right to determine one’s own course of treatment).
administration of medication and the patient will suffer no punitive measures for failing to comply." The court further explained that failure to comply only leads to heightened scrutiny by the physician as to whether or not the patient may be in need of inpatient hospitalization. The petitions in In re Urcuyo were ultimately withdrawn, making it impossible to appeal and obtain a higher court ruling on the law.

In January 2001, In re Martin again challenged the constitutionality of Kendra’s Law. In re Martin, respondents argued that due process and equal protection require a finding of incapacity before forcing an individual to undergo treatment. The court again concluded that Kendra’s Law was constitutional, finding that “the patient is invited to participate in the formulation of his treatment plan” and that “no drugs or treatment will be forced upon him if he fails to comply with the treatment plan.” Similar to the court in In re Urcuyo, the court

---

87 In re Urcuyo, 714 N.Y.S.2d at 868.
88 Id. at 869-70.
89 In re Martin, N.Y.L.J., Jan. 9, 2001, at 31 (N.Y. Sup. Ct. Jan. 8, 2001); Fred Cohen, Assisted Outpatient Treatment: Review of New York Case Law—And Beyond, 3 CORRECTIONAL MENT. HEALTH REP. 1, (July/Aug. 2001) (arguing that the expectation is that Martin petition, unlike the Urcuyo petition, will remain viable and appealable so long as the petitions are not withdrawn), available at http://www.psychlaws.org/generalresources/article 48.htm.
90 N.Y.L.J., Jan. 9, 2001, at 31 (N.Y. Sup. Ct. Jan. 8, 2001). The director of a psychiatric hospital sought an AOT order against respondent patient, who opposed it on the ground that it was unconstitutional. Id. The court rejected the respondent’s argument that due process and equal protection require a finding of incapacity before an AOT petition may be granted. Id. The court also denied respondent’s argument that notice and a hearing should be required prior to being arrested and detained for alleged failure to comply. Id. The court was deferential to the legislature: “[I]t is presumed that the Legislature has investigated and found facts necessary to support the legislation.” Id. In its conclusion, the court stated, “Kendra’s Law is a carefully crafted, well drawn and narrowly tailored enactment specifically directed toward the solution of serious problems faced by society and mentally ill persons.” Id.
91 Id.
92 Id. The court also concluded that the finding that the individual is
in *In re Martin* reasoned that failure to comply only leads to heightened scrutiny from a physician regarding the need for hospitalization and that re-confinement is far from automatic. 93 The court also held that Kendra’s Law complied with due process requirements even though it does not require a pre-revocation hearing prior to arrest or hospitalization because the existence of a potential emergency supports the important governmental interest of protecting the individual and society. 94

The courts are correct that, on its face, the statute requires participation and proscribes forcibly medicating an individual. 95 In practice, however, the application of Kendra’s Law may be less protective of an individual’s interests. 96 Neither the courts nor the legislature have defined the meaning and level of participation sufficient to protect due process. 97

### 4. Judicial Restraint

Kendra’s Law has also been challenged on non-constitutional

unlikely to participate voluntarily in treatment is “analogous to the finding of lack of capacity necessary for the forcible administration of medication.” *Id.* 93

*Id.* A review of due process challenges in other states that allow revocation of outpatient commitment status and hospitalization of an individual suggests that respondents are unlikely to win on this issue if appealed. *See, e.g., In re K.B.*, 562 N.W.2d 208, 211 (Mich. Ct. App. 1997) (holding that statutory procedures that do not include a revocation hearing did not violate due process because of the due process protections in the original commitment proceeding); *In re True*, 645 P.2d 891 (Idaho 1982) (holding that due process requires prompt written notice and a revocation hearing as soon as reasonably possible following the patient’s rehospitalization). *But see State v. Bryant*, 871 P.2d 129, 132 (Or. Ct. App. 1994) (allowing for a revocation hearing prior to hospitalization but finding that due process does not require the state to prove that the person remains mentally ill in order to revoke outpatient commitment).

95 N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2002).

96 *See discussion infra Part II.C (examining how Kendra’s Law erodes the right to determine the course of own’s treatment which includes the right to refuse medication).*

grounds. For example, Kendra’s Law severely restricts judicial discretion when reviewing petitions. Specifically, a court “may not order treatment that has not been recommended by the examining physician and included in the written treatment plan.” This judicial restraint limits the judge’s inquiry solely to the question of whether an individual meets all of the criteria for AOT.

In a recent decision, the Appellate Division, First Department, found that, when deciding whether to grant an AOT petition, a court does not have the authority to decide if a patient should be released from a hospital. The First Department reasoned that the hospital must already have considered releasing the patient and have concluded that AOT is a viable alternative to hospitalization if it is seeking an AOT order. The court clearly stated that a patient may not be hospitalized simply because an AOT petition was denied.

Another court found it had no choice but to approve a “woefully inadequate” treatment plan for an individual the court

98 § 9.60(j). Under Kendra’s Law, a court must dismiss the petition if all of the criteria are not met. Id. A court, however, is not required to order AOT even if all of the criteria are satisfied. Id.

99 § 9.60(j)(2).

100 Id.

101 In re Manhattan Psychiatric Ctr., 728 N.Y.S.2d 37 (N.Y. App. Div. 2001). The psychiatric hospital petitioned for an AOT order against respondent in March 2000, but the court held the order “in abeyance subject to independent psychiatrist concurring in release.” Id. Counsel for the hospital subsequently argued that it may have no legal means to retain the patient until the independent examination. Id. The Appellate Division concurred with the hospital’s counsel that “while it is within the discretion of the hospital director to determine whether to apply for an order, it is for the court to determine whether the director’s petition meets the statutory prerequisites . . . .” Id. The hospital has already decided that release is appropriate, and “that decision is not at issue in the AOT proceeding.” Id.

102 Id.

103 Id. Specifically, the court stated that “[f]or a person residing in the community, the alternative to dismissal of a petition because the criteria for AOT are not met is not admission to a hospital . . . .” Id.
felt should not be released under any circumstances. The court concluded that it does not appear from the statute, and in light of the Appellate Division decision, that “the court can scrutinize the plan and require improvements in it. Thus the court must either accept or reject this plan.” Thus, Kendra’s Law effectively shuts down judicial review regarding the wisdom or propriety of AOT petitions.

Although courts may not agree with the strict requirements, the Legislature may have desired to keep power out of the courts. One possible reason for the lack of discretion is that the Legislature may believe that doctors and hospitals are in a better position to decide when to release a patient and when he is in need of AOT. Lack of discretion, furthermore, protects an individual from arbitrary decisions regarding the need for an AOT order. The legislature, however, should consider allowing judges some discretion, or at least allowing judges to suggest improvements in the treatment plan, as an alternative.

104 In re Endress, 732 N.Y.S.2d 549 (N.Y. Sup. Ct. 2001). Barry H. had a long history of numerous psychiatric hospitalizations and criminal justice contacts due to his schizophrenia. Id. The proposed treatment plan included living in a rooming house, supervision during the day, medication and supervised employment. Id. Mr. H. explicitly told the court that he was unwilling to comply with any long-term outpatient treatment. Id. At the hearing, hospital doctors expressed a concern that he was still a danger to himself or others. Id. The court did not want to discharge him from the hospital but felt it had no alternative. Id.; see also Tom Perrotta, Judge Frustrated by Flaws in Kendra’s Law, N.Y.L.J., Oct. 18, 2001, at 1.


106 During the pilot project, individuals lodged complaints regarding the role of judges. TELSON, supra note 50, at 18. Specifically, complaints arose when judges limited testimony that doctors or patients wanted to introduce, relying instead on the physician’s affidavit, or when judges failed to review the entire treatment plan. Id.
KENDRA’S LAW

II. PROTECTION AND INFRINGEMENT OF RIGHTS

Although the Legislature specifically found that Kendra’s Law was “compassionate, not punitive, [and] will restore patients’ dignity,” certain aspects of the law do not respect a patient’s rights to due process, autonomy, liberty and privacy. Specifically, Kendra’s Law infringes on the necessary right to counsel, the fundamental right to refuse treatment and privileges necessary for confidential treatment.

A. Protection of Due Process

Kendra’s Law has a high standard for eligibility. One of the first reported cases, In re Sullivan, found that the “specificity in pleading required under Kendra’s Law is not to be taken lightly.” In fact, the court held that specificity was necessary to protect a respondent’s due process rights, enable a respondent to prepare a defense and permit the court to make an informed decision regarding the need for AOT. The court also found the physician’s supplemental affirmation insufficient because it “neither state[d] that the allegations [were] based upon the

110 Id. In this case, the physician submitted an affidavit that made conclusory statements rather than citing specific facts. Id. The doctor stated in his affirmation, “without any supporting documentation or specification, that the respondent ‘has a long history of noncompliance with aftercare followup [sic] and medications which has led to physically violent behavior resulting in hospitalizations and criminal incarcerations.’” Id. at 856-57. He further states that respondent “has a ‘previous history of homelessness that has led to incarcerations and hospitalizations for dangerous behavior.’” Id. at 857. Then he stated that respondent “has a history of lack of compliance with treatment that has resulted in one or more acts of serious violent behavior toward self or others . . . .” Id. The court concluded that the language of the doctor’s statements suggested that he tailored his statements to satisfy the statutory language. Id.
personal knowledge of [the doctor] nor identifie[d] the source of such information.”111 Heightened specificity ensures procedural due process, which in turn ensures that only individuals appropriate for AOT will be correctly found eligible.112 One court expressed concern, however, that judges, “motivated more by protecting the public rather than compelling patients to get needed treatment[,] may decide to err on the side of caution.”113

B. Right to Counsel

The right to counsel is a fundamental protection against the risk of erroneous deprivation of liberty.114 Kendra’s Law safeguards this right by providing for representation by Mental Hygiene Legal Services (“MHLS”), lawyers who represent respondent outpatients at all stages of a proceeding.115 The law, however, does not specify when the proceedings begin and, thus, when the right to counsel attaches.116 MHLS has argued that the

111 Id. at 857.
112 Id.
113 Yael Schacher, Experts Disagree Over the Success of Kendra’s Law, N.Y.L.J., June 30, 2000, at 1 (quoting Justice DiBlasi, Westchester County Supreme Court).
114 Watnik, supra note 14. See also Lassiter v. Dept. of Soc. Services of Durham County, N.C., 452 U.S. 18 (1981) (finding a right to counsel for parents whose rights are subject to termination in certain circumstances); In re Gault, 387 U.S. 1 (1967) (finding a right to counsel in juvenile delinquent proceedings); Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986) (finding a right to counsel for an involuntarily committed inpatient at a hearing where the state wants to administer antipsychotic medication against the individual’s wishes); People ex rel. Rogers v. Stanley, 17 N.Y.2d 256 (1966) (finding a right to counsel for individuals in involuntary commitment proceedings). “[T]here is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.” Lassiter, 452 U.S. at 20. See also Matthews v. Eldridge, 424 U.S. 319 (1976) (outlining three elements to be balanced when deciding what due process requires).
115 N.Y. MENTAL HYG. LAW § 9.60(g) (McKinney 2002); see also N.Y. MENTAL HYG. LAW § 47.03(c) (McKinney 2002) (describing the functions of MHLS with respect to AOT).
116 § 9.60(g). “The subject of the petition shall have the right to be represented by [MHLS], or other counsel . . . at all stages of a proceeding
KENDRA’S LAW

right to counsel begins when the individual is being examined.\textsuperscript{117} If the right attaches at the time of the examination, counsel could ensure ‘participation’ in the treatment plan.\textsuperscript{118} Attaching the right prior to the filing of the petition, though, is more costly and could overwhelm MHLS.\textsuperscript{119} The courts or the legislature should clarify when the right to counsel attaches.

While providing for legal representation may give the appearance that Kendra’s Law protects procedural due process rights, the right to counsel under Kendra’s Law is less meaningful given some other aspects of the law.\textsuperscript{120} For example, Kendra’s Law requires a court hearing within three days after the petition is filed.\textsuperscript{121} This brief period provides insufficient time for MHLS to prepare a case or even meet the client,\textsuperscript{122} especially considering that MHLS often does not receive the petition containing the doctor’s findings until the day after filing.\textsuperscript{123} As a result, MHLS attorneys often do not have the opportunity to see their clients prior to their hearings.\textsuperscript{124} Additionally, the law allows for the treatment plan to be submitted at the time of the

\textsuperscript{117} Jaffe, \textit{supra} note 116.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} See Watnik, \textit{supra} note 14, at 1209. Critics “expressed concern that MHLS is underfunded and is often unable to provide attorneys.” \textit{Id.} “[T]he [legal] system could become overburdened as the demand for lawyers increases.” \textit{Id.} at 1218. Wisconsin provides legal counsel once the petition is filed. WIS. ST. ANN. § 51.20(3) (West 2002) (assigning legal counsel at the time of the filing of the petition).

\textsuperscript{120} N.Y. MENTAL HYG. LAW § 9.60(g) (McKinney 2002).

\textsuperscript{121} § 9.60(h). The requirement that the hearing be held three days after the filing of the petition is, on its face, insufficient for any attorney to adequately defend a client. The issue is beyond the scope of this note.

\textsuperscript{122} Watnik, \textit{supra} note 14, at 1209.

\textsuperscript{123} Jaffe, \textit{supra} note 116.

hearing. This does not provide sufficient time for an attorney to rebut the plan. Also, the law does not require that the defending attorney be notified when a warrant has been issued for a client’s alleged failure to comply. Attorneys with MHLS have thus requested that the court include on the AOT order mandatory notification when allegations of noncompliance spark the issuance of a warrant. Some lower courts have added attorney notification provisos to AOT orders, but other judges will not add the requirement since the law does not require it. Patients’ lawyers should be notified so they can intervene and prepare for a hearing. There would be little detriment to the state to include these safeguards in the law. The lack of these safeguards in the law makes Kendra’s Law defective in fully protecting the right of the mentally ill to effective representation.

C. Right to Determine the Course of One’s Own Treatment

New York courts have long recognized that every individual “of adult years and sound mind has a right to determine what shall be done with his own body” and, therefore, to determine the course of his own medical treatment. Kendra’s Law

125 N.Y. MENTAL HYG. LAW § 9.60(i) (McKinney 2002).
126 Watnik, supra note 14, at 1210.
127 § 9.60.
128 Riccardi, supra note 124.
129 Id. at 1.

In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.

Id. at 341; See also In re Storar, 420 N.E.2d 64 (N.Y. 1981) (recognizing the right to choose one’s own medical treatment even if the treatment is necessary to preserve one’s life); see also O’Connor v. Donaldson, 422 U.S. 563 (1975)
KENDRA’S LAW

infringes upon this right due to the consequences of failure to comply with an AOT order and by coercing a mentally ill individual to comply with treatment.¹³¹ Although the law clearly states that “[f]ailure to comply with an order of assisted outpatient treatment shall not be grounds for involuntary civil commitment or a finding of contempt of court,”¹³² Kendra’s Law authorizes physicians to “direct the removal of such [noncompliant] patient[s] to an appropriate hospital for examination to determine” whether hospitalization is necessary.¹³³ Furthermore, the law allows the physician to direct police officers to “take into custody and transport” the noncompliant patient.¹³⁴ These consequences severely impinge upon an individual’s right to freely choose the course of his treatment. An individual has little choice if the only options are to follow the treatment plan or face arrest and hospitalization for failure to comply.¹³⁵

Given that “[t]he right to refuse treatment is perhaps the ultimate expression of mental patient autonomy,” this right

(holding that the state must have a compelling interest to justify the deprivation of a mentally ill person’s liberty interest).

¹³¹ See § 9.60(n). Failure to comply with an AOT order may lead to arrest, hospitalization, or both. Id. Psychiatrists recognize that noncompliance is a “complex phenomenon, which may have many causes” with many factors to consider. TELSON, supra note 50, at 11. For example, patients frequently rejected supported housing because they objected to structure, curfews, and other requirements. Id. at 17. Additionally, noncompliance is a clinical judgment—some physicians may find noncompliance only if a patient refuses all services; other physicians may deem noncompliance to mean a refusal of some services; and others may find noncompliance for failure to attend a single treatment session. Id. at 14. Additionally, New York’s Mental Hygiene Law requires that an individual with mental illness “receive care and treatment that is suited to his needs and skillfully, safely, and humanely administered with full respect for his dignity and personal integrity.” § 33.03 (emphasis added).

¹³² N.Y. MENTAL HYG. LAW § 9.60(n) (McKinney 2002).

¹³³ Id.

¹³⁴ § 9.60(n).

¹³⁵ Moran, supra note 33. “In theory, if a person doesn’t comply with the judge’s ruling, that patient can be sent to the inpatient ward.” Id. (quoting Harvey Bluestone, M.D., director of the Dept. of Psychiatry at Bronx-Lebanon Hospital Center in New York).
should be better protected.\footnote{Wisor, \textit{supra} note 14, at 162.}

One aspect of the right to refuse treatment, the right to refuse medication, is particularly controversial.\footnote{See Campbell, \textit{supra} note 79 (arguing that Kendra’s Law is overbroad and unconstitutional, particularly with respect to the right to refuse treatment).} The right to refuse medication is well-established in New York courts.\footnote{495 N.E.2d 337 (N.Y. 1986).} In \textit{Rivers v. Katz}, the New York Court of Appeals held that the state can administer medications over a patient’s objections only where the patient presents a danger to himself or others or where the individual lacks the capacity to decide for himself.\footnote{Id. at 343-44. \textit{Rivers}, and others similarly situated, were involuntarily committed and refused medication. \textit{Id.} Following administrative review procedures, their objections were overruled and they were then medicated. \textit{Id.} \textit{Id.} at 492. Traditional antipsychotic medications, such as Thorazine, Mellaril, Prolixin, Stelazine, and Haldol, commonly cause dry mouth, blurred vision, constipation, impotence, weight gain and severe neurological adverse effects, such as parkinsonism (muscle stiffness and rigidity) and tardive dyskinesia (“abnormal, involuntary, irregular” muscle movements). \textit{Harold I. Kaplan & Benjamin J. Sadock, Synopsis of Psychiatry} (8th ed. 1998). Dry mouth is a “troubling symptom” for individuals and often leads to discontinuation of medications. \textit{Id.} at 1030. Newer anti-psychotic medications, such as Risperdal and Zyprexa, do not cause the debilitating neurologic effects, but still cause problematic adverse effects, such as drowsiness, dizziness, weight gain, constipation, erectile dysfunction and nausea. \textit{Id.} at 1075-77. For a thorough discussion of antipsychotic medications and the right of mentally ill patients to refuse these medications, see William M. Brooks, \textit{Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs}, 31 IND. L. REV. 937 (1998) (providing an in-depth discussion of effects of psychotropic medication as well as the right to refuse).} The court found “the due process clause of the New York State Constitution (art. I, § 6) affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication.”\footnote{Id. at 492.} Under \textit{Rivers}, the court must conduct an individual assessment of an individual’s incompetency or dangerousness before allowing forced medication.\footnote{495 N.E.2d 337, 344.} The \textit{Rivers} court found that “[t]he fact that a mental patient may disagree.
with the psychiatrist’s judgment about the benefit of medication outweighing the cost does not make the patient’s decision incompetent.” The court understood that “mental illness often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently, that many mentally ill persons retain the capacity to function in a competent manner.” A recent study supports this finding and the holding in Rivers.

It should be noted that, when interpreting the right to refuse treatment, courts generally treat mentally ill individuals differently than medically ill individuals. The differential approach and response is based on the assumption that mental illness impairs an individual’s decision-making capacity and thus prevents a mentally ill individual from meeting the requirements

142 Id. at 342 (citation omitted). “For many, a medication refusal is not a rejection of all treatment, but a protest against the current dosage or side effects . . . .” Wisor, supra note 14, at 172.
143 Id. at 342.
144 Id.
145 William M. Brooks, A Comparison of a Mentally Ill Individual’s Right to Refuse Medication under the United States and the New York State Constitutions, 8 TOURO L. REV. 1 (1991) (arguing that mentally ill individuals should have the same right to refuse medication as healthy citizens and advocating the Rivers approach, which requires a finding of incompetence before administering psychotropic drugs against an individual’s wishes). In Griswold v. Connecticut, the Supreme Court recognized the right to privacy as a constitutional right. 381 U.S. 479 (1965). The right to privacy has been extended to include the right to refuse medical treatment. In re Quinlan, 355 A.2d 647 (N.J. 1976), cert. denied, 429 U.S. 922 (1976) (finding a right to refuse treatment for comatose patient). The Supreme Court concluded in Cruzan v. Director, Missouri Dept. of Health that a constitutionally protected interest exists in the right to refuse unwanted medical treatment. 497 U.S. 261 (1990). As to mental health treatment, the Supreme Court in Washington v. Harper recognized a “significant” liberty interest in the right to refuse antipsychotic medication under the Fourteenth Amendment. 494 U.S. 210 (1990). Nevertheless, the court held that treatment with antipsychotic medication of a mentally ill prisoner against his will did not violate substantive due process when the prisoner was found to be dangerous to himself or others and treatment was in prisoner’s medical interest. Id. The broader impact of Harper is unclear because it occurred in the context of a prison where the state’s interest may be greater. Brooks, supra, at 22-23.
of informed consent. A recent study shows, however, that mentally ill individuals are not always incompetent to make rational treatment decisions, despite the fact that impairment in decision-making is a symptom of mental illness. The study concluded that there was a “need for individualized determinations of the competency question rather than across-the-board assumptions that mental illness equates with impaired ability to make treatment decisions.”

Interestingly, under the precursor to Kendra’s Law, a court could order “involuntary administration of psychotropic drugs” only if the court found by “clear and convincing evidence that the patient lack[ed] the capacity to make a treatment decision . . . and the proposed treatment [wa]s narrowly tailored . . . .” The


147 Id. at 140. In an attempt to assess different abilities related to treatment decision-making, the MacArthur study researchers administered three separate tests to six groups of patients and three groups of well persons in the community matched on key demographic variables. Id. The tests used cannot be directly equated with legal standards relating to competency. Id. Although the study found that patients with mental illness as a group more often manifested deficits on the measures of understanding, appreciation, and reasoning, it also found that “on any given measure of decisional abilities, the majority of patients with schizophrenia did not perform more poorly” than other groups. Id. A minority of individuals with schizophrenia brought down the mean. Id. at 142. Notably, “nearly half of the schizophrenia group and 76% of the depression group were found to perform in the ‘adequate range . . . across all decision-making measures,’ and a significant portion performed at or above the mean for persons without mental illness.” Id. at 144.

148 Id.

149 495 N.E.2d 337 (N.Y. 1986).

150 § 9.61(c)(2). The statute further stated that the proposed treatment must “give substantive effect to the patient’s liberty interest in refusing medication, taking into consideration all relevant circumstances, including the patient’s best interest, the benefits to be gained from the treatment, the adverse
Legislature deleted this provision from Kendra’s Law and failed to include an alternative.\footnote{\textsection 9.60.} Under Kendra’s Law, the court may order an individual to take a prescribed medication as part of a treatment plan.\footnote{\textsection 9.60(j)(4).}

Although Kendra’s Law does not allow the “forcible administration of medication,”\footnote{\textit{In re} Urcuyo, 714 N.Y.S.2d 862, 868 (N.Y. Sup. Ct. 2000).} an individual may be “ordered” to take prescribed medication with severe consequences if he fails to do so.\footnote{\textsection 9.60(j)(4). “A court may order the patient to self-administer psychotropic drugs or accept the administration of such drugs by authorized personnel as part of an assisted outpatient treatment program.” \textit{Id}.} The issue is one of semantics—a difference in interpretation of “forcible administration” versus “ordered self-administration.” Practically speaking, the patient has little choice in deciding whether to take prescribed medication since noncompliance may lead to arrest, involuntary hospitalization, or both.\footnote{\textsection 9.60(n). “The right to reject the treatment may be more of an empty right than an actual one.” Watnik, \textit{supra} note 14, at 1205.} Even some proponents of preventive commitment admit that outpatient commitment statutes are “designed to circumvent the rights of competent persons to refuse treatment.”\footnote{Wisor, \textit{supra} note 14, at 170.}

Two lower court decisions have upheld the practice of ordering patients to take prescribed medication under Kendra’s Law.\footnote{\textit{In re} Urcuyo, 714 N.Y.S.2d 862 (N.Y. Sup. Ct. 2000); \textit{In re} Martin, N.Y.L.J., Jan. 9, 2001, at 31 (N.Y. Sup. Ct. Jan. 8, 2001). \textit{See also} discussion \textit{supra} Part I.B.3 (discussing the holdings of these two cases).} Specifically the courts found Kendra’s Law requires the physician creating the treatment plan to provide the subject of the

side effects associated with the treatment and any less intrusive alternative treatments.” \textit{Id}. The legislature, however, did not detail how the medication order would work in practice. TELSON, \textit{supra} note 50, at 19. Alarmingly, researchers of the Bellevue Pilot Project found few thorough capacity hearings, even though almost two-thirds of the initial orders included medication provisions. \textit{Id}. at 18, 19. Researchers were not aware, however, of any incidences of medication being forcibly administered in the community. \textit{Id}. at 19.
petition “an opportunity to actively participate in the development of such plan” and precludes forcing “drugs or treatment . . . upon [an outpatient] if he fails to comply with the treatment plan.” These findings, however, ignore the fact that the doctor creates the treatment plan and the court makes the final decision as to the plan. Both the physician and the court may even disregard the patient’s wishes. Ultimately, the cases fail to define the parameters of “opportunity to actively participate.” Although this oversight needs to be addressed, even if the patient does participate, the court may still order forcible medication against his wishes.

The lower courts’ interpretations of the right to refuse medication under Kendra’s Law do not protect an individual’s right to the same extent as the Court of Appeals required in Rivers. Although the lower courts interpret Kendra’s Law as providing an opportunity to participate in treatment planning to prevent an individual from being ‘forcibly medicated,’ they disregard the fact that an individual has a greater right to refuse

---

158 714 N.Y.S.2d at 868 (quoting § 9.60(i)(1)).
161 § 9.60(c)(8). “[A]ny directions included in [a health care] proxy shall be taken into account by the court in determining the written treatment plan.” Id. “Nothing herein shall preclude a person with a health care proxy from being subject to a petition . . . .” § 9.60(d). A health care proxy is a document that authorizes the power of another individual to make health care decisions for or states the preferred treatment of an incompetent or incapacitated individual. See N.Y. MENTAL HYG. LAW § 2980(8) (McKinney 2002).
163 Hinds, supra note 14. “If forcible medication [i.e., an enforceable court order requiring a patient to medicate himself] is permitted during outpatient treatment, with fewer patient safeguards than are required for [forcible medication, i.e., physically-forced administration of medication to an unwilling patient, during] inpatient treatment . . . , outpatient commitment loses much of its attractiveness as a less restrictive alternative to inpatient hospitalization.” Id. at 371.
medication when involuntarily hospitalized under Rivers.\textsuperscript{165} Medication orders should not be part of an AOT order. If the legislature and the courts continue to allow medication orders as part of AOT orders, they should require a finding of dangerousness or incapacity before allowing a medication order to protect an individual’s right to refuse medication, thus following Rivers.\textsuperscript{166}

\textbf{D. Physician-Patient and Psychotherapist Privileges}

The Supreme Court has recognized the importance of confidentiality in mental health treatment, finding that effective therapy “depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. The mere possibility of disclosure may impede the development of the confidential relationship necessary for successful treatment.”\textsuperscript{167} Recognizing the significant public policy interests in protecting the psychotherapist privilege, the Supreme Court stated that the privilege “serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{165}] 495 N.E.2d 337, 344; see also supra text accompanying notes 145-48 (discussing the ability of the mentally ill to make medication decisions).
\item[\textsuperscript{166}] Rivers, 495 N.E.2d at 344; see, e.g., WIS. STAT. ANN. § 51.20 (West 2002) (requiring a finding of dangerousness or incompetency before allowing medication to be part of an outpatient commitment order).
\item[\textsuperscript{167}] Jaffee v. Redmond, 518 U.S. 1, 10 (1996). In Jaffee, an administrator of Ricky Allen’s estate brought a federal civil suit against Mary Lu Redmond, a police officer, who had shot and killed Allen. Id. at 1. The court ordered a social worker to give the administrator her notes from counseling sessions with Redmond after the shooting. Id. Neither the social worker nor Redmond complied. Id. The jury found for the plaintiff after being instructed that it could “presume that the notes would have been unfavorable to respondents.” Id. The Supreme Court ultimately held that rule 501 of the Federal Rules of Evidence compels recognition of the psychotherapist privilege; therefore, the privileged notes were protected from compelled disclosure. Id.; see also FED. R. EVID. 501.
\end{enumerate}
\end{footnotesize}
Other reasons for the privilege of confidentiality include reducing the stigma and discrimination that attaches with certain mental illnesses, fostering trust in the therapeutic relationship and ensuring privacy.\textsuperscript{169}

The majority of states have adopted the psychotherapist-patient privilege as well as the physician-patient privilege, which developed in the early nineteenth century.\textsuperscript{170} Although no privilege exists in federal common law, federal courts recognize state privilege laws if applicable to the proceedings.\textsuperscript{171} In the civil

\textsuperscript{168} Jaffee, 518 U.S. at 2.

1. Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient . . . . 5. Ethically, the psychiatrist may disclose only that information which is relevant to a given situation. He/she should avoid offering speculation as fact. \textit{Id.}

\textsuperscript{170} Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1530 (1985) [hereinafter Privileged Communications] (discussing in-depth the medical and counseling privileges, their history and recent changes). States originally created the privilege to foster public health by encouraging people to seek medical treatment. \textit{Id.} at 1532. Later, legislatures justified the privilege to encourage patients to fully disclose all necessary information for treatment. \textit{Id.} at 1532-33. Beginning in the 1950s, when psychology and psychotherapy gained legitimacy, legislatures extended the privilege to include counselors, such as psychologists, social workers, school guidance counselors and family therapists. \textit{Id.} at 1540.

\textsuperscript{171} Fed. R. Evid. 501. Privileges “shall be governed by principles of the common law . . . in the light of reason and experience.” \textit{Id.} When state law applies, privileges “shall be determined in accordance with State law.” \textit{Id.} See, e.g., Jaffee, 518 U.S. at 2 (recognizing the state psychotherapist-patient privilege in a federal civil action). “That it is appropriate for the federal courts to recognize a psychotherapist privilege is confirmed by the fact that all 50 states and the District of Columbia have enacted into law some form of the
commitment context, though, the general view is that the physician-patient privilege is not applicable because it would undermine the purpose of the hearings. ¹⁷² Some jurisdictions, however, have retained the right to raise the privilege.¹⁷³

New York adopted the physician-patient privilege “on the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help and securing adequate diagnosis and treatment.”¹⁷⁴ New York, which in 1828 became the first state to adopt the common law physician-patient privilege, has a long history of upholding the privilege.¹⁷⁵ New privilege . . . .” Id.

¹⁷² See, e.g., In re T.C.F., 400 N.W.2d 544 (Iowa 1987) (holding the privilege inapplicable in a commitment proceeding after finding a waiver by respondent who introduced portions of his doctor’s records at the hearing); In re Farrow, 255 S.E.2d 777 (N.C. App. 1979) (holding the privilege inapplicable in a commitment proceeding); see also 53 AM. JUR. 2D Mentally Impaired Persons § 55 (1996) (providing an overview of the privilege and its application in commitment proceedings). Some states argue that privilege is inapplicable because it would undermine the purpose of commitment, because individuals raise their mental status as a defense, and because a physician’s affidavit is not testimony. Id.

¹⁷³ See, e.g., In re Kathleen M., 493 A.2d 472 (N.H. 1985) (holding that the privilege applies in commitment proceedings, but the privilege may be overcome for compelling reasons); C.V. v. State, 616 S.W.2d 441 (Tex. Civ. App. 1987) (holding that trial court erred in admitting treating psychiatrist’s testimony in commitment proceeding); see also 53 AM. JUR. 2D Mentally Impaired Persons § 55 (1996) (arguing that privilege should be retained particularly when an individual voluntarily commits himself to a hospital or when a physician is a “treating” doctor). Some jurisdictions retain narrow exceptions in cases where it would be unreasonably difficult to obtain an evaluation by another physician or where the treating doctor is the only source available to testify. Id.


York’s Civil Practice Laws and Rules 4504(a) states that “[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.”176 New York has codified separate privileges to cover therapeutic relationships with registered psychologists and certified social workers, who are often mental health treatment providers.177

Limited exceptions to the physician-patient privilege exist for specific purposes. The CPLR, for example, sets out two exceptions to the privilege: 1) “[a] dentist shall be required to disclose information necessary for identification of a patient;” and 2) specified medical personnel “shall be required to disclose information indicating that a patient” under sixteen years old “has been the victim of a crime.”178 The Legislature has also limited the privilege in other statutes.179 Additionally, in Article 81 guardianship proceedings, the legislature made a specific exception to the privilege—the court may authorize the court


177 N.Y. C.P.L.R. 4507, 4508 (McKinney 2002).
178 N.Y. C.P.L.R. 4504(b) (McKinney 2002).
179 See N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 2002) (stating that no privilege exists in proceedings for child abuse or neglect); N.Y. SOC. SERV. LAW §§ 413, 415 (McKinney 2002) (stating that no privilege exists in cases of suspected abuse or neglect); N.Y. PUB. HEALTH LAW § 2101(1) (McKinney 2002) (stating that no privilege exists in cases of communicable diseases for public health reasons); N.Y. PUB. HEALTH LAW § 3373 (McKinney 2002) (stating that no privilege exists in cases of narcotic addictions); N.Y. PENAL LAW § 265.25 (McKinney 2002) (stating that no privilege exists in cases of firearm or deadly knife wounds for penal reasons); N.Y. MENTAL HYG. LAW § 33.13 (McKinney 2002) (stating that no privilege exists for psychiatric records to enumerated individuals or agencies for specific purposes); N.Y. MENTAL HYG. LAW § 33.13(c)(1) (McKinney 2002) (stating that no privilege exists in cases of court orders where the interests of justice significantly outweigh the need for confidentiality).
evaluator to inspect medical, psychological and psychiatric records “notwithstanding the physician-patient privilege.” In addition, courts have also recognized implied waivers of the privilege in certain circumstances. The express “exceptions to the privilege make clear the legislative concept that exceptions to the statutorily enacted physician-patient privilege are for the Legislature to declare.”

New York courts have differed in determining whether the statutory physician-patient privilege should bar treating physicians from testifying in involuntary hospitalization commitment proceedings. New York’s lower courts have concluded that the privilege does not apply in commitment proceedings. The Appellate Division, Third Department, however, concluded that it was error to allow a patient’s personal physician to testify in civil commitment proceedings.

In enacting Kendra’s Law, the Legislature did not include an exception to the privilege. The Legislature could easily have provided an alternative by simply requiring an evaluation by a court-ordered doctor as opposed to relying on an evaluation by the treating physician. The Legislature did find that “[e]ffective mechanisms for accomplishing [the goals of Kendra’s Law]
include . . . the improved dissemination of information between and among mental health providers and general hospital emergency rooms.”

To meet this goal, the Legislature amended the confidentiality provision of the Mental Hygiene Law, but the change does not appear to have had any significant impact.

Despite New York’s long-standing reverence for the physician-patient privilege, Kendra’s Law infringes upon the right of the mentally ill to a confidential relationship with their physicians by permitting their treating physicians to testify at their court hearings. Patients and their advocates have argued that the physician-patient privilege should bar the treating physician from testifying. Given New York’s history regarding the privilege, courts should not conclude that the Legislature desired an implied waiver in Kendra’s Law.

The lower courts, however, have determined that the privilege does not apply to AOT hearings. In Amin v. Rose F., the court concluded that there is an implied waiver of the privilege, finding that the Legislature “intended and desired” the treating psychiatrist to be “intimately involved.”

---

187 See N.Y. MENTAL HYG. LAW § 33.13(d) (McKinney 2002) (allowing patient clinical information to be exchanged between and among licensed mental health facilities and hospital emergency rooms throughout the state). Surprisingly, there have been no challenges to the amended law.
188 N.Y. MENTAL HYG. LAW § 9.60(h)(2) (McKinney 2002). “The court shall not order assisted outpatient treatment unless an examining physician . . . testifies in person at the hearing.” Id. The testifying physician must state “the facts which support the allegation that the subject meets each of the criteria for assisted outpatient treatment, and the treatment is the least restrictive alternative, the recommended assisted outpatient treatment, and the rationale for the recommended assisted outpatient treatment.” § 9.60(h)(4).
190 See supra note 181 (discussing implied waivers).
192 N.Y.L.J., Dec. 7, 2000, at 31. Rather than upholding the sanctity of the privilege and its tradition, the court viewed the privilege negatively,
KENDRA’S LAW

held that the Legislature must have intended to waive the privilege in Kendra’s Law.\footnote{Id. Furthermore, the court concluded, “[O]nce the privilege is waived, it is waived for all purposes.” \textit{Id.}} The court also analogized the AOT hearing to a retention hearing, where physicians are allowed to testify, to justify the waiver.\footnote{Id. See also \textsc{N.Y. Mental Hyg. Law} \S 9.31 (McKinney 2002) (explaining the rules in a situation where a psychiatric inpatient is seeking release, yet the hospital is seeking involuntary retention); \textit{In re Barbara W.}, 537 N.Y.S.2d 427 (N.Y. Sup. Ct. 1988) (holding that the privilege, as to communications made prior to admission, is not waived when an involuntarily admitted inpatient challenges a retention hearing). In a retention hearing, “any physician-patient privilege . . . which [the patient] has does not extend to communications with the physicians responsible for her involuntary admission . . . .” \textit{Id.}}

In \textit{In re Sullivan}, however, the court reached a different conclusion, limiting the testimony of a treating physician.\footnote{710 N.Y.S.2d 804, 805 (N.Y. Sup. Ct. 2000).} The court in \textit{In re Sullivan} found that “[t]he protection of the physician-patient privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.”\footnote{Id.} What information a physician may reveal is unclear due to the complexity of distinguishing “facts” from “communications.” The privilege under C.P.L.R. 4504 covers not only “communications” but also “any information . . . acquired” in attending a patient.\footnote{N.Y. C.P.L.R. 4504 (McKinney 2002); see also Michael Martin, \textit{The Patient’s Privilege of Confidential Communication}, N.Y.L.J., Feb. 14, 1997, at 3.} The court in \textit{In re Sullivan} evaded the serious questions of privilege and confidentiality because the respondent failed to specify what information should be characterized as protected by the privilege.\footnote{\textit{Sullivan}, 710 N.Y.S.2d at 805-06. See also Cohen, \textit{supra} note 89 (providing a brief overview of \textit{In re Sullivan} and other early cases that challenge Kendra’s Law). “[T]he privilege question remains clouded and undecided.” \textit{Id.} at 4.}

Furthermore, the court held that the patient had the finding that it is used as a “tactical maneuver . . . to suppress facts that are injurious to the legal position of the person who seeks its protection.” \textit{Id.}\footnote{194 \textit{Id. See also} \textsc{N.Y. Mental Hyg. Law} \S 9.31 (McKinney 2002) (explaining the rules in a situation where a psychiatric inpatient is seeking release, yet the hospital is seeking involuntary retention); \textit{In re Barbara W.}, 537 N.Y.S.2d 427 (N.Y. Sup. Ct. 1988) (holding that the privilege, as to communications made prior to admission, is not waived when an involuntarily admitted inpatient challenges a retention hearing). In a retention hearing, “any physician-patient privilege . . . which [the patient] has does not extend to communications with the physicians responsible for her involuntary admission . . . .” \textit{Id.}}
burden of showing that the circumstances justified invoking the privilege.\textsuperscript{199} Given the court’s ambiguous statement regarding “facts” and “communications,” it is unclear what information a physician may provide when testifying and what information remains privileged.\textsuperscript{200}

Similarly, Kendra’s Law creates confidentiality concerns for community mental health providers—the treating psychiatrists, psychologists, social workers, physicians and case managers—regarding reporting noncompliance to the AOT case manager.\textsuperscript{201} According to a recent report on mental health by the Surgeon General, confidentiality is a core ethical principle for all mental health professionals.\textsuperscript{202} The New York state chapter of the National Association of Social Workers warned that Kendra’s Law violated social worker-client confidentiality, undermined the treatment plan and prevented effective treatment by imposing mandatory treatment, violating civil liberties.\textsuperscript{203} Involuntary outpatient treatment providers have expressed concern with the required “police” role, which conflicts with the therapeutic role.\textsuperscript{204} If the provider must report noncompliance, a patient may not be honest with his provider out of fear of repercussions.\textsuperscript{205}

\textsuperscript{199} Sullivan, 710 N.Y.S.2d at 805.
\textsuperscript{200} Sullivan, 710 N.Y.S.2d at 805.
\textsuperscript{201} Lawrence K.W. Berg, Ph.D., Esq., Presentation Before the Coalition of Voluntary Mental Health Agencies, Inc., Assisted Out-Patient Treatment: (Kendra's Law) Implications for Community Mental Health Providers’ Responsibilities & Liabilities (n.d.) (on file with the author).
\textsuperscript{202} U.S. SURGEON GENERAL, supra note 169, at ch. 7.
\textsuperscript{203} Harvey Rosenthal, A Misguided Alternative to Fixing Our Mental Health System (Jan. 2000) (arguing that involuntary outpatient commitment, and Kendra’s Law in particular, are “false solutions and misguided public policies borne out of fear and frustration with failure” of the mental health system), at http://www.naswnyc.org/mhs5.html.
\textsuperscript{204} McCafferty & Dooley, supra note 15. New York’s civil practice rule 4504, which requires certain medical professionals to disclose certain patient information relating to a crime, governs treatment providers as well since it refers to any and all “person[s] authorized to practice medicine . . . attending a patient in a professional capacity.” N.Y. C.P.L.R. 4504 (McKinney 2002).
\textsuperscript{205} See Privileged Communications, supra note 170 (stating that some individuals forego treatment to avoid the risk of stigma that follows from
Dishonesty will not benefit a patient’s treatment. Clients may fear the repercussion of hospitalization if they inform their treatment provider that they did not take their medicine or otherwise comply. “The preservation of confidentiality of communications between therapist and patient may be a crucial factor in the successful treatment of psychiatric problems.” Some patients might forego treatment entirely rather than risk disclosure.

To continue to protect the privilege, then, the treating physician should not be the examining physician. The treating physician should also not provide an affidavit or testimony containing confidential information. The Legislature should consider adding a provision to the statute that requires an independent examiner. Although an independent examiner is more costly in terms of time and money, an independent public disclosure. Because information divulged to a therapist is so personal and because of the social stigma attached to those seeking mental health counseling, individuals might hesitate to seek treatment or disclose information if any possibility of subsequent disclosure exists. Id. at 1543. For example, when New York required doctors to report to the government the names of those prescribed narcotics, some individuals discontinued use of the medications or obtained them in other states. Id. at 1543.

206 U.S. Surgeon General, supra note 169. The Surgeon General’s report noted that a 1995 study found that “as persons perceived themselves at risk for serious sociolegal consequences, being informed that certain disclosures would result in mandatory reporting, did limit self-disclosing.” Id. at 1543.

207 See N.Y. Mental Hyg. Law § 9.60(n) (McKinney’s 2002) (discussing the implications of failure to comply with an AOT order).


209 See supra note 205 (discussing why patients might sacrifice treatment altogether without assurances of confidentiality). Interestingly, proposed AOT bills required community providers to report AOT noncompliance and provided reporting providers with immunity from civil liability; the provision was deleted from Kendra’s Law. Berg, supra note 201, at 11.

210 Cohen, supra note 89.

211 See Privileged Communications, supra note 170. To preserve the privilege, “when an important issue at trial requires information regarding an individual’s physical or emotional condition, that information should be obtained through a court-ordered examination whenever possible.” Id.
examiner could provide important protection to the privilege.212 Lastly, the Legislature should consider adding a provision that clearly protects the privilege between treatment providers and their patients to ensure patients provide full disclosure.

III. EFFECTIVENESS

Although forty states, not including New York, and the District of Columbia currently have outpatient commitment laws of various forms, twenty-three states rarely use them to order treatment.213 Studies on outpatient commitment and the Bellevue Pilot Project have had inconclusive findings.214 Although Kendra’s Law has not been fully studied, statistics regarding Kendra’s Law provide some insight into the law’s effectiveness.215

A. Research and Statistics on Outpatient Commitment

Researchers have not found conclusive evidence that

212 Id.
213 See National Conference of State Legislatures, Health Policy Tracking Service: Fact Sheet: Outpatient Civil Commitment (July 14, 1999), at http://www.ncsl.org/programs/health/hpts.commit.htm. The researchers surveyed the states’ use of outpatient commitment by self-report. Id. Six states reported very common use; seven states reported common use; three states reported occasional use; fourteen states reported rare use; and nine states reported very rare use. Id. See also RIDGELY, supra note 35, at 15.
214 See discussion supra Part I.B.1 (discussing the findings of the Bellevue Pilot Project studies); see also RIDGELY, supra note 35 (analyzing the empirical evidence of various state studies on the effectiveness of involuntary outpatient treatment). No studies exist on the cost-effectiveness of involuntary outpatient treatment. RIDGELY, supra note 35.
215 N.Y. State Office of Mental Health, Status Reports for Assisted Outpatient Treatment (2001) [hereinafter Status Reports], at http://www.omh.state.ny.us/omhweb/Kendra_web/kstatus_rpts/statewide.htm. Every month the New York State Office of Mental Health updates the information on the website to reflect current data. Id.; see also discussion infra Part III.B (providing statistics and analysis of the effectiveness of Kendra’s Law).
treatment is as effective when forced by court order as opposed to non-mandated treatment. 216 Advocates for the mentally ill assert that individuals who might otherwise voluntarily participate in treatment avoid such services out of fear of the possibility of forced treatment later. 217 One must question whether court-ordered coercion will ever work for those mentally ill individuals who simply refuse treatment. 218 Coercion may actually prevent a patient from participating in community treatment. 219 Studies have shown that individuals sometimes avoid treatment due to the fear of commitment. 220 “Patients are more likely to willingly participate in a program when they believe that they are viewed as equal partners with the professional staff” as opposed to being viewed as individuals in need of treatment. 221 The therapeutic

216 See John Monahan et al., Mandated Community Treatment: Beyond Outpatient Commitment, PSYCHIATRIC SERVICES, Sept. 2001, at 1198 (discussing the findings of the Duke and Bellevue outpatient commitment studies), available at http://macarthur.virginia.edu/article.pdf; RIDGELY, supra note 35. Early studies finding limited positive results suffered from significant methodological problems. Id. at xvi. Only two randomized clinical trials of involuntary outpatient treatment exist—the Bellevue Pilot Project and the Duke mental health study, but these studies had conflicting results. Id. at xvii. Both studies suggest that improving the availability and quality of mental health services leads to positive outcomes, but differ regarding the effect of court mandates. Monahan, supra.

217 Monahan, supra note 216.

218 See, e.g., In re Endress, 732 N.Y.S.2d 549, 553 (N.Y. Sup. Ct. 2001). Despite the fact that the respondent stated he would refuse to comply long-term with any outpatient treatment plan or court order, the court ordered AOT anyway. Id.

219 Wisor, supra note 14, at 172.

220 MadNation, Replacing Outpatient Commitment Initiatives with Strategies that Work to Engage People in Need, at http://www.networksplus.net/fhp/madnation/news/kendra/strategiesthatwork.htm (last visited Nov. 5, 2002). One study found that fifty-five percent of patients reported avoiding mental health services because of their prior experiences of being involuntarily committed. Id. Another study found that forty-seven percent of patients discharged from a hospital stated that the fear of being involuntarily committed has caused them to avoid treatment on prior occasions. Monahan, supra note 216.

221 Wisor, supra note 14, at 172. See also Monahan, supra note 216
relationship is unlikely to develop in a system based on compulsion. \footnote{222}  

A 1984 study of North Carolina’s outpatient commitment statute found that success did not relate to coercion but rather to staff dedication. \footnote{223}  Similar to the Bellevue Pilot Project study, the North Carolina study found that those under outpatient commitment did not fare significantly better on outcome measures of living situation, rehospitalization, number of hospital days, social contacts, employment, dangerousness and arrest as compared to the control group. \footnote{224}  The study did find, however, that those on outpatient commitment had lower rates of medication refusal and treatment noncompliance. \footnote{225}  In addition, they tended to stay in treatment longer. \footnote{226}  

A more recent study of North Carolina’s outpatient commitment statute, conducted by Duke University researchers, found no significant differences regarding hospital use between those on outpatient commitment and the control group at first glance. \footnote{227}  The Duke Study did show, however, that extended outpatient commitment—greater than 180 days—with intensive outpatient services of three or more visits per month was effective in reducing hospital admissions, lengths of stay, arrest rates and violence. \footnote{228}  

\footnote{discussing various studies on coercion and its negative effect on patients).}  

\footnote{222}  Wisor, \textit{supra} note 14.  

\footnote{223}  \textit{Id.} at 172.  

\footnote{224}  RIDGELEY, \textit{supra} note 35 (detailing studies on the effectiveness of outpatient commitment in different states).  The authors noted a number of limitations of the Duke study: the length of time on outpatient commitment was not randomly assigned; an adherence protocol ensured that enforcement provisions were applied when applicable; and the study was limited to patients discharged from hospitals. \textit{Id.} at 25.  

\footnote{225}  \textit{Id.}  

\footnote{226}  \textit{Id.}  

\footnote{227}  \textit{Id.} at 23.  The 331 participants were randomly assigned to one of the two groups—outpatient commitment order or no order. \textit{Id.}  Individuals in both groups, however, were assigned a case manager and received outpatient treatment. \textit{Id.}  

\footnote{228}  \textit{Id.}  The average intensity of the outpatient services was seven services per month. \textit{Id.}
A study of Tennessee’s outpatient commitment law had a somewhat different outcome. The researchers found that outpatient commitment was ineffective in reducing admission rates among revolving door patients, which is often the cited goal of preventive commitment. Other studies of various forms of outpatient commitment in other states suggest a positive effect of court orders in reducing hospital rates and length of stays. These studies, though, suffer from small sample size and other limitations that restrict the validity and reliability of the studies. The empirical evidence is, thus, at best inconclusive.

Even if mandated treatment is effective, the detrimental impact on patients’ rights suggests that states should consider other equally-effective voluntary methods. While court orders act as leverage for some individuals, “the best studies suggest that the effectiveness of outpatient commitment is linked to the provision of intensive services. Whether court orders have any effect at all in the absence of intensive treatment is an unanswered question.” Further research is clearly needed, however, in order to fully assess the law’s effectiveness.

B. Statistical Analysis of Kendra’s Law

According to the New York State Office of Mental Health

229 Id.
230 Id. at 22. In the Tennessee study, researchers conducted a retrospective review of medical records of seventy-eight individuals discharged with an outpatient commitment order compared to a match group not under court orders. Id.
231 Id. at 19-21.
232 Id. Sample sizes included nineteen in a Massachusetts study, twenty in an Ohio study, twenty-six in a New Hampshire study, and forty-two in a D.C. study. Id.
233 See RIDGELY, supra note 35; BAZELON CENTER, POSITION STATEMENT ON INVOLUNTARY COMMITMENT (documenting further studies regarding the effectiveness of outpatient civil commitment), at http://www.bazelon.org/opcstud.html (last visited Mar. 16, 2001).
234 See discussion supra Part III.A (comparing findings on the effectiveness of voluntary and involuntary programs).
235 RIDGELY, supra note 35, at 27.
(“OMH”), 7,157 AOT investigations were conducted from November 1999 to August 2002. Of those cases, 3,166 were closed with no action taken. For the same period, merely 2,135 court orders were issued. Only 843 renewed orders have been issued. During the same two and a half years, more than half of the AOT petitions in New York City were dismissed. The high number of dismissals of AOT petitions may be due to the need to ration limited mental health services. The high number of dismissals also suggests that too many individuals are inappropriately referred for AOT. Another possible reason for dismissal is that courts may be requiring the high level of specificity as called for in the statute. In either case, Kendra’s Law wastes expensive investigative and judicial resources, especially if only about one of every four result in an order.

236 STATUS REPORTS, supra note 215. OMH oversees the state’s mental health system, including operating psychiatric centers and regulating and certifying various mental health programs operated by local governments and non-profit agencies. New York State Office of Mental Health, About OMH, at http://www.omh.state.ny.us/ (last visited Nov. 5, 2002). OMH is the state agency with oversight of the state’s AOT program. Id.

237 STATUS REPORTS, supra note 215.

238 STATUS REPORTS, supra note 215.

239 Id. The Office of Mental Health does not provide statistics regarding compliance with AOT orders. Id.

240 N.Y. STATE OFFICE OF MENTAL HEALTH, STATUS REPORTS FOR ASSISTED OUTPATIENT TREATMENT—NEW YORK CITY (2001), at http://www.omh.state.ny.us/ohmweb/Kendra_web/kstatus_rpts/nyc.htm. Specifically, 2,143 out of 4,472 investigations were dismissed. Id. These reports, unfortunately, do not state reasons for dismissal of petitions. STATUS REPORTS, supra note 215.

241 Schacher, supra note 113, at 1.

242 N.Y. MENTAL HYG. LAW § 9.60. See also In re Sullivan, 710 N.Y.S.2d 853 (2000) (discussing the specificity needed).

243 See STATUS REPORTS, supra note 215. OMH, however, believes that Kendra’s Law has been effective in meeting its goals. N.Y. STATE OFFICE OF MENTAL HEALTH, PROGRESS REPORT ON NEW YORK STATE’S PUBLIC MENTAL HEALTH SYSTEM (2001) [hereinafter PROGRESS REPORT], available at http://www.omh.state.ny.us. An evaluation of the first three months and the first 141 individuals in AOT found that case management increased by 194%, housing services increased by 107%, Mentally Ill-Chemically Addicted
Another indication of Kendra’s Law’s ineffectiveness is the state’s lack of use.\textsuperscript{244} As of June 2000, forty-five of the sixty-two counties in New York had not used Kendra’s Law.\textsuperscript{245} As of September 2002, three years after the law went into effect, twenty-one counties have still not issued a single court order.\textsuperscript{246} Another twenty-three counties have issued orders in less than five cases.\textsuperscript{247} For example, and not surprisingly, in the two and a half years that Kendra’s Law has been in effect, Niagara and Onondaga counties combined have only used court orders for two people.\textsuperscript{248} The law cannot be effective if it is not used. Even those counties that utilize Kendra’s Law do not obtain court orders with any degree of frequency. Erie County, for example, has created 168 agreements with patients to undergo outpatient treatment voluntarily in lieu of AOT and sought only thirteen court orders during the first year the law was in effect.\textsuperscript{249} When the law initially went into effect, New York City estimated that (MICA) services increased by 79\%, medication management services increased by 67\% and therapy increased by 50\%. Id. Additionally, the study found that medication compliance increased by 129\%, while harmful behavior decreased by 26\% and homelessness decreased by 100\%. Id. at 18. This study, however, suffers from small sample size and short-term effects, since it was so early after the law went into effect. Additionally it suffers from potential bias, since OMH conducted the study and oversees the AOT programs. This study, therefore, should be critically examined.

\textsuperscript{244} See Status Reports, supra note 215 (providing monthly updates regarding the use of Kendra’s Law across the state). Overall, an overwhelming majority of the statewide investigations and court orders occurred in New York City, which has taken individuals to court to force an AOT order in 1,813 cases out of 7,360 statewide investigations. Id. New York City also has a higher ratio of court orders to voluntary treatment agreements than anywhere else in the state. Id.

\textsuperscript{245} Jaffe, supra note 116.

\textsuperscript{246} Status Reports, supra note 215.

\textsuperscript{247} Id.

\textsuperscript{248} E. Fuller Torrey & Mary T. Zdanowicz, Kendra’s Law Could Help Mentally Ill Inmates, BUFFALO NEWS, July 28, 2002, at H5.

7,000 individuals would be eligible for AOT, yet less than 2,000 court orders have been issued in the city since Kendra’s Law’s inception.

C. Additional Factors

Other less coercive methods may be equally effective as AOT in accomplishing the stated goals of Kendra’s Law—stopping revolving door patients and protecting society from the dangerously mentally ill. The most successful community programs ensure a wide array of services. Indeed, OMH recently acknowledged the effectiveness of intensive case management in reducing inpatient hospital days. Additionally, the money may be better spent on community resources rather than court intervention. Lastly, education to increase a patient’s understanding of his mental illness is a key factor in successful treatment. A voluntary community program offering intensive case management, psycho-education and respect for the individual may be as effective as Kendra’s Law in reducing the rates of hospitalization, arrest, homelessness and violence.

Moreover, many individuals with mental illness feel further

250 Jaffe, supra note 116.
251 STATUS REPORTS, supra note 215.
252 See Monahan, supra note 216.
253 Wisor, supra note 14, at 172.
254 PROGRESS REPORT, supra note 243. Intensive case management (ICM) means that a case manager is assigned only a small number of cases in order to ensure individuals receive an intensive level of services. According to the report, ICM clients had a decline in inpatient days by twenty-three days as compared to a control group that had eleven fewer days. Id. at 8.
255 Moran, supra note 33. To implement the law, the state has allocated more funding for community programs and discharge planning. Schacher, supra note 113. Although some have praised the New York Legislature for its funding of community services at a high level after the passage of Kendra’s Law, others have expressed concern about future funding because of the need to maintain a high level of spending in order for the law to be successful. RIDGELY, supra note 35.
256 Winick, supra note 146.
KENDRA'S LAW

stigmatized by the AOT proceedings. Additionally Kendra’s Law fails to consider that an individual’s treating therapist or physician is in the best position to determine a client’s treatment needs. AOT orders also displace individuals who voluntarily seek treatment and for whom treatment may be more beneficial. These non-economic costs of AOT suggest voluntary treatment is a better alternative.

Lastly, Kendra’s Law does not effectively protect society from violent, mentally ill individuals. Two recent examples demonstrate that New York continues to be plagued by incidences of violence caused by individuals with mental illness. In November 2001, a severely mentally ill man, Jackson Roman, pushed a woman in front of a moving subway train. Roman told investigators he pushed her because he was desperate for psychiatric help. Although it is unknown whether Roman was under an AOT order, either way, the mental health system, including Kendra’s Law, failed to serve Roman and to protect society. If he was under an AOT order, he should have been picked up and hospitalized for failure to comply after he left his program. If he was not under an AOT order, one must ask how

257 June M. Briese, Treat Mentally Ill with Dignity, N.Y.L.J., May 1, 2002, at § 5. Many “feel as if they are being treated like criminals in the [m]ental [h]ealth [s]ystem when they appear for their court proceedings.” Id.

258 See Hinds, supra note 14.

259 McCafferty & Dooley, supra note 15.

260 See supra text accompanying note 56 (discussing the legislative findings and purpose of Kendra’s Law).


262 Sean Gardiner, Psychiatric Motive? Subway Suspect Tells Cops He Pushed Woman to Get Mental Help, NEWSDAY, Nov. 17, 2001, at A7. A police officer recalled taking Roman to a local psychiatric hospital recently for an evaluation because of his strange behavior in the subway. Id.

263 Id.
he was overlooked. In March 2002, Peter Troy, who suffers from paranoid schizophrenia, shot and killed a priest and parishioner in the middle of mass in Long Island. His case raises even more alarming questions regarding the effectiveness of Kendra’s Law because the Nassau County Department of Mental Health Commissioner acknowledged that Troy’s AOT case simply fell through the cracks. Hospital doctors referred Troy’s case to the county for AOT. Insufficient staffing, large caseloads, and the inability to locate Troy forced his case to be closed without any investigation or hearing. Although the Legislature hoped to end these types of violent incidences by individuals with mental illness through enactment of Kendra’s Law, the continuation of the problem demonstrates its ineffectiveness.

264 Lauren Terrazzano & Roni Rabin, Warnings Unheeded: County was Unable to Monitor Violent Patient Because He Could Not Be Found, NEWSDAY, Mar. 20, 2002, at A5. Peter Troy was arrested three times since 2000 for bizarre behavior. Id. The year before the incident, he was hospitalized at Bellevue for a month. Id. Bellevue told Nassau County Department of Mental Health about Troy. Id. After his discharge, he was arrested the same month, again due to bizarre behavior, and taken to a hospital on Long Island. Id. See also Kieran Crowley & Andy Geller, How Law Failed Slain Priest, N.Y. POST, Mar. 21, 2002, at 8; Peter C. Campanelli et al., Job Vacancies at Fault, NEWSDAY, Mar. 29, 2002, at A41. “As a psychiatric patient with a long, documented history of violence, Troy did not receive the services and follow-up that were to be assured by the passage of the well-funded 1999 legislation, Kendra’s Law, which mandates outpatient treatment for people whose histories are similar to Troy’s.” Id.

265 Terrazzano & Rabin, supra note 264.

266 Id.

267 Id.

268 See supra notes 260-67 and accompanying text (noting the continuing problem of violence by the mentally ill despite Kendra’s Law). Additionally, the story of Rosemary Murray suggests the law’s ineffectiveness. Rocco Parascandola, Help for Ill Restricted By Standards, NEWSDAY, Mar. 31, 2002, at A28. Murray’s family was shocked when doctors who cared for Murray, a paranoid schizophrenic, said she could not be forced into treatment or an institution because she was not considered dangerous. Id. At times, Murray was a productive member of society, but then she would stop taking medication and deteriorate. Id. There was no “catastrophic moment” that
CONCLUSION

As one commentator stated, Kendra’s Law is “neither a boon nor a bust,” concluding that “[l]egislators, lawyers, the judiciary, and mental health professionals must continue to analyze the effects of Kendra’s Law to determine, ultimately, whether it helped to remedy some of the problems it was created to remedy, or if it created intractable problems for mentally ill individuals and for society.”\(^{269}\) Despite research regarding the lack of effectiveness of involuntary outpatient commitment generally, New York passed Kendra’s Law as an emotional response to a tragedy caused by an individual with mental illness. Although the Legislature carefully crafted Kendra’s Law to narrowly define those eligible for AOT, it did not go far enough in crafting procedural safeguards to protect the rights of those who suffer from a mental illness. Given the findings that involuntary outpatient commitment has little effect, money may be better spent on enhancing mental health services for those who want treatment, which would also allow individuals to retain their invaluable rights.

Kendra’s Law automatically expires in 2005, according to the sunset provision, unless the legislature acts to renew it.\(^{270}\) Before renewing the law, however, the legislature should clarify the problematic elements discussed in this note and provide funding and resources for further research on the efficacy of the law and the treatment programs. Some recommendations for the legislature to consider include (1) requiring the treatment plan to

would have led to commitment. \(\text{Id.}\) Murray’s sister stated she was told “they can’t commit her unless she commits a crime, or tries to kill herself or somebody else.” It is unclear if the family pursued an AOT order, but Murray was recently found dead in a lake in Central Park. \(\text{Id.}\) Although the events leading to Murray’s death are unknown, her mother believes that voices in Murray’s head were responsible. Rocco Parascandola, \textit{End of a Lifelong Battle}, NEWSDAY, Mar. 31, 2002, at A06. Apparently, those same voices had caused Murray “to drink water from the curb.” \(\text{Id.}\)


\(^{270}\) N.Y. MENTAL HYG. LAW § 9.60 (McKinney’s 2002).
be submitted with the petition, (2) extending the time before the hearing, (3) allowing individuals the right to refuse medication without consequence, and (4) requiring an independent examiner as opposed to allowing the patient’s current treating physician to be an examiner. Only a proper balancing of an individual’s autonomy and privacy with the state’s interest will provide due respect for individuals with mental illness, ensure effective treatment, and protect society from those who need more intensive treatment.
ADDRESSING EX-FELON DISENFRANCHISEMENT: LEGISLATION VS. LITIGATION

Martine J. Price*

INTRODUCTION

More than one million convicted ex-felons who have completed their sentences are permanently prohibited from voting in the United States.1 Felony disenfranchisement laws have existed since the colonial age and increased in importance and effect in the post-Civil War era.2 This practice effectively and disproportionately prohibited many African Americans from participating in the electoral process, and it continues to have the same effect today.3 As a result, many affected individuals as well

---

* Brooklyn Law School Class of 2003; B.A., The George Washington University, 1999. The author would like to thank the staff of the Journal of Law and Policy for their hard work. She also wishes to thank Dad, Jeremy, Grandma, Grandpa and especially Mom for their continuing love and support through all things academic and otherwise. Special thanks to Melissa for her cherished friendship and Mike for all his love.

1 THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2001) [hereinafter THE SENTENCING PROJECT]. THE SENTENCING PROJECT estimates, “1.4 million disenfranchised persons are ex-offenders who have completed their sentences.” Id.

2 Andrew L. Shapiro, CHALLENGING CRIMINAL DISENFRANCHISEMENT UNDER THE VOTING RIGHTS ACT: A NEW STRATEGY, 103 YALE L.J. 537, 538 (1993). Some Southern states altered the criminal disenfranchisement laws so that they would have a greater impact on black voters. Id. These states included Mississippi, South Carolina, Louisiana, Alabama, and Virginia. Id. at 541.

3 See THE SENTENCING PROJECT, supra note 1, at 1. According to The Sentencing Project, thirteen percent of black men in the U.S. are disenfranchised. Id.
Disenfranchisement laws began in the United States as an outgrowth of the English practice of imposing collateral civil consequences to felony convictions. Traditionally, this practice was justified by the belief that convicted felons were more susceptible to voter corruption and fraud. Disenfranchisement

4 JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT AND HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998). Groups such as The Sentencing Project and Human Rights Watch frequently monitor legislative and judicial activity with regard to disenfranchisement and conduct research that may be used in lawsuits brought by ex-felons. Id. In 2000, The Sentencing Project reported that legislators in Alabama, Florida, Pennsylvania, Nevada and Connecticut have proposed legislation lessening restrictions on ex-felons’ voting rights. PATRICIA ALLARD & MARC MAUER, THE SENTENCING PROJECT, REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS 4-9 (2000). Additionally, lawsuits were filed in the past several years in states such as New Hampshire, Washington and Pennsylvania in which challenges to the existing disenfranchisement statutes have been made. Id.; see also infra Part I.C (discussing disenfranchisement litigation occurring in state courts).

5 FELLNER & MAUER, supra note 4, at 2-3. The medieval English government would pass bills of attainder to restrict convicted felons’ rights by subjecting their property to forfeiture, prohibiting them from inheriting or bequeathing property and forbidding them from bringing suit in the court system. Id.

6 See Washington v. State, 75 Ala. 582 (Ala. 1884). Courts traditionally argued that denying the right to vote to convicted ex-felons preserved the “purity of the ballot box” by protecting the foundation of democracy from ex-felons who are unfit to vote. Id. at 585. In Kronlund v. Honstein, the court stated that the state’s interest in preserving the electoral process justifies the exclusion of those whose “behavior can be said to be destructive of society’s aims.” 327 F. Supp. 71, 73 (N.D. Ga. 1971). Courts rationalized that permitting ex-felons to vote could possibly disrupt the true intentions of upstanding citizens. FELLNER & MAUER, supra note 4, at 15. A California Supreme court decision reflects this.

The fact that such person committed a crime is evidence that he was morally “corrupt” at the time he did so; if still morally corrupt when given the opportunity to vote in an election, he might defile “the purity of the ballot box” by selling or bartering his vote or otherwise
ADDRESSING EX-FELON DISENFRANCHISEMENT

also served to protect the sanctity of the voting system and ensure that convicts could not influence the lawmaking process. After the Civil War, Southern legislatures attempted to limit the number of eligible black voters by altering felony disenfranchisement laws to include crimes that leaders believed were committed more frequently by blacks. Mississippi provided an ideal example for other Southern legislatures in 1890 when it narrowed the disenfranchisement statute’s application to “black” crimes such as bribery, burglary, theft and arson.

Today, felony disenfranchisement continues in varying forms throughout the United States. While two states allow ex-felons engaging in election fraud; and such activity might affect the outcome of the election and thus frustrate the freely expressed will of the remainder of the voters.


7 FELLNER & MAUER, supra note 4, at 15. By disenfranchising ex-felons, their influence on the political process is eliminated, ensuring that elections were decided exclusively by “responsible” citizens. Id.; see also Citizenship, supra note 6, at 1309.

8 Shapiro, supra note 2.

9 Id. at 538 n.20. The relevant portion of the Mississippi Constitution stated “[e]very male inhabitant of the state . . . who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, forgery, embezzlement or bigamy . . . is declared to be a qualified elector.” MISS. CONST. art. VII § 241 (1890). See also Ratliff v. Beale, 20 So. 865, 867 (Miss. 1896) (stating that the amended Mississippi Constitution contained an increased number of restrictions on the franchise).

10 Nicholas Thompson, Locking Up the Vote; Former Prisoners Barred From Voting Under Florida Law, WASH. MONTHLY, Jan. 1, 2001, at 17. Thompson suggests that contemporary politicians continue to keep disenfranchisement statutes in place because without such laws they never would have been elected. Id. Thompson cites a sociological study that asserts that politicians such as John Warner, Mitch McConnell, Connie Mack, Phil Gramm and Craig Thomas may never have been elected if the felony disenfranchisement statutes in their respective states did not exist at the time of their elections. Id. Such data indicates that many politicians are unwilling to do anything to substantially alter the disenfranchisement statutes, fearing the
to vote while in prison,\textsuperscript{11} others permit ex-felons to vote only after completing parole.\textsuperscript{12} Twelve states permanently

loss of their own power. \textit{Id.} Disenfranchisement constitutional provisions and statutes enacted several decades ago with the purpose of discrimination, therefore, continue to exist. \textit{Id.} Virginia’s 1901 convention, for example, expanded the disenfranchisement laws in order to eliminate “every Negro voter who can be gotten rid of legally, without materially impairing the numerical strength of the white electorate,” \textit{Id.; see also VA. CONST. art. II, § 23 (1902).} Alabama’s 1901 constitution was designed to “ensure white supremacy.” \textit{ALA. CONST. art. VIII, § 182 (1901).} Florida’s 1868 constitution included a disenfranchisement provision that was contested by African Americans and radical Republicans. \textit{FLA. CONST. art. XIV, §§ 2, 4 (1868); see Thompson, supra.} Furthermore, case law indicates that many states continue to justify disenfranchisement based on the beliefs of social contract theorist John Locke. \textit{See, e.g.,} Baker v. Cuomo, 58 F.3d 814 (2d Cir. 1995). The social contract theory centers upon the idea that “morality is founded solely on uniform social agreements that serve the best interests of those who make the agreement.” James Fieser & Bradley Dowden, eds., \textit{Internet Encyclopedia of Philosophy, Social Contract}, at http://www.utm.edu/research/iep/s/soc-cont.htm (last visited Oct. 17, 2002). Expanding on this theory, Locke proposed that a government derives its authority from the consent of its citizens. \textit{See Garth Kemerling, Locke: Social Order, at http://www.philosophypages.com/hy/4n.htm#gov} (last visited Oct. 17, 2002). This relationship creates a contract that imposes obligations on both the political entity and its citizenry. \textit{Id.} While the contract allows citizens to overthrow their government when it fails to meet the needs of society, it also authorizes society to take away privileges such as voting when a citizen has “abandoned the right to participate” by breaking the social contract. \textit{Baker, 58 F.3d at 821} (indicating that the state’s articulated justification for disenfranchisement was based on the social contract theory set out in \textit{Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967).}) A social contract is made between an individual and society when an individual enters society, authorizing the legislature to make laws to protect his own well being. \textit{Green, 380 F.2d at 451. See also Farrakhan v. Locke, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997) (relying on \textit{Green} as support for the state’s position that disenfranchisement is justified); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (relying on \textit{Green}).}

\textsuperscript{11} \textit{See THE SENTENCING PROJECT, supra note 1. These states are Maine and Vermont. \textit{Id.; see also ME. REV. STAT. ANN. 21, § 111 (2001) (listing the general qualifications in order to vote); ME. STAT. ANN. 21, § 115 (2001) (listing the restrictions on voter eligibility); VT. STAT. ANN. 17, § 2121 (2002) (listing criteria for voter registration).}

\textsuperscript{12} \textit{See THE SENTENCING PROJECT, supra note 1, at 3; see also ALASKA
ADDRESSING EX-FELON DISENFRANCHISEMENT

Disenfranchise at least some ex-felons, even after sentence and parole completion. Sixteen states and the District of Columbia disenfranchise ex-felons only while they are in prison. While pardoning procedures exist in some states to restore voting rights, these procedures are not universal. The Sentencing Project notes that:


14 THE SENTENCING PROJECT, supra note 1, at 3; see also D.C. CODE ANN. § 1-1001.02(7) (2002); HAW. CONST. art. II, § 2 (2002); IDAHO CONST. art. VI, § 3 (2002); 10 ILL. COMP. STAT. 5/3-5 (2002); IND. CODE ANN. § 3-7-13-4 (West 2002); KAN. CONST. art. V, § 2 (2001); LA. REV. STAT. ANN. § 18:102 (West 2002); MASS. GEN. LAWS ch. § 1 (2002); MICH. COMP. LAWS § 168.492a (2002); MONT. CODE ANN. § 13-1-111(2) (2002); N.H. REV. STAT. ANN. §§ 607-A:2, 654:5 (1986); N.D. CONST. art. 2, § 2 (2002); N.D. CENT. CODE § 161-04-04 (2002); OHIO REV. CODE ANN. § 2961.01 (West 2002); OR. CONST. art. II, § 3 (2001); 25 PA. CONS. STAT. § 1301 (2002); S.D. CONST. art. VIII, § 1 (2002); UTAH CODE ANN. § 20 A-2-101 (2002).
rights,\textsuperscript{15} they are nonetheless difficult to obtain.\textsuperscript{16}

The disproportionate impact on African Americans and other minorities of many of these state statutes is undeniable.\textsuperscript{17} African-

\textsuperscript{15}Restore Voting Rights After Prison Time, ATL. CONST., June 4, 2001, at A10, available at 2001 WL 3676390. These include Virginia, Florida, Kentucky and North Carolina. \textit{Id.}

\textsuperscript{16}ALLARD & MAUER, supra note 4, at 10. In Virginia, a felon must wait five years after completion of sentence and parole and have paid all fines and court fees. \textit{Id.} If those conditions are satisfied, the felon must request a packet detailing the requirements from the Virginia Secretary of the Commonwealth’s Office and then can apply to the Governor for restoration of the right to vote. \textit{Id.} The Governor has final authority over whether the felon’s voting rights are restored. VA. CONST. art. V, § 12. Only about one hundred people complete the process each year. Frank Green, Panel to Study Ex-felons’ Rights; Va. Restoration Process Difficult, RICHMOND TIMES-DISPATCH, June 20, 2001, at B1, available at 2001 WL 5326577. In Florida, a felon must obtain executive clemency in order to restore his voting rights. ALLARD & MAUER, supra note 4, at 6. The Florida Parole Commission determines whether a felon is eligible for restoration, and refers a candidate to the Executive Board of Clemency. \textit{Id.} If no members of the Clemency Board object, the Clemency Coordinator may restore the felon’s civil rights. \textit{Id.} Recently, this process has been streamlined for some nonviolent, habitual offender ex-felons who no longer must attend a Clemency Board hearing. Julie Hauserman, Cabinet Eases Rules for Restoring Ex-felons’ Rights, ST. PETERSBURG TIMES, June 15, 2001, at 4B (stating that nonviolent offenses include drug-related crimes). New rules enacted by the Florida Cabinet also increase the maximum amount of a felon’s outstanding court fines from two hundred and fifty dollars to one thousand dollars. Scott Hiaasen, Cabinet Expands Clemency Eligibility, PALM BEACH POST, June 15, 2001, at 7B, available at 2001 WL 21884875.

\textsuperscript{17}Andrew Shapiro, The Disenfranchised, AM. PROSPECT, Nov. 1, 1997, at 60, available at 1997 WL 21293207. Because blacks and other minorities such as Latinos are disproportionately represented within the criminal justice system, minority ex-felons make up a disproportionate share of the disenfranchised convicts within the United States. \textit{Id.} For example, the New York Division of Criminal Justice Services issued a report in 1995 stating that black defendants were more likely to receive prison sentences than white defendants who had been convicted of similar crimes. \textit{Id.} In several states, blacks comprise a larger portion of the prison population than whites even though blacks represent a smaller portion of the state’s total population. Alice E. Harvey, Ex-felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look, 142 U. PA. L. REV. 1145, 1151-52 (1994). For example, as of 1990, 0.9% of Alabama’s black population is incarcerated while 0.2% of whites are imprisoned. \textit{Id.} In Delaware, 2% of the black
American men account for an estimated thirty-six percent of all disenfranchised ex-felons. As a result, these statutes restrict the voting rights of thirteen percent of all adult African-American males. Furthermore, the impact is more extreme in certain individual states. For example, in both Alabama and Florida, thirty-one percent of all black men are permanently disenfranchised. In Iowa, Mississippi, New Mexico, Virginia and Wyoming, one in four black men is permanently disenfranchised. In Delaware, one in five black men are permanently disenfranchised. These statistics indicate that the current felony disenfranchisement laws have a significantly higher effect on minorities than on other groups within the country.

Many of these statutes have been challenged in the twentieth century through the court system, as well as by state and federal legislatures, and each of these methods has had varying degrees of success. This note explains the approaches taken through litigation and legislation in both federal and state arenas. The strengths and weaknesses of each approach are evaluated, and this note ultimately concludes that state legislation has the most potential for success. Part I provides an overview of the litigation strategies employed to attack disenfranchisement laws. This includes a discussion of frequently utilized arguments involving the Equal Protection clause of the United States Constitution, the Voting Rights Act and state constitutional litigation. Part II

---

18 ALLARD & MAUER, supra note 4, at 1.
19 FELLNER & MAUER, supra note 4, at 8.
20 Id.
21 Id.
22 Id.
23 See infra Part I (discussing judicial decisions); see infra Part II (discussing legislation).
24 U.S. CONST. amend. XIV, § 1.
analyzes attempts by federal and state legislatures to address this issue, including a federal congressional bill proposal. It also provides an overview of recent state legislation addressing this issue. Finally, this note identifies the most effective approach to achieve the goal of ending disenfranchisement and proposes a workable method to address the disparate impact on minorities.

I. APPROACHES TO DISENFRANCHISEMENT LITIGATION

Litigation is one of the most frequently used methods to address concerns about felony disenfranchisement. Lawsuits have typically focused on the Fourteenth Amendment’s Equal Protection clause or the Voting Rights Act to challenge disenfranchisement laws. In state courts, litigants also derive arguments from state constitutional provisions.

A. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The original purpose of the clause was to assure equal treatment for former slaves in the post-Civil War period. Eventually, the clause was interpreted to require that governmental classifications be
reasonably related to the purpose of the legislation.\textsuperscript{32} The evolution of the Supreme Court’s interpretation of the clause created different levels of scrutiny to determine whether a state action, law or classification has violated the clause.\textsuperscript{33} The most lenient type of review uses a “rational basis” standard to uphold the governmental classification as long as it bears a rational relationship to a legitimate objective.\textsuperscript{34} The middle level standard requires that the means chosen by the government must be substantially related to an important objective.\textsuperscript{35} Finally, the

\textsuperscript{32} Id.

\textsuperscript{33} Id. at 629-30. The levels are rational review, middle level review and strict scrutiny. Id.

\textsuperscript{34} Id. at 635. This standard requires only that a rational connection exist between a statute’s classification and the governmental purpose. Id. In other words, the means must “reasonably relate” to the ends. Id. at 629. The rational basis standard permits legislatures to act broadly and only minimally requires that the means “fit” the ends. Id. at 635. Its use is typified by the Supreme Court’s decision in \textit{Railway Express Agency v. New York}, 336 U.S. 106 (1949) (upholding a statute that prohibited advertising on the sides of vehicles because the classification was rationally related to the purpose of the statute to increase public safety). In \textit{Railway Express}, the agency argued that the classification had no relation to the safety issue because some distracting advertisements are outlawed while others that may be damaging to public safety are not. Id. at 110. Nevertheless, the Court concluded that the Equal Protection Clause does not require that “all evils of the same genus be eradicated.” Id.; see also McGowan v. Maryland, 366 U.S. 420 (1961) (finding that a state could reasonably require certain businesses to remain closed on Sundays in order to protect the general public’s interest in health and encourage the “recreational atmosphere of the day”). In \textit{McGowan}, the Court stated that “[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.” Id. at 425.

\textsuperscript{35} GUNTHER, supra note 31, at 631-32. This standard, while not explicitly acknowledged by a majority of the Court, has nonetheless been utilized in cases. Id. The intermediate standard is more intensive than the rational basis review as it requires that the classifications are “important” and the means have a “persuasive justification.” Id. at 632. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (declaring invalid a statute prohibiting the sale of beer to males under 21 and females under 18 for traffic safety purposes because the gender distinction did not “serve important governmental objectives” and was not “substantially related” to the achievement of traffic safety).
strictest level of review upholds a classification only if the law is necessary to advance a compelling governmental interest.\textsuperscript{36} Strict scrutiny is applied to any law that is based on a suspect classification or affects a fundamental right.\textsuperscript{37}

The Supreme Court first addressed the constitutionality of

\textsuperscript{36} GUNTHER, supra note 31, at 630. In the 1960s the Court articulated a new approach to the Equal Protection Clause that required the presence of either a suspect class or an impact on a fundamental right. \textit{Id.}; see infra note 37 (explaining the categories that require application of strict scrutiny review). The means must be necessary to achieve the ends and justified by a compelling state interest. \textit{Id.} In equal protection cases that involve suspect classes, the Court has rarely found compelling state interests because classifications involving suspect classes are rigidly scrutinized. \textit{Id.} at 664. In order to justify such a classification, the state must demonstrate that the law is essential for a public need. \textit{Id.} For example, in \textit{Korematsu v. United States}, the Court found that a law excluding Japanese people from certain areas on the West Coast constituted a “pressing public necessity” in light of the “real military dangers” that existed during World War II. 323 U.S. 214, 216, 223 (1944). While this decision has been extensively criticized, it is a noticeable example of the Court upholding a law that directly impacts a suspect class. \textit{Id.} More commonly, however, equal protection cases involve the Court striking down legislation that impermissibly affects a suspect class. See, e.g., \textit{Loving v. Virginia}, 388 U.S. 1 (1967) (invalidating a Virginia statute that prohibited inter-racial marriages because the law had no legitimate purpose that necessarily justified its existence).

\textsuperscript{37} GUNTHER, supra note 31, at 630. Race is the principal suspect class that always requires strict scrutiny. See \textit{Palmore v. Sidoti}, 466 U.S. 429 (1984) (reversing a state court custody decision that took away custody rights from a mother after she married an African American); \textit{McLaughlin v. Florida}, 379 U.S. 184 (1964) (invalidating a Florida statute that proscribed the cohabitation of interracial married couples); \textit{Yick Wo. v. Hopkins}, 118 U.S. 356 (1886) (reversing the decision to imprison a Chinese alien who was refused a permit for operating his laundry because the administration of the law was purposely directed at a class of people). The right to vote has been referred to as a fundamental right requiring strict scrutiny. See \textit{Kramer v. Union Free Sch. Dist. No. 15}, 395 U.S. 621 (1969) (invalidating a law that required voters in a school district election to own real property in the district or have children enrolled in the district because the statute did not promote a compelling state interest); \textit{Harper v. Va. State Bd. of Elections}, 383 U.S. 663 (1966) (establishing that a poll tax is unconstitutional because it infringes upon the fundamental right to vote).
felony disenfranchisement in *Richardson v. Ramirez*. In *Ramirez*, California ex-felons challenged a state law that denied them the right to vote. The plaintiffs claimed that the statute violated the Equal Protection clause of the Fourteenth Amendment. Although this argument was accepted by the California Supreme Court, the United States Supreme Court rejected it, determining that the strict scrutiny required by section one of the Fourteenth Amendment did not apply to ex-felons because section two permits states to restrict convicted criminals’ right to vote. Section two provides that a state’s representation may be reduced if the vote is denied to qualified individuals, excluding those who have participated in “rebellion, or other crime.” The Court interpreted this section as permitting the state to deny ex-felons the right to vote. Therefore, equal protection did not apply to ex-felons because section two is an “affirmative sanction” of criminal behavior.

---

39 Id. at 26. The ex-felons challenged both Article XX, section 11 of the California Constitution, which required the adoption of laws that exclude convicted persons from voting, and sections 310, 321, 383, 389, 390, 14240, and 14246 of the California Elections Code as the sections that enforce the mandate of the constitution. Id.
40 Id. at 33. Ramirez claimed that California must articulate a compelling state interest in order to justify the denial of the right to vote by the class of ex-felons. Id. According to Ramirez, because the state could not find such an interest, the statutory and constitutional provisions authorizing disenfranchisement violated the Equal Protection clause. Id.
41 Ramirez v. Brown, 507 P.2d 1345 (1973). The California court examined whether the statutory scheme disenfranchising ex-felons was the least burdensome way the state could regulate the electoral system, and concluded that it was not. Id. at 212. Instead, the court determined that disenfranchisement was not necessary for the state to effectively regulate the voting process. Id. at 216.
42 “[W]hen the vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced.” U.S. CONST. amend. XIV, § 2 (emphasis added); *Ramirez*, 418 U.S. at 54.
43 U.S. CONST. amend. XIV, § 2.
44 *Ramirez*, 418 U.S. at 54.
45 Id.
drastically limited the ability to challenge disenfranchisement laws on the basis of the Equal Protection Clause, and subsequent circuit court cases reflect this futility.\textsuperscript{46}

Although the Supreme Court ruled that denying the right to vote to ex-felons is permissible under section two of the Fourteenth Amendment,\textsuperscript{47} the Court thereafter invalidated a disenfranchisement law in \textit{Hunter v. Underwood}.\textsuperscript{48} In \textit{Hunter}, the Court found that two factors must be met to establish that a disenfranchisement law violates the Equal Protection clause.\textsuperscript{49} First, the plaintiff must prove that the disputed law was conceived and written with racially discriminatory intent.\textsuperscript{50}

\textsuperscript{46} See, e.g., Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000) (holding that the plaintiff did not establish that the state’s act intended to or had the effect of denying the right to vote based on race); Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (dismissing felon’s claim that Mississippi’s Constitution unfairly denied him the right to vote because the constitution was amended since its original enactment, removing any discriminatory intent); Baker v. Pataki, 85 F.3d 1091 (2d Cir. 1995) (affirming lower court’s decision to dismiss ex-felons’ complaint that the New York election law disproportionately deprived blacks of their right to vote); Buckner v. Schaefer, 36 F.3d 1091 (4th Cir. 1994) (stating that there was no evidence that a Maryland statute disenfranchising ex-felons was intended to or is being applied in a discriminatory manner); Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (declaring that a state may rationally decide to disenfranchise ex-felons); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979) (holding that the state classifications disenfranchising ex-felons bear a rational relationship to the state’s interest in limiting the franchise to responsible voters).

\textsuperscript{47} Ramirez, 418 U.S. at 55.

\textsuperscript{48} 471 U.S. 222 (1985).

\textsuperscript{49} Id. at 225.

\textsuperscript{50} Id. Discriminatory intent exists when a court finds that discrimination is a substantial or motivating factor in the adoption of the statute. Underwood v. Hunter, 730 F.2d. 614, 617 (11th Cir. 1984). To determine whether discrimination was a motivating factor, a court must look at a variety of factors, including the historical background of the decision, legislative history and the impact of the decision on the affected group. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 525, 566-68 (1977); see also City of Mobile v. Bolden, 446 U.S. 55 (1980). The Supreme Court agreed with the lower court that the provision in Alabama’s 1901 Constitution that permitted disenfranchisement of any person who was convicted of any crime involving “moral turpitude” constituted an impermissibly broad category that included
ADDRESSING EX-FELON DISENFRANCHISEMENT

Second, the plaintiff must demonstrate that such a law has a disproportionate impact on a protected class.\textsuperscript{51} If both of these factors are established, the Fourteenth Amendment’s Equal Protection clause is violated.\textsuperscript{52}

Ultimately in \textit{Hunter} the Supreme Court found that a provision of the Alabama Constitution that disenfranchised those convicted of misdemeanors of “moral turpitude” was originally adopted with intent to discriminate and had the intended impact on a protected class.\textsuperscript{53} The Court further stipulated that in order to violate the Equal Protection clause, disenfranchisement statutes must have been adopted solely to discriminate and would not have been adopted but for that intent.\textsuperscript{54} Therefore, the Court held that the provision violated the Equal Protection clause.\textsuperscript{55}

\textit{Hunter} is significant in that it provides an Equal Protection within its scope both felonies and misdemeanors. \textit{Hunter}, 471 U.S. at 226. The framers believed these selected crimes were committed more frequently by blacks. \textit{Id.} at 227.

\textsuperscript{51} \textit{Id.} A law has a disproportionate impact when it is demonstrated that one group in society is affected more than another. \textit{Id.} For example, in \textit{Hunter} the lower court found that section 182 of the Alabama Constitution disenfranchised ten times as many blacks as whites. \textit{Id.} at 228. Laws that affect a protected or suspect class are always analyzed using the strict scrutiny standard. See supra note 37 (elaborating on protected and suspect classes). The Supreme Court indicated that the racial impact of the provision was not contested. \textit{Hunter}, 471 U.S. at 228.

\textsuperscript{52} \textit{Id.} at 233.

\textsuperscript{53} \textit{Id.; Ala. Const.} art. VIII, § 182 (1901). The Alabama Constitution denied the vote to those convicted of “any . . . crime involving moral turpitude,” which was later defined by the Alabama Supreme Court to mean an act that is “immoral in itself, regardless of the fact whether it is punishable by law.” Pippin v. State, 73 So. 340, 342 (1916) (quoting Fort v. Brinkley, 112 S.W. 1084 (1908)); \textit{Hunter}, 471 U.S. at 226.

\textsuperscript{54} \textit{Hunter}, 471 U.S. at 227. Using the standard articulated in \textit{Arlington Heights v. Metro. Hous. Dev. Corp.}, 429 U.S. 525 (1977), the Court required proof is necessary to indicate that the questioned statute was enacted with the intent to discriminate and did not serve any other purpose than to discriminate. \textit{Hunter}, 471 U.S. at 227. The Court also reiterated that once a plaintiff demonstrates that racial discrimination was a substantial factor in the creation of the law, the defense must then prove that the law would have been enacted even without this factor. \textit{Id.} at 228.

\textsuperscript{55} \textit{Id.} at 224.
avenue to attack disenfranchisement laws. This case lessens the impact of *Ramirez* by demonstrating that disenfranchisement lawsuits can still be successful. Given the extensive discriminatory purpose in many of the states that continue to deny ex-felons access to the ballot box, the first factor in *Hunter* requiring proof of racially discriminatory intent should not be a difficult obstacle to face.

Few lawsuits, however, have been successful in applying the *Hunter* rule to similar statutes because the presence of discriminatory intent was ambiguous. In *Cotton v. Fordice*, the Fifth Circuit recognized that section 241 of the Mississippi Constitution was enacted in 1890 with discriminatory intent. The court reasoned, however, that because the disenfranchisement provision was amended several times since 1890 to remove sections that may have been intentionally discriminatory, the provision was not unconstitutional since the

56 Shapiro, *supra* note 2, at 548.
57 *Ramirez*, 418 U.S. at 33.
58 Shapiro, *supra* note 2, at 548. Shapiro notes that the history of disenfranchisement in the Southern states is especially apparent. *Id.* This is demonstrated by the results of constitutional conventions that took place after the Civil War. *Id.* at 541. Mississippi’s 1890 constitution is an example of intentional discrimination using disenfranchisement. *See* MISS. CONST. art. VII, § 241 (1890); *supra* note 9 (discussing section 241). Mississippi’s approach was mirrored at the constitutional conventions of other states, including South Carolina, Louisiana, Alabama, and Virginia. Shapiro, *supra* note 2, at 541.
59 See, e.g., *McLaughlin v. City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995). In *McLaughlin*, the District Court for the Southern District of Mississippi declined to decide whether Section 241 of the Mississippi Constitution was enacted with racially discriminatory intent. *Id.* at 978. While the court conceded that this was possible, the issue was not fully addressed because the court had already decided that the plaintiff’s conviction of false pretenses was a misdemeanor, not a felony. *Id.* at 976. Because misdemeanors are not included among the class of crimes for which punishment may include disenfranchisement, *Ramirez* did not apply in this case and the issue of intent was irrelevant. *Id.* at 976-78.
60 157 F.3d 388, 391 (5th Cir. 1998); *see* supra note 9 (discussing section 241).
amendments were not adopted with the intent to discriminate.\textsuperscript{61} Recently, in \textit{Howard v. Gilmore}, the Fourth Circuit dismissed the possibility of discriminatory intent because the constitutional provision disenfranchising ex-felons existed before the enactment of the Fourteenth and Fifteenth Amendments and the extension of the right to vote to blacks.\textsuperscript{62} Other cases reflect the tendency among courts to dismiss disenfranchisement cases with little or no discussion regarding discriminatory intent.\textsuperscript{63}

The outcomes of these cases reflect that while \textit{Hunter} permits Equal Protection dialogue in some disenfranchisement cases, its scope is narrow and thus limited in utility. In conjunction with \textit{Ramirez}, the standard set by \textit{Hunter} significantly restricts constitutional argumentation.\textsuperscript{64} Therefore, litigation challenging disenfranchisement laws must focus on theories not confined by U.S. Constitutional claims.\textsuperscript{65} The ability to change such laws

\textsuperscript{61} \textit{Cotton}, 157 F.3d at 391-92. Section 241 was amended in 1950 to remove “burglary” from the list of eligible crimes. \textit{Id.} It was also amended in 1968 to include “murder” and “rape,” crimes that historically were not considered “black crimes.” \textit{Id.} Because the plaintiff did not offer any evidence that the amendments were enacted with discriminatory intent, the court assumed that they were not enacted with discriminatory intent. \textit{Id.}

\textsuperscript{62} 205 F.3d 1333 (4th Cir. 2000). The court also based its decision on the Supreme Court’s interpretation of section 2 of the Fourteenth Amendment giving express permission to the states to deny the right to vote to convicted criminals. \textit{Id.; see also supra} note 41 and accompanying text (describing the Supreme Court’s rationale in \textit{Ramirez}).

\textsuperscript{63} See Buckner v. Schaefer, 36 F.3d 1091 (4th Cir. 1994) (explaining that plaintiffs provided no evidence that the statute in question was intended to discriminate); \textit{see also} Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (noting that a state could rationally decide to exclude convicted ex-felons from voting); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979) (declaring that the classifications of ex-felons bore a rational relation to the state’s interest in limiting access to the franchise to responsible voters).

\textsuperscript{64} Because \textit{Ramirez} holds that the strict scrutiny required by section 1 does not apply to ex-felons, the possibility of invalidating a law under the Fourteenth Amendment is limited to section 2. \textit{Ramirez}, 418 U.S. at 54. This avenue is further restricted by the \textit{Hunter} standard, however, and thus makes it more difficult to pursue disenfranchisement claims using the Constitution. \textit{See Hunter}, 471 U.S. at 224.

\textsuperscript{65} \textit{See infra} Part I.C. (discussing state court litigation focusing on state
JOURNAL OF LAW AND POLICY

without a favorable Supreme Court ruling is a fundamental problem facing litigants.

B. The Voting Rights Act

Disenfranchised litigants have also attempted to use the Voting Rights Act in conjunction with the Equal Protection clause.\textsuperscript{66} Congress adopted the Voting Rights Act ("the Act") in 1965 to combat continuing racial discrimination in the South by enabling black voters to challenge existing voting barriers.\textsuperscript{67} The Southern states were targeted specifically because state and local governmental officials evaded the provisions of the Fifteenth Amendment by utilizing discriminatory devices such as literacy tests to prevent blacks from voting.\textsuperscript{68}


\textsuperscript{67} GUNTHER, supra note 31, at 985-86. The Act prohibits voting qualifications that "result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(2)(a). See Robert Barnes, Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?, 32 UCLA L. REV. 1203, 1209 (1985) (stating that the main purpose of the Voting Rights Act was to provide a remedy for racially motivated obstruction of voting rights).

\textsuperscript{68} GUNTHER, supra note 31, at 986. In particular, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and North Carolina were singled out because of the continued existence of literacy tests or similar devices throughout the spring of 1965. Chandler Davidson, The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING 7, 18-19 (Bernard Groffman & Chandler Davidson, eds., 1992). In addition to literacy tests, Southern states also created barriers such as grandfather clauses, property qualifications and character tests in order to prevent illiterate whites from being denied the right to vote. Charlotte Marx Harper, Lopez v. Monterey County: A Remedy Gone Too Far?, 52 BAYLOR L. REV. 435, 438 (2000). For example, a grandfather clause entitled anyone who was a descendant of someone who was historically entitled to vote to be excused from taking the literacy test. Gregory A. Caldiera, Litigation, Lobbying, and the Voting Rights Bar, in CONTROVERSIES IN MINORITY VOTING 230, 232 (Bernard Groffman & Chandler Davidson, eds., 1992). In addition, because less than two-thirds of blacks in many Southern states in 1890 knew how to read, requiring the completion of a registration form effectively prevented
ADDRESSING EX-FELON DISENFRANCHISEMENT

The Supreme Court effectively limited the Act’s impact in City of Mobile v. Bolden, however, when it decided that discriminatory intent must be shown in order to establish a violation of the Fourteenth Amendment or section two of the Voting Rights Act. Bolden was a class action initiated on behalf of the black residents of the city of Mobile, Alabama. The plaintiffs alleged that the town’s practice of electing the city commissioners at large by the city’s entire voting population unfairly diluted the strength of their vote in such elections and thus violated section two of the Act. The Court focused on prior cases that required plaintiffs to show that the disputed plan was “conceived or operated as [a] purposeful [device] to further racial... discrimination.”72 Because this standard was particularly difficult to prove, many pending lawsuits at the time of Bolden based on section two faced stiffer resistance from the local governments and were dropped.73

In response to Bolden, Congress amended the Act in 1982 to create a “results” test that would specifically apply to voting most blacks from voting. South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966).

69 446 U.S. 55, 65 (1980). Section 2 of the Voting Rights Act states that “[n]o voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...” 42 U.S.C. § 1973(2)(a) (2001).

70 Bolden, 446 U.S. at 58.

71 Id. at 58-60.


rights litigation. The amendment establishes that a reviewing court must look to the “totality of circumstances” present when considering a voting discrimination claim. By enacting a results test, Congress directed the courts to consider several “typical” factors listed in the Senate Judiciary Committee report addressing the 1982 amendment. The amendment’s supporters attempted to restore the moderate legal standard that existed prior to Bolden.


A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Id.; see also GUNTHER, supra note 31, at 990 (discussing the totality of the circumstances standard in section 2 of the Act).


[A] history of official racial discrimination in voting; racially polarized voting; practices such as majority-vote rules that may enhance the opportunity for discrimination; a discriminatory slating process; socioeconomic disparities that impede minority political participation; racial appeals in campaigns; and the lack of minority electoral success. Two additional factors included the absence of official responsiveness to minority group interests and a tenuous policy in support of the challenged voting practice. Id. (internal quotations omitted). Congress derived these factors from White v. Regester, 412 U.S. 755 (1973), in which the Supreme Court declared that minority groups must be given equal opportunity to vote and declared unlawful practices that had the effect of creating unequal opportunities based on race. McDonald, supra note 73, at 66. This effect could be shown by the presence of any of the factors; evidence of intent was not necessary. Id.; see supra note 75 for the text of the Act.

77 McDonald, supra note 73, at 66. Before Bolden, the Court held in
ADDRESSING EX-FELON DISENFRANCHISEMENT 387

Although the amendment was intended to ease a plaintiff’s difficulties in meeting the intent standard, few disenfranchisement cases have been successful since it was passed. Even when ex-felons refer to the Act to claim that disenfranchisement denies them the right to vote based on race, state and federal courts still require them to prove both specific discriminatory intent and impact in order to invalidate the law. Therefore, because courts have disregarded congressional reasoning behind the amendment, the changes have virtually no impact on the legal standard.

Wesley v. Collins was the first federal case to address the 1982 amendment. In Wesley, the Sixth Circuit rejected a disenfranchised felon’s claim that the Tennessee Voting Rights Act unfairly denied him the right to vote. While the Wesley court conceded that the 1982 amendment was designed so that “the challenging party need not prove discriminatory intent to establish a violation,” it held that the plaintiff failed to demonstrate that the “totality of the circumstances” resulted in a violation of the Act. Tennessee’s history of racial discrimination

White v. Regester that states may not deny minorities an equal opportunity to vote. 412 U.S. 755 (1973). Unequal opportunity may be proven by any of a number of factors, see supra note 76, and specific proof of intent was not necessary. Id. at 67. Therefore, the standard in place pre-Bolden was easier for Voting Rights Act litigants to prove. Id.

78 See supra note 63 and accompanying text (providing examples of cases with ineffective Voting Rights Act claims).

79 Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986). See infra Part I.B (discussing federal cases that evaluated the application of the 1982 amendment to felony disenfranchisement claims).

80 See supra note 63 (providing examples of cases where the legal standard has remained the same).

81 791 F.2d 1255 (6th Cir. 1986).

82 TENN. CODE ANN. § 2-19-143 (1981). The Tennessee Voting Rights Act of 1981 provides that “any person who has been convicted of an infamous crime in Tennessee . . . shall not be permitted to register to vote or to vote in any election.” Id.; see also Wesley, 791 F.2d at 1257.

83 Wesley, 791 F.2d at 1260. The court reasoned that the lower court’s emphasis on the evidence of the effects of past discrimination was misplaced because this factor alone is not sufficient to constitute a violation of the Voting Rights Act. Id.
was not sufficient to establish a violation despite evidence that the state’s Voting Rights Act disproportionately affected blacks.\textsuperscript{84} Instead, the court declared that the rationale behind the law was both legitimate and compelling, based on the holding in \textit{Ramirez} that criminal disenfranchisement is constitutionally permissible.\textsuperscript{85} Therefore, even though \textit{Wesley} contains an acknowledgment of Congress’ attempt to make the standard more lenient, its outcome demonstrates that the Sixth Circuit continues to adhere to the heightened intent standard set by \textit{Bolden}.\textsuperscript{86}

Courts in other circuits have also refused to utilize the results standard.\textsuperscript{87} This indicates that congressional directives supportive of modifying disenfranchisement laws may ultimately have little value when faced with court decisions that reflect the current Supreme Court’s tendency to limit congressional power.\textsuperscript{88}

\textsuperscript{84} \textit{Id.} The court refers to the district court’s finding that the historical presence of racial discrimination in Tennessee continues to have effects in the present day, including the resulting disproportionate impact on blacks who are convicted of felonies at a significantly higher rate than whites. \textit{Id.} at 1260.

\textsuperscript{85} \textit{Id.} at 1261. To justify the state’s rationale, the court cited the Lockean theory that one who breaks society’s laws is authorizing the government to take away certain rights, including voting rights. \textit{Id.; see supra} note 10 (discussing the social contract theory of John Locke). The court also emphasized that it is reasonable for a state to decide to take away the voting privilege from those who commit serious crimes. \textit{Id.} at 1261-62. The act of disenfranchisement is taken against an individual as a result of their participation in a preascertained, proscribed criminal act, rather than against a group of citizens as a whole and thus does not violate equal protection, according to the court. \textit{Id.} at 1262.

\textsuperscript{86} 446 U.S. 55 (1980); 791 F.2d 1255 (6th Cir. 1986). Some believe the plaintiff’s fulfillment of both disparate racial impact and historical discrimination should have been sufficient to constitute a Voting Rights Act violation. Shapiro, \textit{supra} note 2, at 550; \textit{see also} Harvey, \textit{supra} note 17, at 1186 (questioning the \textit{Wesley} court’s claim that plaintiffs suing under section 2 of the Voting Rights Act must demonstrate that discriminatory intent was present in the enactment of the disputed statute, which contradicts the purpose of the 1982 amendments to the Voting Rights Act).


\textsuperscript{88} \textit{See, e.g.}, \textit{City of Boerne} v. Flores, 521 U.S. 507 (1997). In \textit{City of Boerne}, the Court held that Congress does not have the power to define substantive aspects of the Constitution. \textit{Id.} at 519. This case restricts federal
Nevertheless, potential for reform on the federal circuit level is still a possibility. In the Second Circuit, felons brought a lawsuit challenging New York’s election law that denied inmates and parolees the vote based on the results test. The inmates’ original claim was dismissed by the district court of the Southern District of New York. On appeal, five judges voted to allow felons to pursue Voting Rights Act claims, stating that “[w]hile a State may choose to disenfranchise some, all or none of its ex-felons based on legitimate concerns, it may not do so based upon distinctions that have the effect, whether intentional or not, of disenfranchising felons because of their race.” Furthermore, the judges in support of the plaintiffs’ claims minimized the need to demonstrate specific past discrimination in the state in order to establish a Voting Rights Act claim. A split among the judges resulted in the lawsuit’s


90 Baker v. Cuomo, 58 F.3d 814 (S.D.N.Y. 1995). At trial, the felons’ action was dismissed for failure to state a claim upon which relief could be granted. Id. A panel of the trial court reversed this decision. Id. The defendants sought review in the Court of Appeals. Id.

91 Baker, 85 F.3d at 937 (emphasis added).

92 Id. at 937-38.

93 Id. at 938. Judge Feinberg used literacy tests as a comparative example. Id. at 937. When the Court upheld the ban on literacy tests in
dismissal without precedential effect. Nevertheless, this split demonstrates that results-test arguments can be influential.

The reasoning in Baker favoring the results-test rationale indicates that the 1982 Amendment to the Voting Rights Act does not unacceptably push the limits of Congress’ enforcement power of the Equal Protection Clause into unconstitutional boundaries. Despite the lack of a clear victory, Baker demonstrates that the results test of the Act will be influential in changing felon disenfranchisement laws. While several constitutional issues remain in question, this method is not completely devoid of


Baker, 85 F.3d at 921; see also Shapiro, supra note 17, at 3. Ten judges on the Second Circuit sat en banc and were evenly divided as to the merits of the case. Id. Because there was no majority opinion, the lower court’s order to dismiss the ex-felons’ claims was affirmed. Id.

See Baker, 85 F.3d at 934 (Feinberg, J., separate opinion). Judge Feinberg’s alternative view represented the concerns of the five judges who voted to allow plaintiffs to argue that the results test set out in section 2 of the 1982 Amendment negated the necessity of demonstrating discriminatory intent. Id. These judges constitute half of the panel that heard the case. Id.

Baker, 85 F.3d at 937. Judge Feinberg wrote, “I see no persuasive reason, in view of Hunter, why Congress may not use its enforcing power under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment to bar racially discriminatory results, as it did in the Voting Rights Act.” Id.

Id. The fact that half of the judges sitting to hear Baker on the Second Circuit agreed that such a claim may be made indicates a possibility that like-minded judges exist in other circuits, or that judges are gradually becoming more favorable toward disenfranchisement cases based on the 1982 amendments to the Voting Rights Act. Id.

Id. Aside from issues of the scope of congressional power referenced by City of Boerne, the Voting Rights Act is also tainted by the applicability of the plain statement rule, which requires an explicit statement of intent from Congress when altering its usual balance with the states. Id. at 938. The question remains whether this rule applies to the Voting Rights Act. Id. Judge Feinberg argued that application of the Voting Rights Amendment to state disenfranchisement does not upset the balance because the Act follows in the path of the Fourteenth and Fifteenth Amendments, which were specific expansions of federal power. Id. Furthermore, the Court declined to apply the plain statement rule to section 2 of the Voting Rights Act in Chisom v. Roemer, 501 U.S. 380 (1991). Baker, 85 F.3d at 937.
ADDRESSING EX-FELON DISENFRANCHISEMENT

promise.99

C. State Court Litigation

Chances for success in felony disenfranchisement lawsuits may be greater within the state court system. State court lawsuits attacking disenfranchisement laws have taken various approaches.100 Some claims have focused on the irregular application of laws to particular segments of the felony population.101 Other lawsuits have made broader arguments based on the unconstitutionality of specific provisions of state constitutions.102

*Mixon v. Commonwealth* is a key example of a successful disenfranchisement lawsuit focusing on specific groups within the disenfranchised population.103 In *Mixon*, ex-felons who had completed their sentences challenged provisions of

---


101 See *Mixon*, 759 A.2d at 453 (declaring that the state unlawfully denied ex-felons who were imprisoned within the past five years the right to register to vote).

102 Fischer v. Governor, 749 A.2d 321 (N.H. 2000) (holding that New Hampshire’s felon disenfranchisement statutes did not violate plaintiff’s right to vote under the New Hampshire Constitution); Emery v. State, 580 P.2d 445 (Mont. 1978) (declaring that the Montana Constitution and state statutes do not unconstitutionally deny convicted ex-felons the right to vote).

Pennsylvania’s Voter Registration Act, which prohibited ex-felons released from prison for less than five years from registering to vote. The court found no rational basis existed to distinguish ex-felons who had not registered to vote before serving prison sentences from those who had registered prior to their prison terms and were, therefore, permitted to vote upon release.

The Mixon decision has both negative and positive implications for felony disenfranchisement. The court reaffirmed the principle set forth in Ramirez that felony disenfranchisement does not violate the Constitution. The decision to invalidate the unconstitutional provision of Pennsylvania’s Voter Registration Act, however, resulted in the restoration of voting rights for thousands of ex-felons. The fact that the Pennsylvania Supreme Court was willing to declare some voting restrictions invalid is encouraging, and this case is a helpful model for ex-felons in other states. Because this decision focuses on a narrow group of individuals, however, it has limited applicability to general disenfranchisement claims.

104 Id. at 451; Pennsylvania Voter Registration Act, 25 P.A. CONS. STAT. § 961.101-.5109 (1995).
106 Mixon, 759 A.2d at 451. The court stated, “[A]lthough a state may not only disenfranchise all convicted ex-felons it may also distinguish among them, but the distinction must be such that it is rationally related to a legitimate state interest.” Id. This illustrates that, while the court’s use of Ramirez limits the number of ex-felons who are affected by the decision, the fact that the court decides that the Voter Registration Act provision was not rationally related to a legitimate state interest improves the status of many formerly disenfranchised ex-felons. Id.
107 759 A.2d at 449.
108 The Sentencing Project, supra note 1, at 2.
109 The result in this case was based on the lack of a rational basis to justify denying the vote to ex-felons who had not registered before their sentence while permitting those who had already registered to vote. Mixon, 759 A.2d at 451. The court relied upon the Third Circuit decision in Owens v. Barnes that prohibits distinguishing among disenfranchised convicted felons if the distinction is not rationally related to a legitimate state interest. 711 F.2d 25 (3d Cir. 1983); see also Mixon, 759 A.2d at 451. This rationale is
The second, broader approach to disenfranchisement lawsuits focuses on violations of state constitutional provisions. This approach would be more fruitful when attacking a disenfranchisement statute in its entirety. The use of state constitutional analysis to confront disenfranchisement laws has been infrequently utilized, and, therefore, this approach has the potential to restore voting rights to millions. This is especially true in states that continue to disenfranchise ex-felons after completion of parole. The most prominent, albeit unsuccessful, important for specific groups of future ex-felons who are denied the vote while other similarly situated ex-felons are not because of a particular factor that occurs in some ex-felons but not in others and does not meet the rational basis test. An example would be disenfranchising blue-eyed ex-felons but not their brown-eyed counterparts. In order to use this case in other disenfranchisement lawsuits, a specific factor must be present that would apply only to a certain percentage of ex-felons who are affected by the arbitrary distinction. This type of argument may or may not result in ending disenfranchisement for a significant number of ex-felons, depending on the size of the particular group affected and the frequency with which the irrational distinction is made. Therefore, may not be useful in broader disenfranchisement claims.

See infra note 116 and accompanying text (discussing a New Hampshire case that asserted that the state’s felon disenfranchisement statutes violated the state constitution); see also Fischer v. Governor, 749 A.2d 321 (N.H. 2000).

See Mixon, 759 A.2d at 451. In contrast with the result in Mixon, where only the voting rights of those ex-felons who had not registered to vote before committing a felony were restored, a successful attack on a disenfranchisement statute or constitutional provision using a constitutional argument would restore voting rights to a larger percentage of ex-felons because the result would apply to all ex-felons. Id.

See Fischer v. Governor, 749 A.2d 321, 323 (N.H. 2000) (overruling the lower court’s declaration that New Hampshire’s felon disenfranchisement statutes violated the state’s constitution). State constitutional analysis can be applied to the felon population as a whole, rather than specific groups who have particular grievances that do not apply to all ex-felons. Thus, this type of lawsuit would have the most impact on the greatest number of ex-felons.

Fellner & Mauer, supra note 4, at 7. In Alabama, Florida, Mississippi, Virginia and Wyoming, more than four percent of their respective adult populations are disenfranchised even after completion of parole. A repeal of disenfranchisement laws in these states would drastically increase the nation’s population eligible to vote. Id.
attempt to achieve such a result occurred in New Hampshire.\textsuperscript{114}

In \textit{Fischer v. Governor}, the New Hampshire Supreme Court examined whether the state felon disenfranchisement statutes violated the state constitution.\textsuperscript{115} The court used a reasonableness standard to evaluate the state’s interest in limiting the franchise in relation to the plaintiff’s interest in obtaining voting rights.\textsuperscript{116} The court evaluated the state’s argument that by committing a crime, the felon violated “the social contract” that creates the foundation of a democracy.\textsuperscript{117} In determining this rationale to be valid, the court declared that it is not unreasonable to expect society to exclude such individuals from “voting for those who create and enforce the laws.”\textsuperscript{118}

Although the plaintiff in \textit{Fischer} was not successful in re-enfranchising felons, this result should not completely dissuade other plaintiffs from utilizing state constitutions in disenfranchisement challenges.\textsuperscript{119} The reasonableness standard used by \textit{Fischer} is subjective, and the same application in another state’s court may lead to a different result.\textsuperscript{120} This method’s utility has not been fully explored, and it may be particularly

\textsuperscript{114} See Fischer v. Governor, 749 A.2d 321 (N.H. 2000).
\textsuperscript{116} 749 A.2d at 329.
\textsuperscript{117} Id.; see supra note 10 (discussing the Lockean theory of the social contract).
\textsuperscript{118} Id. According to the court, the legislature acted properly given that disenfranchisement is a reasonable reaction to the commission of a felony. Id. at 330. The court attempts to provide additional examples of the legislature’s erudite discretion by stating that only criminals convicted of the “most serious offenses” are disenfranchised. Id.
\textsuperscript{119} See Fischer v. Governor, No. 98 E402 (N.H. Super. Ct. Oct. 27, 1998). The ruling by the lower court that the disenfranchisement statutes violated the New Hampshire Constitution is an indication that there are some judges who are willing to consider state constitutional challenges to disenfranchisement. Id. Because a state court decision is not binding on another state’s judicial system, the result in \textit{Fischer} is merely persuasive.
\textsuperscript{120} Fischer, 749 A.2d at 329.
ADDRESSING EX-FELON DISENFRANCHISEMENT

successful in states where ex-felons do not have the right to vote. When using the state constitution, litigants have more latitude in arguing constitutional violations if the focus is on the reasonableness of preventing ex-felons from voting rather than on the reasonableness of preventing felons currently in prison from voting. This argument would be favored by a court willing to expand the rights of individuals who have completed their sentence and are subsequently contributing to society in a positive manner.

II. LEGISLATIVE APPROACHES TO DISENFRANCHISEMENT

Recently, legislative proposals have addressed disenfranchisement more substantially than the court system. On the federal level, legislators have begun to address the issue by introducing legislation in Congress. State legislatures have been active in establishing task forces to contemplate changes to disenfranchisement statutes. Additionally, several state

---

121 See THE SENTENCING PROJECT, supra note 1, at 3. These include Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Maryland, Mississippi, Nevada and Wyoming. Id.

122 See, e.g., Mixon v. Commonwealth, 759 A.2d 442 (Pa. Commw. Ct. 2000) (declaring invalid a denial of voting rights to certain ex-felons while establishing that no violation occurred in the disenfranchisement of currently incarcerated ex-felons). Courts seem to be more willing to find violations of state constitutions in cases involving ex-felons who have completed their sentences rather than in cases involving current prisoners. Id. at 448.

123 See, e.g., Thompson, supra note 10, at 17 (describing the story of Rosetta Meeks, convicted of a drug felony in 1993 and permanently barred from voting in Florida despite her efforts to contribute to her community, including teaching computer skills to low-income people).


125 H.R. 906. Representative Conyers introduced this bill “[t]o secure the Federal voting rights of persons who have been released from incarceration.” Id. Representatives Martin Frost of Texas, Charles Rangel of New York and Sheila Jackson-Lee of Texas were among those who also supported this bill. Id.

126 Green, supra note 16, at B1. The Virginia State Crime Commission created a task force in June 2001 to study the restoration of civil rights for ex-
legislators have proposed state constitutional amendments.  

A. Federal Legislation  

The most recent federal legislation dealing with felony disenfranchisement is H.R. 906, presented to the House of Representatives in 1999 by Michigan Representative John Conyers. The primary objective of this bill, referred to as the Civic Participation and Rehabilitation Act of 1999, is to restore the federal voting rights of ex-felons. The Act authorizes the Attorney General to initiate declaratory or injunctive relief against states that violate its provisions. It also entitles those who would be affected by a violation of the Act to provide notice to the chief election official of the state. Although this Act died in the Judiciary Committee, the issues raised in a congressional subcommittee hearing on the Act provide insight into future difficulties similar bills might face.  

One of these issues addresses whether Congress’ supervisory power over federal elections is sufficient to justify federal
ADDRESSING EX-FELON DISENFRANCHISEMENT

interference in an area traditionally left to the states.\textsuperscript{133} Gillian Metzger, a staff attorney at the Brennan Center for Justice at New York University School of Law, argued at the subcommittee hearing that such questions should not prevent the passage of the 1999 Act.\textsuperscript{134} Metzger asserted that the Elections Clause of Article I, Section 4 of the Constitution gives Congress very broad power to regulate federal elections.\textsuperscript{135} She also maintained that the Act represents a congressional policy judgment regarding felony disenfranchisement.\textsuperscript{136} These policy considerations are validly enforced through the Elections Clause, which requires states to defer to Congress regarding the conduct of federal elections.\textsuperscript{137}

\begin{footnotesize}
\begin{enumerate}
\item U.S. CONST. art. I., § 4. The Elections Clause gives power to the state legislatures to prescribe “the times, places and manner of holding elections for Senators and Representatives,” but it also permits Congress to “make or alter such regulations.” Id. Some disenfranchisement activists have indicated that this clause may give Congress the authority to establish qualifications for federal elections; however, it has never been directly addressed by the Supreme Court. See ALLARD & MAUER, supra note 4, at 12 (outlining the comments made by Gillian Metzger, a staff attorney for the Brennan Center, at a Subcommittee on the Constitution hearing held on October 21, 1999).
\item Hearing, supra note 132, at 47 (testimony of Gillian Metzger, Brennan Center staff attorney).
\item Id. at 56. According to Metzger, the Elections Clause was used as the rationale giving Congress the authority to enact the Federal Election Campaign Act. Id. Additionally, the Supreme Court affirmed that Congress has a broad power to “safeguard the legitimacy of federal elections” when the Court upheld the Corrupt Practices Act, which regulates contributions and expenditures made to influence the selection of presidential electors. Id.
\item Id. at 48. Metzger stated that H.R. 906 addresses existing disparities between the states regarding felon participation in federal elections, and represents a judgment that “such disparities in citizens’ fundamental rights based on the happenstance of geography are unwarranted, and threaten the integrity and legitimacy of federal government.” Id.
\item Id. at 47-49. Metzger dismissed an opposing argument that the Qualifications Clause of Article I, Section 2 (requiring that the qualifications of the voters in Senate and House elections be the same as qualifications for voters in the most numerous branch of the state legislature) negates any implication that Congress has the power to set qualifications for voters in federal elections. Id. Metzger stated that the intent of the Founders in writing the Qualifications Clause was to prevent states from enacting laws that result in an illegal disenfranchisement.
\end{enumerate}
\end{footnotesize}
Additionally, Metzger argued that Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments provide the authority to adopt the Act since the existence of discriminatory intent and impact in disenfranchisement laws violate both amendments.\textsuperscript{138}

In light of the holding in \textit{City of Boerne v. Flores}, however, the Court likely would have invalidated the 1999 Act.\textsuperscript{139} Because this bill would require states to permit ex-felons to vote in all federal elections, some states would be required to change their voting procedures and qualifications.\textsuperscript{140} This would raise issues regarding the scope of Congress’ power to enforce federal laws in the states.\textsuperscript{141}

\begin{flushleft}
in some citizens being eligible to vote in state elections but not in congressional elections. \textit{Id.}\textsuperscript{138}

\textsuperscript{138} \textit{Id.} at 49, 55. The right to vote is a fundamental right that is protected by the Fourteenth and Fifteenth Amendments, giving Congress the authority to address state laws that impede protected groups’ ability to vote. \textit{Id.; see supra Part I.A (discussing the Fourteenth Amendment’s Equal Protection Clause and its impact on felony disenfranchisement lawsuits); see also supra note 36 and accompanying text (discussing “fundamental rights”). Metzger states that criminal disenfranchisement provisions have been enacted to exclude black voters and continue to have a “substantially greater impact on minorities, particularly African-American men.” \textit{Hearing, supra} note 132, at 55; \textit{see supra} note 51 and accompanying text (discussing the meaning of “disproportionate impact”). Metzger states that Congress has the power to adopt remedial legislation even if it prohibits some conduct that is not unconstitutional. \textit{Hearing, supra} note 132, at 55. She points to Congress’ power to ban literacy tests, even though such tests may not by themselves violate the Constitution. \textit{Id.; see supra Part I.B (discussing the historical factors leading up to the Voting Rights Act and the subsequent use of the Act in felony disenfranchisement legislation); see also supra note 68 (discussing literacy tests and other restrictions on voting).}\textsuperscript{139}

\textsuperscript{139} 521 U.S. 507 (1997); \textit{see supra} note 88 and accompanying text (describing the current Court’s reluctance to endorse congressional actions that expand the federal government’s power).

\textsuperscript{140} H.R. 906, 106th Cong. § 3 (1999). States that do not permit ex-felons to vote in any election would have to implement procedures so that the ex-felons have access to federal elections even if they are still prohibited from voting in the state elections. \textit{See Shapiro, supra} note 17, at 4; \textit{see supra} notes 12-14 (listing the potentially affected states).

\textsuperscript{141} \textit{Guntther, supra} note 31, at 984-85. The scope of the federal
ADDRESSING EX-FELON DISENFRANCHISEMENT

Additionally, a federal disenfranchisement act faces practical concerns of implementation. If a law were enacted to prohibit the disenfranchisement of ex-felons in federal elections, state election officials would be faced with the logistical problem of separating state and federal ballots. Moreover, experts doubt that sponsors of the act would be able to create a broad coalition sufficient to pass the bill, given the limited amount of national public awareness and support for re-enfranchisement. Nevertheless, while disenfranchisement may not be a favored political issue, the involvement of prominent legislators to modify the laws on a federal level may create a more receptive atmosphere. While government’s power to create laws that declare certain practices unlawful even if the Court has not found them to be unconstitutional depends upon whether such laws are determined by the Court to be “remedial.” Id. Remedial laws are those that “provide enforcement mechanisms to implement judicially declared rights.” Id. at 984. The remedial nature of the 1999 Act may be assessed by the standard set by City of Boerne, which requires a high level of justification for congressional action taken against the states. Id. at 99. City of Boerne stated that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” 521 U.S. at 518 (internal citations omitted). Justice Kennedy further stated that congressional legislation prohibiting literacy tests and similar requirements enacted to address racial discrimination in voting was upheld under the Fifteenth Amendment’s enforcement clause. Id. Because City of Boerne also stressed that the enforcement power is remedial and does not permit Congress to decide what is an impermissible constitutional violation, however, the question whether Congress has the power to force states to re-enfranchise ex-felons for federal elections depends upon whether that power is considered merely remedial in nature or constitutes a substantive determination of constitutional violations. Id. at 519.

142 Shapiro, supra note 17, at 4.

143 Symposium, Constitutional Lawyering in the 21st Century, Enfranchising the Disenfranchised, 9 J.L. & Pol’y 249, 283 (2000). Melissa Saunders, professor at the University of North Carolina and Senior Counsel to the North Carolina Attorney General, points out that the issue was raised in the 2000 Democratic Presidential Primary debate and that neither candidate seemed to think that the disenfranchisement of ex-felons was a problem. Id.

144 H.R. 906, 106th Cong. (1999). The 1999 congressional bill was introduced by Rep. Conyers and supported by other well-known
federal efforts are not particularly promising, local legislators may be more likely to change state disenfranchisement laws because they operate on a smaller, more flexible scale and are less likely to be scrutinized by the media and the public.\textsuperscript{145}

\textbf{B. State Legislation}

Several states have passed constitutional amendments and bills repealing sections of disenfranchisement laws or easing restrictions on ex-felons.\textsuperscript{146} Additionally, some states have recognized the importance of this issue by creating task forces and committees to gather evidence to support modifying the existing laws.\textsuperscript{147} The increase in efforts made in states throughout the country as well as the presence of bi-partisan cooperation indicate that state legislation may be the most effective way to influence disenfranchisement laws.\textsuperscript{148} Given the increased representatives, including Charles Rangel of New York, Maxine Waters of California and Jesse Jackson, Jr. of Illinois. \textit{Id.}

\textsuperscript{145} See infra Part II.B (outlining efforts made by state legislatures and governors to modify existing felony disenfranchisement laws).

\textsuperscript{146} H.R. 5042, 2001 Gen. Assem., Reg. Sess. (Conn. 2001) (restoring the voting rights of convicted ex-felons who are on probation); H.R. 126, 140th Gen. Assem. (Del. 2000) (amending the Delaware Constitution to permit persons convicted of certain felonies, excluding murder, sexual offenses, manslaughter and offenses against public administration including bribery, to vote after being pardoned or five years after the completion of their sentences); S.B. 204, 45th Leg., Reg. Sess. 2001 (N.M. 2001) (restoring the right to vote to convicted ex-felons who have satisfied all sentence conditions). See also Steve Miller, \textit{Rights Advocates and Democrats Seek Vote for Ex-felons}, WASH. TIMES, Apr. 9, 2001, at A3 (reporting that ten states have considered measures that would loosen felony voting restrictions during the end of 2000 through the first several months of 2001).


\textsuperscript{148} See \textit{supra} Part II.A (discussing federal disenfranchisement action).
political viability of anti-disenfranchisement rationale in the states, this approach is likely to create a significant amount of change in a relatively short time period.

Connecticut, Delaware and New Mexico have made significant changes to their disenfranchisement laws in recent years. In May 2000, Connecticut Governor John Rowland signed into law a bill restoring voting rights to ex-felons on probation. The bill was supported by several Republican leaders in the state legislature and was moved along by the lobbying efforts of a voting rights coalition that included civil rights groups as well as governmental agencies such as the Department of Corrections. Because this bill has only been in effect for less than a year, it is unknown exactly how much impact it has had on the status of felony disenfranchisement. Nevertheless, because there are an estimated 37,000 ex-felons currently on probation in the state, the bill is likely to have a significant impact in Connecticut.

In June 2000, the Delaware General Assembly amended the state’s constitution to restore voting rights to certain convicted ex-felons five years after the completion of their sentence. The restoration does not apply to ex-felons convicted of murder, manslaughter, offenses against public administration involving bribery or improper influence, sexual offenses or abuse of office.

Efforts underway on a state level have been vastly more successful than on the federal level. See supra Part II.A.

149 ALLARD & MAUER, supra note 4, at 5 (describing restoration efforts in Connecticut and Delaware); Miles A. Rapoport, Restoring the Vote, AM. PROSPECT, Aug. 13, 2001, at 1314 (describing efforts in Connecticut and New Mexico).


151 Rapoport, supra note 149.


153 Editorial, Ballot Box Blunder, CONN. L. TRIB., Apr. 23, 2001, at 22 [hereinafter Ballot Box Blunder].

154 H.R. 126, 140th Gen. Assem. (Del. 2000); ALLARD & MAUER, supra note 4, at 5.

In New Mexico, a bill passed in 2001 repealed the state’s lifetime ban on ex-felon voting. The bill eliminated the obstacle of obtaining a pardon in order to vote. Instead, voting rights are automatically restored once the ex-felon “has satisfactorily completed the terms of a suspended or deferred sentence,” or is “unconditionally discharged.” Supportors focused on the ban’s impact on the lower economic classes.

States such as Maryland, Virginia and Florida have also established special committees and task forces in order to address the problem of disenfranchisement. In Maryland, the state legislature passed a bill in May 2001 creating a task force to determine what modifications should be made to the state’s current statute, which permanently disenfranchises all ex-felons. The measure was enacted after a similar bill passed by the House was unsuccessful in the Senate. The task force released a report on its findings in January 2002.

---

157 S.B. 204 § 2.
158 S.B. 204 § 2(A)(1)-(3); Rapoport, supra note 149. Ex-felons must obtain a certificate of discharge from the state Parole Board that demonstrates that they have met all of the terms of their sentence. S.U. Mahesh & David Miles, N.M. Legal Clashes Loom As Hidden-Gun Law Starts, ALBUQUERQUE J., July 1, 2001, at A1. This bill affects the voting status of 7,000 in New Mexico. Id.
159 S.U. Mahesh, 2 Options Would Let Some Ex-felons Vote, ALBUQUERQUE J., Feb. 2, 2001, at A10. Senate President Pro Tem Richard Romero and Senator Manny Aragon, chairman of the Senate Rules Committee were the major forces behind the bill’s passage. Id.
163 TASK FORCE TO STUDY REPEALING THE DISENFRANCHISEMENT OF CONVICTED FELONS IN MARYLAND, TASK FORCE REPORT (2002); Maryland: Progress on Ex-Felon Voting Rights, DEMOCRACY DISPATCHES (Demos: A
ADDRESSING EX-FELON DISENFRANCHISEMENT

led to the creation of H.B.535, which the Assembly passed in the spring of 2002. The bill permits ex-felons to vote after they have completed “the court-ordered sentence.” The enactment of this bill demonstrates the significant influence task forces such as the one in Maryland can have on changing disenfranchisement laws.

In Virginia, the State Crime Commission formed a task force to address the process of restoring voting rights to ex-felons. Currently ex-felons must meet several requirements and ultimately gain a pardon from the governor. In June 2002, task force members announced their intention to amend the state constitution in order to implement an easier voting restoration process for ex-felons. The Commission’s proposal would create an alternate track established and monitored by the legislature, which would operate alongside the Governor’s independent power to restore voting rights. Virginia’s current governor, Mark R. Warner, is also developing his own proposal to make voting restoration more efficient. Once the change


Id. The bill took effect on January 1, 2003. Id. Before this law was enacted, ex-felons could not qualify to vote until after the probation period had ended. Id.

Green, supra note 16. The idea to form the task force was inspired by a 1996 study by the Richmond Times-Dispatch that revealed that almost 270,000 felons had lost the right to vote in Virginia, as well as the national study completed by the Sentencing Project in 1998. Id.; see also FELLNER & MAUER, supra note 4, at 2; ALLARD & MAUER, supra note 4, at 2.

Id.

Christina Nuckols, State May Simplify Voting Rights Law, VIRGINIAN-PILOT, June 19, 2002, at B3. This additional process would most likely apply to non-violent offenders. Mary Shaffrey, Voting Rights Eyed for Ex-felons, WASH. TIMES, June 25, 2002, at B01.

Green, supra note 16; Shaffrey, supra note 168.

Green, supra note 16; see also Nuckols, supra note 168.
passes in the General Assembly, it would be voted upon in a statewide referendum. 171 Kenneth W. Stolle, Chairman of the Virginia State Crime Commission and a Republican state senator, initiated the creation of the task force. 172 His participation in the task force is an illustration of the increased viability of disenfranchisement as a political issue. In the past, Stolle has stalled the passage of voting rights statutes that attempted to ease restrictions on ex-felons. 173

In Florida, Governor Jeb Bush and his cabinet passed rules that eased restrictions on ex-felons’ voting rights as of June 2001. 174 Ex-felons who are nonviolent and not classified as habitual offenders will be able to get their voting rights restored without a hearing by the Executive Board of Clemency. 175 The new rules also reduce required paperwork and permit ex-felons who have not paid all of their court fees to vote. 176 Additionally, the Florida Office of Executive Clemency recently shortened and

---

171 Shaffrey, supra note 168. Before the state’s constitution can be amended, however, the final plan must first be successful in separate referendums in two different legislative sessions. Id. at 180. In July 2000, Virginia’s restoration process was modified to permit ex-felons to petition circuit court judges in order to speed up the process. Roger Chesley, Efforts to Restore Voting Rights to Ex-felons Grind Along, VIRGINIAN-PILOT, Nov. 17, 2001, at B9. Since its inception, this measure has resulted in judicial approval of 27 requests, of which all but one were granted by the Governor. Id.


173 Id.

174 Florida Rules of Executive Clemency [hereinafter Florida Rules], available at http://www.state.fl.us/fpc/RULES-6-14-01.pdf; see also Julie Hauserman, supra note 16, at 4B. The changes were made after a bill in the House that would automatically restore voting rights to ex-felons failed to garner support throughout the state legislature. Mary Ellen Klas, House Panel: Ex-Inmates Should Have Right to Vote, PALM BEACH POST, Mar. 22, 2001, at 11A; see also Editorial, Constructive Clemency, ST. PETERSBURG TIMES, June 17, 2001, at 2D.

175 Florida Rules, supra note 174. Under the old rules, felons who had completed their sentences but still owed court fees and those who had been convicted of more than two felonies would be required to appear before a hearing of the Clemency Board. Maya Bell & Mark Silva, Felons Can Regain Rights More Easily, ORLANDO SENTINEL, June 15, 2001, at A1.

176 Hauserman, supra note 16, at 4B.
simplified the form used by ex-felons to apply for restoration.\textsuperscript{177} Before the form was changed, ex-felons were required to obtain certified copies of court records and notify the presiding or chief judge and prosecuting attorney of the application.\textsuperscript{178}

All of these state-initiated efforts reflect a changing societal view of criminal justice issues.\textsuperscript{179} The failure of harsh criminal punishments to adequately improve crime statistics as well as the prevalence of the disproportionate racial impact of such programs are factors that influence the way lawmakers view disenfranchisement.\textsuperscript{180} Disenfranchisement’s political viability is also enhanced by the participation of individuals who are affiliated with parties traditionally opposed to the relaxation of criminal justice standards.\textsuperscript{181} Given the current activity in state governments, therefore, the primary focus of felon disenfranchisement activists should be on developing legislation and courting political leaders who would be willing to alter such laws at the state level. This approach has the advantage of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{177} Press Release, American Civil Liberties Union, ACLU Applauds Changes to Aid Restoration of Voting Rights in Florida, Urges Governor to Make Process Automatic (Apr. 24, 2002) [hereinafter Press Release], available at http://www.aclu.org/news/2002/n042402c.html. The state has reduced the size of the questionnaire used by felons to apply for the restoration of their voting rights from twelve pages to four. Bell & Silva, supra note 175, at A1.
\item \textsuperscript{178} Press Release, supra note 177.
\item \textsuperscript{179} Rapoport, supra note 149.
\item \textsuperscript{180} Id. These factors have helped ex-felony disenfranchisement opponents gain bi-partisan support on the local government level. Id.
\item \textsuperscript{181} Id. Connecticut Governor John Rowland and Virginia Chairman Kenneth Stolle are examples. Id.; see also Heyser, supra note 160. With support from politicians who traditionally have not been in favor of disenfranchisement efforts, there is a greater likelihood that cooperation will increase and modifications of disenfranchisement laws will be introduced more frequently and passed more rapidly. See Rapoport, supra note 149; see also Heyser, supra note 160. Furthermore, the presence of such politicians in the process helps to legitimate the movement by demonstrating that disenfranchisement is an issue that must and can be addressed on a broad scale. See id. (discussing Chairman Stolle’s reasons for being involved in the task force).
\end{enumerate}
\end{footnotesize}
achieving results quickly and effectively. Moreover, it provides a direct way to change the laws instead of initiating a court proceeding that is lengthy and subject to appeals.

CONCLUSION

Efforts to change outdated felony disenfranchisement laws have had varying degrees of success. The court system has traditionally been the main focus in disenfranchisement activism, and many ex-felons have utilized different theories in order to attack the laws. In federal court, lawsuits have used constitutional arguments, centering on the Equal Protection clause as well as the 1965 Voting Rights Act. While these efforts provided initial promise, successes are few. In state courts, litigation has focused not only on federal constitutional provisions and laws, but also on the application of state statutes and constitutional provisions. While such lawsuits have more promise because of greater potential for flexibility in state laws, disenfranchisement laws have yet to be significantly changed.

182 See Shapiro, supra note 17, at 4. Shapiro believes that “[t]ruly effective legislative reform must occur at the state level.” Id.
183 See supra Part I (discussing disenfranchisement litigation); Part II (discussing legislative approaches).
184 See supra Part I (analyzing the use of the Equal Protection Clause, the Voting Rights Act and state law theories in disenfranchisement lawsuits).
186 Id. Those that do succeed are limited to cases where both the intent to discriminate and the impact of discrimination on a suspect class are obvious and egregious. Id.; see also supra Part I.B (explaining the implications of the decisions in Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986), and Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996), in which litigants focused on Voting Rights Act claims). While the Act was specifically enacted to target voting qualifications that limit the rights of protected classes, the Supreme Court has interpreted the Act as requiring evidence of discriminatory intent in order to declare a state action invalid. See Bolden, 446 U.S. 55, 65 (1980). Despite Congress’ efforts to lessen that burden, federal courts consistently continue to apply the standard. See supra Part I.B (discussing cases in which the federal courts have declined to utilize the higher intent standard).
187 See supra Part I.C (analyzing the approaches taken in state court litigation).
ADDRESSING EX-FELON DISENFRANCHISEMENT  407

using this method.188

In recent years, proposed legislation addressing the problem of felony disenfranchisement has increased on both the federal and state levels. The most significant federal bill, the Civic Participation and Rehabilitation Act of 1999, would guarantee all ex-felons the right to vote in federal elections.189 Because the bill was not enacted, however, its actual impact was minimal.190

Efforts to attack disenfranchisement laws should be concentrated on the state and local legislatures. Bills and constitutional amendments in state legislatures have been frequently proposed and enacted throughout the country in recent years.191 These types of changes have had the most significant

188 See supra Part I.C (outlining the possible state court options in felony disenfranchisement lawsuits). While this approach has not yet been fully explored, litigants in state court have the option of using both federal constitutional rationales as well as any provided by the state’s own constitution, which may provide more constitutional leeway than the federal Constitution does. Id.

189 H.R. 906, 106th Cong. (1999). This bill represents a significant achievement because it furthers political discussion of felony disenfranchisement in Congress. See supra note 144 (listing prominent legislators involved in the creation of H.R. 906). Because felony disenfranchisement has typically not attracted nationally known politicians to champion the issue, the fact that legislation was introduced and considered in a U.S. House committee demonstrates that the political atmosphere may be shifting, if only slightly, to create a more favorable environment to raise such issues. Id.

190 Hearing, supra note 132. The bill died in the Judiciary committee after the October 21, 1999 hearing. Id.; see also ALLARD & MAUER, supra note 4, at 12; Miller, supra note 146.

191 See supra Part II.B (giving examples of states in which constitutional amendments and bills have been debated and/or passed). Local legislators have been influential in amending state constitutions to ease voting restrictions on both felons and ex-felons. See, e.g., H.R. 126, 140th Gen. Assem. (Del. 2000) (amending the Delaware constitution to permit persons convicted of certain felonies excluding murder, manslaughter, offenses against public administration including bribery, and sexual offenses to vote after being pardoned or five years after the completion of their sentences). Legislators have also created task forces to streamline the pardon process. See, e.g., Green, supra note 16 (describing the task force set up by the Virginia State Crime Commission to address the restoration of voting rights for ex-felons).
and influential impact on improving access to the ballot box, and the changes have occurred throughout the country, including in several Southern states. Such modifications have the most potential to reinstate voting rights to the greatest number of people. Therefore, in states that continue to enforce restrictive disenfranchisement laws, the best avenue to combat these laws lies in the local legislature.

Finally, they have restored the right to vote to thousands in the felony population. Fellner & Mauer, supra note 4, at 8. In Delaware, twenty percent of black men were permanently disenfranchised under the old felony disenfranchisement statute. Id. Connecticut disenfranchised over 42,000 ex-felons under the previous statute. Id. at 9. In New Mexico, four percent, or almost 50,000 ex-felons were disenfranchised before the passage of the 2001 bill. Id. See supra Part II.B (outlining additional material regarding the new legislation in these states).

192 Allard & Mauer, supra note 4, at 4. For example, efforts were taken in 1999 in Alabama’s House to pass legislation requiring that the Board of Pardons and Parole automatically restore voting rights upon completion of a felon’s sentence. Id.; see supra Part II.B (providing information regarding the efforts underway in Florida and Virginia).

193 See Allard & Mauer, supra note 4, at 2 (noting enhanced voting activity in seven states). The range and scope of actions being taken throughout the country to change disenfranchisement laws is illustrative of the potential significant impact state legislation can have on this issue. Id. Furthermore, the political climate in the states has become more favorable to changes, which makes lobbying local legislators the most productive avenue. See supra Part II.B (illustrating that politicians in several states are working together in a bi-partisan effort to modify the existing disenfranchisement laws).