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TO SEEK CRIMINAL CHARGES

Luis Baez**

The 2008 housing and financial crisis produced numerous books, documentaries, and legal works around the term “Too Big to Jail.” Though the United States Justice Department claimed that the term’s applicability to the financial crisis was mostly conjecture, the past few years has indicated it is—for the most part—true. While other legal and scholarly works have discussed the term and its validity, this article argues that prosecutors should be entirely barred from considering “economic consequences” of their decisions whether or not to bring criminal charges against a person or other legal entity in order to uphold justice within the criminal system.

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INTRODUCTION

Academics, government officials, and Wall Street companies continue to draft a thorough and accurate response to the 2008 housing crisis and financial meltdown. Reforms of many different kinds have been proposed. Others, like the Dodd-Frank Act, have already been enacted into law and are making their way through the regulatory codification process. However, one aspect of the housing and financial crisis and the subsequent response is not readily subject to quick change or reform. The Criminal Division of the Department of Justice (DOJ), for the past few years, has been the subject of strong criticism for what appears to be to many a lack of will and inability to bring federal criminal charges against executives in their personal capacities of the major financial institutions whose policies, many believe, are clear violations of federal criminal law. The same concerns extend to charging the corporation in their capacity as a legal, separate entity.

In January 2013, Lanny Breuer, as the then Assistant Attorney General for the DOJ’s Criminal Division, spoke to reporters from PBS

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1 See e.g., CHARLES V. BAGLI, OTHER PEOPLE’S MONEY: INSIDE THE HOUSING CRISIS AND THE DEMISE OF THE GREATEST REAL ESTATE DEAL EVER MADE (2013); THOMAS SEWELL, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011).
3 See, e.g., Richard Eskow, As Federal Prosecutors Cash In, Big Bankers Go Unpunished, The Huffington Post (Jan. 27, 2013, 11:13 PM), http://www.huffingtonpost.com/rj-eskow/as-federal-prosecutors-cash_in-big-bankers-go-unpunished_n_2564522.html. The DOJ also has the ability to bring federal charges against corporate entities, but that is not the subject of this article.
4 Id.
5 Id.
about his opinions on the housing and financial crisis.\(^6\) When questioned about why no one on Wall Street has been charged with federal crimes, Breuer responded:

> I think I am pursuing justice. And I think the whole entire responsibility of the Department is to pursue justice. But in any given case, I think I and prosecutors around the country, being responsible, should speak to regulators, should speak to experts, because if I bring a case against institution “A,” and as a result of bringing that case there’s some huge economic effect, it affects the economy so that employees who had nothing to do with the wrongdoing of the company...may lose their jobs.\(^7\)

Several weeks later, Breuer retired.\(^8\) A popular phrase coined by those in opposition to Breuer’s statement is that the companies involved and their executives have become “Too Big to Jail.”\(^9\) However, from an outsider’s point of view, it is difficult to criticize from a legal standpoint the decisions that Breuer and his colleagues have made because the notion and principle of federal prosecutorial discretion has deep constitutional roots and is a well-settled area of federal criminal procedure under the Constitution.\(^10\)

Nonetheless, it may be the case that the application of prosecutorial discretion with respect to the crimes perpetrated during the 2008 housing crisis has not been uniform and has ignored professional and ethical standards to which federal prosecutors hold themselves accountable. This Article attempts to identify whether consideration of the “economic effects” of bringing charges is an abuse of federal prosecutorial discretion. This Article takes the position that collateral “economic effects” should not be a factor in the federal prosecutor’s decision of whether or not to charge. To help illustrate that position, Part I will provide a brief background of the development of federal prosecutorial discretion and why it is generally supported. Part II will survey relevant guidelines and procedures federal prosecutors must follow in executing their public duty to promote justice. Parts III and IV will review other major financial and corporate crimes, and examine the DOJ’s response. Part V will provide analysis as to whether the

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7 Id (emphasis added).
9 This is a play on the phrase popularized during government bailout discussions, “Too Big to Fail.”
10 See infra Part I.
notion of considering “economic effects” has been consistently applied to other cases and events similar to the 2008 housing and financial crisis. Further, Part V discusses whether justice has been served for crimes arising out of the 2008 housing and financial crisis. Because, as this Article will argue, the issue of “economic consequences” is not a factor that has been uniformly applied to federal prosecutorial decisions to charge executives of corporations, it should not apply to the executives of the companies involved in the most recent crisis.

I. THE SOURCE OF FEDERAL PROSECUTORIAL DISCRETION

The source of the federal prosecutor’s power to charge an individual comes from Article II, Section 3 of the Constitution. It provides that the President “shall take Care that the Laws be faithfully executed.” Today, this phrase has come to mean that the prosecutorial power is vested in the executive branch of government. This is different from civil cases where those who are harmed must bring a complaint on their own initiative with their own resources. The role of a federal prosecutor, whose primary purpose it is to punish crime, comes from the notion that this power be vested in prosecutors because there is more crime than there are resources to prosecute them.

As crime in society grew more prevalent, the idea of dedicated, full-time prosecutors took form. Several arguments are often advanced in favor of the full-time federal prosecutor. The first is that these prosecutors are needed because of the complexity of the cases, including concerns of affordability and expertise. Punishment for crimes could be administered more effectively if it was a part of the government’s responsibility to do so via a full-time prosecutor. Second, any crime committed came to be seen as harmful to society as a whole, and not just a single party or individual who may be the victim of that crime. This notion frames many other rules of our federal criminal justice system. With this newfound role for prosecutors, rules governing their decision-making authority came under scrutiny.

Today, prosecutorial discretion can be defined as the near absolute and unreviewable power under American law for prosecuting attorneys to

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11 U.S. CONST. art. II, § 3.
12 See generally, Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 545 (1994).
13 Id.
16 Id.
(1) choose whether or not to bring charges and (2) select what charges to bring.\textsuperscript{17} There are two Supreme Court cases, discussed below, that have solidified both aspects of prosecutorial discretion.

\textbf{A. THE DECISION TO CHARGE}

In 1971, there was a large prison revolt at the Attica Correctional Facility in which prisoners overtook the facility.\textsuperscript{18} State officials planned to recapture the prison.\textsuperscript{19} At the end of the event, thirty-two inmates were killed, and many others were injured.\textsuperscript{20} The plaintiffs in \textit{Inmates of Attica v. Rockefeller} were the mother of an inmate who was killed and a member of a New York State Subcommittee on Prisons.\textsuperscript{21} The plaintiffs asked the Supreme Court to compel federal and state officials to investigate and prosecute potential defendants like the Governor, State Commission of Correction Services, corrections officers, and many other government officials involved with planning the recapture of the prison for, \textit{inter alia}, conspiring to commit cruel and inhumane treatment upon the prisoners.\textsuperscript{22} The Court refused to compel such action.\textsuperscript{23} The Court’s primary reasons for refusing to mandate or review actions of the federal prosecutors when deciding whether or not to charge were based on separation of powers concerns.\textsuperscript{24} It consequently refused to substitute its judgment for that of the U.S. Attorney not to prosecute.\textsuperscript{25} In its decision, the Court also mentioned other practical concerns of review.\textsuperscript{26} This law is well settled: prosecutorial decisions whether or not to file charges are unreviewable for practical and constitutional concerns. Even in a case like \textit{Inmates of Attica}, where there were gross violations of prisoner safety and rights, the prosecutorial decision to not bring charges will be enforced.\textsuperscript{27}

\textbf{B. SELECTING THE CHARGE}

Milton Batchelder had a felony record.\textsuperscript{28} He was later found in possession of a firearm in violation of 18 U.S.C. 922(h).\textsuperscript{29} However, there

\textsuperscript{17} Id. at 987.
\textsuperscript{18} \textit{Inmates of Attica Correctional Facility v. Rockefeller}, 477 F.2d 375 (1973).
\textsuperscript{19} Id.
\textsuperscript{20} Id at 377.
\textsuperscript{21} Id.
\textsuperscript{22} Id at 378.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 379.
\textsuperscript{26} Id.
\textsuperscript{27} Id at 380.
\textsuperscript{28} United States v. Batchelder, 442 U.S. 114 (1979).
was also a separate federal statute that provided for punishment of the same crime. This statute, 18 U.S.C. 1202(a), provided for a maximum punishment that was significantly less than the punishment authorized under 922(h). Batchelder appealed his conviction and asked for resentencing on the grounds that Congress did not intend for his conduct to be punishable under both statutes.

The Court recognized that these two statutes were “redundant.” However, it made clear that it had no ambiguities before it to resolve. The Court stated that “the Government may prosecute under either [statute] so long as it does not discriminate against any class of defendants.” In other words, even though a prosecutor might be influenced by the existence of two different statutes providing different punishment for the same action, that fact alone is not enough to give rise to a violation of the defendant’s rights under the Eighth Amendment.

There are Due Process and Eighth Amendment arguments against federal decisions to prosecute, such as “cruel and unusual punishment” or “vindictive prosecution” claims that can be made in response to prosecutorial decisions to charge. They are not examined here. Though decisions to prosecute or not are generally unreviewable, they are not shielded from public critique. It is quite common for even local, state level prosecutors to bear the brunt of criticism when they decide not to charge people with crimes despite community sentiment. Nonetheless, before levying a similar critique of the decision not to charge within the context of the 2008 housing and financial crisis, the rules that govern federal prosecutorial discretion should first be examined to identify any potential guidance on the question of whether “economic consequences” is a proper factor to consider.

II. RULES THAT GOVERN PROSECUTORIAL DISCRETION

Throughout the past two decades, there has been much academic debate surrounding the question of regulating the ethics of federal

29 Id.
30 Id.
31 Id at 115.
32 Id.
33 Id.
34 Id at 116.
35 Id at 117.
36 Id.
37 ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 972.
prosecutors.\(^3^9\) In 1994, the legal community divided itself on this question when then-Attorney General Janet Reno adopted an administrative, formal rule for the DOJ that U.S attorneys were allowed to communicate with persons or entities that were represented by counsel in the course of an investigation or proceeding.\(^4^0\) Academics questioned whether the DOJ had the ability to supersede national and state level ethics guidelines through the use of a federal regulation.\(^4^1\)

However, material on potential “violations” of the United States Attorneys’ Manual (USAM) section on Principles of Federal Prosecution is not available nor is it commonly discussed. This may be because the USAM itself provides that the rules are “cast in general terms with a view to providing guidance rather than to mandating results,” and that the intent of the USAM “is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.”\(^4^2\) The rules in this section of the USAM also provide that prosecutors “may modify or depart from the principles set forth herein as necessary.”\(^4^3\) The rules are also, expressly, not enforceable at law.\(^4^4\)

For purposes of this Article, there are still several relevant guidelines to evaluate. First is 9-27.260, “Initiating and Declining Charges—Impermissible Considerations.” This section only provides three categories of factors that prosecutors are not allowed to consider: (1) The person's race, religion, sex, national origin, or political association, activities or beliefs; (2) the attorney's own personal feelings concerning the person, the person's associates, or the victim; or (3) the possible affect of the decision on the attorney's own professional or personal circumstances.\(^4^5\)

Second, the rules provide grounds for other situations where prosecutors do not have to bring charges: (1) no substantial Federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.\(^4^6\) The comments to both of these rules reinforce the principle that prosecutors have vast amounts of discretion.

There is a portion of the USAM that addresses charges against corporations. This section, entitled “Principles of Federal Prosecutions of


\(^{4^2}\) U.S. ATTORNEYS’ MANUAL § 9.27.

\(^{4^3}\) U.S. ATTORNEYS’ MANUAL § 9-27.140.

\(^{4^4}\) U.S. ATTORNEYS’ MANUAL § 9-27.150.

\(^{4^5}\) U.S. ATTORNEYS’ MANUAL § 9-27.260.

\(^{4^6}\) U.S. ATTORNEYS’ MANUAL § 9-27.220.
Business Organizations,” does refer to “collateral consequences.” It limits the considerations and states: “Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation.” This section also adds that the federal prosecutor should consider whether there are alternative means of punishment. The section was edited and authored in 2008 by the then Deputy Attorney General Mark Filip. Though other parts of the memo have been changed or adopted, the views in that memo are what make up the Principles of Federal Prosecutions of Business Organizations Section. The rules here also point out that “it should be the rare case where prosecutors do not pursue provable individual culpability, even in the face of offers of corporate guilty pleas.”

It is clear that though there are standards and guidelines for federal prosecutors to follow, there are no means of enforcing those standards. For that reason, this Article can only critique and analyze past and present DOJ practice when it comes to the prosecution of corporate crime. For one last governmental opinion on the issue, consider statements made by Attorney General Eric Holder before a Senate Judiciary Committee:

“I am concerned that the size of some of these institutions becomes so large that it does become difficult to prosecute them. When we are hit with indications that if you do prosecute, if you do bring a criminal charge it will have a negative impact on the national economy, perhaps world economy, that is a function of the fact that some of these institutions have become too large. It has an inhibiting impact on our ability to bring resolutions that I think would be more appropriate. That is something that you all need to consider.”

48 Id.
49 Id.
51 Id.
III. THE HANDLING OF PAST CORPORATE CRIMES

A. THE GREAT DEPRESSION

After the stock market crash of 1932, a Senate committee, the Pecora Commission, began to investigate responsibility for the crash.53 Its investigation led to indictments of many different banking chief executive officers.54 One of those CEOs was Charles Mitchel, then president of National City Bank.55 Charles Mitchel’s bank sold many shoddy investments.56 After his resignation, he admitted to the Pecora Commission that he knew his bank was advertising and selling these bad investments.57 However, banking laws at the time were not sufficient for federal prosecutors to bring charges.58 CEOs like Mitchel were not prosecuted, but paid civil fines instead.59

B. SAVINGS & LOAN CRISIS

Congressional response to the Savings and Loan Crisis of the 1980s and 1990s was much more aggressive than the response to the Stock Market Crash of 1932.60 More than 1,000 bankers were convicted by the Justice Department.61 Charles Keating Jr. was the CEO of Lincoln Savings and Loan, and David Paul was the CEO of Centrust Bank.62 The short version of the Savings and Loan Crisis involves specialized banks that used low-interest, federally insured, deposits in savings accounts to fund mortgages.63 Because investors could get higher interest rate returns from other marketable securities as opposed to depositing their money with a savings bank, the banks lobbied Congress to remove restrictions on the interest rates they could distribute.64 After Congress caved, savings and

54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
61 Id.
62 Frontline, supra note 51.
64 Id.
loans banks were able to raise their interest rates on deposits and even let these savings banks make commercial and consumer loans. These banks tried to raise capital, and invested in risky commercial loans of their own. Quickly though, consumers wanted their money back and this started to bankrupt the banks. A federal bailout soon followed so that customers would not lose all of their savings.

During the length of this crisis, over 1,000 banks with total assets of over $500 billion failed. CEOs Paul and Keating Jr. spent ten years in prison for their knowledge as well as their pursuit of bad loans and fraud on the market. One interesting tool that federal prosecutors used to avoid going after the banks and other CEOs that they were not confident they had a strong case against were “referrals.” Government regulators would work closely with government prosecutors to share information and analysis on potential charges.

C. ENRON

The collapse of Enron is considered to be one of the biggest corporate downfalls in U.S. history. Kenneth Lay and Jeffrey Skilling are two of almost one dozen Enron corporate executives who were prosecuted for federal crimes such as fraud and conspiracy. Prosecutors claimed that these executives all took steps to hide the financial troubles of the company from its balance sheet, income statement, and cash flow sheets. The collapse of the company caused the loss of over 5,000 jobs and a billion dollars in retirement savings.

Some of the charges listed on the indictment against both of the executives include the following: (1) conspiracy to commit securities and wire fraud, as both executives approved the production of annual and quarterly reports that were submitted to the SEC with gross misstatements of revenue and earnings; (2) securities fraud for treating a de facto subsidiary off the Enron’s books, to hide mass amounts of debt and

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65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Frontline, supra note 51.
74 Id.
75 Id.
76 Id.
knowingly keeping it off the books; (3) wire fraud for stating via telephone and video conferences that Enron’s financial condition was “looking great” and that the company “will hit its numbers;” (4) false statements to auditors; (5) insider trading; and (6) bank fraud for making false statements to banks.\footnote{Associated Press, The Enron Trials: Charges Against Lay and Skilling, USA TODAY – MONEY (Jan. 30, 2006, 12:21PM), http://usatoday30.usatoday.com/money/industries/energy/2006-01-27-charges_x.htm.} There were forty-one counts listed on the indictments.\footnote{Id.} Other executives like Mark Koenig, Andrew Fastow, Sherron Watkins, Kenneth Rice, Ben Gislan Jr., and David Delaney also faced federal charges.\footnote{Goodwyn, supra note 73.}

Other corporate entities like Arthur Anderson, Enron’s auditing company, and Merrill Lynch and Co., the investment bank for Enron, were also charged.\footnote{Linda Chatman Thomsen, Enron: 10 Years Later, LAW 360, http://www.davispolk.com/files/Uploads/Documents/Law360.Thomsen.Enron.pdf.} Below is a table of the results of the federal prosecutions against those involved with the Enron collapse.\footnote{Id.}

**TABLE I. OUTCOMES OF FEDERAL PROSECUTIONS AGAINST ENRON, MERRILL LYNCH, AND ARTHUR ANDERSON**

<table>
<thead>
<tr>
<th>Party</th>
<th>Role</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arthur Anderson</td>
<td>Enron’s Auditor</td>
<td>Conviction overturned on appeal.</td>
</tr>
<tr>
<td>Merrill Lynch &amp; Co.</td>
<td>Enron’s Investment Arm</td>
<td>Conviction vacated and remanded on appeal; government did not retry.</td>
</tr>
<tr>
<td>Daniel Boyle</td>
<td>Enron Executive</td>
<td>Convicted of obstruction; no appeal.</td>
</tr>
<tr>
<td>James Brown</td>
<td>Merrill Lynch</td>
<td>Conviction vacated and remanded on appeal; government did not retry.</td>
</tr>
<tr>
<td>Christopher Calger</td>
<td>Enron Executive</td>
<td>Successfully withdrew plea; charges later dismissed.</td>
</tr>
<tr>
<td>David Duncan</td>
<td>Arthur Anderson</td>
<td>Successfully withdrew plea; charges later dismissed.</td>
</tr>
<tr>
<td>William Fuhs</td>
<td>Merrill Lynch</td>
<td>Conviction vacated on appeal.</td>
</tr>
<tr>
<td>Robert Furst</td>
<td>Merrill Lynch</td>
<td>Conviction partially vacated on appeal; later entered into deferred prosecution agreement.</td>
</tr>
<tr>
<td>Joseph Hirko</td>
<td>Enron Executive</td>
<td>Conviction vacated and remanded on appeal; later pled to reduced charges.</td>
</tr>
<tr>
<td>Kevin Howard</td>
<td>Enron Broadband Services</td>
<td>Conviction vacated and remanded on appeal; later pled to reduced charges.</td>
</tr>
<tr>
<td>Sheila Kalanek</td>
<td>Enron</td>
<td>Acquitted at trial.</td>
</tr>
<tr>
<td>Michael Krautz</td>
<td>Enron Executive</td>
<td>Mistrial at first trial; acquitted at second trial.</td>
</tr>
<tr>
<td>Kenneth Lay</td>
<td>Enron Executive</td>
<td>Conviction vacated due to death.</td>
</tr>
<tr>
<td>Rex Shelby</td>
<td>Enron</td>
<td>Hung jury and partial acquittal at first trial; later pled to reduced charges.</td>
</tr>
<tr>
<td>Jeffrey Skilling</td>
<td>Enron Executive</td>
<td>25 years in prison.</td>
</tr>
</tbody>
</table>
Enron filed for bankruptcy in December of 2001. The Justice Department began its investigation after the company went bankrupt. Unlike the Great Depression, the Savings and Loan crisis, or the 2008 housing crisis, the impact of the Enron collapse was much more limited in scope (though extremely unfortunate and devastating for the employees of the company).

IV. THE 2008 HOUSING AND FINANCIAL CRISIS

A. FACTS AND THE GOVERNMENT’S RESPONSE

Many different financial entities were involved in the 2008 housing and financial crisis. For purposes of this Article, only a brief background of the relevant facts for different entities will be given.

1. Bank of America

Bank of America (BOA) sold many different mortgages and loans to financial institutions including Fannie Mae and Freddie Mac. Eventually, executives of BOA planned a new business model in an attempt to streamline the sale of mortgages. Part of this plan involved eliminating various checks on the quality of the loans that served as the underlying asset for securitized mortgages before selling them to third parties. The elimination of this credit check is what BOA and many other financial institutions did, but marketed the mortgage-backed securities as healthy when they no longer had a means of verifying that quality. This new business model was named “The Hustle.”

On October 13, 2013, a jury found Rebecca Mairone, a manager of a Bank of America subsidiary during the time of the 2008 housing and financial crisis (and who now works at JP Morgan Chase), liable for its sale.

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85 Id.
86 Id.
87 Id.
of defective mortgages. Prosecutors in the case have asked Bank of America to pay nearly $900 million dollars in fines and penalties, but the final amount of the penalty will be decided by the presiding judge. The Manhattan U.S. Attorney has sued Bank of America in a civil action for the same fraudulent activity, and the bank is reportedly prepared to pay thirteen billion dollars in fines and fees to settle any other claims which other governmental agencies may have.

2. Citigroup

Though Citigroup was not directly involved in the sale or securitization of poor quality mortgages, the company did make a series of moves that may have misled shareholders and other investors. As the 2008 housing crisis unfolded, Citigroup attempted to reassure its investors and shareholders that its liability and potential losses were minimal, to the tune of $13 billion dollars. However, it failed to disclose on its balance sheet that it was also liable for another $43 billion dollars involving investments in another set of mortgage-backed securities. Balance sheets and other reports are the only documents that investors have rights of access to and rely on when making investment decisions. These documents are also filed with the SEC, per SEC rules. Citigroup, as a corporate entity, settled with the SEC for $75 million. Two executives were also fined $100,000 each. No criminal charges against Citigroup have been brought.

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89 Id.
92 Id.
93 Id.
94 Investopedia Staff, Knowing Your Rights as a Shareholder, INVESTOPEDIA (Jan. 02, 2010), http://www.investopedia.com/articles/01/050201.asp.
95 Id.
3. Fannie Mae and Freddie Mac

Fannie Mae and Freddie Mac are two “government sponsored entities” designed with the purpose of helping to keep the mortgage market stable. Most of the malicious conduct on behalf of Fannie Mae and Freddie Mac mirrors that of Citigroup. Both entities misrepresented their liabilities and losses on the balance sheets and other documents eventually disclosed to investors and the SEC. The corporate entities admitted responsibility for their conduct in a statement apologizing to investors, but no criminal or civil charges were sought by the SEC. These cases are also ongoing. No criminal charges against Fannie Mae and Freddie Mac have been brought.

4. Goldman Sachs

The questionable conduct of Goldman Sachs involved executive approved plans to sell a new type of mortgage-backed security. It was called the Abacus 2007-AC1. John Paulson was the hedge fund manager that helped create this new type of security. Goldman Sachs did not disclose to investors who wanted to purchase or invest in the Abacus 2007-AC1 that John Paulson was betting against the success of the Abacus 2007-AC1 on the market. Goldman Sachs has not admitted any wrongdoing, but only that the marketing materials for the security contained “incomplete information.” To avoid SEC suits or criminal charges, Goldman Sachs in its corporate capacity agreed to a $555 million settlement. The SEC’s charges against Fabrice Tourre, a Goldman Sachs executive involved with

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99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Id. and Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
the Abacus 2007-AC1, is set for trial in July. No criminal charges have been brought against Goldman Sachs.

5. JPMorgan Chase

Executives at JPMorgan Chase evaluated the quality of underlying mortgage loans that were eventually securitized and marketed by its brokers. When executives noticed that some of the underlying loans were not performing well, they called them “sh*t breathers.” Regardless, those loans were still packaged into securities to pass to investors. JPMorgan also told its investors that only thirty or so of the mortgages were in default, when in reality over 600 were. JPMorgan settled with the SEC for $417 million dollars. No criminal charges have been sought against JPMorgan Chase. JPMorgan Chase recently settled with the DOJ to pay thirteen billion dollars in fines to absolve itself of any civil or criminal liability. JPMorgan Chase also expects half of that fine to be tax-deductible. However, a recent consumer protection watchdog group has sued the DOJ claiming that its settlement with JPMorgan Chase violated federal law and constitutional mandates.

6. Bear Stearns

Federal prosecutors did bring charges against two Bear Stearns executives, Ralph Cioffi and Matthew Tannin, for conspiracy and securities fraud. Their trial took place in 2009 on the basis of the same conduct that JPMorgan and Bank of America are alleged to have committed. Both of

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109 Id.
111 Id.
112 Id.
113 Id.
115 Id.
118 Id.
the defendants were acquitted of every charge.\textsuperscript{119} However, this result may not be the consequence of inadequate evidence, but poor trial strategy.\textsuperscript{120}

First, federal prosecutors relied on snippets of an email between the two executives.\textsuperscript{121} These excerpts, when viewed alone, did seem somewhat damning.\textsuperscript{122} For example, Mr. Tannin wrote that the “subprime market looks pretty damn ugly,” and added that if things were as bad as everyone thought they were, “we should close the funds now [as the] entire subprime market is toast.”\textsuperscript{123} These statements referred to storing away funds that would have to be paid out to investors in the case of defaults if those funds were available. However, the jury would eventually see the entirety of these emails which included lengthy discussions about how to make sure that the company would make the best financial choice in the situation.\textsuperscript{124}

Additionally, the prosecution failed to admit potentially damning evidence.\textsuperscript{125} For example, there was a talking points memo authored by the defendants that told Bear Stearns brokers to tell investors if asked about their exposure to bad mortgage backed securities that it was only 3\% when it was really 60\%.\textsuperscript{126} Federal prosecutors called a former Bear Stearns broker to discuss the malicious nature of a memo like this, but did not rebut claims of bias and a lack of impartiality made by the defense. Nor did prosecutors do a sufficient job of using this evidence to argue fraud in their closing argument.\textsuperscript{127}

The failure of this trial may be the catalyst for the lack of criminal charges against the corporate executives in their personal capacities of many of the major financial institutions discussed above. However, it is still important to analyze whether justice has been properly administered by the DOJ, or some other governmental entity.

V. Analyzing Whether Justice Has Been Upheld

Even the Supreme Court has commented that achieving perfect justice in the criminal context is extremely difficult.\textsuperscript{128} As a consequence, those charged with the responsibility of administering justice in response to crime should make sure that their policies, procedures, and practice effectuates this justice with some degree of uniformity. Considering the

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
history of major financial corporate crimes, it is apparent that “economic consequences” as a part of the decision whether or not to bring charges has been absent in most cases, but for some reason is prevalent in the 2008 housing and financial crisis. This Section will analyze that issue. Furthermore, because the DOJ has effectively closed the door on bringing federal charges against other corporate executives, this Section will also analyze alternative means of punishment and question how effectively these entities and persons have been punished for the sake of justice.

A. **Economic Consequences**

The fall of Enron caused 5,000 people to lose their jobs and almost a billion dollars worth of retirement savings to vanish.\(^{129}\) Federal charges were not brought against Enron corporate executives until after the company went under. In this context, the timing seems appropriate as federal prosecutors found out about the commission of corporate crime at the same time the public did. Enron collapsed as a consequence of fraud and other financial crimes that threatened the safety of the corporation. It was most likely very easy for federal prosecutors, once the company collapsed and effectively ceased to exist as a corporate entity, to bring charges against Enron executives without having to worry about what the “economic consequences” of bringing those charges would be. Without this concern, there was nothing to deter federal prosecutors from convicting former CEOs of a defunct company.

The collapse of several savings and loan banks in the late 80s and early 90s, however, does mirror events of the 2008 housing and financial crisis.\(^ {130} \) Banks and financial institutions started to fail one by one.\(^ {131} \) To triage the damage, Congress provided bailouts in both instances.\(^ {132} \) Nonetheless, at least two different major corporate executives were charged with federal corporate crimes during the savings and loan crisis while hundreds of other small-scale bankers were charged. There were no devastating economic consequences. Those executives were simply replaced by other successful corporate managers. The SEC was not timid in levying fines against other corporations and their CEOs. The consideration of “economic consequences” is difficult to find in that context, considering public outrage and a demand to charge at least somebody with a crime that caused the failure of many different banks.

\(^ {129} \) See supra Section III.B.

\(^ {130} \) See supra, Part III.

\(^ {131} \) Id.

Though the concern about “economic consequences” was hardly present in past decisions to bring federal charges in corporate crimes, it is extremely prevalent today. Considering the similarities between the 2008 housing financial crisis and the savings and loan crisis, it is difficult to understand why the consideration of “economic consequences” has halted the prosecution of major executives involved in the 2008 housing and financial crisis.

1. Potential Market Consequences

One possible reason against bringing charges against corporate executives is that it would negatively affect the markets. However, assuming that two or three major executives from each different institution were charged with a crime and sent to prison, that would not be enough to damage the health or success of a company in the long term. Corporate takeovers, poison pills, tender offers, mergers, and the election of a new board of directors (and consequently, appointment of new CEOs) take place far too often on Wall Street. In other words, corporate shakeups happen quite often. These CEOs are easily replaceable and newer, crime-free CEOs might fare better with the warning that would come with the prosecution of those former CEOs for their fraudulent conduct. Regardless, this potential economic consequence is not sufficient to outweigh seeking criminal charges against executives behind the 2008 housing and financial crisis.

After all, that decision should be left to a grand jury of twenty-three members. There is enough information for a prosecutor to seek an indictment through a grand jury. This plan is also symbolic considering the grand jury’s role of representing the people. It would be much easier for the DOJ to deflect criticism for the lack of charges if the department could say it had tried to seek charges but a grand jury of twenty-three Americans did not feel as though there was enough evidence to move forward. Instead, DOJ department heads have consistently relied upon possible “economic consequences” when discussing the issue, and that simply is not as credible as mentioning that an indictment received a “no bill” from a grand jury.

On the other hand, there may be an “economic consequence” worth noting if charges were to be brought against corporate executives. Depending on the persons appointed to replace prosecuted CEOs, the market may not respond well. Wall Street runs off what is known as an “efficient capital market” hypothesis.133 This means that information in the

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investment and financial world travels freely and instantly. Any changes in a corporation’s policy or structure will have an almost immediate effect on the company’s stock price and worth to investors that have judged the change. Wall Street may not respond well to the replacement of CEOs, especially if those replaced CEOs had been in place since the crisis, and are in the middle of recovery. For this reason, “economic consequences” seem somewhat apparent.

The odd thing, however, is that this is another reason not made apparent by DOJ officials. The average American watching the DOJ’s response and plan may not recognize the issue with replacing CEOs, and for that reason the DOJ should be more explicit in explaining which “economic consequences” it is referring to. As more and more time passes, it becomes increasingly difficult to bring charges for practical and statute of limitations concerns. Furthermore, many of these banks and financial institutions are significantly connected to other institutions across the country and on an international level. These CEOs were not only in charge of fighting through the crisis they may have caused, but were also handed the responsibility of overseeing government bailout funds and finding a way to see their institution to economic recovery. Replacing them could indeed cause a negative economic consequence.

However, this only proves the point that considering “economic consequences” causes an injustice or at the very least a breach of the duty to administer justice blindly. As a matter of principle, it is a misapplication of justice that, for example, a husband and father of three children can be sentenced to a prison term causing severe “economic consequences” to his family, while a corporate executive can avoid punishment because of the same “economic consequence” concern. Of course, factors like those in the example are considered in the sentencing phase after conviction. What happened in the case of CEOs of financial institutions during the 2008 housing and financial crisis is that they were not even charged in the first instance. This policy sends the message that, if a citizen can position himself or herself in a way that makes the U.S. economy dependent on their role and existence, they may be able to avoid punishment for their crimes.

Some research has shown that defense counsel for many of these corporate entities have been able to avoid federal charges against their clients by making presentations to federal prosecutors on the possible economic consequences of a guilty verdict. This can only undermine the metaphor that justice is meant to be blind, and does not take into account what a person’s status may be before the law.

134 David Sirota, Are Banks Too Big to Jail?, SALON (Jan 23. 2013), http://www.salon.com/2013/01/23/are_banks_too_big_to_jail/.
2. Secondary Avenues of Punishment

DOJ statements, that “economic consequences” are worth worrying about, may be a means of sweeping under the rug concerns about the likelihood of success of bringing criminal charges. In a criminal trial, the standard is “proof beyond a reasonable doubt.” Lanny Breuer commented on how difficult a standard this is to prove at trial, when compared to “clear and convincing evidence.” Some commentators have noted that the failure of the DOJ to win the case against former Bear Stearns executives prevents DOJ prosecutors from bringing additional charges. However, the prosecutor should not be concerned with winning at trial, but only make sure that justice is done. The question of guilt in this case is not for the prosecutor to predetermine or estimate, but for a jury to decide. Though there are no ways of enforcing these arguments, as a matter of practice, it seems as if there is enough evidence to at least attempt a trial as a means of satisfying the public.

Furthermore, the DOJ has not failed at every attempt of bringing charges at trial against these CEOs. Two former brokers of Credit Suisse have been imprisoned for five to ten years for their part in selling bad securities.\footnote{Chris Isodore, \textit{Credit Suisse Banker Sentenced to 30 Months in Prison}, CNN\textsc{Money} (Nov. 22, 2013), http://money.cnn.com/2013/11/22/news/companies/credit-suisse-sentencing/} Both of them were ordered to pay nearly 5 million dollars in fines.\footnote{Id.} Furthermore, six executives from Taylor Bean & Whitaker pleaded guilty to securities fraud charges.\footnote{Esther Cho, \textit{Former Taylor, Bean and Whitaker CFO Sentenced to 60 Months in Prison}, DS\textsc{News} (June 15, 2012), http://dsnews.com/former-taylor-bean-and-whitaker-cfo-sentenced-to-60-months-in-prison-2012-06-15/} Most of them were sentenced to 30 years in prison. However, this may be another example of how size matters. Both of these financial entities are relatively small, and any corporate shakeups with respect to these companies are not likely to have a significant effect on the market.

Even if it is not a good principle to stand by, nothing prevents federal prosecutors from considering “economic consequences” of a decision to charge. What is clear is that this factor was not much of a concern during earlier financial meltdowns, but has been for the 2008 housing and financial crisis - mostly likely because of the stature and position of those corporations. As lawmakers scramble for attempts at reform, they should keep in mind whether or not some executives who specifically authorized plans to sell shaky mortgage backed securities were handed a free pass. However, the DOJ has not been completely silent on the issue of seeking justice.
B. DEFERRED PROSECUTION AGREEMENTS

In the 2008 memorandum authored by Mark Filip to United States Attorneys discussed above, he called for consideration of “alternative” methods of punishment. In practice, and as so far applied to different Wall Street corporations, prosecutors can enter into deferred prosecution agreements with entities they believe need some reform. If companies investigate and reform their own wrongdoings, federal prosecutors can enter into agreements with the corporations and their executives to cancel bringing charges if the corporation promises to fix its behavior.

Because the DOJ has effectively decided not to bring charges, this may be the next best option in the pursuit of justice. These deferred prosecution agreements, though they are no real incentive to quit white-collar crime, are a means of holding these corporations accountable to change and reform. Most of these agreements require the payment of penalties, fines, restitution, and correction of the behavior the DOJ and other regulatory entities consider problems, before charges will be cancelled or dismissed.

Federal prosecutors have also used another tactic. When federal prosecutors believe that there is some indication of wrongdoing by a corporation, they will pay them a visit. Federal prosecutors will visit these companies early on during an investigation, inform the corporation of their findings and concerns, and ask that the corporation conduct an internal investigation to figure out if there is any ongoing illegal activity. Those companies will then use in-house and outside counsel to investigate their internal affairs and report back to federal prosecutors.

On one hand, since the DOJ seems unlikely to bring federal charges against corporations, these deferred agreements and active cooperation with corporations seems to be an effective option. If the DOJ can save its resources and manpower by stopping crimes before they occur by forcing corporations to correct their behavior, then it should do so. There is little reason to go to trial to effectuate some corporate policy change when informing the corporations of its missteps can cause the same effect. These agreements and cooperation plans can correct malicious behavior without any negative “economic consequences” taking place.

On the other hand, despite its effectiveness, these options are just more examples of a privilege extended to corporations and their executives that are not extended to smaller scale criminals. During the course of a

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138 See supra note 50, Part II.
grand jury investigation, prosecutors do not have an obligation to present or provide exculpatory information for the jury’s consideration nor for the defendant to be made aware of.\textsuperscript{140} Additionally, a subject of a grand jury investigation does not have the right to present exculpatory information.\textsuperscript{141} However, it seems odd that federal prosecutors are more than willing to make exceptions for corporate entities and their executives. It would be very odd for federal prosecutors investigating, for example, the activities of a violent motorcycle gang involved in the drug trade, to tell the subject of its investigation that if it looked into its activities and reported back to the government, charges could be avoided. Undoubtedly, these two situations are not the same, but the contrast does speak to unequal treatment of certain types of crimes, when all crimes should be punished equally and justly.

C. SEC LAWSUITS AND FINES

Aside from the DOJ, the Securities and Exchange Commission (SEC) has the responsibility of making sure that corporations and its officers follow SEC regulations. Independent of DOJ action or inaction, the SEC has been vigorously pursuing suits against the corporations involved in the 2008 housing and financial crisis discussed above. The SEC has brought cases against at least fourteen different parties including former executives at Countrywide Financial, Goldman Sachs, Citigroup, Ernst & Young, Washington Mutual, Wells Fargo, and Citigroup.\textsuperscript{142}

In total, the SEC has won judgments for almost $880 million against individual executives as well as corporations.\textsuperscript{143} It is difficult to categorize these fines as punishment for crimes since SEC suits are considered civil, not criminal actions. However, this seems to be the only means of punishment that has been administered so far. An interesting aspect of this litigation is that a majority of the funds awarded to the SEC have to be paid back to investors by the corporations. The lawsuits initiated and led by the SEC should be taking place conjunction with, and not as a substitute for, criminal charges brought by the DOJ.

CONCLUSION

It is very apparent that new rules and guidelines have been crafted as a consequence of worrying about “economic concerns” stemming from

\textsuperscript{140} See generally ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE.
\textsuperscript{141} Id.
\textsuperscript{142} Louise Story, Tracking Financial Crisis Cases, NY TIMES (Feb. 2, 2011),
\textsuperscript{143} Id.
potential prosecutions of corporate entities and their executives. It is also apparent that these guidelines would rarely be, and have not been, utilized in relation to any other type of crime. The reason for this is clear: the stature and position of these corporations in relation to the health and prosperity of the American and international economies means that federal government officials should be cautious about upsetting the economic health of the corporations.

This is a new form of the corporate veil. Before, the corporate veil referred to protecting the owner of a corporation from liability in the event that the corporation got into some sort of financial trouble. Today, certain corporations have the ability to protect not only themselves from criminal liability, but their executives too. Instead of normal means of punishment, these high profile, white-collar crimes are afforded the luxury of things like “economic consequences” factors, deferred prosecution agreements, and orders to conduct a good faith internal investigation without federal prosecutors giving a serious threat of answering for corporate crimes.

The limits of what the DOJ knows and does not know, and why it has decided not to bring charges, is difficult for any outsider, student, or media member to know for certain. However, at the very least, the DOJ has not been explicit or forthcoming in its decision making process and thus it is understandable why members of the public continue to demand the prosecution of corporations and executives. Even if the DOJ’s reasons for not seeking prosecutions are prudent, the use of deferred prosecutions and internal investigations are perceived, justifiably, as if the DOJ believes these entities are “too big to jail.”

It is hard to predict how the DOJ will handle future financial crises, but hopefully it can avoid the consideration of “economic consequences” and only consider what the most just outcome could be. Though corporations and executives involved in the 2008 housing and financial crisis have not gotten away completely unpunished, most have not had to deal with the full force of the law through the criminal justice system. The “economic consequences” of charging these entities will not be known, and ideally it is something that federal prosecutors will not have to consider in the future.
AN IMMINENT SUBSTANTIAL DISRUPTION:
TOWARDS A UNIFORM STANDARD FOR
BALANCING THE RIGHTS OF STUDENTS TO
SPEAK AND THE RIGHTS OF ADMINISTRATORS
TO DISCIPLINE

ALLISON G. KORT**

Twenty-five years before Tinker v. Des Moines, the Supreme Court cautioned against placing too much discretion in the hands of school boards. Over the course of the last four decades, however, the Court has returned to the school boards the power to invade the sphere of intellect and spirit in public schools. Supreme Court decisions and lower court opinions have chipped away at students’ rights by making exceptions to Tinker, deferring to the school board on judging the “reasonableness” of the school’s action, and deciding these cases on the basis of the speech’s content. The resulting outcomes fail to provide uniform applicable standards by which new cases may be decided. Students are subject to personal opinions of the school boards, with whom rests “the determination of what manner of speech in the classroom or in school assembly is inappropriate.” This article argues that Tinker should be universally applied with less deference to school administrators.

First, Tinker’s “reasonably forecast to cause a substantial disruption” language should be defined so that only speech that meets the “incitement to imminent disruption” of legitimate state interests may be restricted. Second, administrators should justify restricting student speech only in order to protect the “work and discipline of the school” that is a legitimate state interest. Rather than a separate test for measuring speech given to captive audiences inside the school building, the “lewd, vulgar, and plainly offensive” test (announced in Bethel School District v. Fraser) should be considered as part of Tinker’s “work and discipline” test: the interest in teaching students the “boundaries of socially appropriate behavior.” School administrators may then, without engaging in viewpoint discrimination, inculcate manners and habits of civility in the public schools, while maintaining the classroom as “peculiarly the ‘marketplace of ideas.’”

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INTRODUCTION

The primary function of the public school is education.¹ Twenty-five years before Tinker v. Des Moines School District, the Supreme Court cautioned against placing too much discretion in the hands of school boards.² However, in the realm of school speech, courts have returned to school boards the power to invade the sphere of intellect and spirit in public schools.³ In 1969, the Supreme Court first protected public school students’ First Amendment rights to free speech and expression, with the heralded statement: “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴ In Tinker, Iowa high school students voiced opposition to the Vietnam War by wearing black armbands to school, which violate

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¹ Richard Berkman, Students in Court: Free Speech and the Functions of Schooling in America, 40 Harvard Educ. Rev. 4 (1970); Brown v. Bd. of Ed., 347 U.S. 483, 493 (1954) (recognizing education as “the very foundation of good citizenship. Today it is a principal instrument in awaking the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment”).
³ Clay Calvert, Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser, 90 Denv. U. L. Rev. 131, 155-56 (2012) (noting the broad deference given school officials for their decisions to censor student speech).
The students were suspended from school until they returned without the armbands. The Supreme Court determined that student speech cannot be censored when the record “does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” The student armbands caused discussion outside of class, but did not interfere with work or cause any disorder in school. Therefore, the school’s discipline of the students for wearing black armbands was unconstitutional.

Today, Tinker still provides public school students with the greatest protection from discipline for their expression. However, in the forty-four years following Tinker, Supreme Court decisions and lower court opinions have chipped away at students’ rights by widening the standards for speech that causes or forecasts a substantial disruption or material interference in school activities. Courts frequently make an end run around Tinker by deferring to the school board on the “reasonableness” of the school’s action, or deciding these cases on the basis of the speech’s content. The resulting outcomes fail to provide uniform applicable standards by which new cases may be decided. Neither students nor school officials enjoy clear awareness of students’ rights to free speech and expression, and students are subject to personal opinions of the school boards, with whom rests “the determination of what manner of speech in the classroom or in school assembly is inappropriate….”

This article argues that Tinker should be universally applied in school speech cases, with less deference to school administrators. Part I discusses Supreme Court school speech jurisprudence following Tinker, and the viewpoint-based exceptions to Tinker. Part II illustrates how lower courts have applied the Tinker standard inconsistently, producing viewpoint-based decisions. Part III proposes universal definitions of the terms in Tinker, so that administrators may understand how to craft school policies and so that students may be aware of their rights. The inquiry into whether certain speech “might reasonably have led school authorities to forecast substantial disruption of or material interference with school

5 393 U.S. at 504.
6 Id.
7 Id.
8 Id.
9 Id.
10 See Calvert, supra note 3, at 155 (noting the difficulties of determining what speech is “offensive,” and cautioning that “creating and imposing bright-line legal doctrines around message meanings is an extremely problematic task”).
activities” should involve an analysis of several terms. First, the term “reasonably forecast” should be narrowed so that only speech that meets the “incitement to imminent lawless action,” or the disruption of legitimate state interests, may be restricted.\textsuperscript{12} Second, some uniform standards for what expression constitutes a “material and substantial disruption” must be articulated if school administrators are to apply the standard. Finally, administrators must justify the protection of the regulation in order to protect the “work and discipline of the school.” Rather than a separate test by which to measure speech given to captive audiences inside the school building, \textit{Fraser} should be considered as having defined part of the work of the school as teaching students the “boundaries of socially appropriate behavior.”\textsuperscript{13} School administrators may then, without engaging in viewpoint discrimination, inculcate manners and habits of civility in the public schools, while maintaining the classroom as “peculiarly the ‘marketplace of ideas.’”

I. THE SUPREME COURT’S VIEWPOINT-BASED EXCEPTIONS TO TINKER: SEX AND DRUGS

The second Supreme Court opinion on student speech provided a new restriction, allegedly based not on the content of the speech, but on the vulgar, lewd, or plainly offensive nature of the words used.\textsuperscript{14} High school student Matthew Fraser was suspended after, at a required assembly, he “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.”\textsuperscript{15} The school district properly sanctioned Fraser because the First Amendment did not prevent school officials from prohibiting a speech that “would undermine the school's basic educational mission.”\textsuperscript{16}

First, public schools are responsible for “inculcating fundamental

\textsuperscript{13} Fraser, 478 U.S. at 681.
\textsuperscript{14} Id. at 676. Although the majority frequently referred to the content and effects of the speech, the actual text does not appear anywhere in the majority opinion. Reprinted only in Justice Brennan's concurrence, the speech provided:

\begin{quote}
I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.
\end{quote}

\textit{Id.} at 687 (Brennan, J., concurring).

\textsuperscript{15} Id. at 677-78.
\textsuperscript{16} Id. at 686.
values necessary to the maintenance of a democratic political system….”

In teaching those values, including the “habits and manners of civility” administrators must take into account the sensibilities of other students, and balance students’ “freedom to advocate unpopular and controversial views” against the “interest in teaching students the boundaries of socially appropriate behavior.”

The majority noted that just as abusive and offensive language may be proscribed in Congress, the work of the schools involves preventing language that is “highly offensive or highly threatening to others.”

The Court then jumped from stating that schools must promote civil debate, to announcing administrators’ rights to prohibit “lewd, indecent, or offensive speech and conduct,” with no analysis of a school’s need to determine whether that lewd, indecent, or offensive speech was reasonably likely to cause a material and substantial disruption to the work of the school in promoting civil debate.

Because Fraser’s speech glorified male sexuality, was acutely insulting to teenage girls, and could have damaged the younger students who were “on the threshold of awareness of human sexuality,” it was “plainly offensive to both teachers and students—indeed to any mature person.” The only evidence of disruption mentioned in the majority opinion was that some students were “bewildered by the speech and the reaction of mimicry it provoked.”

Justice Brennan forecast the difficulties courts would have in applying the Fraser standard. Although he concurred with the majority’s decision because Fraser’s remarks “exceeded the limits of acceptable speech” he stated that the language itself was not obscene, and no

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17 Id. at 686. See also Ambach v. Norwich, 441 U.S. 68, (1979) (upholding a requirement that public schoolteachers must be United States citizens as rationally related to the legitimate government interest in furthering education).

18 Id. at 681.

19 Id. at 683 (quoting Tinker, 393 U.S. at 508).

20 Id. at 683.

21 Id. at 683.

22 Id. at 684.

23 Id. at 684.

24 Id. at 683 (Brennan, J., concurring).

25 Id. at 683-84 (Brennan., J., concurring).

26 Id. at 684-85. In addition to obscene speech, sexually explicit speech, broadcast at a time when the audience may include children, is prohibited. In 1978, the Court addressed the question of whether an afternoon broadcast of George Carlin’s “Filthy Words” monologue was “indecent” and therefore proscribable. Carlin had described the monologue as containing “words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.” Id. at 729. The FCC characterized Carlin’s language as “’patently offensive,’ though not necessarily obscene,” and explained that “[t]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.”
evidence showed that the students found it upsetting.27 Had the majority simply adopted Brennan’s reasoning that the speech disrupted the school’s educational mission of inculcating habits and manners of civility at a mandatory school assembly, rather than introduce a standard for bypassing Tinker and engaging in viewpoint-based discrimination by characterizing the expression as lewd or plainly offensive, the educational mission of the school would have remained at the forefront of judicial analysis of student discipline cases. With the advent of the lewd, vulgar, and plainly offensive exception to Tinker, courts began to focus on whether certain words used inside the school contained sexual innuendo and were therefore proscribable, rather than focusing on the disruptive effect the speech was reasonably likely to have on the school’s mission.28

Twice more the Court deviated from the Tinker standard. A school may regulate the content and format of school-sponsored speech,29 and speech that could be reasonably regarded as promoting illegal drug use, even at an off-campus school-sponsored activity.30 The Court in Hazelwood rationalized that because speech that could be seen as school-sponsored would be viewed as emanating from the school curriculum, educators could exercise more editorial authority over its content.31 Thus, prior to Morse, school speech cases fell into one of three categories:

Id. at 731-32 (quoting 56 F.C.C 2d, 94, 98 (1975)). The Supreme Court agreed with the Commission, holding that “[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” Id. at 749.

In Fraser, the Court compared Matthew Fraser’s speech at a mandatory school assembly with the “obscene, indecent, or profane” broadcast of Carlin’s monologue in Pacifica:

These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: “Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 478 U.S. at 685 (quoting Pacifica, 438 U.S. at 745).

27 Id. at 689, n. 2.
28 See Calvert, supra note 3, at 134 (“Under Fraser, a message determined to possess a sexual connotation can be permissibly punished despite the absence of any evidence suggesting it will have even the slightest disruptive effect among the student body”).
30 Morse v. Frederick, 551 U.S. 393, 396 (2007).
31 Id. at 271. Brennan’s dissent criticized the majority for failing to apply Tinker’s material interference and substantial disruption standard to the facts. The school principal “broke more than just a promise. He violated the First Amendment’s prohibitions against any censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.” Id. at 277 (Brennan, J., dissenting) (noting that each year, student journalists published the school paper’s Statement of Policy, which provided that speech may only be prohibited if it “materially and substantially interferes with the requirements of appropriate discipline”) (quoting Tinker, 393 U.S. at 513).
Under Fraser, a school may categorically prohibit lewd, vulgar or profane language. Under Hazelwood, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school’s own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker’s general rule: it may be regulated only if it would substantially disrupt school operations or interference with the rights of others.32

Morse added to the trilogy by permitting school officials to restrict Frederick’s “BONG HiTS 4 JESUS” banner without engaging in a Tinker analysis.33 The special characteristics of the school environment and the government interest in stopping student drug abuse permitted the departure from Tinker.34 Justice Thomas took the opportunity to explain his view that student speech is not constitutionally protected and that Tinker should be overturned.35 Justice Breyer was concerned that the majority’s holding failed to guide schools as to which “steps” other than prohibiting the unfurling of banners at school outings schools may take to safeguard students from speech regarding illegal drug use.36 This lack of guidance would allow school administrators to establish further viewpoint-based restrictions.37

Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? ....

33 Id. at 408.
34 Morse, 551 U.S. at 397.
35 Id. at 410 (Thomas, J., concurring). Thomas described the advent of public schools during the colonial era as a mechanism for the states to educate students whose families were too poor to afford private school, and that “no one doubted the government’s ability to educate and discipline children as private schools” Id. at 412. Public schools were places where “[t]eachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.” Id. Teachers instilled a “core of common values” by presenting ideas, demanding obedience, punishing students for disrespectful behavior, enforcing rules of etiquette, and requiring courtesy. Id. In the 1800s, schools could discipline students and maintain order through in loco parentis, which set little restriction on the school’s ability to set rules, including those restricting student speech. But “Tinker effected a sea of change in students’ speech rights, extending them well beyond traditional bounds.” Thomas reasoned that because Tinker’s rationale conflicted with the traditional role of the judiciary concerning public school discipline, “the Court has since scaled back Tinker’s standard, or rather set the standard aside on an ad hoc basis.” Id.
36 Id. at 428. (Breyer, J., concurring in part and dissenting in part). While disagreeing with the Court’s application of First Amendment law, Justice Breyer concurred with the judgment because Morse was protected by qualified immunity from Frederick’s claim for monetary damages.
37 Id. at 426.
What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick’s banner had read “LEGALIZE BONG HiTS,” he might be thought to receive protection from the majority’s rule, which goes to speech “encouraging illegal drug use.” … But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.\(^{38}\)

Justice Stevens dissented, because the banner was designed to attract the attention of camera crews, and “was never meant to persuade anyone to do anything.”\(^{39}\) In all, a case about a “silly, nonsensical banner” ended with the invention of a rule permitting censorship of any student speech that mentions drugs, as long as an administrator could perceive that speech to contain a “latent pro-drug message.”\(^{40}\) Further, no evidence showed that the banner infringed on the rights of students or interfered with the school’s educational mission.\(^{41}\)

Application of these four seminal cases has permitted lower courts to pick and choose which standard to apply, and make inconsistent, viewpoint-based determinations, which continuously steer away from Tinker’s central premise that “it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”\(^{42}\) Even when they apply Tinker, courts are more likely to defer to the school board, because Tinker did not “lay down some guidelines for how to arrive at a calculation of

\(^{38}\) Id. (citations omitted). Justice Breyer was also concerned that school officials would no longer have the necessary authority to discipline students. More student-teacher disputes would likely end up in court, “[yet no one wishes to substitute courts for school boards, or to turn the judge’s chambers into the principal’s office.”

\(^{39}\) Id. at 425 (Stevens, J., dissenting). Justice Stevens warned that the majority opinion “does serious violence to the First Amendment in upholding—indeed—lauding—a school’s decision to punish Frederick for expressing a view with which it disagreed.”\(^{40}\) While the school certainly had an interest in protecting its students from exposure to speech reasonably regarded as promoting illegal drug use, it could not justify disciplining Frederick for his attempt to make “an ambiguous statement to a television audience simply because it contained an oblique reference to drugs.”\(^{40}\) There is a difference between speech that advocates illegal drug use, and “an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy.” Id. at 439.

\(^{40}\) Id. at 446.

\(^{41}\) Id. at 440. As Stevens noted, the majority’s excising pro-drug speech from Tinker’s protections “for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.”

\(^{42}\) Tinker, 393 U.S. at 508-09.
which interests are substantial and what constitutes sufficient evidence of substantial interference with them.”

II. LOWER COURT APPLICATIONS OF TINKER AFTER FRASER, HAZELWOOD, AND MORSE

Student speech cases are frequently litigated in lower courts, particularly with the advent of social media and online communication. Tinker is almost universally applied to speech created off-campus. Fraser is dismissed outright in internet speech cases, with reference to Justice Brennan’s dissent: “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”

Application of these standards has led to inconsistent results based on different views of several terms in the two standards: a) reasonably portend; b) material and substantial disruption; c) lewd, vulgar, and plainly offensive; and d) the work and discipline of the school. The reasons given for upholding discipline in these cases frequently surround exactly what the Tinker Court cautioned against: an “undifferentiated fear or apprehension of disturbance,” rather than facts which “might reasonably have led school authorities to forecast substantial disruption of or material interference with

43 Kristi Bowman, The Civil Rights Roots of Tinker’s Disruption Tests, 58 AM. U. L. REV 1129, 1160 (quoting Memorandum from Martha Field to Justice Fortas 4-5 (Nov. 27, 1968), in Abe Fortas Papers, Group 858, Series I, Box 79, Folder 1666, Yale University Library Manuscript Collections).

44 Frederick Schauer, Abandoning the Guidance Function: Morse v. Frederick, 2007 Sup. Ct. Rev. 205, 208-09 (2007) (“In the thirty-eight years since Tinker v. Des Moines Independent Community School District, there have been only three Supreme Court cases dealing directly with the issue of student speech….Yet during this same period there has been immensely more litigation in the lower courts on this subject than on most of the seemingly more familiar items in the free speech canon….One might suppose that the frequency with which issues involving speech in the schools arise in the lower courts and in the daily practices of school teachers and administrators would suggest to the Court that this is an area in which there is a particular need to give assistance to the courts below, as well as to provide guidance for school administrators, teachers, and students”).

45 See e.g., Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011). The dichotomy of “on campus” and “off campus” speech is not the focus of this article. However, the distinction becomes irrelevant when the material and substantial disruption is further defined, and if courts were to stop employing a Fraser analysis of “lewd,” “vulgar” and “plainly offensive.”

46 Fraser, 478 U.S. at 688 (Brennan, J., dissenting).

47 Analysis of Tinker’s second prong, that student expression which invades the rights of other students is not “immunized by the constitutional guarantee of freedom of speech,” Tinker, 393 U.S. at 513, is beyond the scope of this article. The invasion of the rights of others prong emanates from the principle that an individual may exercise his freedom up until the point of “collision with rights asserted by any other individual,” which the State must often determine. W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 630 (1943).
school activities.” Generally, these cases “effectively deconstitutionalize the First Amendment in the context of schools by declaring there will be great judicial deference to school administrator’s decisions.”

A. “REASONABLY PORTEND”

The Tinker Court arrived at the “reasonable likelihood” standard by incorporating the “actual disruption” test from two Fifth Circuit decisions into its opinion. Without explanation, the Court broadened the test announced in Burnside and Blackwell from actual disruption to speech that was reasonably anticipated to cause a disruption. The Court itself used several phrases interchangeably to articulate the “risk of disruption” standard: a restriction on speech is unconstitutional without evidence that “it is necessary to avoid material and substantial interference;” without “showing that the students’ activities would materially and substantially disrupt the work and discipline of the school;” without a demonstration of “any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities;” or without evidence that “the school authorities had reason to anticipate that the [expression] would substantially interfere with…. ” Since Tinker, courts have addressed the “reasonably foreseeable” language in several circumstances: speech advocating violence, critical speech (including internet parodies) of teachers and administrators, and “hate speech” or speech that violates anti-harassment policies.

The issue of whether students could be punished for expression advocating violence or other illegal behavior came about in 1987, before the advent of the internet and before the school-shooting episodes beginning with Columbine in 1999. In Bystrom, the district court addressed the issue of speech advocating violence, after first holding that a genuine issue of material fact existed as to whether a substantial disruption of school activities resulted from some students’ distribution of a satirical paper. An article entitled “Trash & Slash ’86,” did not rise to the level of inciting imminent lawless action, when other students read, passed around,
and reacted to the paper, and when teachers had to interrupt their classes to address the disturbances.\textsuperscript{57}

Following the beginning of school shooting episodes, courts became more restrictive of speech encouraging violence. An eighth-grader’s expression met the \textit{Tinker} test when the student shared an AOL Instant Messaging icon depicting a pistol firing a bullet at a person’s head, splattered blood, and the words “Kill Mr. VanderMolen,” referencing the student’s English teacher.\textsuperscript{58} Although a psychologist and the police believed that the student meant no actual harm and posed no real threat to the teacher,\textsuperscript{59} the speech disrupted school operations “by requiring special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time.”\textsuperscript{60} Nor did \textit{Tinker} protect a student who sent instant messages to another student about obtaining a gun and shooting classmates, in response to being rejected by a potential romantic interest.\textsuperscript{61} The principal received phone calls from concerned parents, increased security at the school, and limited access to the school.\textsuperscript{62} Despite the student’s claims that his messages about shooting students were intended as a joke, the court held that the comments were reasonably likely to come “to the attention of school authorities and create a risk of substantial disruption” in school.\textsuperscript{63}

Similarly, a sixth grader was appropriately disciplined when he circulated a fictional story about a student engaging in several acts of violence, including: (1) stabbing a boy in the head; (2) going on a killing spree and stabbing other “bad kids;” and (3) chopping off a female classmate’s head while she was having sex with another student.\textsuperscript{64} Because the story \textit{might} have caused disruption, it could be censored: “[t]he story, with its graphic depictions of the murder of specifically named students and

\begin{itemize}
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} Wisniewski ex rel. Wisniewski v. Bd. of Ed., 494 F.3d 34 (2d Cir. 2007).
  \item \textsuperscript{59} \textit{Id.} at 36-37.
  \item \textsuperscript{60} \textit{Id.} at 37. Although the distinction between “on campus” speech, usually analyzed under \textit{Fraser}, and “off-campus speech,” analyzed under \textit{Tinker}, is not the focus of this paper, the \textit{Wisnewski} court’s analysis of when internet speech made off-campus can be subject to censorship under \textit{Tinker} is useful. Wisniewski’s transmission of the IM icon away from school property did not preclude school discipline because it was reasonably foreseeable that the IM icon would come to the attention of the school and VanderMolen, and would “foreseeably create a risk of substantial disruption within the school environment.” \textit{Id.} at 40. Aaron’s transmission of the Icon urging the killing of his teacher “cross[ed] the boundary of protected speech and constitut[ed] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities.” \textit{Id.} at 38.
  \item \textsuperscript{61} D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754 (8th Cir. 2011).
  \item \textsuperscript{62} \textit{Id.} at 759.
  \item \textsuperscript{63} \textit{Id.} at 766.
\end{itemize}
sex between named students, may materially interfere with the work of the school by disturbing the students and teachers.\footnote{Id. at 125-26. The story also constituted a true threat because it described a student killing other “real-life” students. Id. at 126. Although no students testified at the hearing to being threatened or harassed by D.F., the hearing officer concluded that the story was designed to cause fear of bodily harm, and that D.F. had “threatened use and/or contemplated use of a weapon in violation of the Code of Conduct.” Id. at 124.} In an Oregon Court of Appeals case, a student circulated a petition declaring that a particular teacher was “the devil,” and provided that students who did not sign the petition would be “subjected to be beaten till you turn blue and black.”\footnote{J.Amishadnejad v. Cent. Curry Sch. Dist., 108 P.3d 671, 680 (Or. Ct. App. 2005).} While the court held that a question of fact existed as to whether the student’s speech was disruptive or capable of causing disruption,\footnote{Id. at 678-79.} the dissent would have upheld summary judgment on the First Amendment claim because the expression could have disrupted the educational mission of the school.\footnote{Id. at 679 (Edmonds, J., concurring in part and dissenting in part).} The school officials had reason to believe, based on the expression “aimed at encouraging other students to express hatred for an authority figure in the school and to declare her to be the ‘devil,’” and informing students that they could be “beaten till you turn black and blue” would cause a potential disruptive effect.\footnote{Id. at 680-81.}

Speech critical of schoolteachers and administrators may be reasonably likely to cause a material and substantial disruption if teachers and administrators are diverted from their primary duties because of the speech.\footnote{Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).} A student was properly disciplined when after posting a message on her blog about the cancelation of an annual battle-of-the-bands concert, school administrators received phone calls and emails from members of the school community, which diverted their attention away from their normal duties in the school.\footnote{Id.} The student called administrators “douchebags” and used the phrase “piss [...] off.”\footnote{Id.} As a result of the email, the superintendent and the school principal received many telephone calls and emails, and students were called out of class as administrators dealt with the dispute.\footnote{Id.} Disruption was reasonably likely because the post posed a “substantial risk” that administrators and teachers “would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over Jamfest’s purported cancellation.”\footnote{Id. at 51-52.}

In \textit{J.S. v. Bethlehem Area School District}, the Pennsylvania
Supreme Court decided that a student’s creation of an Internet website containing “derogatory, profane, offensive and threatening statements directed toward one of the student’s teachers and his principal” that caused “actual harm to the health, safety and welfare of the school community” was protected by neither Fraser nor Tinker. Eighth-grader J.S. created a website called “Teacher Sux.” The school principal believed the website to contain serious threats, and contacted local police and the FBI, both of which declined to file charges against J.S.

[The teacher who was the subject of the website] testified that she was frightened, fearing someone would try to kill her. [She] suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well-being as a result of viewing the web site. She suffered from short-term memory loss and an inability to go out of the house and mingle with crowds. [She] suffered headaches and was required to take anti-anxiety/anti-depressant medication. Furthermore, Mrs. Fulmer was unable to return to school to finish the school year.

J.S. was ultimately expelled from school. Once the court decided that the website was “on-campus” speech, it analyzed protection of the website under both Tinker and Fraser. Under Tinker, the website caused an actual

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76 Id. at 850.
77 Id. at 852.
78 Id. at 851. The site consisted of a several web pages, including one page called “Welcome to Kartsotis Sux,” referencing the school principal, and several webpages about Kathleen Fulmer, J.S.’s algebra teacher, entitled, “Why Fulmer Should be Fired,” Mrs. Fulmer Is a B___,” and “Why Should She Die?” Id. J.S. told other students about the website and showed it to another student at school; other students viewed the website; and a teacher learned of the site and reported it to Principal Kartsotis.
79 Id. at 852.
80 Id.
81 Id. at 853.
82 The issue of whether internet speech occurs on or off campus is the subject of many articles. This paper addresses the issue only to the extent that some internet speech created off-campus is considered to have a sufficient nexus to the school, and therefore falls under the Tinker analysis. However, it is interesting to note that the Pennsylvania Supreme Court established a new rule regarding the “on-campus” nature of internet speech: “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.” Id. at 865. Although J.S.’s website was created off school grounds, it became “on-campus” speech because it was accessed by J.S. at school and shown to a fellow student at school; accessed by other students, faculty members, and members of the administration; and “aimed not at a random audience, but at the specific audience of students and others connected with this particular School District.” Id.
83 Id. at 867-68.
and substantial disruption of the school environment. “[T]he entire school community” was disrupted, with the most significant disruption being the “emotional and physical injuries to Mrs. Fulmer,” who was unable to complete the year. To handle Fulmer’s absence, the district hired three different substitute teachers, a process that “unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment.” Students expressed anxiety about their safety, the website was a “hot” topic of conversation around the school, and low morale permeated the school environment. Parents expressed concern for their children’s safety and about the use of substitute teachers. In a similar instance, derogatory and sexually suggestive behavior aimed at a teacher in the classroom materially and substantially disrupted the work of the school.

Non-violent Internet parodies of administrators and teachers may be censored, depending on the facts. Without a uniform standard for what language causes a material disruption or permits school administrators to reasonably portend disruption, similar fact patterns result in differing analyses. The twin Third Circuit cases of Layshock v. Hermitage School District and J.S. v. Blue Mountain School District involved internet

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84 Id. at 869. Before addressing the issue under Tinker, the court decided that the use of “lewd, vulgar and plainly offensive language, including the personal attacks on Mrs. Fulmer and Principal Kartsotis,” fit within the Fraser requirements. Id. at 869. The court did not reach the issue of whether a foreseeable risk of substantial disruption occurred.

85 Id.

86 Id. (“The atmosphere of the entire school community was described as that as if a student had died.”)

87 Id.

88 Requa v. Kent Sch. Dist., 415, 492 F. Supp. 2d 1272, 1280 (W.D. Wash. 2007). The plaintiff was involved in filming a student standing behind an unknowing teacher and making faces, rabbit ears, and pelvic thrusts towards the teacher. Id. The film included a section of the teacher’s buttocks as she bent over, and a rap song accompanying the video. Id. at 1274. The plaintiff posted a link on his MySpace page to the YouTube video. Id.

89 Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012). Senior Justin Layshock, while at his grandmother’s house and using her computer, created a parody of his school principal on “MySpace,” which included “bogus answers to survey questions.” Id. at 208. The School District argued that the speech should be treated as occurring on campus and analyzed under Fraser’s lewd, vulgar, and plainly offensive standard. Id. On appeal, the Third Circuit first held that the speech occurred off campus and therefore the question of whether it was lewd, vulgar, or plainly offensive was irrelevant. Id. at 219. Because the school district rested its arguments on Fraser and did not challenge the district court’s finding that the School District failed to establish a disruption of the school environment, Layshock could not be disciplined. Id. The website included:

- Birthday: too drunk to remember
- Are you a health freak: big steroid freak
- In the past month have you been on pills: big pills
- In the past month have you gone Skinny Dipping: big lake, not big dick
- In the past month have you Stolen Anything: big keg
- Ever been drunk: big number of times
parodies of school administrators that did not meet the substantial disruption standard. In Layshock, the school district relied only on Fraser in a situation when Tinker should have been applied because the speech occurred outside of school. The district therefore failed to establish a reasonable likelihood of a material and substantial disruption. In Blue Mountain, J.S. created a fake profile of her middle school principal, which contained his official photograph from the School District’s website, and “contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family.” The School District claimed that several problems resulted which might reasonably have led officials to forecast substantial disruption, including: “general rumblings,” a math teacher stopping class to address students who were discussing the profile, a group of girls approaching another teacher to discuss the fake profile during independent study time, and Debra Frain—the guidance counselor referred to in the posting—being forced to reschedule several student meetings. The Third Circuit held that no reasonable forecast of substantial disruption was present.

On the issue of anti-harassment, hate speech, and dress code policy, courts will examine whether the language of the policy is overbroad in determining whether it addresses speech that is reasonably likely to result in disruption. For instance, in Saxe v. State College Area School District, the Third Circuit held that a public school district’s anti-harassment policy was overbroad when it prohibited language or conduct

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91 Layshock, 650 F.3d at 219.
92 650 F.3d at 920. The “General Interests” section of the profile listed “M-Hoe’s” interests as “detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, hitting on students and their parents.” Id. Further, in the “About Me” section, the profile stated:

HELLO CHILDREN[,] yes, it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL[,] I have come to myspace so i can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[,] Another reason I came to myspace is because—I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren’t in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN…Id. at 921.

93 Id. at 922-23.
“based on specified characteristics and which has the effect of substantially interfering with a student’s educational performance or which creates a hostile educational atmosphere.”94 The policy punished:

    Not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech “which has the purpose or effect of” interfering with educational performance or creating a hostile environment. This ignores Tinker’s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it.95

The Saxe court cited West v. Derby Unified School District for the proposition that a “reasonable likelihood” requires “specificity and concreteness.”96 In West, the school district enacted a racial harassment policy that prohibited students possessing “any item that denotes … Confederate flags or articles,” after the district had experienced several racial confrontations related to the Confederate flag, including “a hostile confrontation between a group of white and black students at school and at least one fight at a high school football game.”97 These “substantial facts” reasonably supported a forecast of disruption, and “the fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one.”98

B. MATERIAL INTERFERENCE OR SUBSTANTIAL DISRUPTION

Justice Fortas’ law clerk, Martha Field, forecast the difficulties that later courts would have in defining a “substantial disruption.” In her notes to Justice Fortas, Ms. Field wrote:

    If there were a showing that the wearing of armbands would cause disorder because of the hostile reaction of other students, First Amendment problems would exist from suppressing the

94 Saxe, 240 F.3d at 204 (3d Cir. 2001) (internal quotations omitted).
95 Id. at 216-217.
97 West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 12331-32 (D. Kan. 1998). The West court referred to another Confederate flag case in South Carolina, where a student was suspended for wearing a jacket depicting the Confederate flag, which violated a dress code which prohibited attire that would “interfere with classroom instruction.” Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F.Supp. 488, 490 (D.S.C. 1997). Five prior incidents of racial tension had previously been directly caused by students wearing clothing depicting the confederate flag, and the school therefore satisfied the reasonably foreseeable test. Id. at 490.
98 West, 23 F. Supp. 2d at 1232-33.
petitioners’ exercise of speech because of adverse reaction on the part of others…. I do not think that the Court can lay down any definitive rule in this opinion: the “substantial interference” etc. standards that the Fifth and Eighth circuits were disagreeing about are meaningless, because their meaning changes with their application. It seems to me that the best that can be done is to show that the same basic tests apply for regulation of the First Am in the schools as anywhere else [where regulation must be justified by a substantial state interest], though different interests are of importance in the schools, so that the application of the broad standard may lead to different results.99

Prior to Tinker, several courts dealing with student violations of “Good Grooming” rules suppressed student speech under synonyms for “disruption”: interruption, disturbance, distraction, injury to the educational process,100 and disturbing influence.101 The Supreme Court, in Burnside and Blackwell, addressed the issue of disruption.102

[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the

99 Abe Fortas Papers, MS 858, Series Nol. I, Box 79, Folder 166, at Yale University Library Manuscripts and Archives.
100 Akin v. Bd. of Educ. of Riverside Unif. Sch. Dist., 262 Cal. App.2d 161, 168-69 (Ca. Ct. App. 1968) (holding that a student’s right to wear a beard was outweighed by the rights of the public to have its children educated in an environment “devoid of disruptive influences,” “with a minimum of interruption, and “free of disturbances and distractions”).
101 Davis v. Firment, 269 F.Supp. 524, 528 (E.D. La. 1967) (holding that a “Beatles”-style haircut was proscribable where rules concerning hair length were directly related to disciplinary considerations, and “gross deviation from the norm does cause a disruption of the learning atmosphere”); Ferrell v. Dallas Indep. Sch. Dist., 393 F.2d 697, 699 (5th Cir. 1968), aff’d by Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 704 (5th Cir. 1968). Cf. Berryman v. Hein, 329 F. Supp. 616, 619-20 (1971) (holding that students wearing their hair long in direct disregard of a rule was not “inherently distracting”).
102 In Burnside, students were suspended for wearing freedom buttons on school property. Burnside, 363 F.2d at 745. The buttons caused no interference with education, no commotion, and no indication that they “tended to distract the minds of the students away from their teachers.” Id. at 748. The Fifth Circuit noted that some speech could be prohibited inside the school if it would “inherently distract students and break down the regimentation of the classroom.” Id. The “mild curiosity” exhibited by other school children did not prevent the school from carrying on its normal activities. In Blackwell, however, students at a different high school were prohibited from wearing freedom buttons after some students distributed buttons to other students in the school, and even “accosted other students by pinning the buttons on them even though they did not ask for one.” 363 F. 2d at 751. The student expression “created a state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline,” which gave school administrators the authority to punish and prohibit the expression. Id.
constitutional guarantee of freedom of speech.\textsuperscript{103}

Since then, courts have taken viewpoint-based, inconsistent approaches to the definitions of “disruption” or “interference.”\textsuperscript{104} While administrators may meet the \textit{Tinker} burden by showing that disruptions occurred in the past, “administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption.”\textsuperscript{105}

However, in \textit{Saxe}, the definition of harassment did not rise to the level of substantial disruption where the policy prohibited speech that created an “intimidating, hostile or offensive environment.”\textsuperscript{106} The policy did not require any showing of pervasiveness or severity, and therefore it could be applied to restrict any speech about “some enumerated personal characteristics the content of which offends someone.”\textsuperscript{107} Thus, some showing of “severity” or “pervasiveness” must be required to constitute a “material interference” or “substantial disruption.”

More recently, the Fifth Circuit discussed whether there must be a connection between the speech and past disruptions.\textsuperscript{108} \textit{McAllum} dealt only with the issue of Confederate flag display, recounting decisions over the course of nearly 40 years, in which the Confederate flag caused either racial tension or actual disruptions. While administrators may meet the \textit{Tinker} burden by showing that disruptions occurred in the past, “administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption.”\textsuperscript{109}

The Seventh Circuit has taken a more expansive approach.\textsuperscript{110} In \textit{Nuxoll}, a student wore a T-shirt that said “Be Happy, Not Gay” during the

\textsuperscript{103}Tinker v. des Moines Sch. Dist., 393 U.S. 503, 513 (1969).

\textsuperscript{104}Few courts have considered whether certain words are in and of themselves “inherently disruptive.” Chandler v. McMinnville Sch. Dist., 978 F. 3d 524, 530 (9th Cir. 1992). The majority in \textit{Chandler} held that buttons with the word “scab,” worn by students during a teacher’s strike, were not inherently disruptive.

\textsuperscript{105}Id. at 526. The concurring judge cautioned that no subcategory of “inherently disruptive” words exists within the \textit{Tinker} class of prohibited speech. \textit{Id.} at 533 (Goodwin, J., concurring).

\textsuperscript{106}A.M. ex rel. \textit{McAllum} v. Cash, 585 F.3d 214, 224 (5th Cir. 2009) (holding that racial tension and hostility at the school caused by the display of the Confederate flag, while not an actual disruption, gave administrators a reasonable expectation that the flag’s display was likely to result in disruption).

\textsuperscript{107}\textit{Saxe}, 240 F.3d at 217.

\textsuperscript{108}Id.

\textsuperscript{109}\textit{McAllum}, 585 F.3d at 224.

\textsuperscript{110}\textit{Id.} at 224 (holding that racial tension and hostility at the school caused by the display of the Confederate flag, while not an actual disruption, gave administrators a reasonable expectation that the flag’s display was likely to result in disruption).

\textsuperscript{111}Nuxoll v. Indian Prairie Sch. Dist. 204, 523 F.3d 668, 674 (7th Cir. 2008).
school’s “Day of Silence” to advocate tolerance for homosexuals.\textsuperscript{111} Based on a school rule forbidding “derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability,” the T-shirt was forbidden.\textsuperscript{112} The court gave some substance to the material and substantial disruption standard, gleaning from \textit{Fraser} and \textit{Morse} that if “a particular type of student speech will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.”\textsuperscript{113} Although the phrase “Be Happy, Not Gay” was “tepidly negative,” but not derogatory,\textsuperscript{114} speculation that the T-shirt would lead to incidents of harassment of homosexual students was “too thin a reed on which to hang a prohibition of the exercise of a student’s free speech.”\textsuperscript{115}

Judge Rovner concurred, noting that the phrase “Be Happy, Not Gay” was disparaging both because it criticizes homosexuals and because the word “gay” is a generic term of disparagement.\textsuperscript{116} However, “disparaging” was insufficient to meet the standard of materially and substantially interfering, because “there is a significant difference between expressing one’s religiously-based disapproval of homosexuality and targeting LGBT students for harassment.”\textsuperscript{117} Professor Emily Waldman, in discussing applying Title IX analysis to speech that is potentially harmful to other students, defines material disruption in line with the \textit{Nuxoll} court as “tangibly interfering with [the] ability to learn and succeed at school.”\textsuperscript{118} That “tangible interference” would be measured by “school attendance, grades, test scores, or similar indicia.”\textsuperscript{119} Ultimately, Waldman advocates that school administrators may prohibit certain speech if it is not personally

\textsuperscript{111} Id. at 670.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 674.
\textsuperscript{114} Id. at 676.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 678-79 (Rovner, J., concurring). Judge Rovner noted that the word “gay” is used as a general insult in teenage jargon, such that the statement “that sweater is so gay” is a way of insulting the sweater. \textit{Id.} at 679.
\textsuperscript{117} Id. at 679. Judge Rovner referenced \textit{Nabozny v. Podlesny}, 92 F.3d 446, 451 (7th Cir. 1996), where students “called a gay classmate a ‘faggot,’ struck him, spit on him, threw him into a urinal, beat him to such a degree that he suffered internal bleeding, and subjected him to a mock rape in a classroom while a few dozen people looked on and laughed,” and the student subsequently attempted suicide. \textit{Id.}
\textsuperscript{118} Emily Gold Waldman, \textit{A Post-Morse Framework for Students’ Potentially Hurtful Speech (Religious and Otherwise)}, 37 J.L. & EDUC. 463, 469 (2008). According to Waldman, the most stringent definition of “substantial disruption” would borrow from Title IX jurisprudence, and would state “that schools can restrict non-personally-directed student speech only when that speech is ‘so severe, pervasive, and objectively offensive that it can be said to deprive [other students] of access to the educational opportunities or benefits provided by the school.’” \textit{Id.} at 499 (quoting \textit{Davis v. Monroe Cnty. Bd. of Educ.}, 526 U.S. 629, 650 (1999)).
\textsuperscript{119} Waldman, \textit{supra} note 118, at 501.
directed or if there is “a real likelihood” that the speech would “sufficiently interfere” with even one other student’s educational performance. 120

R. George Wright opined that the substantial disruption analysis in the context of “doubtful threats,” where the threat is unlikely to be carried out and lacks imminence, addresses the wrong question. 121 According to Wright, where courts have affirmed administrative decisions to suspend students who make “doubtful threats,” they have implicitly adopted a substantial distraction rationale, which investigates not whether the speech makes reasonably foreseeable a material and substantial disruption of the work and order of the school, but whether suspension of that student will reduce distraction. 122 He states “a certain degree of distraction may justify infringement of student speech even if it does not arise to physical disruption, disorder, indiscipline, or disturbance.” 123 Courts should focus on distraction, because it “gets closer to explaining the real nature of the educational harms that doubtful threats pose in modern American public schools.” 124

C. WORK AND DISCIPLINE OF THE SCHOOL

Although the language of Fraser supports the school’s duty to teach patriotism and political responsibility, the standard is generally interpreted as having nothing to do with the school’s duty to teach political responsibility, but as prohibiting speech that is sexually explicit, profane, or contains sexual innuendo. 125 While “[t]he First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us,” 126 Fraser permitted school
administrators to sacrifice students’ freedom to speak in favor of teaching good manners. The Fraser opinion provided that those “fundamental values of ‘habits and manners of civility’ essential to a democratic society” include tolerance of different and unpopular political and religious views, and consideration of the personal sensibilities of others. While the Court seemingly heralded “the undoubted freedom to advocate unpopular and controversial views in schools and classrooms,” the opinion changed from proposing that speakers in the school setting should consider the personal sensibilities of others to broadly holding that public schools could prohibit the use of non-profane speech that included sexual innuendo, because those “fundamental values” disfavor the use of “terms of debate highly offensive or highly threatening to others.”

1. Pre-Tinker ideas about the mission of the school: from mandating uniformity to encouraging individuality

Prior to the 1960s, uniformity was valued above individual thought. The idea of schools acting in loco parentis gave school administrators the authority to maintain safety through discipline and uniformity. “[T]hose who saw the establishment of a uniform national character as a precondition to the development of a stable citizenry gave to the schools the additional tasks of removing ethnic differences, fostering social equality, and eliminating highly individualistic conduct.” For instance, long-haired students were denied admission for the school year, and the court upheld the decision by heckler’s veto, noting several past problems that resulted from male students with “Beatles’” haircuts:

On one occasion a group of boys in this school had decided that a classmate’s hair was too long and that they were going to take the matter into their own hands and trim it themselves…. [B]oys with long hair were subjected to substantial harassment. Obscene language had been used by some students in reference to others

professional integrity, personal mental resolve, and individual character are going to dissolve, willy-nilly, in the face of the digital posturing of this splenetic, bad-mannered little boy.” Id. Second, giving a teacher the finger was not the equivalent of “fighting words,” because it was not likely to provoke a violent response. Id. at 1442, n. 3.

127 Fraser, 478 U.S. at 681.
128 Id.
129 Id. at 683.
130 See Morse v. Frederick, 551 U.S. 393, 410-17 (2007) (Thomas, J., concurring).
131 Berkman, supra note 1, at 569 (noting that where education was seen as a means of “taming and civilizing the anarchic instincts of the populace,” schools included discipline and moral instruction in the curriculum). See also Morse, 551 U.S. at 410-17 (Thomas, J., concurring).
132 Berkman, supra note 1, at 569.
with long hair and girls had come into his office complaining about the language being used. The long hair boys had also been challenged to a fight by other boys who did not like long hair. Also, long hair boys had been told by others that the girl’s restroom was right down the hall.133

Another common goal of the school was instilling patriotism and civil duty in young people.134 Fraser’s often-quoted language concerning the role of the American public school system to “inculcate the habits and manners of civility as values in themselves” was originally published by two historians in the 1968 edition of The Beards’ New Basic History of the United States.135 Two pages in the New Basic History discussed the “educational philosophy befitting the spirit of the democratic age,” as formulated by public school advocates. Free schools were necessary to “advance civilization in all its phases” because:

[t]he vote had been given to nearly all white men, … factories using technology were demanding greater knowledge and skill on the part of workers in industry[; p]overty was a blight on American civilization[; p]eople were commonly lacking in knowledge of the simplest rules for health and healthful living[; and p]litaracy barred the way to that knowledge as well as to the treasures of the world’s best thought.136

As Justice Thomas stated in his concurrence in Morse, “early public schools were not places for freewheeling debates or exploration of competing ideas.”137 The New Basic History referenced Horace Mann, “indefatigable leader in the public-school movement,” as believing that although students should be taught respect for property, law, and order, this respect was not “settled for all time.”138

In 1968, the Scoville court articulated the state’s interest in producing “well-trained intellects with constructive critical stances….139 Moreover, the court recognized that student criticism of school authorities was “a worthwhile influence in school administration.”140 Tinker recognized the principle that First Amendment rights in the classroom are “actually essential to an effective educational process in a democracy rather

133 Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968).
134 Berkman, supra note 1, at 574–75.
135 Charles A. Beard & Mary R. Beard, New Basic History of the United States 228 (1968).
136 Id.
138 Id.
139 Scoville v. Bd. of Educ. of Joliet Twp. High Sch. Dist. 425 F.2d 10, 14 (7th Cir. 1970)).
140 Id.
than a source of disruption of that process.”\textsuperscript{141} The \textit{Tinker} majority did not intend to extricate discipline as a goal of the public school system. Rather, \textit{Tinker} differentiated between two needs of public schools: freedom to disagree, and school discipline.\textsuperscript{142}

2. From \textit{Tinker} to \textit{Fraser}: Inculcating manners and habits of civility

The \textit{Fraser} opinion bolstered its definition of the work and discipline of the school as including the “inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system,” by referencing a 1979 case challenging a law which prevented non-citizens from being certified as school teachers.\textsuperscript{143} In analyzing whether teaching in public schools constituted a government function requiring citizenship, the Court discussed the importance of the public schools in preparing children to be participatory citizens, and in preserving “the values on which our society rests.”\textsuperscript{144} Quoting \textit{Brown v. Board of Education}, the \textit{Ambach} Court stated that education is the foundation of good citizenship, and serves as “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”\textsuperscript{145} In that context of defining the public school as the “‘assimilative force,’ by which diverse and conflicting elements in our society are brought together on a broad but common ground,”\textsuperscript{146} the Court then stated that social scientists had confirmed “[t]hese perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system…. ”\textsuperscript{147}

\textsuperscript{141} Berkman, supra note 1, at 581.
\textsuperscript{142} Id. at 583.
\textsuperscript{143} Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (challenging the constitutionality of New York’s public school teacher certification requirement that an applicant be a citizen of the United States).
\textsuperscript{144} Id. at 76.
\textsuperscript{145} Id. (quoting \textit{Brown v. Bd. of Educ.}, 347 U.S. 483, 493 (1954)).
\textsuperscript{146} Id. at 77.
\textsuperscript{147} Id. at 77-78. See \textit{e.g.}, ROBERT D. HESS & JUDITH V. TORMEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 114, 217-20 (2005) (observing that although the school system more than the family teachers attitudes, conceptions, and beliefs about the political system, schools tend to underemphasize the rights and obligations of citizenship, and “much of what is called citizenship training in the public schools does not teach the child about the city, state, or national government, but is an attempt to teach regard for the rules and standards of conduct of the school”); V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 323 (1961) (noting that education affects a student’s attitude “about his place in the social system and his outlook toward participation in politics”); RICHARD E. DAWSON & KENNETH PREWITT, POLITICAL SOCIALIZATION 167 (1969) (“The classroom in a number of different ways serves as a very important agent of political learning, one that is often employed consciously and deliberately by society’s leaders to ensure political support and knowledge”).
3. Off-track: Fraser’s focus on sexual innuendo

Following its discussion of the public school’s responsibility to promote civil debate, the Fraser majority announced school administrators’ rights to prohibit “lewd, indecent, or offensive speech and conduct,” without discussing whether that speech was reasonably likely to cause a material and substantial disruption to the work of the school.\footnote{Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).} Subsequently, lower courts had to analyze what speech was plainly offensive, lewd, or vulgar; rather than what speech affected the “work and discipline of the school.”

a. Pre-Guiles v. Marineau: “Plainly offensive” means something other than lewd and vulgar

Prior to the Second Circuit’s opinion in Guiles v. Marineau, courts distinguished somewhat between speech that was lewd or vulgar, and speech that was offensive. In 1991, a middle school student was properly disciplined for wearing a vulgar T-shirt to school, despite the anti-drug message that the shirt proclaimed, “Drugs Suck!”\footnote{Broussard v. Sch. Bd. of City of Norfolk, 801 F. Supp. 1526, 1527 (E.D. Va. 1992).} After testimony on the origin and meaning of the word “suck,” the court held that the middle school administrators could reasonably find that the word may be interpreted to have a sexual connotation:

This is not to say that the phrase “Drugs Suck!” is reasonably interpreted to mean that drugs were engaging in sexual activity or that the shirt advocates sexual activity of any form. Rather, the meaning of “disapproval” in the use of the phrase “X sucks” derives from a sexual connotation of oral-genital contact. Although the anti-drug message itself admittedly makes no sexual statement, the use of the word “suck,” and its likely derivation from a sexual meaning, is objectionable.\footnote{Id. at 1534.}

In 1997, a school district interpreted Marilyn Manson t-shirts as plainly offensive, not because the t-shirts contained profanity or sexual innuendo, but because the band “promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school.”\footnote{Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000).} The shirts were properly prohibited because they contained
symbols and words promoting values “patently contrary” to the educational
mission of the school.\textsuperscript{152}

b. \textnormal{Guiles} and after: “Plainly offensive” means sexually-charged
speech

The Second Circuit, in the process of determining the meaning of
“plainly offensive,” provided some guidance to the \textit{Fraser} standard as a
whole.\textsuperscript{153} A seventh grader wore a t-shirt to school that was critical of
George W. Bush.\textsuperscript{154} The Second Circuit held that the district court had
incorrectly determined that the speech was properly censored under \textit{Fraser}
because “the images of drugs and alcohol are offensive or inappropriate.”\textsuperscript{155} Although the court applied \textit{Tinker}, it alluded to the \textit{Fraser}
standard as prohibiting words connoting sexual innuendo or profanity, rather than
prohibiting both sexual words and those meeting the dictionary definition of
“offensive,” as causing “displeasure or resentment or is repugnant to
accepted decency.”\textsuperscript{156} Plainly offensive speech was related to obscenity,
because all the cases cited in \textit{Fraser} concerned vulgarity, obscenity, and
profanity, and the \textit{Fraser} Court was interested in protecting minors from
exposure to vulgar and offensive language.\textsuperscript{157} Otherwise, the school
administrators in \textit{Tinker} could have properly censored the armbands
because they were “offensive and repugnant to their sense of patriotism and
decency.”\textsuperscript{158} Because they were not sexually charged, the images on the
George W. Bush T-shirt were “not offensive, let alone plainly so, under
\textit{Fraser}.”\textsuperscript{159}

\textsuperscript{152}\textit{Id.} at 470. The dissent took issue with the offensiveness analysis, noting that the \textit{Fraser} Court intended the term “offensive” to be interpreted in line with “lewd” and “vulgar.” \textit{Id.} at 473 (Gilman, J., dissenting). In the context of school speech cases, “vulgar” and “offensive” words are “themselves coarse and crude,” not words that convey an unpopular opinion. \textit{Id.} Yet, Boroff’s t-shirt failed the \textit{Fraser} test because it expressed an idea that many people found repulsive, not because it was lewd and vulgar. \textit{Id.} at 474.

\textsuperscript{153}\textit{Guiles v. Marineau,} 461 F.3d 320 (2d Cir. 2006).

\textsuperscript{154}\textit{Id.} at 322. The t-shirt read “George W. Bush,… Chicken-Hawk-In-Chief,” and below those words was a picture of the President’s face superimposed on the body of a chicken and surrounded by oil rigs and dollar signs. Near the president were cocaine, a razor blade, a straw, and a martini glass. \textit{Id.} The District Court found that the images were “plainly offensive or inappropriate” under \textit{Fraser}, and that the school properly censored the images. \textit{Id.} at 323.

\textsuperscript{155}\textit{Id.} at 327 (emphasis in original).

\textsuperscript{156}\textit{Id.} at 327-28 (citing MERRIAM-WEBSTER’S THIRD NEW INT’L DICTIONARY 1156 (1st ed. 1981); BLACK’S LAW DICTIONARY 1110 (7th ed. 1999)).

\textsuperscript{157}\textit{Id.} at 328-29.

\textsuperscript{158}\textit{Id.} at 328.

\textsuperscript{159}\textit{Id.} at 330. The Supreme Court in \textit{Morse} reiterated that \textit{Fraser} did not include the broader definition of “offensive,” and declined to adopt a rule that the Bong HiTS for Jesus banner was proscribable because it was plainly offensive under \textit{Fraser}, noting that \textit{Fraser} “should not be read...
In post-*Guiles* cases decided under *Fraser*, speech that is not sexually charged will generally not be curtailed unless it interrupts the “maintenance of a civil and respectful atmosphere toward teachers and students alike.” Images of Hitler Youth on buttons were not lewd, vulgar, or plainly offensive because they did not contain sexual innuendo. Even bracelets with the word “boobies,” used in the context of a national breast cancer awareness campaign were not lewd or vulgar under *Fraser*.

4. More recent interpretations of the “work and discipline of the school”

Most recently, school speech will be censored if it could be interpreted as leading to school violence. Courts have addressed cases dealing with speech advocating violence by applying Morse’s holding that school administrators need not apply *Tinker* to speech advocating illegal drug use. In 2007, the Fifth Circuit applied Morse’s standard regarding speech advocating illegal drug use to speech referencing a Columbine-type shooting. A high school student kept a diary describing an allegedly fictional story about a Nazi group harming homosexual and minority students, setting another student’s house on fire and murdering his dog, and planning to commit a Columbine-style shooting at the school.

The Fifth Circuit reiterated Morse’s interpretation that “prevention of the ‘serious and palpable’ danger that drug abuse presents to the health and well-being of students” was a compelling interest, sufficient to bypass an evaluation of the speech’s potential for school disruption. While the majority opinion in *Morse* failed to define the harms that trigger an interest compelling enough to forego *Tinker*, Alito’s concurrence provided that the special characteristic of “the threat to the physical safety of the students”

to encompass any speech that could fit under some definition of “offensive.”” Morse v. Frederick, 551 U.S. 393, 409 (2007).


161 *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 644 (D.N.J. 2007). The buttons said “No School Uniforms” and portrayed a group of Hitler Youth dressed in the same uniforms and facing the same direction. *Id.* at 636. Because the defendants asserted only that the images on the buttons were offensive, they failed to show that the buttons caused a disruption or a “specific and significant fear of disruption.” *Id.* at 645 (quoting *Saxe v. State College Area Sch. Dist.*., 240 F. 3d 200, 211 (3d Cir. 2001)).

162 *H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 393-94, 405-08 (E.D. Pa. 2011) (holding that bracelets with the slogan “I (heart) Boobies (Keep A Breast)” were not vulgar or lewd because not all uses of the word “boobies” are vulgar; the word was used in the context of a national breast cancer awareness campaign and chosen to enhance the effectiveness of the breast cancer awareness campaign to middle-school aged girls; and the school did not have the authority to determine “what is appropriate and inappropriate for student dress”).

163 Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 771 (5th Cir. 2007).

164 *Id.* at 766.

165 *Id.* at 769 (quoting Morse v. Frederick, 551 U.S. 393, 408 (2007)).
warranted the restriction on students’ free speech rights.\textsuperscript{166} If school administrators were permitted to prohibit student speech advocating illegal drug use because “‘illegal drug use presents a grave and in many ways unique threat to the physical safety of students,’ … then it defies logical extrapolation to hold school administrators to a stricter standard with respect to speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a whole.” \textsuperscript{167}

The Eastern District of Pennsylvania also equated the impact of violence in schools with the issue of illegal drug use in schools, and permitted speech regarding violence to be restricted in the same manner as the drug-related speech in \textit{Morse}.\textsuperscript{168} A student wore a T-shirt that displayed images of an automatic handgun, the words “Volunteer Homeland Security” printed on the front of the T-shirt, and “Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit” on the back of the shirt.\textsuperscript{169} Under \textit{Morse}, the court noted, speech that promotes illegal behavior may be restricted.\textsuperscript{170} The T-shirt encouraged illegal conduct, because it advocated citizens taking the law into their own hands, thereby advocating “the use of force, violence, and violation of law in the form of illegal vigilante behavior and the hunting and killing of human beings.”\textsuperscript{171} Therefore, the school district did not have to demonstrate a material and substantial disruption of school discipline.\textsuperscript{172}

Ironically, recent Confederate flag cases have applied the \textit{Fraser} balancing test. But rather than encouraging the “undoubted freedom to advocate unpopular views,” these cases have been decided against the speaker, favoring the need to “take into account consideration of the sensibilities of others.”\textsuperscript{173} At the district court level, a policy prohibiting the wearing of clothing depicting the Confederate flag was supported by \textit{Fraser} as well as \textit{Tinker}.\textsuperscript{174} Where the district concluded that the display of the Confederate flag was associated with racial prejudice and was so likely to provoke “feelings of hatred and ill will in others” that it was inappropriate in school, the district’s “insistence upon more civil terms of

\textsuperscript{166} \textit{Id.} at 770.
\textsuperscript{167} \textit{Id.} at 771-72 (quoting \textit{Morse}, 551 U.S. at 425 (Alito, J., concurring)).
\textsuperscript{169} \textit{Id.} at 611.
\textsuperscript{170} \textit{Id.} at 623.
\textsuperscript{171} \textit{Id.} at 625.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
\textsuperscript{174} West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233 (D. Kan. 1998). The \textit{Fraser} analysis was not mentioned in the 10th Circuit opinion.
debate” was within its lawful authority.\footnote{Id. at 1234.}

Further, the Eleventh Circuit directly suggested that the principles of Fraser should be considered in conjunction with the Tinker standard.\footnote{Denno v. Sch. Bd. of Volusia Cnty., 218 F.3d 1267, 1274 (11th Cir. 2000). While the court included the Fraser principles within the Tinker standard, it never went on to apply Tinker to the facts.} In Denno, a student was suspended for displaying a Confederate flag during the school lunch break, while he was discussing “historical issues of Southern heritage” with other students.\footnote{Id. at 1270.} The court decided that the school board should have been held to the standard of a “reasonable school official in the same circumstances.”\footnote{Id. at 1272.} Therefore, the court evaluated the suspension in terms of whether the administrator’s actions “were … so obviously wrong, in light of the preexisting law, that only a plainly incompetent school official or one who was knowingly violating the law would have done such a thing,” ultimately determining that the prohibition on displaying the Confederate flag violated the First Amendment.\footnote{Id. Had the court gone on to evaluate the second question posed, of whether the speech did cause a risk of a substantial disruption or interference with school activities, it likely would have found that the display of a Confederate flag to a group of friends during a lunch break did not violate the Tinker standard.} “The fact that reasonable jurists have applied Fraser’s more flexible standard in cases similar to the instant case is a strong indication that a reasonable school official might see the Tinker-Fraser legal landscape as including the more flexible Fraser standard.”\footnote{Id. (emphasis added).} Interestingly, the dissent disagreed that Fraser involved a balancing of students’ right to speak with administrators’ right to discipline in order to promote the work and discipline of the school at all. Judge Forrester stated that Fraser did not require the court to weigh the student’s right to speak against the administrator’s right to enforce the boundaries of acceptable behavior, but stood for three principles: “a student may be suspended for materially and substantially interfering with the educational process; … a student may be suspended for insubordination with reference to an established school rule which is reasonable; and … a public school has the right to disassociate itself from certain speech.” The rest of the opinion, according to Judge Forrester, is dicta, because the statements regarding the mission of public education are “written so broadly as to be considered an aside lacking the authority of binding precedent;” and the student was punished because his speech was disruptive and interfered with the orderly environment of the school, not because it did not promote civility and moral values.\footnote{Id. at 1283 (Forrester, J., dissenting).}
III. UNIFORM STANDARDS FOR REASONABLE LIKELIHOOD OF MATERIAL AND SUBSTANTIAL DISRUPTION OF THE WORK AND DISCIPLINE OF THE SCHOOL

More than forty years and three Supreme Court cases later, courts continue to defer to school boards by making an end run around Tinker. Rather than universally apply Tinker, and analyze whether the speech at issue is actually reasonably likely to cause a material interference with the work and discipline of the school, courts follow the unwritten rule: the student will prevail under Tinker; the school board will prevail under Fraser, Hazelwood, and Morse. Because courts are likely to defer to the judgment of school administrators on student speech, courts are reluctant to apply Tinker at all. School administrators and reviewing courts may revive and strengthen Tinker by reading some guiding principles into the material and substantial disruption standard, and engaging in an analysis of the competing interests at stake in a particular case.

A. REASONABLE LIKELIHOOD OF A SUBSTANTIAL DISRUPTION: IMMINENT DANGER THAT A COMPELLING STATE INTEREST WILL BE VIOLATED

“The possibilities for emasculation of the Tinker holding lie first in the traditional willingness of courts to define broadly ‘interference with discipline’ in cases dealing with student criticism of school policy and personnel.”182 To breathe life back into Tinker, courts may both combine the “reasonable likelihood” standard with the “incitement to imminent lawless action” standard articulated in Brandenburg v. Ohio,183 and require school administrators to justify burdens imposed on student speech rights.184 By reading Brandenburg in conjunction with Tinker, school
administrators will be required to justify burdens on student speech, and provide clearer guidelines for when expression will rise to the level of creating a reasonable anticipation of a material and substantial disruption.

In the First Amendment realm outside of the schoolhouse gates, standards for political criticism are refined, tangible, and analogous to the school speech cases. In the early part of the 20th Century, it was only necessary to show that a critical speech created a “clear and present danger” of the substantive evil which the legislature had the right to prevent. 185 The issue of a “reasonable likelihood” of the harm became law in Dennis v. United States. 186 In 1969, Brandenburg’s “incitement” test replaced Schenck’s “clear and present danger” test. 187 Mere advocacy of “lawless action could no longer be punished; the speech had to cause incitement to imminent, or immediate lawless action. 188

Prior to Tinker, the Supreme Court in West Virginia v. Barnette, as well as several lower courts addressing student speech issues, incorporated some iteration of the imminent lawless action standard in the school speech setting. In addition to the famous statements in Barnette regarding the voluntariness of the flag salute, the ideological principles of free public education, and the Bill of Rights withdrawing “certain subjects form the vicissitudes of political controversy,” 189 the opinion provided that freedom of speech is susceptible to restriction only “to prevent grave and immediate danger to interests which the state may lawfully protect.” 190

In Scoville v. Board of Education, the Northern District of Illinois

perhaps justified the majority’s decision that the students wearing the armbands did not “disrupt” the school. “the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.” Id. “[P]ublic protest in the school classes against the Vietnam war distracted from that singleness of purpose which the state… desired to exist in its public educational institutions.” Id. Yet the Tinker majority sought to permit censorship of speech that was potentially disruptive, rather than merely distracting.

186 341 U.S. 494, 509-10 (1951) (“Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required”).
188 Schenck, 249 U.S. at 52 (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent”).
189 Brandenburg, 395 U.S. at 448.
191 Id.
applied the incitement standard in the public school setting. High school students had distributed copies of an underground school publication entitled “Grass High,” which urged students to destroy or refuse to accept a previously distributed Principal’s Report to parents. The publication contained an editorial, which, among other things,

... criticize[d] school attendance regulations as “utterly idiotic and asinine,” and concluded that “our whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting time.” Elsewhere, the editorial accused the senior dean of the school of having a “sick mind.”

Citing Barnette and the Schenck “clear and present danger” test, the district court held that the students’ speech was an “immediate advocacy of, and incitement to, disregard” of school rules. On appeal, the Seventh Circuit reversed, despite applying a substantial disruption standard which would seemingly have been more speech-restrictive than the “clear and present danger” test applied by the district court. Although the editorial imputing a “sick mind” to the dean reflected a “disrespectful and tasteless attitude toward authority,” it did not reasonably forecast a substantial disruption of school policies. Although the dean was “undoubtedly offended and displeased,” the expression did not meet the Tinker test.

Berkman cited two college-campus speech opinions discussing the application of the “clear and present danger” standard in the school speech context. In Norton, state university students distributed pamphlets calling administrators “despots” and “problem children,” and calling attention to civil rights disturbances going on around the country at universities such as Columbia, Harvard, and Ohio State. The pamphlets urged students to “stand up and fight,” and the Sixth Circuit, citing Tinker and the clear and present danger test, held that the administrators “had the right to nip such action in the bud and prevent it in its inception.” In his dissent, Judge

193 Id. at 989.
194 Id.
197 Id. at 12.
198 Id. at 14.
199 Id.
201 Norton, 419 F.2d at 198.
202 Norton, 419 F.2d at 199.
Celebrezze noted that although the language of the pamphlets distributed on the campus was “abrasive, abrupt, rude, possibly even false and inflammatory” no evidence showed that the documents would incite or cause a breach of the peace by provoking the students addressed to violence. He reiterated that merely advocating the use of force is insufficient to constitute a clear and present danger. Only where “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” can school authorities justify curtailment of speech.

By contrast, in Jones, evidence of actual disruption was present. One of the students said to the University president, “[m]an, we didn’t come here to listen to your lies and empty promises. We came here to eliminate you and tear this joint down,” when he was leading several other students in “completely disrupting a grievance meeting held at the university … in the aftermath of three days of rioting at or near the University campus.”

Incorporation of the “imminent disruption of compelling state interests” standard finds support in Tinker itself. Although the move from the “actual disruption” to a “reasonable likelihood of a substantial disruption” standard was announced in Tinker, it was never explained in the opinion itself. Its meaning may be derived from law clerk Martha Field’s notes to Justice Fortas. Field recommended that the Court “lay down some guidelines for how to arrive at a calculation which interests are substantial and what constitutes sufficient evidence of substantial interference with them.” She noted that courts have consistently emphasized that if speech is to be regulated, two requirements must be met. First, the danger that the state is trying to avert must be a “substantial danger.” Second, that danger must be likely to result absent the challenged regulation. Citing Barnette and explaining that the school board could not enjoy unlimited deference, Field noted that “[a]lthough school boards have a wide discretion as to how the schools should be run, they do not have discretion to violate the Bill of Rights.” In the facts of Tinker, the purpose of the armbands was not to create a disorder, and there

203 Id. at 207 (Celebrezze, J., dissenting) (“The record reveals no grounds from which any neutral body could reasonably determine that there existed at any time on the East Tennessee campus an actual or probable danger of eruption so as to breach the standard of Schenck and its progeny”).
204 Id. at 209.
205 Id. (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
207 Id.
208 Fortas papers, supra note 99.
209 Id.
210 Id.
211 Id.; Barnette, 319 U.S. 624, 637 (1943).
212 Fortas papers, supra note 99.
was no threat that disorder would occur. A rule that prohibited speech without any showing that disorder was substantially likely to occur would permit school officials to hypothesize “the requisite likelihood of disorder for anything that they don’t like, for whatever reason including reasons that violate the First Amendment, and administer a highly discriminatory system.” While the school board could not be deprived of all power to regulate speech,

[T]he same test of validity under the First Amendment applies in the school as anywhere else. In schools, however, unlike other places, the State does have a compelling interest in the orderly operation of the classroom. Schools can therefore regulate exercise of First Amendment rights to preserve order, in situations where other organizations could not.

Because there was no showing of any danger that the armbands would “interfere with the orderly conduct of school activities,” the regulation did not serve a compelling state interest.

True application of the Tinker standard should not only incorporate an analysis of imminent interference with a compelling state interest, but require a balancing of the interests in each case. In her notes, Field cautioned that regulations may be justified if schools can show that they fulfill a compelling state interest, but not if the “evil” that the school officials are trying to guard against in promulgating this regulation is the exercise of free speech itself. Yet, courts are too quick to defer to the authorities of the school board, because the constitutional rights of the dissenter may stir people to anger or create “inconvenience, annoyance, or unrest.”

“Actual government interests that motivate regulation of the speech in question and the evidence supporting the need for the restriction are to be judicially examined. This heavy burden of justification at least approximates the methodology mandated by the free speech principle.”

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213 Id.
214 Id.
215 Id.
216 Id.
217 Id. (comparing Learned Hand’s formula: “In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”).
219 Id. (citing Dennis v. United States, 341 U.S. 494, 509-10 (1951)).
Rather than formalistic judicial decision making, where courts defer to the school board and do not actually analyze the competing interests in each case, courts should employ more of an “ad hoc” balancing approach, whereby they actually identify the competing interests. “If formalism emphasizes predictability of outcome and objectivity, balancing stresses flexibility and fairness in dealing with the competing interests actually at stake in the dispute.” 221

B. WORK AND DISCIPLINE OF THE SCHOOL

Within this balancing test, a court evaluating a student’s speech and a school speech regulation must identify the interests of the school. The concept of the “work and discipline” of the school is not stagnant, and cannot be viewed as simply maintenance of order, or at the other end of the spectrum, acceptance of all expression. In drafting regulations and policies, school administrators themselves must balance the right of the student to speak with the rights of school administrators to maintain order.222 As Berkman noted, the majority in Tinker recognized that “the process of education can be more important than its content in achieving educational aims.”223

As early as 1925, the Supreme Court held that the state has the power to regulate schools, and to require that “certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”224 At different times in this country’s history, different purposes of the public school have been articulated. Under the umbrella of “education,” schools have been charged with not only instruction in the arts and sciences, but with instilling and maintaining obedience to authority, patriotism, civic duty, moral character, tolerance of different political and religious viewpoints, and consideration of the sensibilities of others. Justice Black’s dissent in Tinker revealed his view of the school as an instrument for teaching students about “discipline and disciplinary rules, and about the authority structure within that

221 Dienes & Connolly, supra note 220, at 390.
222 Fraser may be taken to permit additional limits on those few classes of speech considered outside of the protection of the First Amendment: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words –those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Obviously, the classes of speech outside the protection of the First Amendment entirely are outside the protection of the First Amendment within the schoolhouse gate. However, the analysis behind the Fraser opinion is more relevant than a mere application of the lewd, vulgar, or plainly offensive standard.
223 Berkman, supra note 1, at 581 (“The thesis of the Tinker opinion is that First Amendment rights in the classroom are actually essential to an effective educational process in a democracy rather than a source of disruption of that process”).
school.”

On the other hand, for Justice Fortas, the work of the school was defined as schoolwork in addition to order. School administrators may protect student speech while still accomplishing the schools’ central purpose of “preparing students to function as self-governing individuals and free citizens.” Although Fraser spawned a line of cases permitting schools to ignore the speech rights of students by focusing on whether the speech contained sexual innuendo, it was that decision that broadened the parameters of the role of the school with the majority opinion’s “inculcate manners and habits of civility” language.

School speech jurisprudence seeks to encourage students’ freedom to advocate unpopular and controversial views, and maintain the state’s interest in teaching students the boundaries of socially appropriate behavior. Students should be exposed to a variety of ideas:

The most viable approach to reconciling the problem posed by competing educational values is to assure that voices other than that of the school official will be heard…. What the State cannot do is censor, suppress, or exclude competing ideas, beliefs, and values, unless it can establish an overriding justification.

C. AMERICAN FLAGS AND BOOBIES BRACELETS

While the topic of school dress codes is not the main focus of this article, the issue of expression through dress provides a useful example of the “imminent disruption” test’s potential application. Students have been prohibited from wearing expressive clothing, under various student speech

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226 Tinker, 393 U.S. at 512. See Fortas papers, supra note 99, at 3 (“Finally at least in this case, I don’t think the state had any legitimate interest in prohibiting the arm bands. Of course it is true that school authorities must maintain decorum and discipline. But I think that the school authorities must bear a heavy burden before they outlaw a kind of expression which, in itself, is not at all disruptive”). See also Tinker, 393 U.S. at 512; Yudof, supra note 226 at 367 (“School authorities fail to satisfy the substantial disruption test when: (1) the student’s speech does not interfere with, or is unlikely to interfere with, the school’s direct teaching activities; the communication from the teacher to the students or from the students back to the teacher is in a structured setting; and (3) there is no violence or threat of violence”).
227 Dienes & Connolly, supra note 220 at 345.
228 Fraser, 478 U.S. at 686. See also Mark Yudof, Tinker Tailored: Good Faith, Civility, and Student Expression, 69 St. John’s L. Rev. 365, 371 (1995) (“In other words, the educational mission encompasses community and civility of discourse.”).
229 Yudof, supra note 227, at 371 (1995) (“In other words, the educational mission encompasses community and civility of discourse”).
230 Dienes & Connolly, supra note 220, at 384.
tests.\textsuperscript{231} The imminent disruption test would help provide some uniformity here. Last May, for example, the Ninth Circuit decided that a public school rightfully prohibits students from wearing t-shirts with American flags on them in order to prevent race-related violence.\textsuperscript{232} In \textit{Dariano}, after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, the school asked a group of white students to remove their t-shirts with images of the American flag.\textsuperscript{233} The school had a history of violence, some gang-related and some racial, and in the six years that the principal had served the school, he had observed at least thirty fights on campus.\textsuperscript{234}

Citing the direct evidence of “nascent and escalating violence at Live Oak,”\textsuperscript{235} the court noted that school officials do not need to wait until violence actually occurs to act. Unlike in \textit{Tinker} where there was no reference to an anticipated disruption, the school officials “explicitly referenced anticipated disruption, violence, and concerns about student safety in conversations with students at the time of the events, in conversations the same day with the students and their parents, and in a memorandum and press release circulated the next day.”\textsuperscript{236} In addressing the level of deference given to the school administration, the opinion stated that it is not the court’s role to second-guess the decision to have a Cinco de Mayo celebration with precautions in place:

We review with deference schools’ decisions in connection with the safety of their students even when freedom of expression is involved, keeping in mind that deference does not mean

\begin{itemize}
  \item Images of a handgun on a T-shirt were prohibited under Morse’s restriction on the encouragement of illegal activity. \textit{Miller}, supra note 168, at 617. Students have been prohibited from wearing the confederate flag under \textit{Tinker}. Phillips, supra note 96. In 1997, Marilyn Manson t-shirts were plainly offensive under \textit{Fraser}, because the band promoted demoralizing values contrary to the educational mission of the school, Boroff, supra note 151, at 469.
  \item \textit{Dariano} v. Morgan Hill Unified Sch. Dist., 745 F. 3d 354, 360 (9th Cir. 2014).
  \item \textit{Dariano}, 745 F. 3d at 356.
  \item \textit{Dariano}, 745 F. 3d at 356-57. The prior year, an altercation between a group of white students and a group of Hispanic students had occurred, wherein among other things, the white students had begun clapping and chanting “USA” around an American flag hanging on a tree, Mexican students walked around with the Mexican flag, and one Mexican student shouted “[t]hose white boys” repeatedly. The following year, a group of white students wore American flag shirts to school, and one student asked one of the students wearing the flag “[w]hy are you wearing that? Do you not like Mexicans?” A white student approached the assistant principal and said that there might be “some issues.” The assistant principal directed the students to turn their shirts inside out or take them off, and they refused, although they knew that wearing the shirts put them at risk of violence. The students received threats by text message and by phone call, and overheard a group of classmates saying that some gang members would come “take care of” the white students. Because of these threats, the three students with the American flag shirts did not go to school for two days.
  \item \textit{Dariano}, 745 F. 3d at 358.
  \item \textit{Dariano}, 745 F. 3d at 359.
\end{itemize}
abdication—the question is not whether the threat of violence was real, only whether it was reasonable for the school to proceed as though it were.” 237

If an imminent disruption standard were employed, the result would likely have been the same, with a slightly different analysis. First, danger that white students’ wearing of the American flag would cause imminent disruption of a legitimate state interest, in this case student safety, was evidenced by past violence and current threats made via text message, telephone, and in person. Educators and parents have a compelling interest in keeping students safe from violence, and certain restrictions on student speech would likely be upheld as necessary to protect that interest in these narrow circumstances. Moreover, the students wearing the flags were not punished. They were required to turn their shirts inside out, or take them off, but did not receive further discipline. Given the principal’s experience with gang members and student fighting, some deference would be warranted.

The “I Heart Boobies” cases were recently resolved when the Supreme Court denied certiorari in B.H. v. Easton Area Sch. District. 238 In B.H, the Third Circuit reviewed the Fraser line of cases and made several conclusions: (1) “plainly lewd speech” may be categorically restricted because it cannot be interpreted plausibly as political or social commentary; (2) a school may categorically restrict ambiguous speech that a reasonable observer could interpret as lewd, as long as it could not also be interpreted plausibly as commenting on a social or political issue; (3) a school may not categorically restrict ambiguous speech that a reasonable observer could interpret as having a lewd meaning and could interpret plausibly as commenting on a social or political issue; and (4) Fraser does not apply to speech that could not be interpreted as lewd, vulgar, or profane. 239 Because the “I Heart Boobies” bracelets could plausibly be interpreted as political or social commentary, they cannot be categorically restricted. 240

Rather than engaging again in the 30-year old task of divining the meaning of Fraser’s “lewd, vulgar, and plainly offensive” test, the court might have come to the same conclusion by applying a less academic and more practical standard. Instead of characterizing the words themselves as vulgar, lewd, plainly offensive, interpreted plausibly as political or social commentary, not interpreted plausibly as social or political commentary, or

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237 Dariano, 745 F. 3d at 360 (quotations omitted).
238 B.H. v. Easton Area Sch. District, 725 F.3d 293.
239 B.H., 725 F.3d at 320-21.
240 B.H., 725 F.3d at 321.
some combination thereof, the Third Circuit might have found a more useful analysis in determining whether the “I Heart Boobies” bracelets incited danger to a compelling state interest. The two interests at stake in B.H. were the same interests in Fraser: teaching “the appropriate form of civil discourse” to students, while maintaining students’ rights to speak, particularly on issues of social importance. In 2014, teenagers’ display of the word “boobies” on bracelets could cause minimal damage to the school’s interest in teaching the “appropriate form of civil discourse.” In B.H., the only “bracelet-related incident” reported occurred weeks after the district-wide ban. During lunch, two girls were discussing their bracelets when a boy overheard them, interrupted, said something like “I want boobies,” and made an “inappropriate gesture with two red spherical candies.” One incident occurring weeks after the speech would not sufficiently incite immediate disruption of the school’s interest in maintaining decorum and civil discourse among students. Certainly, students wearing the bracelets would increase the opposing state interest in promoting breast cancer awareness among middle school students.

On the issue of deference to school administrators, the B.H. court did recognize that schools may not categorically prohibit any student speech that is inconsistent with the school’s “basic educational mission.” Rather, the court deferred only to the school’s “reasonable judgment.”

The Third Circuit concluded its discussion of Fraser by stating that “[o]ver time, the fault lines demarcating plainly lewd speech and political or social speech will settle and become more rule-like as precedent accumulates.” Hopefully, over time precedent will accumulate, which rather than pigeon-holing student speech into the current variations of the

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241 Fraser, 478 U.S. at 683.
242 B.H., 725 F.3d at 314.
243 B.H., 725 F.3d at 300.
244 B.H., 725 F.3d at 300.
245 B.H., 725 F.3d at 316. Regarding the school district’s argument that the school was the final arbiter of which speech could be censored if it did not comply with the school’s “basic educational mission,” the opinion noted:

Whatever the face value of those sentiments, such sweeping and total deference to school officials is incompatible with the Supreme Court’s teachings. In Tinker, Hazelwood, and Morse, the Supreme Court independently evaluated the meaning of the student’s speech and the reasonableness of the school’s interpretation and actions. There is no reason the school’s authority under Fraser should receive special treatment. More importantly, such an approach would swallow the other student-speech cases, including Tinker, effectively eliminating judicial review of student-speech restrictions. See Guiles, 461 F.3d at 327 (making this point). That is precisely why the Supreme Court in Morse explicitly rejected total deference to school officials.

246 B.H., 725 F.3d at 317.
247 B.H., 725 F.3d at 319.
Tinker “material disruption” test, the Fraser “lewd and vulgar” test, or some combination thereof, may provide more useful guidance for students and administrators alike, to meet the goals of student safety, education, diversity, and the freedom to advocate unpopular and controversial views in the classroom.

CONCLUSION

Freedom of speech is not a right that exists in principle rather than fact. “Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.”248 Speech restrictions after Tinker not only prohibit speech outside of areas designated as safe havens for crackpots, but prohibit types of speech within the safety zone of the school based on that speech’s content. To keep in line with the principles announced in both Tinker and Fraser, courts should require school boards to justify regulations of student speech, and weigh whether the speech at issue is in fact “reasonably likely to substantially disrupt” the work and discipline of the school.

248 Tinker, 393 U.S. at 513.
In 2006, Congress passed the Military Commissions Act, detailing thirty-two offenses of the law of war triable in military commissions. Five years later, in Hamdan v. United States (Hamdan II), the D.C. Circuit ruled that the charge “material support for terrorism (MST)” was not a violation of the law of war that could be brought against detainees at Guantanamo under customary international law. By November 2013, another detainee’s petition to dismiss the charge of conspiracy reached the D.C. Circuit, raising further questions about the integrity of the Military Commissions Act’s list of triable offenses. Both “material support for terrorism” and “conspiracy to commit terrorism’s” material elements are defined by the independent offense of terrorism. As such, these cases are mere precursors to a larger debate that is currently being litigated at the military commissions level in the cases of Khalid Sheikh Mohammad and Abd al-Rahim al-Nashiri: is the charge of ‘terrorism,’ as codified under 10 U.S.C. §950t (2011), itself a cognizable international law of war offense? This paper looks at the D.C. Circuit’s treatment of MST in Hamdan II and uses it as a lens through which to examine the charge of terrorism. It suggests that when terrorism is evaluated through this framework, the charge satisfies the court’s threshold for identifying law of war offenses triable by military commission. The core elements of the crime have emerged with enough international consensus to satisfy the standard necessary to allow Congress to codify the offense under the Offenses clause. If the Court upheld the charge of terrorism, this would have serious implications for Congress’s ability to define and punish future law of war offenses. It would also present novel questions for whether other nations would then use the charge of terrorism, as defined by Congress, in their respective military commissions or comparable tribunals.

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** Leslie Esbrook, JD Candidate, Yale Law School 2015. Many thanks go to Professors Linda Greenhouse, Eugene Fidell, and Harold Koh for their help and support on previous drafts, and to Nema Milaninia at the ICTY for his encouragement and tutelage on international criminal tribunals. All errors and omissions are of course my own.
The attack on the U.S.S. Cole in 2000 and the 9/11 bombings in 2001 brought the word “terrorism” and its various connotations to the forefront of the dialogue between the United States and the world. Defeating terrorism has been the impetus for U.S. boots on the ground and for NSA wiretapping programs. It has also been the impetus for the prosecution of high-level detainees at Guantanamo accused of orchestrating the 2000 and 2001 attacks. Khalid Sheikh Mohammed and his four accomplices (the “KSM 5”) and Abd al-Rahim al-Nashiri have been charged with the crime of terrorism, along with other war crimes. If convicted, they face death. Yet a battle that portends future litigation in the D.C. Circuit and possibly the Supreme Court has already begun deep within the military commissions. Is “terrorism” really a cognizable international law of war offense?

It is beyond the scope of this paper to ask the underlying theoretical question of whether terrorism is a violation of the law of nations. The topic is rich and has an extensive academic history. Instead, this paper looks at the D.C. Circuit’s treatment of material support for terrorism (MST) in Hamdan II and uses it as a lens to examine the charge of terrorism. It suggests that, when terrorism is evaluated through this framework, the charge satisfies the court’s threshold for identifying law of war offenses triable by military commission.

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2 See infra Part II.D International Treaties and Scholarship.
International tribunals, scholars, treaties, and practice have developed the crime of terrorism since the 1960s in myriad forms.\(^3\) The core elements of the crime have emerged with enough international consensus to satisfy the standard necessary to allow the United States Congress to codify the offense under the Offenses clause. If the Court upholds the charge of terrorism, its ruling would have great implications for Congress’s ability to define and punish future law of war offenses. It would also present novel questions for whether other nations would then use the charge of terrorism, as defined by Congress, in their respective military commissions or comparable tribunals. Moreover, upholding the charge would symbolically signal that the law of war is a changing body of law, subject to revision and reconstruction, as the way in which the world conducts warfare shifts dramatically.

**BACKGROUND: SETTING THE SCENE FOR THE CHARGE OF TERRORISM**

In May 2013, nearly eleven and a half years after Guantanamo Bay’s Camp X-Ray opened to detain enemy combatants in the ‘War on Terror,’\(^4\) President Obama gave a speech at the National Defense University (NDU) re-affirming his commitment to close the site.\(^5\) As an original campaign promise,\(^6\) shutting down facilities at Guantanamo would do much to restore faith in Obama’s leadership and promote goodwill among allies. However, as the NDU speech indicated, closing facilities is not the equivalent of closing the Guantanamo chapter in U.S. history. President Obama asked for Congress to look into sites within the territorial United States to hold ongoing military commissions and detain prisoners who fall into the “detainable but not triable” category.\(^7\) To end the ongoing

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\(^4\) Steve Vogel, *Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer to U.S. Base in Cuba*, N.Y. TIMES (Jan. 9, 2002).


\(^7\) Remarks at the National Defense University, supra note 5. For confirmation that the idea of moving commissions inside the territorial United States is gaining traction, see also Adam Goldman and Karen DeYoung, *Military Trial in U.S. Being Considered for Russian Detained in Afghanistan*, WASH. POST (Dec. 16, 2013) (discussing the possibility of convening a military commission inside the U.S. to try a Russian accused of working with al-Qaeda).
indefinite detention at Guantanamo, the administration must figure out what to do with its seventy-five or so detainees.

Approximately forty-five detainees fall into the “detainable but not triable” category, which presents an intractable problem for the administration. However, the other thirty are awaiting prosecution by military commission. Their swift prosecution would reduce the number of prisoners at Guantanamo and restore confidence in the commissions as a whole. The commissions have been heavily criticized for their delays, novel procedures, paucity of trials, and contestation of convictions since their commencement in 2003, leading the Obama administration to go so far as to shut them down for a two-year period.

Restarted in 2011, the highest profile cases awaiting trial are those of the KSM 5 and Abd Al-Rahim Al-Nashiri. They are accused of orchestrating and proximately causing both the 9/11 attacks and the attack on the U.S.S. Cole in 2000, respectively. The government commenced both trials in military commissions, attempted to move the KSM 5 trial to federal court and, facing significant political backlash from the alleged security risks of trying terrorists inside the United States, reinstated both trials by military commission in 2011. Obama’s May 2013 speech indicated that these trials, even if returned to domestic soil, will continue in the form of military commissions rather than in federal criminal trials. As

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8 For the most recently released list of the names and statutes of each detainee at Guantanamo, see U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, FOIA RESPONSE TO CHARLIE SAVAGE, GULANTANAMO REVIEW DISPOSITIONS (June 17, 2013). These numbers are roughly confirmed in the U.S. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (Jan. 22, 2010), http://www.justice.gov/opa/documents/ksm
such, the commission’s success or failure hangs in the balance with these two cases.13

Already, all six defendants have faced multiple revisions of their charge sheets as part of the battle in the U.S. Court of Military Commission Review (CMCR) and the D.C. Circuit over defining law of war offenses. In *Hamdan II*, the D.C. Circuit found that material support of terrorism (MST) did not qualify as a traditional law of war offense at the time of the commission of Hamdan’s crime,14 and there is good reason to believe that the D.C. Circuit en banc will similarly strike down conspiracy to commit terrorism in the case of *al-Bahlul v. United States*.15 The government has revoked the MST charge in the KSM trial and has agreed to drop conspiracy as a standalone offense recognizing, in essence, this crime’s lack of recognition as a violation of the law of war.16

The debate over what constitutes a traditional law of war offense in the *Hamdan II* and *al-Bahlul* cases is only a forerunner to the larger question arising from the KSM and al-Nashiri cases. These cases also charge defendants with the offense of terrorism, codified by the Military Commissions Act (MCA) under §950(t)(24).17 MST and conspiracy to

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13 This is all the more true given that KSM5 and al-Nashiri are the only defendants who actually face formal charges of those detainees scheduled for prosecution. *See id.; Dep’t of Defense, Office of Mil. Commissions, Military Commissions Cases, http://www.mc.mil/CASES/MilitaryCommissions.aspx* (last accessed Dec. 26, 2013).


Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one of more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such
commit terrorism are both lesser offenses that encompass the material elements of terrorism as referred to in the MCA.\textsuperscript{18} Indeed, Chief Prosecutor Mark Martins agreed to revoke conspiracy and MST to focus on convictions for more serious charges like terrorism. One other non-Guantanamo prisoner to date has been charged with committing the offense of terrorism, but he was released from custody by Iraqi authorities before any military commission proceedings commenced.\textsuperscript{19} The detainee, Ali Daqduq, was accused of killing four U.S. soldiers in Iraq who were\textit{hors de combat}.\textsuperscript{20} Had the case gone forward, the seriousness of the allegations no doubt would have made it one of the most sensationalized and influential trials of a detainee in the military commission system, reinforcing the gravity of present trials that charge the offense of terrorism.

The defense teams in the military commissions for al-Nashiri and KSM 5 have already filed pre-trial motions to dismiss for lack of jurisdiction, arguing that terrorism, along with conspiracy and several other charges, is not recognized as a violation under the law of war.\textsuperscript{21} They both moved to dismiss the charges as violations of the \textit{ex post facto} clause, as well, although it is clear from the Supreme Court’s interpretation of the MCA under the doctrine of constitutional avoidance that the Court other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct. \textit{Id.} at (24).

\textsuperscript{18} \textit{Id.} at (25) (Defining the offense material support for terrorism to apply to anyone who “provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24))…” and defining conspiracy to apply to anyone who “conspires to commit one or more substantive offenses triable by military commission under this chapter…”). \textit{See also Al-Bahlul}, 820 F. Supp. 2d at 1194.


\textsuperscript{20} U.S. Office of Mil. Commissions, MC Form 458, Charge Sheet (Jan. 3, 2012). [Daqduq].

\textsuperscript{21} Defense Motion to Dismiss for Lack of Jurisdiction, United States v. Khalid Shaikh Mohammed, AE107 (MAH, AAA) (Nov. 2, 2012) [hereinafter KSM Motion to Dismiss]; Defense Motion to Dismiss for Lack of Jurisdiction Over the Charge of Terrorism, United States v. Al-Nashiri, AE049 (Mar. 12, 2012) [hereinafter al-Nashiri Motion to Dismiss].
presumes that Congress did not intend to violate the *ex post facto* clause, and therefore will not strike down a charge on that ground.\(^{22}\)

A ruling in al-Nashiri denied both the motion to dismiss for lack of jurisdiction over the charge of terrorism and the motion to dismiss terrorism as a violation of the *ex post facto* clause. The commission cited the *Bahlul* CMCR decision’s affirmance that “the 2006 MCA definition [of terrorism] is...consistent with the most comprehensive definition of ‘terrorism’ by international treaty extant on September 11, 2001,” in denying the motion to dismiss for an *ex post facto* violation.\(^{23}\) The commission again cited *Bahlul* in denying the motion to dismiss for lack of jurisdiction, which looked to the *Hamdan II* CMCR’s discussion of the international sources of terrorism to conclude that “Congress acted within the scope of its constitutional authority in defining terrorism as an offense in the 2006 M.C.A...”\(^{24}\) The judge has not yet ruled on the motion to dismiss in the KSM case, most likely because the motion is not specific to terrorism but states other charges including the question of conspiracy currently at issue in the D.C. Circuit.\(^{25}\)

The CMCR opinion in *Hamdan* has been overruled and the *al-Bahlul* CMCR vacated, casting doubt on the force of the al-Nashiri rulings. Still, the government’s response to the motion to dismiss in the KSM 5 trial, filed after *Hamdan II* came down, was short and to the point. It displayed confidence that despite the rocky foundations of the al-Nashiri military commission ruling, the government would still win in future hearings on the viability of the terrorism charge.\(^{26}\) The response grounded its argument in the Court’s finding in *Hamdan II* that certain forms of terrorism constitute violations of the international law of war.\(^{27}\) In hinging

\(^{22}\) KSM Motion to Dismiss, citing *Hamdan v. Rumsfeld*, 548 U.S. 553, 603 (2006) (“the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledge to be an offense against the law of war”).


\(^{24}\) Ruling on Motion to Dismiss for Lack of Jurisdiction over the Charge of Terrorism, United States v. Al-Nashiri, AE049B (May 29, 2012), quoting United States v. al-Bahlul, 820 F.Supp.2d at 1201 (citing United States v. Hamdan, 801 F.Supp. 2d 1247, 1287-93 (C.M.R.C. 2011)).

\(^{25}\) See KSM Motion to Dismiss (disputing the following charges: conspiracy, 10 U.S.C. 950t(29), attacking civilians, 10 U.S.C. 950t(2), attacking civilian objects, 10 U.S.C. 950t(3), murder in violation of the law of war, 10 U.S.C. 950t(15), destruction of property in violation of the law of war, 10 U.S.C. 950t(16), hijacking an aircraft, 10 U.S.C. 950v(23), and terrorism, 10 U.S.C. 950t(24)).


\(^{27}\) *Id.* at 20.
its argument on dicta in *Hamdan II*, the prosecution affirmed the importance of *Hamdan II*’s framework for evaluating law of war offenses.

The conciseness of the government’s argument serves as a reminder that the factual predicate and discussion of sources of international law related to terrorism as discussed in the *Hamdan II* and *Bahlul* CMCRs remain useful to future courts’ examination of the charge.\(^\text{28}\)

The trajectory of the MST and conspiracy cases also show that debates over terrorism will not rest in the military commissions. In a body of law that remains extremely unsettled, the matter will only be fully settled by a ruling of the D.C. Circuit or the Supreme Court.

I. **THE HAMDAN II STANDARD PRELIMINARIES-DISTINGUISHING THE PLACE OF TERRORISM IN CIL**

Since the commissions began in 2003, the question of which crimes would be triable under their jurisdiction has been the subject of great debate.\(^\text{29}\) *Hamdan II*’s evaluation of customary international law sources for material support provides a framework that the court may use in its evaluation of terrorism. Certain elements of the *Hamdan II* ruling not specific to the international law investigation present threshold barriers that need to be addressed in future litigation to distinguish MST from terrorism. The following sections address these preliminaries.

A. **DISAMBIGUATING MATERIAL SUPPORT FOR TERRORISM FROM TERRORISM**

First, the D.C. Circuit distinguished terrorism from MST in a direct manner to dispel any notion that the court decided both issues in *Hamdan II*. Such a distinction was important not only legally, but also because it sharpened media and public relations campaigns that took great liberties with the word terrorism in describing charges and defendants at Guantanamo. The government itself participated in the conflation of material support with terrorism proper, releasing press releases stating that Hamdan had been convicted of terrorism at his military commission trial in


2008. Indeed, the Military Order of November 13, 2001, authorizing the detention and trial of non-citizens in the war against terrorism, blanketed the personal jurisdiction of detention and prosecution to anyone who had “engaged in, aided or abetted, or conspired to commit, acts of international terrorism…”

The court in Hamdan II acknowledged that, “international law establishes at least some forms of terrorism, including the intentional targeting of civilian populations, as war crimes.” The court also stated that, “there is a strong argument that aiding and abetting a recognized international law war crime such as terrorism is itself an international-law war crime,” a direct example of the overuse of the term terrorism. Read literally, this sentence suggests the court has agreed “terrorism” is a recognized international-law war crime. The petitioners in Hamdan II recognized this distinction and kept the two crimes separate so as not to conflate arguments, clearly stating, “terrorism is not material support for terrorism.” Therefore, arguments by both the government and petitioners in al-Bahlul and Hamdan II that interchange the offenses should not provide evidence in favor or against the terrorism charge debate, as the court in Hamdan II looked only to the place of MST in customary international law and explicitly did not reach the question of terrorism.

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32 Hamdan II, 696 F.3d at 1249-50.
33 Id.
34 Neither the KSM5 nor the al-Nashiri motions or judgments cite this line, suggesting it is extremely weak dicta. In al-Bahlul the Court pointedly states that “Congress acted within the scope of its constitutional authority in defining terrorism as an offense in the 2006 M.C.A…” but it then goes on to use this fact as support for MST as a form of co-perpetrator liability similar to that found in international criminal tribunals, misconstruing international criminal tribunals’ substantive offenses. See al-Bahlul, 820 F. Supp. 2d at 1201.
35 Brief for Petitioner Salim Ahmed Hamdan, Hamdan v. United States (Hamdan II), No. 11-12-57 (D.C. Cir. Nov. 15, 2011), 2011 WL 5569434 (C.A.D.C.) (Appellate Brief), at *32-33 (“Whether terrorism is a war crime simply has no bearing on the status of MST.”).
B. THE EVOLVING NATURE OF WAR AND WAR CRIMES

Second, the D.C. Circuit recognized that the law of war has changed and expanded with new types of warfare since the Geneva and Hague conventions. Before the MCA, the U.S. prosecuted war crimes under 10 U.S.C. §821 for violations of the “law of war.” Violations of the law of war are “based on norms firmly grounded in international law.” The court acknowledged that, at the core, customary international law has some well-defined prohibitions, referring to those settled in the Geneva and Hague conventions. For the “imprecise [contours]” of international law, however, the court recognized that there was “good reason for Congress and the Executive…to enact statutes outlawing specific conduct rather than prohibiting something as vague as ‘intentional law’…or the ‘law of war.’” The court looks favorably upon recent statutory consensus between the Executive and Congress to give international law definition, and the MCA is just such an attempt.

The MCA is the first time Congress has codified law of war violations not found in the Geneva Conventions. The Army Field Manual of 1956 is imprecise, stating, “every violation of the law of war is a war crime.” It adds that the law of war is contained in the Geneva Conventions. At the behest of the courts to clarify perceived international law violations, Congress’s enactment of the MCA responds to contemporary notions of the changing state of warfare. The legislative history of the MCA made identical overtures during debates on the Senate floor, with certain members describing the crimes of hijacking and terrorism as “modern day war crimes.” The court’s emphasis on the possibility to define crimes not directly clarified in the Geneva or Hague conventions lays the groundwork for the court to consider terrorism in a neutral light.

37 Hamdan II, 696 F.3d at 1248, also recognized as Art. 21 of the UCMJ. Note that this is specifically the international law of war, and arguments for the recognition of a U.S. common law of war will not be the basis of the argument for terrorism, as Hamdan II was very clear on the international nature of the law of war. Id. at 1248 n. 9.
38 Id. at 1250 n. 10, citing Sosa v. Alvarez-Machain, 542 U.S. 692, 724-38 (2004); Hamdan, 548 U.S. at 602-03 (plurality).
39 Id.
40 Id.
42 Uniform Code of Military Justice, 64 Stat. 109, 10 U.S.C. Ch. 47 §499.
Defining war crimes during wartime or prosecution of wartime enemies engenders great controversy.\textsuperscript{44} While there exists a distinct temporal gap between the enactment of the MCA during wartime and the enactment of the seminal conventions post-wartime, for legal purposes the distinction is irrelevant.\textsuperscript{45} The MCA’s recognition of the evolving state of law refutes claims made in the KSM 5 briefs that, because terrorism is not defined in the Geneva or Hague conventions, it cannot be considered a law of war violation.\textsuperscript{46} Similarly, in Hamdan II, the government offered a handful of cases from the Civil War as precedent for charging MST, but these sparse, easily distinguishable examples only hurt its case. In a future D.C. Circuit showdown, the government need not make any such showing.\textsuperscript{47} Terrorism’s lack of inclusion as a crime in the core conventions on the law of war, and its lack of direct precedent in U.S. military commissions from 70 to 150 years prior, does not refute its potential to constitute a violation of the law of war, particularly given the plethora of international debates post-World War II on the definition of the crime.\textsuperscript{48}

\section*{C. The Power of Congress to Define and Punish Terrorism}

Unlike for a statutory charge of MST, Congress has the power under the Offenses clause to define the charge of terrorism. The Offenses clause gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”\textsuperscript{49} The Court in \textit{Hamdan II} left open the question whether Congress holds the power to define international law violations

\footnotesize{\textsuperscript{44} For examples of popular discomfort in defining crimes during wartime, see Jonathan A. Bush, “The Supreme...Crime” and its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324 (2002); see also David Frakt, New Manual for Military Commissions Disregards Commander-in-Chief, Congressional Intent and the Laws of War, HUFFINGTON POST (Apr. 29, 2010), http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html.}

\footnotesize{\textsuperscript{45} If anything, the courts have recognized the need for a high level of deference to the will of the executive in wartime (here instantiated in the MCA following executive orders establishing the military commissions). See, e.g., Boumediene v. Bush, 553 U.S. 723, 797 (2008) (“The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security”); Ex Parte Quirin, 317 U.S. 1, 27-32 (1942) (affirming the power of the executive to hold military commissions in conjunction with the Congress’s power to define and punish law of war violations).}

\footnotesize{\textsuperscript{46} Transcript of Oral Argument at 5144-45, United States v. Khalid Sheikh Mohammed, Aug. 23, 2012.}

\footnotesize{\textsuperscript{47} See \textit{Hamdan II}, 696 F.3d at 1252 (rejecting the Government’s attempt to “latch[] on to a few isolated precedents from the Civil War era to prop up its assertion that material support for terrorism was a pre-existing war crime”).}

\footnotesize{\textsuperscript{48} Supra note 28.}

\footnotesize{\textsuperscript{49} U.S. CONST. art. I, § 8.}
prospectively using enhanced Article I, Section 8 war powers, instead cabining the debate to read the MCA consistent with the ex post facto clause. Therefore, the MCA only covers conduct already criminalized by 10 U.S.C. §821.

Both the al-Nashiri and KSM 5 motions to dismiss for lack of jurisdiction cite the Offenses clause as a limitation on Congressional power to criminalize law of war violations in an inconsistent manner, highlighting the ambiguity of the Clause’s contours. The KSM 5 brief interprets “define” to mean adopting a definition universally agreed upon, rather than taking any affirmative measures to state or interpret an international crime. The al-Nashiri brief takes a less stringent interpretation of “define,” and states only that Congress’s definition power is limited to offenses that “exist as a cognizable offense under international law.”

Non-Guantanamo cases that address the Offenses clause remain similarly vague about what level of consensus is necessary between nations to allow Congress to codify international law violations, leaving the question subject to open and robust debate. In Hamdan II, the court did not reach the limits of the Offenses clause because it did not find any evidence of MST as a customary international law violation. The court may follow a similar mode of reasoning for the terrorism charge and first look only to international sources, for which it will find substantial efforts by the international community over the past fifty years to cognize the offense. However, unlike in the MST inquiry, the court for terrorism, faced with such substantial evidentiary material, may need to grapple with the secondary inquiry of how much evidence would be enough to allow Congress to assert its powers under the Offenses clause to codify a violation of the law of war.

Reading the term “define” to contain a certain measure of

50 Hamdan II, 696 F.3d at 1246 n. 6. Similar arguments have been made in reference to the conspiracy charge and that of sabotage. See Peter Margulies, Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions, 36 FORDHAM INT’L L. J. 1, 48, 58, 67 (2013) (arguing for a flexible read of the Offenses clause to allow analogous conduct like conspiracy to stand and citing Quirin’s flexible view of the elements of the charge of sabotage as support for Congress’s ability to tailor war crimes charges based on circumstance, particularly for membership offenses).
51 Hamdan II, 696 F.3d at 1246.
52 Al-Nashiri Motion to Dismiss at 5; KSM Motion to Dismiss at 1.
53 Al-Nashiri Motion to Dismiss at 5, citing United States v. Arjona, 120 U.S. 479, 488 (1887).
55 Hamdan II, 696 F.3d at 1248-49.
56 Supra note 28.
flexibility for Congress to discern the basic nature of universal crimes, a theory supported not only by historical debates but also by the petitioners themselves, Congress has the power to define terrorism under the Offenses clause. The key difference between MST and terrorism in this respect turns on the distinction between “defining” and “creating” the offense. The Hamdan appellate brief cites records of the Federal Convention in which a delegate stated ‘‘define’’ was intended to suggest the need to provide detail, not to create offenses where none had previously existed,” and scholarly literature quoting the U.S. Attorney General in 1865 who characterized the clause with the following distinction: “[t]o define is to give the limits or precise meaning of a word or thing in being; to make is to call into being.”

Amicus briefs in favor of the petitioner in Hamdan II, as well as in al-Bahlul, give similar characterizations of the Offenses clause that assert Congress’s inherent powers to formulate a definition once a basis of core elements is understood and agreed upon by the international community. For example, the al-Bahlul brief for the petitioner cites the case of United States v. Yousef, in which the Court required the violation of the law of nations to be ‘‘defined by the law of nations with reasonable certainty’’ and rejected the efforts of the government to analogize the crime to similar crimes in order to find its legitimacy in customary international law. The original debates on the Offenses clause included arguments by James Wilson that, “to pretend to define the law of nations…would have a look of arrogance. [T]hat would make us ridiculous.” Such objections failed in favor of inclusion of the word “define” along with “punish.”

All of the above suggests that the word “define” was intended to have meaning beyond the mere punishment of laws already codified as violations of the laws of war in international legal doctrines. In rejecting MST as a violation of the law of war, the D.C. Circuit rejected the analogizing standard used by the government and found MST’s lack of precedent in its own right to be equivalent to its creation out of whole cloth. 62 The court’s comparison of MST’s absence from international sources to some forms of terrorism’s cognizance in international law 63 highlights the fine line between creation and definition that separates MST and terrorism. This distinction makes the question of whether terrorism is a law of war offense a much more difficult one to answer. The debate over terrorism is not its creation, a firmly rejected power of the Congress, but rather in its precise definition given the plethora of treaties and sources of international law. Oral arguments in al-Nashiri and KSM 5 elucidate this discrepancy. 64

The standard for defining customary international law retains room for minor disagreement within the international community, as expressed through opinions in various foreign and international courts. Thus, while the language in Yousef called for “reasonable certainty” in the definition, language in the ICJ case Nicaragua v. United States of America called for practice that is “in general” consistent with the relevant rule, and R v. Jones, a UK Supreme Court decision, held that aggression could be considered a customary international law violation so long as States understood the “core elements” of the crime. 65 Congress’s power to define the contours of international crimes, which themselves need only to be cognized in the form of their core elements, supports the probability of the court sustaining the charge of terrorism if the core elements of the crime may be discerned from international law sources.

62 Hamdan II, 696 F.3d at 1250-52.
63 Id. at 1249.
II. THE SEARCH FOR CUSTOMARY INTERNATIONAL LAW

The preceding three arguments—the evolving nature of warfare, the precedential value of *Hamdan II* and *al-Bahlul*’s evaluations, and the application of the Offenses clause—distinguish MST from terrorism, but, absent inquiry into the sources of customary international law, neither affirm nor reject terrorism’s legal status under the MCA. They clear the way to focus on the international law sources that discuss terrorism. Should those sources provide sufficient evidence, the preceding points would help to tip the balance in favor of sustaining terrorism as a war crime. The next section will lay out the test used to find violations of the international law of war and apply the test to the crime of terrorism.

The *Hamdan II* court looked to the traditional trinity of international treaties, treatises on customary law, and commentaries to evaluate MST’s place in international law.66 It also scanned additional sources such as the U.S. Army JAG School Handbook of 2005, Congressional Research Service reports, and the government’s admission of the crime’s customary international law character.67 All of these sources will be examined in the context of the terrorism charge.

*Hamdan II* also looked to U.S. military commission precedent; however, this was neither necessary nor directly applicable.68 The search for U.S. military commission precedent was not necessary because MST and terrorism are allegedly war crimes that have evolved out of a more recent international consensus; it was not directly applicable because it was only a search for analogous crimes. This paper will thus not examine U.S. military commission precedent. The evaluation of U.S. law codifying various forms of terrorism does not independently provide evidence of an international law precedent either.69 The non-application of domestic law for customary international law violations was upheld in *Hamdan II*70 and, while domestic statutes may give evidence to satisfy notice requirements for certain customary international law practices, this paper will not examine domestic terrorism statutes except to note that issues of the word’s

66 *Hamdan II*, 696 F.3d at 1251 (“[N]either the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have identified material support for terrorism as a war crime”).
67 *Hamdan II*, 696 F.3d at 1251-52.
68 See supra Part I.B.
70 *Hamdan II*, 696 F.3d at 1250-53.
exaggerated use arise in domestic legislation akin to debates in the international sphere.71

A. CONGRESSIONAL AND EXECUTIVE POSITIONS ON THE CHARGE

Although the traditional customary international law inquiry relies solely on international law sources, the court in Hamdan II looked to certain congressional and executive domestic sources to understand the government’s position on the charge and its conception of the charge during the MCA’s drafting. These sources show that both branches of government conceive of terrorism as a more legitimate war crime than the previously evaluated crimes. Unlike the charges of MST and conspiracy, the government has never renounced its claim that terrorism is a violation of the law of war.72 As recently as August 2013, the government filed a brief in the KSM 5 trial defending its position.73

The CRS report on the MCA contemplated military commissions and Article III courts as options available to try “criminals acts related to terrorism that may or may not be triable by military commission,” suggesting certain crimes defined under the MCA had dubious standing as war crimes.74 The CRS report elaborated by stating that a court may find the charges of conspiracy, murder in violation of the law of war, and material support for terrorism to be “new” crimes.75 However, this paragraph made no mention of the crime of terrorism. The CRS’s silence on the charge, given its overt questioning of similar charges, signals that the CRS found enough precedent not to take issue with the definition of terrorism.

The U.S. Army JAG School’s Handbook on the law of war cited in Hamdan II is a 2005 explanatory text that, as the court notes, includes no mention of the crime of MST.76 However, this document does refer to


72 Hamdan II, 696 F.3d at 1251 (“even the U.S. government concedes in this case that material support for terrorism is not a recognized international-law war crime”).


75 Id. at 9-10. This reference was cited in Hamdan II, 696 F.3d at 1251.

76 Hamdan II, 696 F.3d at 1249.
terrorism under “The Law Which Operates to the Benefits of All Civilians During Any Type of Armed Conflict…” In addition, the CRS noted the definition of the crime of terrorism changed from Military Commission Order No. 1 to Military Commission order No. 2, before being codified by Congress, to omit language that would have convicted fighters who attacked legitimate military targets or whose actions broadly speaking “affect[ed] the conduct of a government.” These changes narrowed the scope of the charge and showed thought and deliberation to determine the core elements of the crime.

The charge was further amended from the M.C.I. No. 2 draft to the final version of the MCA to include acts taken with the aim of retaliating against government conduct, a more narrow conduct requirement in line with intimidation or coercion already punishable under the offense. The previous draft broadly punished any conduct “affecting” the government. The MCA also limited the scope further from M.C.I. No. 2, clarifying the killing must be “intentional,” and must be against “protected persons” rather than against any persons.

The drafters of the final MCA version deleted the section that criminalized engaging in an act that is “inherently dangerous to another,”

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79 DEP’T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2 §6(B)(2) (Apr. 30, 2003).

Terrorism:

a. Elements
   (1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;
   (2) The accused:
      (a) intended to kill or inflict bodily harm on one or more persons;
   or
      (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
   (3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and
   (4) The killing, harm, or destruction took place in the context of and was associated with armed conflict.

b. Comments
   (1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.
   (2) The requirement that the conduct by wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

80 10 U.S.C. §950t(24). For the full text of the MCA charge, see id.
81 Id.
eliminating further the vagaries of the charge in the 2003 draft. Finally, the charge eliminated all explicit application of the crime to armed conflict, as this became redundant under the common conception that military commissions only had jurisdiction over war crimes. Similarly, the definition of personal jurisdiction, which was changed by the drafting of the MCA, lends credence to the idea that Congress, working with the Executive, narrowed the scope of the charge. The initial military order defined personal jurisdiction to cover “people who have engaged in acts of terrorism,” while the MCA chose the more tailored definition of “unlawful enemy combatants,” abandoning the use of the term terrorism, lends credence to the idea that Congress, working with the Executive, narrowed the scope of the charge of terrorism. This change also reflects a conscious decision to limit the overuse of the word terrorism, which was formerly abused in a manner so as to confuse terrorism as a global threat with the specific elements of the crime.

The charge stands out amongst those in the M.C.I. No. 2 as an offense “triable by military commissions” rather than those listed under violations of the law of war, a distinction referenced by the defense in Nashiri and the KSM 5 arguments. However, this typographical division is a product of the bifurcation of Geneva-Hague traditional law of war offenses and the evolved law of war crimes. The distinction was abandoned by the MCA. The Congressional and Executive debates on the charge display a refinement consistent with the need to define the core elements of terrorism extracted from the international community’s use of the term. Just as the Senate debate over the enactment of the MCA

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82 Id.
85 Dep’t of Defense, Military Commission Instruction No. 2 (Apr. 30, 2003). Other crimes listed as “Triable by Military Commission” under the M.C.I. No 2. included: 1) Hijacking or Hazarding a Vessel or Aircraft; 2) Murder by an Unprivileged Belligerent; 3) Destruction of Property by an Unprivileged Belligerent; 4) Aiding the Enemy; 5) Spying; 6) Perjury or False Testimony; and 7) Obstruction of Justice Related to Military Commissions.
86 Dep’t of Defense, Military Commission Instruction No. 2 §6(B)(2) (Apr. 30, 2003); 10 U.S.C. §950t (2006); al-Nashiri Motion to Dismiss at 8.
87 See supra note 28 (citing the treaty law on terrorism as discussed in al-Bahlul).
demonstrated a need to prosecute terrorism in particular, so too did debates over the War Crimes Act of 1996 which was Congress’s first attempt to codify war crimes. A review of Congressional and Executive sources examined in *Hamdan II* reveals a much greater support for the validity of terrorism as a war crime, particularly given its narrow tailoring over the course of statutory drafting.

### B. U.S. Judicial Decisions on the Charge

The Al-Nashiri team offers two federal cases – *United States v. Yousef* and *Tel-Oren v. Libyan Arab Republic* – as evidence that U.S. courts have repeatedly denied granting terrorism the status of an international law crime. However, the cases cited are distinguishable and not precedential for either the CMCR or the D.C. Circuit. *Yousef* was a Second Circuit opinion discussing the universality principle for jurisdiction of international crimes. Instead of reaching the issue of universality, the court found jurisdiction under the international treaty provisions of the Montreal Convention on Hijacking. *Tel-Oren* was a D.C. appellate decision, but the court split three ways and gave no holding to follow. The court in *Tel-Oren*, moreover, addressed terrorism as a violation of the law of nations under the Alien Tort Statute, which has its own jurisprudence tailored to the very narrow statutory cause of action and which addresses violations of the laws of nations rather than the more limited category of violations of the laws of war. These cases are irrelevant for the debate over terrorism as a war crime triable by military commission.

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90 142 CONG. REC. S9648 (daily ed. Aug. 2, 1996) (statement of Sen. Inhofe). (“This could act as a deterrent…for people who may be considering perpetrating some terrorist act that could be defined as a war crime.”) Unfortunately, poor Congressional drafting makes evaluation of the War Crimes Act’s substantive elements weak, as the statute was designed for prosecution in federal courts and does not specify particular crimes. In its twenty-year existence, the Act has not been used to prosecute anyone, making it all the more futile a comparison and irrelevant to the discussion of the MCA.  
91 al-Nashiri Motion to Dismiss at 7-10 (referring to Tel-Oren as the “seminal case” on the interpretation of the law of nations); but see Government Response to Defense Motion to Dismiss for Lack of Jurisdiction over the Charge of Terrorism 32, United States v. Al-Nashiri, AE049 (2012) (arguing *U.S. v. Yousef* actually supports the government’s petition because the court in that case found jurisdiction for the charge of an act of terrorism).  
92 United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).  
93 *Id.* at 34.  
Definitions of terrorism in international criminal statutes add fuel to both sides of the debate. *Hamdan II* notes that neither the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), nor the Special Court for Sierra Leone (SCSL) recognize MST as a war crime. However, the Special Court for Sierra Leone has convicted Charles Taylor on the crime of terrorism, as defined in Article 3(d) of its statute, adopting the Additional Protocol II definition of the crime. The ICTY statute does not prohibit terrorism per se, but has adopted the prohibitions found in the Geneva Convention’s Additional Protocols to prosecute defendants for “spread[ing] terror.” The ICTR statute also prohibits terrorism in its subject matter jurisdiction, although to date no one has been convicted of the crime. Moreover, in a landmark ruling, the Special Tribunal for Lebanon affirmed the crime of terrorism had crystallized into a violation of the law of nations in a 2011 interlocutory decision. On a macro level, all major international tribunals have prosecuted or codified the crime of terrorism.

In *Hamdan II*, the court also noted MST was not included in the Rome Statute as evidence of its failure to make the most recent international conception of modern day war crimes. Defense teams have argued that this absence of the terrorism charge likewise disqualifies terrorism from the pantheon of war crimes. Still, this absence is not as

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95 *Hamdan II*, 696 F.3d at 1249.
97 Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgment (Int’l Crim. Trib. For the Former Yugoslavia Jan. 17, 2005), available at http://www.icrty.org/x/cases/blagojevic_jokic/tjug/en/blaj-050117e.pdf (quoting Article 51(2) of the Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions) (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”); see also Johan D. van der Vyver, * Prosecuting Terrorism in International Tribunals*, 24 EMORY INT’L L. REV. 527, 541-43 (2010).
98 Statute of the International Tribunal for Rwanda, U.N. Doc. S/Res/955 (Nov. 8, 1994) art. 4(d); see also van der Vyver, supra note 97, at 532-34. These facts are taken into account in *Hamdan II*, 696 F.3d at 1251 as a means of distinguishing MST from terrorism.
100 *Hamdan II*, 696 F.3d at 1251.
101 See KSM Motion to Dismiss at 7-8; al-Nashiri Motion to Dismiss at 5.
straightforward as it would seem from defense arguments.\textsuperscript{102} Whereas MST took up no time in discussions during the Rome Conference, the draft statute for the International Criminal Court included a provision defining crimes of terrorism that included not only offenses under prominent terrorism-based conventions but also an independent definition.\textsuperscript{103}

Moreover, the court in \textit{Hamdan II} recognized that the Rome Statute codifies “an extensive list of war crimes,” but did not go so far as to claim the list was exhaustive.\textsuperscript{104} Article 10 of the Rome Statute confirms that its list of customary war crimes is not exhaustive, stating “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”\textsuperscript{105}

Insofar as terrorism was not included in the Rome Statute, good evidence suggests the reasoning lies not with its absence from customary international law but rather with the political maneuvering designed to keep the United States in the negotiating room to agree on the most fundamental points in order to bring any sort of universal quality to the Statute.\textsuperscript{106} The United States’ biggest issues were procedural. Fears of releasing classified and sensitive information and the Court’s lack of life sentences or death penalties for serious crimes made the U.S. desire to keep the prosecution of terrorism on the national level.\textsuperscript{107} Such extraneous concerns do not preclude the possibility that the crime of terrorism may exist independent of the Rome Statute.

A comparison to the development of the crime of aggression and other peremptory norms is instructive. Codified in the Kampala Review Conference to the Rome Statute in 2010, many commentators had

\textsuperscript{102} KSM Motion to Dismiss at 8 (The final draft of the [Rome] Statute...’provides the most comprehensive, definitive and authoritative list of war crimes.’ Yet, it does not list ‘terrorism’ as a violation of the law of war. \textit{Id.} quoting Robert Cryer, \textit{International Criminal Law v. State Sovereignty: Another Round?}, 16 EUR. J. INT’L L. 979, 990 (2005)).

\textsuperscript{103} Van der Vyver, \textit{supra} note 97, at 536. For the purposes of the present Statute, “crimes of terrorism” means: (1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever consideration and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them.

\textsuperscript{104} \textit{Hamdan II}, 696 F.3d at 1251. Nor has either of the defense teams stated this concretely.


\textsuperscript{106} See van der Vyver, \textit{supra} note 97, at 537; \textit{see also} Remarks of Ambassador David J. Scheffer at the Centre for Human Rights, University of Pretoria (Aug. 22, 2000).

\textsuperscript{107} See S. REP. NO. 107-2 (2001) (Exec. Rep.) (Remarks of Senator Helms); \textit{see also} van der Vyver, \textit{supra} note 97 at 536.
suggested that the crime of aggression absent a statutory definition had already attained customary international law status. Those who argued that aggression was a customary international crime before Kampala stressed that a crime need not attain word for word agreement among all nations to attain customary status. They cited piracy as another example of a peremptory norm whose contours remain contested but nevertheless is universally recognized as a violation of customary international law.

Genocide, too, developed as a subset of the broader category of crimes against humanity. It eventually became a discrete class of crimes based on international criminal tribunal practice despite minor definitional differences between various nations and international statutes.

Such arguments are particularly relevant to the debate over terrorism as its development loosely follows that of aggression. Both were tried without prior statutory definition in the aftermath of World War II, and the search to define both crimes has largely developed over the course of the latter half of the twentieth century. International criminal tribunals’ relationships with the crime of terrorism provide a complex web of support for the crime’s nascent recognition over the course of the past twenty years. At a minimum, evidence from the international criminal tribunals clearly distinguishes terrorism from MST or conspiracy and complicates the question of consensus while raising issues of tribunal reliability, norm acceptance, and exhaustiveness of statutory international war crimes.

D. INTERNATIONAL TREATIES AND SCHOLARSHIP

In addition, international treaties, along with scholarly commentaries, provide greater support for terrorism as an international law of war offense than sources evaluated for MST. Unlike MST, where the CMCR could find that it qualified as a war crime by an “utterly self-
referential approach to international law,"\textsuperscript{113} scholarly debate over terrorism is hotly contested precisely because incarnations of the word appear in a host of international law sources. There are twelve international treaties referencing various forms of terrorism written since the 1960s, including terrorist financing, hijacking, the taking of hostages, and terrorist bombings.\textsuperscript{114} Several regional conventions outlawing terrorism also exist, although they do not use one standard definition of the crime.\textsuperscript{115} For example, the Inter-American Convention Against Terrorism, which the U.S. has ratified, defines offenses of terrorism as those already codified in all of the aforementioned conventions.\textsuperscript{116}

Although it has been suggested that the crime of terrorism, as a more recent import to the evolving law of war doctrine, need not be found in the Geneva or Hague Conventions, the Geneva Conventions do foresee prohibiting acts of terror. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War refers to terrorism in Article 33, which states, “[A]ll measures of intimidation or of terrorism are prohibited.”\textsuperscript{117} Additional Protocol I and II, relating to protection of victims in international and non-international armed conflicts, respectively, also prohibit all “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”\textsuperscript{118}

The Third Restatement of Foreign Relations Law specifically cites terrorism as a crime of universal concern, stating “a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as...war crimes, and perhaps certain acts of terrorism...” The text goes on to suggest that terrorism is a crime of universal concern and that the definition is emerging

\textsuperscript{113} Kevin Jon Heller, \textit{The CMCR Invents the “War Crime” of Material Support for Terrorism, OPINIO JURIS} (June 24, 2011), http://opiniojuris.org/2011/06/24/the-cmcr-invents-the-war-crime-of-material-support-for-terrorism/.
as certain acts of terrorism are now recognized as violations of the laws of nations.\footnote{119}{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §404 (1987).} The text, while cautious, conceives of terrorism as a developing violation of international law and keeps the door open for attempts to codify a definition post-1987, when the Restatements were last revised.

Finally, the International Committee of the Red Cross (ICRC)’s catalog of customary international humanitarian law on the crime of terrorism lists a surprising number of other international instruments that criminalize terrorism, including nearly all countries’ military manuals.\footnote{120}{Practice Relating to Rule 2. Violence Aimed at Spreading Terror among the Civilian Population, ICRC (Dec. 28, 2013), http://www.icrc.org/customary-ihl/eng/print/v2_rul_rule2.} Most of these sources prohibit terrorism but do not go further in defining its material elements. Petitioners in al-Nashiri, KSM 5, and Hamdan all capitalized on the discrete nature of criminal acts of terrorism in treaties to support their argument that no core crime exists, and contested the findings in international law as inconclusive of a general international consensus. Yet the sheer number of treaties as well as references to terrorism in other international instruments makes it difficult to discount the possibility that the international community has conceived of terrorism as a crime worthy of universal punishment in its basest form.

Due to the nature of the development of the crime through these treaties, scholars are divided over the idea that a core crime of terrorism exists. Most scholars come to the conclusion that terrorism is an umbrella word to encompass various forms of international crimes that have themselves been outlawed and condemned as CIL violations, rendering the word “terrorism” largely devoid of substance.\footnote{121}{See, e.g., Link, supra note 71; Vincent Joel Proulx, Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?, 19 AM. U. INT’L L. REV. 1009 (2004); Tim Stephens, International Criminal Law and the Response to International Terrorism, 27 UNSW L. J. 454 (2004); Johan D. van der Vyver, supra note 97, at 527. But see Cassese, supra note 105, at 933; Joseph Isanga, Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary Int’l Law from U.N. Resolutions, 37 DENV. J. INT’L L. & POL’Y 233 (2008).} Others argue that the crime is redundant as it is already covered by the jurisdiction of established war crimes such as attacking civilians or civilian property. This argument features prominently in the KSM 5 petitioner’s hearing.\footnote{122}{Transcript of Oral Argument at 5143-44, United States v. Khalid Shaikh Mohammed, Aug. 23, 2012.}

Still, others argue that the crime eludes definition at all because those who perpetrate it may have legitimate aims, and if one man’s terrorism is another man’s freedom fighter, sovereigns should not have the power to exercise discretionary universal jurisdiction over an act that...
carries such powerful political, religious, or philosophical ideologies. In sum, most scholarship uses the disagreement in the international forum and the development of the crime through treaties defining discrete acts as an easy platform from which to denounce the concept of one international crime of terrorism. Still, the treaties themselves are proof that nations have been diligently working to address the contours of the international crime since the 1960s and continue to make strides in their conception of its elements.

E. THE CORE SUBSTANTIVE ELEMENTS OF TERRORISM

The treaties that govern acts of terrorism punish discrete acts like hijacking and financing but, given the ongoing debates, it is clear that the disparate acts do not encompass all aspects of terrorism. As Martins argued, there may be “core elements” of the crime of terrorism that can be extracted from international custom to sustain the charge. First, the crime is distinguishable from other charges in that it is a specific intent crime, requiring a higher level of mens rea to support the charge as compared to attacking civilians or civilian objects. The prosecution must prove defendants acted "in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct." Rather than disproportionate attacks that injure civilians recklessly, the crime conceives of actors whose purpose is “designed to beget profound insecurity and anxiety in the population.”

The recognition of intent designed to import grave psychological effects on victims mirrors the emerging recognition of mental injury in other areas of law. For example, mental torture and intentional infliction of emotional distress in tort law have evolved doctrinally with the understanding that psychological harms present equal if not greater injuries than physical harms. The specific intent requirement for terrorism

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124 Transcript of Oral Argument at 5141, United States v. Khalid Shaikh Mohammed, Aug. 23, 2012. The question of what conduct rises to a level sufficient to satisfy the elements of the crime remains a separate question not addressed here. For an example of Hamdan II’s conspiracy charge and how particular elements could satisfy the crime, see Margulies, supra note 50, at 56-58.


126 Cassese, supra note 105, at 948.

facially distinguishes the crime from attacks on civilians or civilian objects.

Second, insofar as there are core elements of the crime of terrorism to identify, substantial work has already been done by Antonio Cassesse and his ruling of the Special Tribunal for Lebanon (STL) that defined the international law violation of terrorism. Discussions related to the STL’s ruling may be the best evidence that terrorism has developed into an international law crime, both in theory and in practice at an international criminal tribunal. The STL ruled that, in times of peace, the crime of terrorism exists with: (1) the perpetration of a criminal act or threat of such act, (2) the intent to spread fear among the population or to coerce a national or international authority to take some action or to refrain from taking it, and (3) a transnational element.

Again, the operative distinction for terrorism becomes the second element: intent to spread fear. The STL noted that the abundance of national prohibitions on terrorism supports the fact that the offence is regarded as an attack on values held to be of “paramount importance in th[e] community,” affirming the universal nature of the crime rather than suggesting this evidence shows piecemeal application of an umbrella term. The STL’s decision affirms the peacetime crime of terrorism; its potential overreach has created worries of defining the crime too broadly.

Yet, for the purposes of military commissions it is unnecessary to widen the scope of inquiry to peacetime violations. Cassese’s writings argue that


130 Id., §91; see also Ventura, supra note 65, at 1028.

131 Margaret M. DeGuzman, Harsh Justice for International Crimes?, 39 YALE J. INT’L L. (forthcoming 2014) (explaining a general worry in international criminal law of that the gravest crimes charged in international tribunals are being charged for increasingly less serious crimes and that international rhetoric inflates perceptions of their seriousness).
terrorism as a war crime has a narrower scope than its application in peacetime.\textsuperscript{132} He redefines terrorism in wartime as: (1) any violent action or threat against civilians or other persons not taking a direct part in armed hostilities or against civilian objects, (2) with the intent to spread terror.\textsuperscript{133}

The MCA definition of terrorism employs these elements and limits their application even more narrowly, defining terror as conduct “affecting the government or civilian population by intimidation or coercion, or…retali[ation] against government conduct,”\textsuperscript{134} and limits violent action against civilian objects to only those acts that “evidence wanton disregard for human life.”\textsuperscript{135} The peacetime/wartime distinction is also evident in regard to federal criminal code definitions of terrorism, which widen the scope of the crime by punishing acts that “appear to be intended to intimidate or coerce a population…”\textsuperscript{136} or that cause serious bodily injury without any political component.\textsuperscript{137} The Rome Statute’s proposed definition of the crime also mirrored Cassese’s definition of terrorism, minus the jurisdictional element.\textsuperscript{138} Furthermore, a 2001 attempt to draft a Comprehensive Convention on International Terrorism by an ad hoc committee of the UN adopted similar language for the peacetime definition of the crime.\textsuperscript{139}

In debates over both the UN Comprehensive Convention and the Rome Statute, drafters did not contest the definition itself. Rather, representatives debated over its application to “State-sponsored terrorism” or “freedom fighter” movements that some nations felt were groups with legitimate aims who should not be subject to prosecution.\textsuperscript{140} But the U.S. courts are not in the business of resolving which groups fall outside the jurisdiction of international crimes, and the question of who is correctly deemed a freedom fighter is not part of the courts’ inquiry for identifying the war crime of terrorism. Agreement on the substantive basis for the crime satisfies the inquiry into its universal character and counters the main

\textsuperscript{132} Cassese, supra note 105, at 946.
\textsuperscript{133} Id. at 946-47.
\textsuperscript{134} 10 U.S.C. §950(t)(24).
\textsuperscript{135} Id.
\textsuperscript{138} Van der Vyver, supra note 97, at 537.
argument that terrorism is not itself a defined crime with unique material elements.

F. WHICH INTERNATIONAL LAW OF ARMED CONFLICT? A FORAY INTO THE WEEDS OF INTERNATIONAL LAW

There remains this question: if terrorism is an offense cognizable under the law of war, for which type of war is it unlawful? The prosecution in KSM 5 and al-Nashiri cite the Fourth Geneva Convention and the Additional Protocols’ reference to terrorism as evidence of its customary international law character. The petitioners’ rebuttals argue that the reference to terrorism must only apply to the types of armed conflicts covered by the Fourth Convention and the Additional Protocols. Additional Protocol II applies to attacks on civilians in the hands of Occupying Powers only when the Occupying Powers control land in non-international armed conflicts; Geneva Convention IV and Additional Protocol I apply to international armed conflicts. Because petitioners find that the war with al-Qaeda is not a conflict of the type covered by these sections, they claim that even if terrorism is an international crime, it cannot be prosecuted in the war with al-Qaeda.

Chief Prosecutor Martins responds that the standard for finding violations of the laws of war rests on “norms firmly grounded in international law,” and the parsing of non-international armed conflict (NIAC)/international armed conflict (IAC) distinctions is irrelevant to this analysis. The dichotomy between the two sets of conflicts highlights the difficulties of defining new war crimes in an era where conflicts have changed radically since the times of the great wars. The edifice of war’s proprieties has crumbled, which has in some sense given rise to the need to define crimes that were once deemed less threatening or less immediately in need of definition. It is not clear that the conflict distinction is at all relevant to the codification of terrorism, particularly as it has already been suggested that terrorism’s lack of inclusion as a specific crime defined in the Geneva Conventions is not a definitive marker of the crime’s international law status. Still, it is useful to look at ways in which U.S. and international sources blur the distinction to address petitioners’ concerns and forecast what material the court could look to in deciding this issue.

142 Id. at 5185.
143 Id. at 5176-77.
The conflict distinction has not been explicitly addressed in recent case law and literature and has instead been muddled in ways that prove the distinction lacks force. Neither *Hamdan II* nor the recent *al-Bahlul* oral arguments discuss the NIAC/IAC distinction to assess whether an alleged crime falls under the category of war crimes for *non-international armed conflicts*.\(^{144}\) The ICRC’s Commentary on universal jurisdiction of the laws of war incorporates violations described as “serious violations during international and non-international armed conflict,” including crimes under Additional Protocol II, and specifies that its list of sources for war crimes is non-exhaustive.\(^{145}\) The CRS report on subject matter jurisdiction under the MCA also merges the ICTY Statute on war crimes in non-international armed conflict with discussions of offenses in the context of an international armed conflict, at least raising the possibility of overlap or a wide interpretation of war crimes triable by military commission to include violations in both international and non-international armed conflicts.\(^{146}\)

The Convention with Respect to the Laws and Customs of War on Land (1899 Hague Convention II) obligated nations to instruct their troops on the particulars of the laws of war.\(^{147}\) The U.S. Army’s commentary on the laws of war in Field Manual 27-10 restates the prohibition of terrorism as found in the Fourth Geneva Convention, mentioning the term in a limited way outside of the context of traditionally codified crimes.\(^{148}\) However, this code was drafted in 1956 and has not been updated to reflect current understandings of the evolving customary norms.\(^{149}\) At least one commentator has suggested that the British field manual, significantly


\(^{146}\) Elsea, *supra* note 74, at 11 n. 55, 57 (including discussion of violations of non-international armed conflicts’ crime of killing of civilians in the ICTY statute).

\(^{147}\) Convention with Respect to the Laws and Customs of War on Land art. 1, July 29, 1899, 32 Stat. 1803.


\(^{149}\) The Field Manual was updated in 1976 but none of the changes related to the crime of terrorism. For full text of the amendments, see http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.
revised in 2004, provides a better understanding for modern day war crimes.\textsuperscript{150}

The U.K. Manual follows the U.S. and Fourth Geneva Convention prohibition of terrorism against protected persons.\textsuperscript{151} However, it goes a step further by prohibiting under methods of warfare used in \textit{any} type of conflict “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population.”\textsuperscript{152} The manual gives the example of car bombs installed in busy shopping streets as an example, and the language is followed by other crimes that have gained acceptance as legitimate violations of the law of war such as the prohibition of civilians as shields and protection of cultural objects and places of worship.\textsuperscript{153}

The U.S. Army JAG School Handbook’s reference to terrorism under “The Law Which Operates to the Benefits of \textit{All} Civilians During \textit{Any} Type of Armed Conflict”\textsuperscript{154} also bolsters the crime’s nature as a violation of international law without distinction by type of conflict. The section includes language from treaties and tribunal statutes protecting civilians in international and non-international armed conflict, but in so combining the jurisdictions it emphasizes the conclusion that “all non-combatants…are entitled to humane treatment.”\textsuperscript{155} The combination of various international statutory norms in both NIAC/IAC under one heading of “Examples of War Crimes in International Statutes” provides strong support for the idea that war crimes as defined by Congress are norms grounded firmly in customary international law rather than tailored specifically to types of armed conflicts.\textsuperscript{156}

Although these citations do not resolve the question of what elements comprise the offense of terrorism, they have other effects. First, they suggest that terrorism or “acts of terror” have evolved to be included as war crimes in statutory drafting. Second, they blur the distinction between war crimes of international and non-international armed conflicts to which the defense in the KSM 5 oral arguments attach much importance. The distinction remains an open question and one in which prior military commissions have not engaged. The \textit{Hamdan II} court’s silence on the

\textsuperscript{152} Id. at 67 (quoting the language of Additional Protocol I art. 51(2) as applied to all conflicts in which the British military engage).  
\textsuperscript{153} Id. at 68-70.  
\textsuperscript{155} Id. at 145.  
\textsuperscript{156} The War Crimes Act similarly does not distinguish between types of conflicts. \textit{See} 18 U.S.C. §2441.}
distinction suggests that the muddled debate will not be resolved or used conclusively in the court’s future determinations.

Moreover, both the al-Nashiri and KSM 5 defense teams present evidence against finding terrorism as a war crime that speaks not to terrorism as a violation of the law of war in a non-international armed conflict, but rather to terrorism as defined under other customary and statutory standards. This evidence repudiates the attempt to cabin the debate to violations of different types of armed conflict not analogous to the fight against al-Qaeda. The KSM 5 team also cites U.S. resistance to defining terrorism as a peacetime violation of the law of nations and cites the federal criminal code’s definition of terrorism exclusively as a civilian offense, neither of which bear directly on the status of terrorism as a war crime or, more particularly, a war crime during NIAC. These arguments are diversionary rather than probative, and indicate that the inquiry should simply be whether or not terrorism is a norm firmly grounded in international law.

AVENUES FOR FURTHER RESEARCH

If the D.C. Circuit concludes that the charge of terrorism is an international-law war crime, the charge may be useful to prosecute not only the top leaders of terrorist acts but also those detainees who are currently not charged or whose charges of MST and conspiracy have been dropped. Debates over conspiracy and MST as substantive law of war offenses have frequently noted the similarity between these charges and the ICTY’s joint criminal enterprise (JCE) mode of liability. The government’s argument that detainees were on notice for these charges based on the ICTY’s JCE fundamentally confused the substantive charge of conspiracy with the use of enterprise liability to attach a defendant to a recognized law of war violation.

159 Handan II, 801 F. Supp. 2d 1247, 1286 (C.M.C.R. 2011) (en banc), rev’d, 696 F.3d 1238 (D.C.Cir. 2012) (finding a “similar analytical nexus” between the charge and the JCE); Link, supra note 71 at 465-68.
Future research should explore the possibility of charging detainees with terrorism and using the customary international law mode of liability of JCEI or III to satisfy the attenuated mens rea and actus reus standards of the completed crime. JCE liability remains controversial, particularly the third formulation when attached to specific-intent crime. As it requires a lower mens rea standard, it may inculpate a potentially exponential amount of persons engaged in low level criminal activity as part of a wide organizational posture and convict them of the same crimes as principal members of the organization. JCE I liability attaches to those actors who share an intent to commit a criminal act. JCE III allows for a court to find a defendant is a member of a criminal enterprise if the accused is part of a JCE (shares the intent to commit a criminal act) and knowingly takes the risk that the group will commit additional acts that are foreseeable as part of the common plan. Its potential for overreach notably led the Special Tribunal for Lebanon to disallow it in the punishment of the peacetime crime of terrorism. No doubt the concept of using JCE, particularly JCE III, remains highly controversial.

However, JCE is still acknowledged as a procedural feature of customary international law. Unlike conspiracy in the U.S., which is its own substantive charge, JCE is a framework to implicate members of a criminal organization to other substantive charges committed on behalf of the entire group. JCE loosens evidentiary requirements in recognition of the complex nature of international criminal groups and the difficulties of individual prosecution, but it is careful not to assign punishment merely for membership. If the subject matter jurisdiction of military commissions is the prosecution of violations of the law of war, may the commissions adopt procedural aspects of customary international law such as JCE? The argument has up to now not been seriously presented or developed.

161 See Jens David Ohlin, Joint Intentions to Commit International Crimes, 11 CHI. J. INT’L L. 693 (2010); see also Link, supra note 71, at 468-470; but see Larry Alexander & Kimberly D. Kessler, Mens Rea and Inchoate Crimes, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1138-39 (1997) (arguing for why forming intentions is something we do intentionally, and thus why it should be culpable).
162 Ohlin, supra note 161, at 2 n. 1.
164 See Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction, Prosecutor v. Milutinovic et al., Case No. IT-9-37-AR72 (21 May 2003); see also International Criminal Law & Practice Training Materials, Modes of Liability: Commission & Participation, http://wcjp.unicri.it/deliverables/docs/Module_9_Modes_of_liability.pdf (last accessed Dec. 27, 2013); see also Ohlin, supra note 161 at 1-2.
Future research should explore other national attempts to incorporate JCE liability. The hybrid Extraordinary Chambers of the Courts of Cambodia (ECCC)’s Case No. 2 against Khmer Rouge leader Kaing Guek Eav (Duch), in evaluating JCE’s status as customary international law, looked to national precedent within Cambodia to see if similar modes of liability existed to put defendants on notice for invocation of JCE III liability. Directing the inquiry inward, the ECCC found JCE III liability violated Cambodia’s principle of legality. A similar inquiry into U.S. precedent may uphold JCE III. The original concept of JCE took its shape from the common law concept of Pinkerton liability, which holds actors liable for additional crimes committed by co-conspirators so long as the crimes were committed in furtherance of the conspiracy and were reasonably foreseeable. In the context of the military commissions, initial Department of Defense indictments expressed the commission’s power to try defendants under language that substantially mirrored JCE liability, further proof of U.S. precedent.

Finally, judicial discretion in sentencing would allow the courts to tailor punishment to the amount of participation in either JCEI or JCE III, mitigating fears of cruel and unusual punishment for detainees with minimal material acts contributing to al-Qaeda or the Taliban’s commission of terrorism. Further research should consider whether to adapt the JCE concept to military commissions to replace previously withdrawn charges of conspiracy and MST. That research will need to acknowledge the controversial nature of the JCE and its progeny of judge-made customary international law.

CONCLUSION

The ultimate catch-22 of Guantanamo is that, for all of the procedural revisions that military commissions have been subjected to through judicial review, they now represent the best route out of indefinite detention for those detainees not cleared by past or current periodic review

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166 Id., citing Kaing Guek Eav (alias Duch), Trial Judgment, 26 July 2010, ECCC Trial Chambers, Case No. 001/18-07/2007/ECCC/TC, pp. 105-159.
169 M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 97-98 (2012).
assessments. The D.C. Circuit has shown in habeas petition trials that it will not overturn Executive decisions simply because of the length of detention, effectively resolving itself to the indefinite nature of modern day warfare. The story of Guantanamo thus begins and ends at the hands of the Executive branch. As events have shown, though, the Executive’s ability to implement its policy of closing Guantanamo hinges substantially on Congressional action, whether in the form of budget allocations, unfreezing detainee transfers, or codification of law of war offenses.

While all types of congressional action play an important role in the development of policy, the latter determinations hold novel value for a number of reasons. Charging detainees with terrorism has implications for our national psyche and the public’s perception of the success or failure of the longest war in U.S. history. It has direct bearing on detainees’ freedom and liberty, and on the legal community’s basic conception of who declares customary international law.

Although the debate over terrorism’s status as a violation of the law of nations has consumed thousands of pages in academic literature, U.S. federal courts face the issue with a relatively clean slate. There are very few U.S. cases on the charge of terrorism, and they are all distinguishable from the KSM 5 and al-Nashiri cases. The courts’ notable hesitance to incorporate international law principles or jurisprudence into rulings, most recently with the blatant disregard for the Vienna Convention on Consular Relations in Medellin v. Texas, suggests that the D.C. Circuit will likely not be swayed by the position of most international academics who reject terrorism as a core war crime.

While the contest of terrorism in the KSM 5 and al-Nashiri commissions may not reach the D.C. Circuit for a while, if ever, there are strong reasons to believe the court will uphold the charge, in contrast to MST or conspiracy. Congress has the power to define universally

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171 For the most recent statement by the Court, see Ali v. Obama, 741 F.Supp.2d 19 (D.D.C. 2011), aff’d 736 F.3d 542 at 19-20 (D.C. Cir. 2013) (“We are of course aware that this is a long war with no end in sight…but…it is not the Judiciary’s proper role to devise a novel detention standard that varies with the length of detention”).

recognized concerns under the Offenses Clause, and terrorism has been a
developing crime since foundational exercises of codifying war crimes by
the Geneva Convention. Treaties on various aspects of terrorism
criminalize discrete acts but do not capture the full scope of the crime;
terrorism has core elements that suffice to sustain the charge in military
commissions. Moreover, upholding terrorism as a war crime limits the
reach of criminal punishment to a subset of customary international law
and leaves the question of terrorism as a violation of the law of nations or
as a crime against humanity for resolution in future deliberations.

The KSM 5 and al-Nashiri trials may answer the rhetorical
question of precisely what the U.S. has been fighting since 2001, once and
for all.
FULL OF HOT AIR: WHY THE ATMOSPHERIC TRUST LITIGATION THEORY IS AN UNWORKABLE ATTEMPT TO EXPAND THE PUBLIC TRUST DOCTRINE BEYOND ITS COMMON LAW FOUNDATIONS

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The issue of climate change has been a major feature in public discourse for more than twenty-five years and the debate has vociferously engaged scientists, politicians, and the general public. Climate change is impacting the local, state, national and global levels, ranging from the loss of coastal land in Massachusetts to the loss of permafrost in Alaska. The challenge to addressing the crisis that these climate change impacts are presenting has inspired various proposals, both legal and scientific. The 2012 case Alec L. v. Jackson has brought the issue of Atmospheric Trust Litigation and potential claims for injury due to climate change to the forefront. This article analyzes the Atmospheric Trust Litigation theory for its viability as a potential remedy to address the issue of climate change by looking at the potential obstacles presented by the Public Trust Doctrine.
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INTRODUCTION

The issue of climate change has been a major feature in the news and public discourse for more than twenty-five years, and the debate has vociferously engaged scientists, the general public, and politicians.¹ Private individuals have sought to remedy alleged injuries on either a collective or individual basis.² The individual states have also sought redress of claims of actual or imminent injury through both the state and federal courts in the United States. Climate change is causing impacts on the local, state, national and global levels, ranging from loss of coastal land in Massachusetts to the loss of permafrost in Alaska.³ The challenge to address the crisis that these climate change impacts are presenting has inspired various proposals, both legal and scientific.

The recently decided *Alec L. v. Jackson* case has brought the issue of Atmospheric Trust Litigation and potential claims for injury due to climate change to the forefront.⁴ The Atmospheric Trust Litigation (ATL)

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² See generally Kanuk v. State, No. 3AN1107474, 2012 WL 8262438 (Alaska Super. Ct. Mar. 16, 2012) (discussing the dismissal of an action in which the lower court denied the Plaintiff’s request to declare the atmosphere as part of the public trust, which the State of Alaska has a fiduciary duty to manage, and that the State of Alaska has failed their duty by not engaging in rulemaking to reduce carbon emissions by 6%).
theory proposes that the avenue through which to address climate change is to expand the Public Trust Doctrine (PTD) to include the atmosphere.\(^5\) This expansion seeks to hold state and federal governments responsible, under a fiduciary standard, for their actions, or inaction, related to the protection of the atmosphere and other matters subject to the PTD.\(^6\) The courts have wrestled with the issue of expanding the basic premise of the PTD.\(^7\) The courts have also looked at related resources under the PTD when analyzing cases.\(^8\) Professor Richard Lazarus once described the efforts to expand the PTD in the following manner:

Commentators and judges alike have made efforts to ‘liberate,’ ‘expand,’ and ‘modify’ the doctrine's scope, yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine's historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine's past.\(^9\)

This article discusses why the ATL theory is an unworkable attempt to expand the PTD beyond its common law foundation. Even if the court permitted the expansion of the PTD, the doctrines of Standing and Political Question should deny these claims unless modified into the more familiar form of private nuisance or public nuisance cases outside the scope of areas regulated by the EPA.

Part I of this article addresses the background of the PTD and ATL. Part II addresses the progression of the PTD, climate change litigation, and ATL, including a discussion of the policy considerations of these doctrines. Part III examines standing and the political question doctrine in PTD and ATL cases to determine the applicability of the doctrines to the plaintiff’s claims. This article concludes that the ATL theory can be utilized in jurisdictions where the legislature has previously provided a basis for the air or atmosphere as a part of the Public Trust; however, in jurisdictions where this has not occurred, the ATL theory seeks to circumvent

\(^{5}\) See generally Adjudicating Climate Change infra Part I.B; Nature’s Trust infra Part I.B.
\(^{6}\) Id.
\(^{7}\) See generally Nat’l Audubon Soc’y v. Super. Ct., 33 Cal. 3d 419 (1983); Marks v. Whitney, 6 Cal.3d 251, 259-60 (Cal. 1971) (discussing the Public Trust as traditionally defined and how the trust has been expanded to include additional related rights).
\(^{8}\) See generally Geer v. Conn., 161 U.S. 519 (1896); see infra note 21.
unfavorable political outcomes with legal actions, which runs afoul of non-justiciability limitations.

I. CONCEPTUAL FOUNDATIONS OF THE PUBLIC TRUST DOCTRINE AND ATMOSPHERIC TRUST LITIGATION

A. THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine in American jurisprudence traces its roots to the mid-1800s when the Supreme Court of the United States tackled the issue in two cases, Martin v. Waddell’s Lessee and Pollard’s Lessee v. Hagan.10 These cases represent the origin of the concept that the absolute right to “navigable waters, and the soils under them, passed to the states upon admission to the union, for the ‘common use’ of the ‘people.’”11 The PTD has developed almost primarily as an issue of state law, by virtue of the title passing to the states upon their admission to the union.12

While these cases helped define the initial scope of the doctrine, the roots of the PTD are traceable to England where the common law established “the King is the owner of all navigable rivers, bays, and shores below low water mark, and he owns them, not as trustee, but in full dominion and propriety.”13 The King’s ownership of the land was subject to two limitations: “That these waters shall remain highways for passage and navigation;” and “[t]hat while they remain ungranted there is a common right of fishery therein.”14 There is also a foundation for the PTD in Roman law as the Supreme Court discussed in Idaho v. Coeur d’Alene Tribe of Idaho by citing the Institutes of Justinian’s characterization of the public use of rivers and ports and their commonality.15

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11 Timid Approach, supra note 10, at 54.; Cf. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (holding that the State gained title in fee simple to lands influenced by the tides even though they were not navigable at the time of Mississippi’s admission to the Union).
12 District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1082 (D.C. Cir. 1984); See also supra note 5; Richard M. Frank, The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future, 45 U.C. DAVIS L. REV. 665, 680-85 (discussing application of PTD in the federal system and citing to Illinois Central that the decision was a “judicial explication of state, rather than federal, law principles”) (hereinafter The Public Trust Doctrine).
13 Arnold v. Mundy, 6 N.J.L. 1, 52 (1821).
14 Id.
American jurisprudence has departed from this absolute ownership. It has cast aside the trustee relationship, as established by English common law, in favor of “[a] public trust doctrine [that] holds...certain crucial natural resources are the shared, common property of all citizens [and] that [they] cannot be subject to private ownership and must be preserved and protected by the government.” This departure from the English common law tradition is notable because the King’s absolute title permitted him to treat the land in any manner he wished, subject to the limitations for navigation and fisheries, as opposed to the American common law tradition to which creates a “fiduciary obligation to protect such natural assets” to which the state is held. The fiduciary duty has traditionally “functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes.” This fiduciary duty limitation is manifested in two manners: one is a constraint on the state legislature in terms of the laws enacted, and the other is the act of the state in conveying land subject to the PTD.

1. Scope of the Public Trust Doctrine

In Martin v. Waddell’s Lessee, the Supreme Court provided the foundation for the PTD in American jurisprudence. The Court reasoned that “[w]hen the revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them; for their own common use, subject only to the rights since surrendered by the constitution to the general government.” The states’ ownership of the PTD land is subject to

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17 Id.; See generally Geer, 161 U.S. at 519; See also The Public Trust Doctrine, supra note 12, at 676-79 (discussing the applicability of the PTD to fish and wildlife resources).
18 Air Fla., Inc., supra note 12, at 1082-83.
20 Martin v. Waddell’s Lessee, 41 U.S. 367 (1842); See supra note 5; See also Adapting to Climate Change, supra note 15, at 798-9; Washburn and Nuñez, supra note 15, at 25 (explaining how the Equal Footing doctrine operates such that “each subsequently admitted state acquired the beds of navigable waters in its sovereign capacity at statehood” subject to a federal law limitation that “the navigable waters that passed to the states under the equal footing doctrine are those that
federal government restrictions, but this does not result in the federal government being subject to the standard as the states. Since the Supreme Court established the basis for the PTD, courts have wrestled with the issue of whether to expand the basic premise of the PTD and introduce new areas that may be subject to the doctrine. Courts have also looked at related resources, such as the wildlife, and scientific endeavors when considering expanding upon the traditional lands, also known as “res communes,” under the PTD.

In Air Florida, Inc., the Court referred to a series of cases in which the courts in California have expanded the PTD from the traditional water-related uses to include “swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands.” The PTD has been utilized as a source of authority to seek damages for water-related harms when an oil spill causes waterfowl to be killed. The basis of this authority was that “under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources.” The right instilled in the government did not “derive from ownership of the resources but from a duty owing to the people.”

The expansion of the PTD has been adopted by some courts, but the judicial expansion has not exceeded the scope of navigable waters.

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23 Marks v. Whitney, 6 Cal.3d 251, 259-60 (Cal. 1971) (discussing the Public Trust as traditionally defined and how the trust has been expanded to include additional related rights).
24 Geer, 161 U.S. at 519 at 525 (discussing what was divided among men in private ownership and those things that remained in common ownership – “referred to by jurisconsults [as] ‘res communes.’ These things included ‘the air, the water which runs in the rivers, the sea, and its shores”).
25 See supra note 16; See generally Geer, 161 U.S. at 519.
26 See supra note 12.
27 Complaint of Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (discussing a cause of action for damages, statutory penalties, and cleanup costs where the defendant caused an oil spill in the Chesapeake Bay in 1976 that resulted in the death of approximately 30,000 migratory birds).
28 See supra note 27.
29 See supra note 17.
Additionally, some states have expanded their definitions of navigable waters to include more waterways than would be included under the federal standard. The addition of environmental rights in a state constitution or other statute should not be confused with an expansion of the common law PTD as that expansion is an exercise of the individual state’s police power. On the topic of expansion, Richard Lazarus contended that the strength of PTD “necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access.”

2. Limitations on the State by the Public Trust Doctrine

There are two theories that courts have applied to restrict the state’s treatment of the res communes of the PTD. The first is that courts have imposed an affirmative duty upon the State to reasonably protect or conserve Public Trust resources, but this approach is in the minority. Most courts have instead imposed limitations on State “actions that adversely affect the [Public Trust] concerns” and this has been further broken down into three approaches. These approaches are as follows: (1) A requirement that the action at issue “satisfy a public trust purpose;” (2) a requirement that the State consider “adverse impact on the trust resource” before acting if the impact is “either minimal or necessary,” and (3) that the action be specifically authorized by the legislature when it is being taken by the executive branch.

The seminal case in PTD jurisprudence for the limitations on State action by the fiduciary duty imposed is Illinois Central. In Illinois Central, the Court limited the ability of the Illinois state legislature to convey title of the lakebed of Chicago’s harbor to the Illinois Central

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34 Changing Conceptions, supra note 31, at 650-51.
35 Compare Changing Conceptions, supra note 31, at 650-51 with Adjudicating Climate Change, infra Part I.B and Nature’s Trust, infra Part I.B.
36 Changing Conceptions, supra note 31, at 650-51.
37 Id.
38 See supra note 20.
Railroad Company. This limitation is due to the fact that the “public trust cannot be relinquished by the state, except as to parcels used in promoting the interest of the public and without the substantial impairment of the public interest in the remaining lands and waters.”

This limitation has been adopted in “virtually every state jurisdiction as a matter of state common law.”

The pursuit of constraint by legal action has been seen time and time again to “stave off the greedy or harmful proposed uses of state water, waterbodies, watercourses, and their related resources” and provided “an effective tool for judicial oversight of private interests and complacent state agencies.”

This use of legal action has given rise to various theories utilized to protect the res communes. The Atmospheric Trust Litigation theory is the most recent example of this effort.

**B. ATMOSPHERIC TRUST LITIGATION**

1. Domestic Application

ATL involves the notion that courts “can hold governments at the national and subnational level accountable for reducing carbon emissions” by virtue of the atmosphere being “characterized ... as one of the assets in the trust, shared as property among all nations of the world as co-tenants.”

The theory would hold governments at various levels responsible on a fiduciary basis for public trust res and seek court ordered relief for any violations of that duty. Courts would essentially be ensuring that the other

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39 See generally supra note 20. *Adapting to Climate Change, supra* note 165, at 801 (distinguishing private ownership of public trust doctrine lands is also subject to limitation based on the navigability of the waterway); *Is the Public Trust, supra* note 15, at 25 (discussing the limitation for private owners will vary from no limitation for owners of non-navigable waterways, to strict limitations on property rights that extend only to the waterway).

40 See supra note 20, at 453; See also, *Is the Public Trust, supra* note 15, at 25.

41 *Is the Public Trust, supra* note 15, at 25 (discussing Ill. Cent. R.R. Co. as an example of legal action to curtail the actions of the State legislature, as opposed to an agency, that had been complacent in its grant of land to the railroad company only to realize the error at a later date).

42 *Timid Approach, supra* note 10, at 55.


44 *Adjudicating Climate Change, supra* note 43, at 100; See also MARY CHRISTINA WOOD, *Nature’s Trust: Environmental Law for a New Ecological Age* 156-61, 221-22
branches of government are fulfilling their duties as trustee of the Public Trust. The violation that the PTD seeks to have rectified is one where the trust has been used “as a prerogative for the advantage of government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”

The strategy, as a whole, would seek to apply the PTD or a country-specific derivation, as applicable, “toward enforcing planetary carbon reduction requirements, formulated to hold each government accountable for its share of the necessary reduction.” The stratagem would be distinguishable in the United States domestic courts from those claims that sought relief under the various environmental statutes, such as the Clean Air Act. The rationale for using the PTD, as opposed to other strategies, is three-fold. First, the doctrine “is the most fundamental legal mechanism to ensure government safeguards natural resources necessary for public welfare and survival.” Second, the PTD is more likely to be justiciable because “judicial enforcement of fiduciary obligations is necessary when the political branches abdicate their responsibility to protect the res of the trust.”

A third justification for the use of the doctrine is based on the human rights argument of a “right to life” and the doctrine being “a judicial tool to ensure that political branches of government protect the [right].”

The fiduciary duty as trustee, under the PTD, to protect the res is not a duty that can be disclaimed. The Public Trust is described as an “attribute of government” and thus the management of the trust is

(discussing a multi-factor test for defining the res under the Nature’s Trust adaptation of the Public Trust doctrine and how the Atmospheric Trust Litigation theory approaches climate change for the res of the trust) (2013) (hereinafter Nature’s Trust).

Adjudicating Climate Change, supra note 43, at 100; Nature’s Trust, supra note 44, at 14 (explaining how Nature’s Trust is another step in determining ownership for resources based on the Public Trust Doctrine and thus an obligation upon the government).

Adjudicating Climate Change, supra note 43, at 102.

Adjudicating Climate Change, supra note 43, at 100.

Id. at 100.

Id. at 100-03; See also Nature’s Trust, supra note 44, at 14.


Mark Belleville & Katherine Kennedy, Cool Lawsuits - Is Climate Change Litigation Dead After Kivalina v. Exxonmobil?, 7 APPLACHIAN NAT. RESOURCES L.J. 51, 82 (2013) (citing the amicus law professors) (hereinafter Cool Lawsuits); Nature’s Trust, supra note 44, at 128 (explaining how the duty imposed on government by the public trust is discharged when the government’s conduct is “directed to no other end but the peace, safety, and public good of the people”).

See supra note 47.

Adjudicating Climate Change, supra note 43, at 103.
applicable to all government bodies. While this traditionally has been the case, the concept of the PTD in American jurisprudence has always been “controversial...[due to] U.S. law favor[ing] ownership of natural resources as private property.” This controversy centers around the fact that the PTD “treat[s] some resources as subject to a perpetual trust that forecloses private exclusionary rights.” The beneficiaries of this trust are “present and future generations” thus enabling citizens to pursue enforcement of the government’s duty as the trustee of the trust. The fiduciary duty sought to be enforced is one that requires a trustee to “protect the assets of the trust from damage.”

The ATL theory seeks to analogize trust assets with transboundary trust assets, such as a waterway shared between states, or migratory birds that migrate across borders. Under the ATL theory, the fiduciary duty is translated to the federal government from the state government when there is a national interest in the resource, such as under Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).

In order to move forward, the theory presupposes a series of cases on an ATL basis that does not necessarily need to be brought in every jurisdiction. Once a sufficient number of “precedent-setting lawsuits” create a “clear liability framework” then that can “spur necessary action on the political level nationally” and eliminate need for massive litigation to continue. A declaratory judgment may also be sufficient to move the ball forward and become a “yardstick for political action.” The declaratory

54 Id.; See also Nature’s Trust, supra note 44, at 16 (discussing how different views exist about the Public Trust, but that despite being a judicial tool the “doctrine’s fundamental applicability to the legislative and administrative branches”).
55 Cool Lawsuits, supra note 51, at 82.
56 Id.
57 Adjudicating Climate Change, supra note 43, at 104.
58 Id. at 105 (citing Restatement (Second) of Trusts §176 that states “The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.” [emphasis added]).
60 Adjudicating Climate Change, supra note 43, at 107 (citing CERCLA, 42 U.S.C. § 9607(f) n. 40, as an example of co-trusteeship); See also Nature’s Trust, supra note 44, at 133-36 (discussing the status of the federal government as a co-trustee in management of the public trust). Contra Martin v. Waddell’s Lessee, 41 U.S. 367 (1842) (stating that the State’s succeeded Great Britain in sovereignty over their land, subject to the same restrictions as those imposed upon the King under British common law). For further discussion, see infra Part II.
61 Id.
62 Adjudicating Climate Change, supra note 43, at 113-14; See also Nature’s Trust, supra note 44, at 226-27 (discussing the types of actions that can be brought).
63 Adjudicating Climate Change, supra note 43, at 115.
judgment may come from various levels of a sovereign, such as from a “municipal [judge], state court [judge], and federal [judge] to enforce the fiduciary obligation against the various levels of government.” The carbon reduction plan may take various shapes, such as “carbon taxes, infrastructure projects, or transfer of public investment” and these may be outside the scope of judicial enforcement due to non-justiciability standards.

2. Global Applications

For application of ATL on a global scale, the United Nations Framework Convention on Climate Change is cited as creating an obligation for the parties to “protect the climate system for the benefit of present and future generations...” and this is a way to require foreign sovereigns to comply with carbon emission reductions. This obligation will position “nations...as sovereign co-tenant trustees of a shared atmosphere” and potential permit enforcement of the obligation to “protect the climate system.” In order to accomplish the goal of carbon emission reduction, each sovereign would be attributed a reduced target goal and this goal could be “scaled down to each subnational jurisdictional level.” This approach would spread the responsibility equally amongst the nations and allows for intra-nation divisions as well, with the goal of eliminating the “developed versus undeveloped world” rift in the current international regulation of climate change. However, the theory continues to discuss the potential reality of “orphan shares,” which occur when a sovereign does not take responsibility for its share of liability to reduce carbon emissions. These orphan shares would not be positioning sovereigns to take more than their share in the initial stages, but the theory creates a principle of inexcusability of orphan shares, in part or whole, and any significant

64 Id. at 118; See also Nature’s Trust, supra note 44, at 145, 248-53 (discussing the common law’s ability to adapt to changing circumstances and how a declaratory judgment is the foundation for Nature’s Trust remedies).
65 Adjudicating Climate Change, supra note 43, at 121.
68 Adjudicating Climate Change, supra note 43, at 111.
69 Id. at 112.
70 Id. at 113.
orphan share “is likely to defeat efforts to reduce emissions adequately in the short time frame needed.”

Once a nation has been successfully transitioned to accepting its atmospheric fiduciary obligation, then actions may be “brought by one sovereign trustee against another for failure to maintain common property” as an effort to ensure compliance between sovereign nations. This is because governments’ approach to climate change has been “perceived as a matter of political discretion, not obligation” and in order to accomplish the goals of ATL there will need to be a significant shift in societal emphasis in “moral, political, spiritual, economic, and legal framework.”

II. EXISTING LEGAL FRAMEWORK OF PUBLIC TRUST DOCTRINE AND ATMOSPHERIC TRUST LITIGATION

To evaluate the ATL theory’s prospects for success, case law that has developed in and around the question of PTD and climate change must be considered.

A. THE EVOLUTION OF THE PUBLIC TRUST DOCTRINE

Illinois Central Railroad Company is the seminal case on the issue of what a government can and cannot do in relation to lands that are subject to the PTD and the inalienability rule that locks resources into public ownership. In Illinois Central, at issue was the controversy regarding the “control of the bed of Lake Michigan east of downtown Chicago.” There were various entities clamoring to establish their claim of controlling interest so the Court would grant them the title to the lands on which the lakefront of Chicago, which was formerly lakebed but now is currently occupied by railroad tracks among other structures to which the railroad

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71 Id.
72 Id. at 114; See also Nature’s Trust, supra note 44, at 226-27 (discussing the capability of a sovereign to pursue action against another sovereign for committing waste of an asset in the Nature’s Trust).
75 American Public Trust, supra note 74, at 800.
claims title. In 1851, the Illinois legislature granted certain lands, subject to a previous act of Congress, to the railroad company for the purpose of creating a railroad that would serve as a “public highway for the use of the government of the United States” and also serve the State of Illinois and City of Chicago. However, the issue arose due to the railroad company constructing the railroad on land that was reclaimed from the waters of Lake Michigan, without acquisition of those lands beyond those granted by an ordinance from the City of Chicago and the act of the State Legislature. In 1873, the State Legislature repealed the grant of the land to the Illinois Central Railroad Company in order to use the land for a more modern purpose.

In discussing the grant of the bed of Lake Michigan to the railroad company, the Court discussed the importance of the harbor of Chicago to the people of the State of Illinois and asserted that “depriving the state of control…and pl[ac[ing] the same in the hands of a private corporation…is a proposition that cannot be defended.” The character of the property is one of a public nature that is held “by the whole of the people for purposes in which the whole people are interested.” The submerged land is “held by the people of the state in trust for the common use…” The Court reasoned that “the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them … without impairment of the public interest…than it can abdicate its police powers in the administration of government and the preservation of the peace.”

The Court determined that the State Legislature had acted in a manner analogous to licensing when the original grant was provided to the railroad to develop the land, which was in the public’s interest, and that by repealing the grant the Legislature had in essence terminated the license

76 Ill. Cent. R.R. Co., 146 U.S. at 433 (discussing how the lands were attributed to the State of Illinois upon their admittance to the union and that as a matter of law “lands covered by tidewaters” are under the ownership of the State); See generally State v. Central Vt. Ry. 571 A.2d 1128 (Vt. 1989) (analogizing the Railway’s land as fee simple subject to condition subsequent, which was a restriction that the land be use for public purposes); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979) (holding that Lewis Wharf statutes gave grantees title to land below low water mark in fee simple, but subject to conditions subsequent that it be used for the public purpose for which it was granted).
77 Id. at 445.
78 Id. at 445.
79 The Origins of the Public Trust Doctrine at 905-912.
81 Id. at 456.
82 Id. at 459.
83 Id. at 452-3.
previously granted. The Court noted that as “a grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.”

The issue in National Audubon revolved around a grant by the Division of Water Resources of the State of California for the City of Los Angeles to divert certain streams of water that fed into Mono Lake. The diversion resulted in a drop in water level in Mono Lake, which supported a wide array of wildlife. The case presented a dichotomy between the PTD and the “appropriative water rights system which since the days of the gold rush has dominated California water law.”

The court reviewed the foundations of the PTD. The purpose of the PTD was determined to have been originally based in “navigation, commerce and fisheries” then expanded in California to include additional recreational uses. The court reasoned that Mono Lake was a navigable waterway or at a minimum, it is a fishery subject to protection under the PTD. The scope of the trust was an analysis limited to those traditional lands subjected to the trust and those, like Mono Lake, which have been included under a more expanded view of “navigable waterways.”

The final stage of the analysis was to consider the State’s duties and powers as trustee. The court emphasized that “parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust.” The court cited to the Illinois Central case for determining whether the State had acted within their duties and powers as the trustee or if they had acted more in a manner akin to the Illinois Legislature. The court determined that the PTD requires the use of “public properties for public

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84 Ill. Cent. R.R. Co., 146 U.S. at 460-463 (rejecting Illinois Central Railroad’s argument that the lands had been actually conveyed rather than having received the equivalent of a license).
85 Ill. Cent. R.R. Co., 146 U.S. at 460-63 (The decision put the two grants of the State Legislature at odds, one which championed the public interest and one that seemingly violated the public interest, and so the repeal operated to terminate the latter).
87 Id.
88 Id. at 426.
89 Id. at 434.
90 Id.
91 Id. at 437.
92 Id. at 437-38.
purposes” and there is a duty on the State, as trustee, to “protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”

In reviewing the relationship between the PTD and the California water right system, the court concluded that each of the systems of management “would occupy the field of allocation of stream waters to the exclusion of any competing system of legal thought.” The court reasoned that the mutual exclusivity of these two systems was not compatible with our legal system, which necessitated a compromise that would integrate the two.

The court held that the State has the right to exercise dominion over the navigable waters, including lands beneath them, but that when considering uses of the waterways or uses that would impact them, the State has “as affirmative duty to take the public trust into account.” In so holding, the court sought to infuse the two regimes to “clear away the legal barriers” and enable the State to take “a new and objective look at the water resources of Mono Basin” while protecting “human and environmental uses of Mono Lake” because “such uses should not be destroyed because the state mistakenly thought itself powerless to protect them.”

B. CLIMATE CHANGE LITIGATION EVOLUTION

1. Massachusetts v. EPA

In Massachusetts v. EPA, the Supreme Court reviewed a claim by the State of Massachusetts for harms due to climate change because the EPA had denied a petition to begin regulating the emissions of carbon dioxide, as a pollutant, from new automobiles. The case largely revolves around the issue of standing, in particular whether under the Lujan standard there is a demonstrated “concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and

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94 Id. at 440-41.
95 Id. at 445.
96 Id.
97 Nat’l Audubon Soc’y, 33 Cal.3d at 445-47.
98 Id. at 452.
that it is likely a favorable decision will redress that injury.”\textsuperscript{100} The Court reasoned that the litigant was vested with a procedural right as a result of 42 U.S.C. §7607(b)(1), which grants judicial review to challenge agency action.\textsuperscript{101} The Court looked to \textit{State of Georgia v. Tennessee Copper Co.} to reason that Massachusetts, like Georgia, had a vested interest in the outcome of the case sufficient “to warranty the exercise of federal judicial power” and that Massachusetts’ interest in “protecting its quasi-sovereign interests” entitled it to “special solicitude in our standing analysis.”\textsuperscript{102}

The harm alleged by the Commonwealth of Massachusetts was one where the rise of sea levels due to global warming would precipitate a sufficient loss of coastal property because the Commonwealth “owns a substantial portion of the state’s coastal property.”\textsuperscript{103} This potential loss of land gives rise to the possibility that the EPA may exercise its rulemaking authority to limit greenhouse gas emissions to curtail the extent of the harm.\textsuperscript{104}

2. Public Nuisance

In pursuing claims for climate change, the issue of regulation is often seen as both a positive and a negative, but in the \textit{American Electric Power Company} case the issue of federal regulation served as a bar to a common law right to seek abatement of carbon dioxide emissions.\textsuperscript{105} The Court addressed the issue by looking at (1) the availability of a federal common law right, (2) whether congressional action on a question previously at issue under federal common law removes a need for it to be addressed, and (3) when there is federal regulation on point, whether the

\textsuperscript{100} \textit{Massachusetts v. EPA}, 549 U.S. at 517.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 519-20; \textit{See generally} \textit{Georgia v. Tennessee Copper Co.}, 206 U.S. 230 (1907) (discussing the State of Georgia pursuing a claim against the Tennessee Copper Co. for the “[discharge] of noxious gas from their works in Tennessee over [Georgia’s] territory.” The Court reasoned that the State had an interest “independent of and behind the titles of its citizens, in all the earth and air within its domain.” The Court also reasoned that “it is fair and reasonable demand” by the State of Georgia, or any other sovereign, “that the air over its territory should not be polluted … by acts of persons beyond its control.” The Court concurred with the assertion by the State of Georgia that the pollution generated by the Tennessee Copper Co. was impacting the lands that they sovereignly held, which is similar to the public trust albeit navigable waters were not implicated explicitly, and that the State was entitled to their relief until the Tennessee Copper Company could complete their new structures).
\textsuperscript{103} \textit{Massachusetts v. EPA}, 549 U.S. at 523.
\textsuperscript{104} Id. at 526.
resulting government entity’s inaction in regulating the particular cause of action does not result in displacement.  

The Court determined that there was indeed federal common law and a right to pursue a claim, if the subject is one of national concern. The Court cited to a prior case that stated “air and water in their ambient or interstate aspects” do give rise to a claim under federal common law. However, the availability of a federal common law claim is “an academic question” because of the presence of the “Clean Air Act and the EPA actions the Act authorizes.”

The implementation of displacement depends on whether Congress has addressed “a question previously governed by a decision that rested on federal common law” and if it has addressed that then “the need for such an unusual exercise of law-making by federal courts disappears.” The threshold test is not subject to the same level of scrutiny that a state law may be; the Court stated that “legislative displacement of federal common law does not require the ‘same sort of evidence of a clear and manifest [congressional] purpose.’”

The Court held that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”

The EPA is free to seek any of its authorized methods of enforcement and when it has not “set emission limits for a particular pollutant or source of pollution, States and private parties may petition for a rulemaking on the matter.” The plaintiffs had argued that if the EPA actually exercised its authority then the displacement would occur, and if it had not actually exercised its authority, then no displacement would occur. The Court stated that “the Clean Air Act is no less an exercise of the legislature’s ‘considered judgment’ concerning the regulation of air pollution because it permits emissions until EPA acts.” The result is that the EPA has been delegated the power of regulate CO\textsuperscript{2} emissions from power plants, which displaces the ability of a party to seek enforcement through litigation.

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107 Id.
109 Id. at 2537.
110 Id.
111 See supra note 109.
112 Id.
114 Id.
115 Id. at 2538 (considering the issue of determining whether the inaction by the EPA changed the legislative intent to displace based on prior case law).
116 Cool Lawsuits, supra note 51, at 55.
The Court ultimately concluded that plaintiff’s state law action depended on the preemptive effect of the federal act, where the Clean Air Act displaced a federal common law cause of action based on the holding of International Paper Co. v. Ouellette.\(^{117}\)

In Comer, plaintiffs asserted claims for private nuisance due to the defendant’s release of “by-products that led to the development and increase of global warming, which produced the conditions that formed Hurricane Katrina, which damaged their property.”\(^{118}\) The District Court ultimately rejected their claim based primarily on res judicata, the lack of standing for the plaintiffs, the political question doctrine, and displacement by the Clean Air Act.\(^{119}\) The plaintiffs appealed the decision to Fifth Circuit Court of Appeals, which affirmed the lower court’s ruling on the basis of res judicata.\(^{120}\)

In the lower court decision, the main issues of relevance here are standing, political question and displacement.\(^{121}\) The focus issue of the standing was on causation.\(^{122}\) The court reasoned that the plaintiffs’ assertions of causation, when viewed in the context of the EPA’s findings on greenhouse gases, “does not in and of itself support the contention that the plaintiffs’ property damage is fairly traceable to the defendants’ emissions.”\(^{123}\) This contribution, or lack thereof, meant that the plaintiffs’ allegations of contribution “to the kinds of injuries that they suffered” were insufficient for standing and represented only part of the required elements.\(^{124}\) Ultimately, standing was denied because the burden of proving standing resides with the plaintiffs, whose alleged injuries were more difficult to prove than those in Massachusetts v. EPA or American Electric Power Co. due to their tenuous nature as pled.\(^{125}\)

The court briefly reviewed the political question doctrine in light of the plaintiff’s prayer for relief and assertions of causal link between the


\(^{118}\) Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (2012); See also Comer v. Murphy Oil USA, Inc., 718 F.3d 460 (2013); Misuse of Public Nuisance, supra note 105, at 209-12.

\(^{119}\) Comer, 839 F. Supp. 2d at 849.

\(^{120}\) Comer, 718 F.3d at 460.

\(^{121}\) See supra note 118.

\(^{122}\) Comer, 839 F. Supp. 2d at 858 (citing Center for Biological Diversity v. U.S. Dept. of Interior, 563, F.3d 466, 478 (2009)); See also Massachusetts v. EPA, 549 U.S. at 517; See generally Bellon, 732 F.3d at 1131.

\(^{123}\) Comer, 839 F. Supp. 2d at 860-61.

\(^{124}\) Id. at 861.

\(^{125}\) Id. at 861-62 (citing the court’s decision in the prior Comer case disallowing “discovery that will likely cost millions of dollars, when the tenuous nature of the causation alleged is readily apparent at the pleadings stage of litigation”).
release of defendants’ by-products and an increase in global warming.\textsuperscript{126} However, the plaintiffs contended that their prayer for relief was not “asking [the] court to regulate emissions or to make policy determinations concerning climate change” but the court cited portions of the plaintiff’s complaint that meant the court would have to “determine that the defendants’ levels of emissions are ‘unreasonable.’”\textsuperscript{127}

The court also ruled that the plaintiffs’ claim was displaced by the Clean Air Act, citing to Am. Elec. Power Co., where the plaintiffs similarly requested relief relating to the emissions by the defendants and the court’s need to make a determination as to the reasonableness of those emissions.\textsuperscript{128}

The State of California has been at the forefront of global warming and PTD cases as seen in National Audubon.\textsuperscript{129} However, courts have occasionally transitioned from injunctive relief to damages for causes of action under a theory of climate change\textsuperscript{130} and the Native Village of Kivalina v. ExxonMobil Corp. case is illustrative of that dilemma.\textsuperscript{131}

In Kivalina, the Village of Kivalina is the governing body for the approximately 400 Eskimo villagers who reside in the City of Kivalina.\textsuperscript{132} The villagers have asserted a claim based on the increased temperatures as a result of global warming reducing the amount of Arctic sea ice that protects the coastline and resulting in erosion and destruction forcing the relocation of the villagers.\textsuperscript{133} The court was presented with a claim of common law nuisance by a request for relief that is neither injunctive nor monetary damages, but an estimated requirement of “$95 million to $400 million” and various requests for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).\textsuperscript{134}

\textsuperscript{126} Id. at 862.
\textsuperscript{127} Id. at 864.
\textsuperscript{128} Comer, 839 F. Supp. 2d at 865; See also California v. Gen. Motors Corp., No. C06–05755 MJJ, 2007 WL 2726871 *1 (N.D. Cal. Sept. 17, 2007) (discussing the claim by the State of California against a group of automobile manufacturers in which they sought damages rather than an injunction, which is a notable departure from prior cases in climate change litigation, but ultimately the Court held that “it cannot adjudicate Plaintiff's federal common law global warming nuisance tort claim without making an initial policy determination of a kind clearly for nonjudicial discretion.”); Misuse of Public Nuisance, supra note 105, at 212-13 (discussing California v. General Motors Corp., 2007 WL 2726871 at *1).
\textsuperscript{129} See supra note 88.
\textsuperscript{130} See generally California v. Gen. Motors Corp., 2007 WL 2726871 at *1; Misuse of Public Nuisance, supra note 105, at 212-13.
\textsuperscript{132} Native Village of Kivalina, 663 F. Supp. 2d at 863.
\textsuperscript{133} Id. at 865.
\textsuperscript{134} Id. at 870.
The court evaluated the plaintiff’s standing and the defendants argued that the matter at issue should be dismissed on political question doctrine and standing grounds. The court primarily reviewed the political question doctrine because “the Supreme Court has indicated that disputes involving political questions lie outside of the Article III jurisdiction of federal courts.” The court reiterated the Baker v. Carr test for political question and summarized it into three groupings.

The court reviewed each of the six tests outlined in Baker v. Carr, starting with textual commitment. The textual commitment test is one where “the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.” The defendants had argued that the case violated the first test because of the global nature of the harm and the Constitution’s textual commitment of foreign relations to the executive branch. The court cited two cases for the propositions that “the very nature of executive decisions as to foreign policy is political, not judicial” although “Baker cautioned against ‘sweeping statements’ that imply all questions involving foreign relations are political ones.” The court determined that while the “indisputably international dimension of this particular environmental problem does not render the instant controversy a non-justiciable one…global warming issues may implicate foreign policy and related economic issues, and the fact that this case ‘touches foreign relations’ does not ipso facto place it beyond the reach of the judiciary.”

The second and third prongs under the Baker test can be lumped together when the court reviewed the “well-settled principles of tort and public nuisance law,” as applicable, but reasoned that these principles would not provide guidance here since the current court is “not so sanguine” as the Supreme Court when deciding Am. Elec. Power Co. In fact, the court further reasoned that “the harm from global warming involves a series of events disconnected from the discharge itself” and the liability and damages extending from such an attenuated chain of causation is “on a scale unlike any prior environmental pollution case cited by the Plaintiffs” thus the second test precluded judicial consideration.

135 Id. at 870.
136 Native Village of Kivalina, 663 F. Supp. 2d at 871.
137 Id. at 871-72.
138 Id. at 872.
139 Id.
140 Id. at 872-73.
141 Native Village of Kivalina, 663 F. Supp. 2d at 873.
142 Id. at 873.
143 Id. at 875.
144 Native Village of Kivalina, 663 F. Supp. 2d at 876.
The court evaluated the plaintiffs’ Article III standing and concluded that plaintiffs had not alleged a valid injury. The plaintiffs assert, “[T]hey need only allege that defendants ‘contributed’ to their injuries” and concede, “they are unable to trace their alleged injuries to any particular defendant.” The basis for this assertion is from the context of the Clean Water Act for contribution principles, but the court rejects that this does not preclude the party from the injury requirements in a common law nuisance claim, which is substantially distinguishable from a statutory water pollution claim. The plaintiffs further contended that they were entitled to receive “special solicitude” treatment for Article III standing similar to the Commonwealth of Massachusetts in Massachusetts v. EPA. However, the court rejected that argument based on the fact that the plaintiffs are not “seeking to enforce any procedural rights concerning an agency’s rulemaking authority” but rather their “claim is one for damages directed against a variety of private entities.”

The court’s holding was that the “plaintiffs' federal claim for nuisance is barred by the political question doctrine and for lack of standing under Article III.” The plaintiffs appealed the case to the Ninth Circuit Court of Appeals. The Ninth Circuit held that the District Court had properly rejected the claim by the Village of Kivalina, concluding that the Clean Air Act displaced a federal common law claim for public nuisance as seen in Am. Elec. Power Co. and Bell v. Cheswick Generating Station.

3. Atmospheric Trust Litigation Cases

Thus far, there have been several notable cases brought in state courts under the Atmospheric Trust Litigation theory, which will be reviewed briefly.

In Butler ex rel. Peshlakai v. Brewer, the Nation’s first ATL case “to be heard on its merits,” was argued in 2012. However, the case was

145 Id. at 878.
146 Id.; See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).
147 Native Village of Kivalina, 663 F. Supp. 2d at 879-80.
148 Id. at 882.
149 Id.
150 Native Village of Kivalina, 663 F. Supp. 2d at 883.
151 See also Barhaugh v. State, 264 P.3d 518 (Mont. 2011); Amy Poehling Eddy, The Climate Petition and the Public Trust Doctrine, 36-Aug. MONT. LAW. 6 (2011) (discussing the efforts by petitioners seeking to have the State of Montana adopt regulations to curb GHG emissions and the denial & dismissing that resulted); States with Active Lawsuits, OUR CHILDREN’S TRUST, http://ourchildrenstrust.org/US/LawsuitStates (last visited Nov. 10, 2013).
subsequently appealed due to the dismissal under Arizona Rule of Civil Procedure 12(b)(6). The plaintiffs’ complaint sought relief “on the basis of the PTD” by requesting that the court declare “atmosphere is a public trust asset” and “defendants have a fiduciary obligation as trustees to take affirmative action to preserve the atmosphere and other trust assets from impacts associated with climate change.” On appeal, the plaintiffs amended the complaint to solely address “whether the [PTD] in Arizona includes the atmosphere.”

The plaintiffs allegations involve “state inaction,” which is not alleged to have been a violation of “any specific constitutional provision on which relief can be granted.” The relevant cases in Arizona’s PTD jurisprudence also “do not provide a constitutional basis for [the plaintiff’s] challenge because [they] do not assert that the state improperly disposed of a public trust resource.” Ultimately, the plaintiff did not assert any “constitutional provision from which we may derive the public trust protections and remedy [they urge].” The court could not “order the defendants to take actions in violation of a statute unless we determine the statute is unconstitutional” thus “[b]ecause we determine that relief cannot be granted, [plaintiff] is essentially requesting us to issue an advisory opinion which we will not do.”

A second ATL case was filed by Gloria dei Filippone, who is a minor, through her mother Maria Filippone against the Iowa Department of Natural Resources. The lawsuit was filed as result of the denial of “a petition for rulemaking pursuant to Iowa Code §17A.7(1)” by Kids vs. Global Warming and specifically requested that the Department of Natural Resources (“DNR”) “adopt new rules restricting greenhouse gas

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156 Id. at 2.
157 Id. at 7.
159 Id.
160 Id at 8.
emissions.” The DNR denied the petition because it “anticipated the Environmental Protection Agency (EPA) will likely be creating new standards, which might be inconsistent with the proposed rules in violation of Iowa Code §455B.133(4).” The DNR also cited that “adopting the proposed rules would require resources and funding to be designated to the program, and that without additional legislatively-appropriated funding, it would be unable to develop and administer the proposed rules.” The District Court held that DNR’s denial was not “unreasonable, arbitrary, capricious, or an abuse of discretion” and the court “declined Filippone’s invitation to expand the public trust doctrine to include the atmosphere.”

On appeal, the court considered three issues: the Inalienable Rights Clause, PTD, and Fair Consideration. The Inalienable Rights Clause, asserts a claim that provides a “right to a life-sustaining atmosphere.” However, Filippone failed to assert this issue before the District Court, which constrained the Court of Appeals from considering the.

The second issue is the PTD and Filippone’s request that the DNR “must consider new rules regarding greenhouse gas emissions because the PTD applies to the atmosphere.” The court noted that the PTD in Iowa is one that “limits the State’s power to dispose of land encompassed within the public trust and is based on the notion that the public possesses inviolable rights to certain natural resources.” However, the court also noted “the public trust doctrine in Iowa has a narrow scope” and that the Supreme Court of Iowa does not “necessarily subscribe to broad applications of the doctrine, noted by one authority to include rural parklands, historic battlefields, or archaeological remains. In fact, we are cautioned against an overextension of the doctrine.” The limited scope of the PTD resulted in the DNR not having “a duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere.”

Filippone, 829 N.W.2d at 1.
Id.
Filippone, 829 N.W.2d at 1.
Id. at 2-3.
Id. at 2.
Filippone, 829 N.W.2d at 2.
Id.
Filippone, 829 N.W.2d at 2.
Id. at 2 (citing Fenci v. City of Harpers Ferry, 620 N.W.2d 808, 813 (Iowa 2000) and State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989) to support the propositions of limited scope for the Iowan Public Trust Doctrine); See also Bushby v. Wash. Cnty. Conservation Bd., 654 N.W.2d 494, 498 (Iowa 2002) (noting a cite by the Court to a prior decision where “our supreme court declined to extend the doctrine to cover forested areas”).
Filippone, 829 N.W.2d at 3.
Therefore, the court concluded that the DNR’s denial of the proposed rule was not unreasonable.\textsuperscript{173}

The final issue of fair consideration involves the DNR’s duty to “give fair consideration to the petition for rulemaking.”\textsuperscript{174} The Iowan standard is that “an agency give fair consideration to the propriety of issuing the proposed rule” and “it does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule.”\textsuperscript{175} The Court of Appeals affirmed the District Court conclusion that the DNR gave fair consideration to the rulemaking petition noting that the “denial of the petition was not unreasonable, arbitrary, capricious, or an abuse of discretion.”\textsuperscript{176}

The third ATL case for discussion is \textit{Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality}.\textsuperscript{177} Similar to Filippone, \textit{Bonser-Lain} case involved a petition for rulemaking.\textsuperscript{178} Here, the petition had been submitted to the Texas Commission on Environmental Quality to develop a plan that would reduce carbon-dioxide emissions within the state by six percent per year.\textsuperscript{179} The court reviewed the petition for rulemaking, which had been denied on ground that the Texas PTD was “exclusively limited to the conservation of water” and that the Commission was “prohibited from protecting the air quality because of the federal requirements of the Federal Clean Air Act.”\textsuperscript{180}

In reviewing the Commission’s rationale for denying the petition for rulemaking, the court determined that the PTD differed from the traditional common law limitation to the conservation of water, but rather the Texas Constitution required “preservation and conservation of all of the natural resources of this State.”\textsuperscript{181} The court further reviewed the second rationale of the Commission and held that the Texas Clean Air Act mandated the protection of air quality by citing to Tex. Health & Safety

\begin{itemize}
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} (citing Cmty. Action Research Grp. v. Iowa State Commerce Comm’n, 275 N.W.2d 217, 220 (Iowa 1979), which reviewed the standard under Iowa Code §17A.7 for an agency’s review of a petition for rulemaking).
  \item \textsuperscript{176} \textit{Filippone}, 829 N.W.2d at 3.
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{181} \textit{See Bonser-Lain}, 2012 WL 3164561 at *1 (citing Texas Const. Art. XVI, § 59, which provides the range of resources to be protected).
\end{itemize}
Code Ann. § 382.002, which requires “safeguard[ing] the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants.” 182 The court ultimately denied the Defendant’s Plea for Jurisdiction because the Texas Constitution expanded the scope of the PTD beyond the traditional conservation of water and that the Clean Air Act did not prohibit a State from establishing more stringent rules. 183

III. PROPOSAL FOR ADDRESSING IMPACTS OF CLIMATE CHANGE BASED ON NUISANCE FRAMEWORK

This portion of the article will focus on two main points. First is an analysis of the ATL theory when argued on the common law basis for the PTD. This includes claims regarding navigable water ways or related resources, and nuisance claims accounting for permissible claims involving an air-related injury. Second, even if ATL is determined to be viable for the PTD fiduciary breaches, the claims should fail for justiciability concerns.

A. ATMOSPHERIC TRUST LITIGATION IS BEYOND THE INTENDED SCOPE OF THE PUBLIC TRUST

1. The Doctrine Traditionally Has Been Limited to Navigable Waterways or Related Resources

The PTD, as created and modified in American jurisprudence, has remained primarily focused on the issues relating to and regarding the use of navigable water. 184 In fact, it has been argued that the very basis for the famous Justinian Institutes quotation regarding the “common property of all” was “likely reflecting less the true nature of public rights during the Roman Empire than Justinian’s own idealization of a legal regime.” 185 The basis for the PTD really found its footing in Illinois Central, which was decided based on a theory of Public Trust. 186 The Illinois Central case sets

183 Id.
184 Changing Conceptions, supra note 31, at 633-38 (discussion of the origins of the Public Trust Doctrine); See generally Nat’l Audubon Soc’y, 33 Cal.3d at 435.
185 Id. at 635 (Footnote 12 includes a discussion of the origins of the famous Justinian Institutes quotation, the actuality of a Public Trust Doctrine operating in fact during the Roman Empire, and distinguishes the possibility of that Doctrine with Roman practice of conveying rights for the purpose of exploitation).
186 American Public Trust, supra note 74, at 926 (citing “What is less clear is why Justice Field felt compelled to reach for the blunderbuss of the public trust doctrine to defeat the Illinois Central’s vested-rights claim, rather than a more fact-specific argument, such as Justice Harlan’s characterization of the grant of the outer harbor as a revocable license”).
forth the basis for the disposition of Public Trust assets by the Trustee—in that case it was the State legislature attempting to dispose of assets, and also as much about how the Trustee may use the lands subject to the Public Trust to improve the utility for “whole of the people.”

The restriction set forth by *Illinois Central* raises the issue of what lands are actually subject to the Public Trust doctrine. *Arnold v. Mundy*, a 19th century New Jersey case, is a good starting point for defining the types of lands subject to the Public Trust as it predates both *Martin v. Waddell’s Lessee* and *Pollard’s Lessee v. Hagan*. In *Arnold*, the court defined the types of land common to “whole of the people” of New Jersey: Navigable rivers, the ports, bays, coasts of the sea for the purposes of passing, navigation, fishing, fowling, sustenance, and all other uses of the water or its products. The basis for the property rights derived from a grant from the King of England to the “duke of York…in which the rivers, ports, bays, and coasts were a part, passed to the duke of York, … exercising the royal authority.” The State of New Jersey, including the whole of the people, succeeded to “all of those royal rights” as a result of the Revolution. The Supreme Court recognized this in *Martin v. Waddell’s Lessee* and further stated that the Duke of York’s grant was “held by the king in his public and regal character, as the representative of the nation; and in trust for them.” The Court further held that “the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them; for their own common use, subject only to the rights since surrendered by the constitution to the general government.” The Supreme Court in *Pollard* referenced the proposition from holding of *Martin v. Waddell’s Lessee* that the lands subject to the PTD remain an issue of the states by stating “[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and

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187 *See generally Ill. Cent. R.R. Co.*, 146 U.S. at 387; *See also American Public Trust, supra note 74, at 929-930.
190 Id.
191 *Arnold*, 6 N.J.L. at 1 (emphasis added).
192 Id.
193 *Martin*, 41 U.S. at 367.
194 Id. (emphasis added).
jurisdiction over this subject as the original states. Thus, navigable waters and related lands are subject to the State’s definition of the PTD that the State must use in a manner consistent with their duties under the doctrine.

This progression of cases, when coupled with Illinois Central, clearly establishes a common law traditional jurisprudence linking the PTD to lands related to navigable waters. When this basis is added to the limitation in absolute title imposed upon the King of England by holding title “only for the benefit of the public” this means that the states could “enjoy no greater title” than what the King of England held.

Expansion of the PTD must be limited when defining scope of the resources as those “extending to ‘property of a special character’ and of ‘public concern to the whole people of the state’” as laid out by Illinois Central. The court in National Audubon Society faced the dilemma over whether the Mono Lake tributary streams qualified as navigable waters. It reasoned that while the streams did not qualify themselves as navigable waterways, the disruptions of the streams caused a drop in the water levels of Mono Lake, which is navigable water, and thus could be managed under the PTD.

An examination of the holding in PPL Montana, LLC v. Montana addressed what the “contours of the public trust” are and upon what they depend. The Court stated that the public trust does not rely on the Constitution to define its scope but rather “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders.” This principle has been demonstrated in the course of litigation sought under the theory of ATL: where the State has expanded the contours of the public trust, the results have been different from states in which there has been no change.

195 Pollard’s Lessee, 44 U.S. at 212.
197 See supra note 241.
199 Id. at 59 (citing Ill. Cent. R.R. Co., 146 U.S. at 454-55).
200 See generally Nat’l Audubon Soc’y, 33 Cal. 3d at 419; Conservative Reconstruction, supra note 196, at 59-63.
201 Id.
202 PPL Montana v. Montana, 132 S. Ct. 1215, 1234-35 (2012) (holding that the State of Montana did not hold title, under the equal footing doctrine, to riverbeds that were under segments of rivers that were non-navigable at the time of entry into the Union).
204 Compare Filippong, 829 N.W.2d at 589, with Bonser-Lain, 2012 WL 3164561 at *1; However, also see Alec L., 863 F. Supp. 2d at 11; Brewer, 2013 WL 1091209 at *1; Barhaugh, 361 Mont. at 1.
2. Air, When Used, Was the Result of a Nuisance Claim Outside the Scope of the Trust

Judicial expansion of the PTD has generally eschewed expanding the trust to include the atmosphere, even though the air has been the basis of litigation, and “judicial expansion has not been one to impose the common law public trust to resources other than navigable waters.”205 The holding in Georgia v. Tennessee Copper Co. provides insight into that reluctance when the Court focused not on the fact that pollution was caused by the sulphurous acid gas but instead on the “domestic destruction they have suffered.”206 The Court reasoned that the “wholesale destruction of forests, orchards, and crops” caused by the defendant’s use of their land to process ore in a manner that “the tall chimneys in present use cause the poisonous gases to be carried to greater distances” was sufficient to establish “there is no alternative to issuing an injunction.”207

The expansion of the public trust to include the atmosphere could potentially introduce the argument (by analogy) that the waterways were the ancient “public highway” and the air is the more modern “public highway” based on the holding in United States v. Causby, where the Court stated “[t]he navigable airspace which Congress has placed in the public domain ….”208 The Court subsequently stated that the “[t]he airspace, apart from the immediate reaches above the land, is part of the public domain” for the questions of whether flights over Causby’s property constituted a potential taking in the case.209 However, the situation in Causby is distinguishable from that of an ATL where the issue is primarily centered on global warming as opposed to the mere trespassory nature of overflights where “invasions of [air] are in the same category as invasions of the [land].”210

In the case of an argument by analogy to wildlife or game, using District of Columbia v. Air Florida, Inc. or Geer v. Connecticut as a basis, the analogy would be distinguishable from the basis of these decisions under parens patriae rather than the PTD per se.211 In Air Florida, the

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205 Is the Public Trust, supra note 15, at 26 (citing to Marks v. Whitney, 6 Cal.3d 251 (1971)).
207 Id at 239.
208 United States v. Causby, 328 U.S. 256, 263-64 (1946) (discussing the relevant limits to a property owner’s use and enjoyment of their property and contrasting the ancient tradition where the upper limit was the “periphery of the universe”).
209 Id. at 266.
210 Causby, 328 U.S. at 265.
211 See generally Geer, 161 U.S. at 519; Air Fla., Inc., 750 F.2d at 1077; Marks, 6 Cal.3d at 251; Cf. Jeffrey W. Henquinet & Tracy Dobson, The Public Trust Doctrine and Sustainable
Court held that the defendant was liable under the PTD. The river, which is a navigable waterway under the PTD, provided the Court a basis to find that Air Florida owed a duty of care regarding the river, which was breached by the crash. California has been a leader in the area of environmental litigation related to the public trust lands, but even it distinguishes between “common law public trust applicable to navigable waters and a public trust that arises from a statute that specifically provides that fish or wildlife are held in trust for the people and are regulated by a state agency pursuant to a specific statute.” Additionally, the regulation of wild animals and their state-based ownership has been removed from this analogy since the United States Supreme Court has also overruled Geer.

The final word on whether an analogy argument can be made or if the air is even subject to being classified as a part of the public trust may have been given when the Supreme Court addressed the issue of GHG emissions in American Electric Power. The Court acknowledged the limited applicability of “federal common law when dealing ‘with air and water in their ambient or interstate aspects’ in light of the existence of the [Clean Air Act].” In Am. Elec. Power Co., the Court stated that Congressional acts “installed an all-encompassing regulatory program, supervised by an expert administrative agency,” in this case the EPA, to deal with pollution. Thus, categorizing air as a component of the public trust may fall into a group of claims that are non-justiciable even if the air or atmosphere were to be included at common law.

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212 Air Fla., Inc., 750 F.2d at 1078.

213 Id.


215 Hughes v. Oklahoma, 441 U.S. 322 (1979) (stating “Geer v. Connecticut … is overruled. Time has revealed the error of the result reached in Geer through its application of the 19th century legal fiction of state ownership of wild animals. Challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources”).


217 Id.


219 Id (stating, “[W]hen Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise of law-making by federal courts disappears.” Milwaukee II, 451 U.S., at 314, 101 S. Ct. 1784 (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in Milwaukee I).
B. ATMOSPHERIC TRUST LITIGATION, IF Viable, FAILS FOR JUSTICIABILITY CONCERNS

In the event that ATL is found to be a viable expansion of the PTD, the next set of hurdles that the litigants must overcome is that laid out in Article III concerning standing and non-violation of the political question doctrine.220

I. Standing

In order to address Standing in this instance, we must look to Lujan v. Defenders of Wildlife. This case articulates the three-part test for standing: injury in fact, causation, and redressability.221

The standing requirement was a large portion of the decision in Lujan because the plaintiffs alleged that the actions of the Secretaries of the Interior and Commerce in regards to foreign nations would violate the Endangered Species Act of 1973.222 The Court reviewed the alleged harm by the plaintiffs and in the standing analysis found that in order to invoke federal jurisdiction.223 The Court stated a test for standing that required the plaintiff carry the “burden of showing standing by establishing, inter alia, that they have suffered an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest.”224 The plaintiff must also be able to demonstrate a “causal connection between the injury and the conduct complained of—the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not...[of] the independent action of some third party not before the court.’”225 The third prong of the test is that there must be redressability or the prospect that the Court will grant “must be ‘likely,’ as opposed to merely ‘speculative.’”226

220 U.S. Const., art. III, § 2, cl. 1 (The requirement that in order for judicial power to be available, the issue before the Court must involve “Cases, in Law and Equity, arising under this Constitution” or “Controversies to which the United States shall be a Party”).
222 Id.
223 Lujan, 504 U.S. at 555-6.
224 Id.; See also Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006).
225 Lujan, 504 U.S. at 560; See also Bellon, 732 F.3d at 1143-44 (citing Allen v. Wright, 468 U.S. 737 n. 19 (1984), which states that “[t]he ‘fairly traceable’ and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement.’”); Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1228 n. 5 (9th Cir. 2008).
226 Lujan, 504 U.S. at 560-61.
The party that invokes the jurisdiction of the federal courts is the same party that “bears the burden of establishing these elements.”

The Court reasoned that while the respondents established a “special interest in the subject” by their members they did not, however, demonstrate that they suffered any injury in fact. The respondents “state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals.”

The Court also determined that the respondents not only lacked injury, but that “failed to demonstrate redressability.” By failing to include the agencies which granted the funding for the projects at issue, but the Court could not grant relief requested by the respondents by order non-parties to capitulate unless they were “bound by the Secretary’s regulation, which is very much an open question.” Ultimately, the Court held that the respondents “lack standing to bring this action” and the Court reversed the Court of Appeals decision stating “the Court of Appeals erred in denying the summary judgment motion filed by the United States.”

In Massachusetts v. EPA, the State was subjected to the standing analysis from Lujan but also recognized that Congress had “accorded a procedural right to protect [their] interests” and “can assert that right without meeting all the normal standards for redressability and immediacy.” The Court permitted the Commonwealth of Massachusetts a “special solicitude” and reasoned that like the State of Georgia in Tennessee Copper Co., Massachusetts should be able to assert action to protect its quasi-sovereign rights.

Massachusetts’ burden for injury was more easily met because the “special solicitude” permitted an aggregation of actual or imminent injury for all of the citizens.

The Ninth Circuit’s ruling in Washington Environmental Council v. Bellon has narrowed the requirements for standing by reviewing a lower court’s ruling on the Plaintiff’s action to “compel the [agencies] to regulate [GHG] emissions from the state’s five oil refineries under the [Clean Air Act].” In order to meet the burden under standing, the Plaintiffs were...
required to show an injury in fact, the causality of that injury based on the Defendant’s action, and redressability. The court also reviewed the Plaintiff’s claim for relaxed standing requirements similar to those that the Commonwealth of Massachusetts was held to, but the court distinguished this by determining that neither the council nor its members were a sovereign, nor did they exercise a procedural right. The Court ultimately held that the Plaintiff’s had failed to meet their burden for Article III standing and had not satisfied the “irreducible constitutional minimum” as required by Lujan and thus the lower court did not have jurisdiction to rule on the merits.

In the ATL cases presented earlier, the plaintiffs generally alleged that the State had not thoroughly conducted their duties under the PTD and that as a result some harm, related to climate change, had or would injure them if relief were not granted. The plaintiffs have also generally petitioned the State agency responsible for environmental protection for rulemaking related to carbon dioxide emissions prior to filing their suit. Using these as the two steps that would be taken for a plaintiff who files a well-pled complaint under the theory of ATL, the following is an analysis of how the federal courts may treat the claim for standing purposes.

The first step is to determine whether the plaintiff would be able to establish that they suffered an injury in fact that is both “concrete and particularized.” The plaintiff would not be able to claim some exception from normalized standing under a rule similar to what the Commonwealth

237 Bellon, 732 F.3d at 1137-138 (reviewing the various claims by the plaintiffs to illustrate an injury, either currently or a risk of future harm, but since the defendants did not dispute the claims the court assumed, without deciding, that the plaintiffs had met their burden).
238 Id. at 1138-142 (citing various cases in their review of causation, but in specificity the inability of the plaintiffs to demonstrate causality because of the significant attenuation of the defendant’s alleged misconduct and the plaintiff’s assumed injury in fact. The court’s review of the alleged misconduct required more than “vague, conclusory statements” linking the misconduct to “their purported injuries.” The court specifically noted the causal chain’s “series of links strung together by conclusory, generalized statements of ‘contribution,’ without any plausible scientific or other evidentiary basis that the [defendant]’s emissions are the source of their injuries.” The court determined, through expert testimony, that the emissions were “scientifically indiscernible” and that there was an “absence of any meaningful nexus” thus resulting in “the causal chain is too tenuous to support standing”).
239 Bellon, 732 F.3d at 1143 (reasoning that the failure to meet causality is the same as a failure to meet redressibility due to the overlap between the two based on the plaintiff’s requested relief of a court order to regulate GHG emissions by the defendants).
240 Id. at 1141-143.
241 Bellon, 732 F.3d at 1144.
242 Lujan, 504 U.S. at 560 (discussing the requirement for an injury to be particularized the injury must not be “widely shared” because otherwise “an injury that is widely shared is ipso factor not an injury sufficient to provide the basis for judicial review” according to Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).
of Massachusetts used because there claim is based on a procedural right rather than substantive.\textsuperscript{243} Using the Filippone case as an example, the plaintiff may have a very difficult time establishing an injury in fact but likely would qualify under the denial of rulemaking exception. However, the claim brought by Nelson Kanuk might satisfy the injury in fact requirement since the erosion of the riverbank is both concrete and particularized to him, at least in his relevant area, but there is the potential that it becomes a “widely spread” injury thus void for judicial review under the “particularized” requirement.\textsuperscript{244} The second part of the injury analysis is that the injury must be “actual or imminent, not conjectural or hypothetical.”\textsuperscript{245} In the case of the individual without an injury in fact, then they would fail this portion of the first step and be denied standing without an exception for rulemaking appeals. The claim in the form of global warming may also face challenges establishing the “actual or imminent” requirement due to potential challenges on the reliability of the modeling data provided by their expert witness.\textsuperscript{246} In the case of Mr. Kanuk, his injury would most likely qualify under imminent harm unless it was shown that there was actual erosion of his land due to the melting of the permafrost.\textsuperscript{247}

The second step of the standing analysis requires an evaluation of the “causal connection” from the alleged injury and the defendant’s behavior and that connection must be “fairly traceable” but not the result of some “independent action of [a] third party not before the court.”\textsuperscript{248} Here, the harm is results from the denial of rulemaking or, as in the case of Kanuk, the alleged result of global warming due to the inaction of the State to regulate carbon-dioxide emissions. The causal connection in the event of a denial of rulemaking also extends to whether the body has the authority or responsibility to regulate the atmosphere. This belongs in the discussion of whether the PTD is amenable to expansion to include the atmosphere. Assuming arguendo, the causal connection between the State’s inaction to

\begin{thebibliography}{99}
\bibitem{Massachusetts} See generally Massachusetts v. EPA, 549 U.S. 497 (2007).
\bibitem{Filippone} Ed Ronco, \textit{Mt. Edgecumbe Senior Sues AK Over Climate Change}, ALASKA PUBLIC MEDIA, http://www.alaskapublic.org/2012/12/10/mt-edgecumbe-senior-sues-ak-over-climate-change/; See also supra note 242.
\bibitem{Lujan} \textit{Lujan}, 504 U.S. at 560.
\bibitem{Alvaro} Alvaro Hasani, \textit{Forecasting the End of Climate Change Litigation: Why Expert Testimony Based on Climate Models Should Not Be Admissible}, 32 MISS. C. L. REV. 83, 91-94 (2013) (discussing how the Frye and Daubert standards of expert witness testimony would both take issue with the reliability of this type of testimony based on climate change models).
\bibitem{Lujan2} \textit{Lujan}, 504 U.S. at 560.
\end{thebibliography}
regulate and the harm incurred would be factually similar to *Massachusetts v. EPA* and would likely qualify as fairly traceable.

The third step in the standing analysis is whether the Court can grant relief that is redressable to the alleged injury.\(^{249}\) In the case of an ATL claim, the courts certainly have demonstrated their capability to issue injunctions to order a regulatory agency to act, such as in *Massachusetts v. EPA*, or grant relief against a private entity, such as in *Tennessee Copper Co.*. As for the claim by Kanuk, the remediation of the riverbank would likely be grantable, but economic considerations may prevent the Court from granting that type of relief because of the impracticability of the remediation.\(^{250}\)

2. **Political Question Doctrine**

The second hurdle that a potential ATL claim may face is that of non-justiciability due to political question. The Political Question doctrine is one that should be approached with care to ensure that the doctrine must be cautiously invoked because “the mere fact that a case touches on the political process does not necessarily create a political question beyond courts' jurisdiction.”\(^{251}\) The Supreme Court has identified six tests that independently can be used by the courts to identify the existence of a political question in the matter before their courts.\(^{252}\) The six tests are:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. a lack of judicially discoverable and manageable standards for resolving it; or
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\(^{253}\)

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\(^{249}\) *Lujan*, 504 U.S. at 561.

\(^{250}\) See generally *Native Village of Kivalina*, 663 F. Supp. 2d at 863.


\(^{252}\) Id. at 680.

\(^{253}\) *Barasich*, 467 F. Supp. 2d at 680.

For the purposes of this article, only the first, second, and third tests will be discussed despite potential relevance for the fourth, fifth and sixth tests and part of the rationale is that “[t]he tests are probably listed in descending order of both importance and certainty.” 254 The other rationale is that the Court only needs to find one of the six tests indicative of political question for the matter to be non-justiciable. 255

The first test under Baker v. Carr involves direct analysis of the Constitution to determine whether the issue at hand has been “textually committed” to “a coordinate political department.” 256 In applying the first test to the ATL theory, the American Electric Power case provides guidance as to the applicability a potential textual commitment by stating that “[e]nvironmental protection is undoubtedly an area ‘within national legislative power,’ one in which federal courts may fill in ‘statutory interstices,’ and, if necessary, even ‘fashion federal law.’” 257 The Clean Air Act was an act of Congress, as authorized by the United States Constitution, but the Constitution does not textually commit the regulation of carbon-dioxide emissions to the federal government. However, one of the stated goals of the ATL theory is to create a global scheme for the reduction of carbon dioxide emissions, which would implicate the foreign powers’ textual commitment to the Executive Branch. 258 Therefore, if the case involved that particular aspect of the theory, then the first test could find the cause of action non-justiciable due to political question. 259

However, the issue of foreign policy is not the end of the discussion because “the mere fact that foreign affairs may be affected by a judicial decision does not implicate abstention.” 260

The second test presents a dilemma for the judiciary over how to resolve the case due to “a lack of judicial discoverable and manageable standards.” 261 This is distinguishable from Massachusetts v. EPA, because that case provided the Court with a federal statute to interpret despite “the Supreme Court stat[ing] that it possessed neither the expertise nor the

254 Barasich, 467 F. Supp. 2d at 680.
255 Id. at 580.
256 Baker, 369 U.S. at 217.
258 Supra note 43.
259 See generally Carter v. Goldwater, 444 U.S. 996 (1979) (discussing the impasse between the Congress and President Carter over the right of the President to nullify a treaty with a foreign power resulted in the case being dismissed out for want of a justiciable issue).
260 See Native Village of Kivalina, 663 F. Supp. 2d at 873 (2009) (citing to Khouzam v. Attorney Gen. of United States, 549 F.3d 235, 250 (3rd Cir. 2008)). Contra Nature’s Trust, supra note 44, at 342 (discussing the need for a “massive global effort” to combat the causes of climate change analogized to the efforts in World War II).
261 Barasich, 467 F. Supp. 2d at 580.
authority to evaluate the policy judgments that EPA offered as justification for refusing to regulate motor vehicle emissions, such as issues involving foreign relations.” 262 The Comer court held that the requested relief by the plaintiffs “constitute[d] non-justiciable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented, and because the case would require the court to make initial policy determinations that have been entrusted to the EPA by Congress.” 263 The Kivalina Court cited Am. Elec. Power Co. on the presence of judicially discoverable and manageable standards by contending that “[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing plaintiffs' claims and federal courts are competent to deal with these issues” such that their global warming concerns can “be addressed through principled adjudication.” 264 In the ATL context, the court would be able to refer back to the litany of PTD and climate change cases, such as those discussed previously, in order to determine standards for managing the case.

The third prong of the Baker test is “the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion.” 265 This step may be the most difficult for a claim under the ATL theory, as the Court may be asked to determine whether the emissions from an individual company are in excess of what reasonable levels are and thus “the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.” 266 The goal of this prong is to respect the balance of powers in the United States’ system of governance by “preventing a court from ‘removing an important policy determination from the Legislature.’” 267 The Kivalina Court reasoned that what the Plaintiffs were requesting, despite their denials, was a political judgment “that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming” based solely on the belief that “they are responsible for more of the problem than anyone else in the nation.” 268 The Court in California v.
General Motors Corp. reasoned that “[t]he political branches’ actions and deliberate inactions in the area of global warming further highlight this case as one for nonjudicial discretion.”\(^{269}\) The Court also further reasoned that policy determinations, like those concerning carbon dioxide standards, “lie with the political branches of government, and not with the courts.”\(^{270}\) Without touching on the issue of displacement by virtue of EPA regulation, as set forth by Congress in the Clean Air Act and recognized in *American Electric Power*, the likelihood of a claim under the theory of ATL surviving a challenge based on justiciability of the issue due to political question can be shown to be very low given the nature of the regulatory scheme as it exists today.

When looking at the three ATL cases that have had an initial hearing, two of the three cases survived because the State Legislature had previously amended the respective constitutions to include a provision for preservation or conservation of the air as a resource for the State.\(^{271}\) The legislature’s enactment of constitutional amendments permitted the courts to review the cases rather than being forced to dismiss the cases as non-justiciable, which was the result in the third case.\(^{272}\)

C. ADDRESSING CLIMATE CHANGE THROUGH PRIVATE NUISANCE OR POLITICAL ACTION

The discussion in this paper leads to one of two possible solutions for addressing climate change. The first option is to address climate change through private nuisance, as in *Bell v. Cheswick Generating Station*, to remedy an injury caused by climate change for an individual landowner.\(^{273}\) The second option is to address climate change by seeking political action, such as the addition of air as a resource (this was previously done by the State legislatures in *Bonser-Lain* and *Filippone*).\(^{274}\) The situation in *Bonser-Lain* and *Filippone* are indicative of the issue facing ATL—as Professor Mary Wood admits—that the end goal of the theory is to promote political

\(^{270}\) Id. at *10 (citing to Massachusetts v. EPA, 549 U.S. 497 (2007)).
\(^{271}\) See generally Filippone, 829 N.W.2d at 2; Bonser-Lain, 2012 WL 3164561 at *1. Contra Brewer 2013 WL 1091209 at *3; Barhaugh, 361 Mont. at 1.
\(^{272}\) Id.
\(^{273}\) See supra note 117 (discussing that in Bell, the plaintiffs sought relief for adverse effects to their property as a result of pollution, in the form of particulate matter being emitted from the neighboring generating station, under a theory of private nuisance).
\(^{274}\) See supra note 271; See also Nature’s Trust, supra note 44, at 346-47 (discussing efforts to combat climate change on a localized basis much as the Government’s bond drive and conservation efforts were done in World War II).
In *Filippone*, the political question issue was avoided because the court was reviewing the district court’s ruling on the Iowa Department of Natural Resources’ response to the plaintiff’s request for rulemaking. This outcome in *Filippone* is useful for illustrating that ATL, in the most basic sense, is an attempt to utilize the courts to engage in action as a result of unfavorable outcomes in the political process. The facts of *Bonser-Lain* and *Brewer* also indicate the same pattern of requesting rulemaking by the State Agency in charge of environmental regulations and once the request is rejected then proceeding to petition for review of that decision. While the courts can be useful for prompting agencies to avoid the dereliction of their statutory or common law duties, the use of the courts to push forward issues that ought to be resolved in the political process is not permitted. Therefore, the best way to combat climate change in a jurisdiction that has not amended the state constitution is to pursue that change and statutorily define the air or atmosphere as a resource that the government must protect for the good of the people. When a party has suffered an injury or will imminently suffer a harm a third party’s misconduct, then the court system is the place to seek remedies for that harm, if the burden is sufficiently carried. But the way forward in resolving the climate change dilemma ought not to “require tortured constructions of the present” in seeking to expand the PTD.

**CONCLUSION**

In the search to hold a party responsible for misconduct on the issue of GHG emissions that contribute to title change, a theory has been put forth based on the PTD. The Public Trust is a common law doctrine that holds certain resources, traditionally related to navigable water ways,

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275 See supra note 65 (noting the plan to reduce carbon emissions, but that these options may be outside the scope of the Court’s oversight thus questionable under the doctrines of non-justiciability).
276 *Filippone*, 829 N.W.2d at 1.
277 *Filippone*, 829 N.W.2d at 1 (citing, “Filippone filed a petition for judicial review on July 21, 2011.”) The plaintiff filed her petition for judicial review nearly one month after the unfavorable outcome from the Iowa DNR ruling on the request for rulemaking).
279 See supra note 76; *Cf. Baker*, 369 U.S. at 186; *Native Village of Kivalina*, 663 F. Supp. 2d at 863; *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) aff’d, 718 F.3d 460 (5th Cir. 2013); *Am. Elec. Power Co.*, 582 F.3d at 309; *Contra Nature’s Trust, supra* note 44; *Adjudicating Climate Change, supra* note 43.
280 See supra note 267.
281 See *Massachusetts v. EPA*, 549 U.S. at 497; *Bellon*, 732 F.3d at 1131; *See generally Changing Conceptions, supra* note 31; *See supra note 8.*
282 See generally *Adjudicating Climate Change, supra* note 43.
as an asset in trust for the benefit of the “whole of the people” and the
government must manage these resources in a responsible fashion to meet
that purpose.\textsuperscript{283} The ATL theory modifies the public trust beyond the
traditional scope to include additional assets, such as the air or
atmosphere.\textsuperscript{284} Once a sovereign is subject to a fiduciary duty under the
trust, the theory would seek to expand responsibility to all the remaining
sovereigns.\textsuperscript{285}

The potential claims for climate change vary between that of an actual harm\textsuperscript{286}
to that of an imminent harm from a failure to engage in rulemaking.\textsuperscript{287} The theory of harm has also touched on a public nuisance
that provides an avenue for relief for a large group of individuals,\textsuperscript{288} which
could also be in the form of grouped, individualized private nuisance
claims, or by entities representing large groups of private citizens.\textsuperscript{289}
Claims have also started to arise under the ATL theory,\textsuperscript{290} but the results
have varied based on whether or not the claimants’ jurisdictions had
previously provided protection for air quality, the air in general, or even all
resources.\textsuperscript{291}

While the ATL theory has enjoyed some success thus far, the basic
premise of the theory expands the doctrine of Public Trust beyond its
traditional scope of navigable water ways by relying on reasoning like a
“tortured [construction]” of Tennessee Copper Co.\textsuperscript{292} The ATL theory also
faces potential challenges to meeting the burden of standing\textsuperscript{293} and avoiding
violating the political question doctrine\textsuperscript{294} to find the claim non-justiciable.
The way forward based on the issues of pursuing a claim under ATL

\textsuperscript{283} See generally Ill. Cent. R.R. Co., 146 U.S. at 387.

\textsuperscript{284} See generally Adjudicating Climate Change, supra note 43; See also Nature’s Trust, supra note 44.

\textsuperscript{285} Id.

\textsuperscript{286} See generally Bell, 2013 WL 4418637 at *1.

\textsuperscript{287} See Massachusetts v. E.P.A, 549 U.S. 497 (2007); Bellon, 732 F.3d at 1131; Native Village of
Kivalina; Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 863 (S.D. Miss. 2012) aff’d, 718
F.3d 460 (5th Cir. 2013).

\textsuperscript{288} See Bell, 2013 WL 4418637 at *1.

\textsuperscript{289} See Am. Elec. Power Co., 582 F.3d at 309; Barasich, 467 F. Supp. 2d at 676.

\textsuperscript{290} See generally Adjudicating Climate Change, supra note 43; Nature’s Trust, supra note 44.

\textsuperscript{291} See Alec L., 863 F. Supp. 2d at 11; Bonser-Lain, 2012 WL 3164561 at *1; Filippone, 829
N.W.2d at 2; Kanuk, 2012 WL 8262431 at *1. Contra Brewer, 2013 WL 1091209 at *1; Barhaugh, 361 Mont. at 1.

\textsuperscript{292} See generally Cool Lawsuits, supra note 51; Changing Conceptions, supra note 31; Misuse of
Public Nuisance; See supra note 102 (reasoning the right of the State of Georgia to protect harms
to their citizens from misconduct by Tennessee Copper Co.).

\textsuperscript{293} See Massachusetts v. E.P.A, 549 U.S. 497 (2007); Lujan, 504 U.S. at 555; Bellon, 732 F.3d at 1131.

U.S. 224 (1993); Baker, 369 U.S. at 186; Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849,
863 (S.D. Miss. 2012) aff’d, 718 F.3d 460 (5th Cir. 2013); Native Village of Kivalina, 663 F.
should be remedied by separating claims into (1) a private nuisance action, (2) a claim for denial of rulemaking where the state has provided a duty to protect air as a resource, or (3) political action to have that right provided.295

We think of our land and water and human resources not as static and sterile possessions but as life giving assets to be directed by wise provisions for future days. We seek to use our natural resources not as a thing apart but as something that is interwoven with industry, labor, finance, taxation, agriculture, homes, recreation, good citizenship.

Franklin D. Roosevelt296

295 See Bell, 2013 WL 4418637 at *1; Filippone, 829 N.W.2d at 2; Bonser-Lain, 2012 WL 3164561 at *1. Contra Alec L., 863 F. Supp. 2d at 11; Brewer 2013 WL 1091209 at *3; Barhaugh, 361 Mont. at 1; See also Caroline Cress, Comment, It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier, 92 N.C.L. Rev. 236 (2013) (noting other rationales for why ATL faces an uphill battle in implementation of the theory).

This article addresses a rhetorical conundrum that lies at the center of modern free exercise jurisprudence. On the one hand, the purpose of the free exercise clause is to protect the right of individuals to define the contours of their religious practice. Yet on the other, adjudicating the application of the free exercise clause requires courts to determine what constitutes a genuine religious belief—and what does not. As a result, in the guise of protecting the individual exercise of religion, the courts in reality reserve for themselves the right to define what constitutes a religious belief. In so doing, courts go beyond the basic exercise of judicial interpretation. In recent times, the Supreme Court has acted to investigate the nature of a religious practice even when the basic standard for religious practice—that the participants have a genuine belief in the religious nature of their actions—has been met. The Court has relied on a rhetoric of judicial objectivity to mask the increasingly arbitrary distinctions it has made in key first amendment cases such as Braunfeld v. Brown (1961), Sherbert v. Verner (1963), Employment Division v. Smith (1990), and especially Hosanna-Tabor v. EEOC (2012). To elucidate the ways in which this has occurred, this article argues, based on ideas articulated by Michel Foucault, that the Supreme Court’s discourse on free exercise has enabled the Court to regulate the conditions of religious practice and shape the underlying presumptions of judicial intervention in the conceptualization of fundamental rights, thereby extending the regulatory power of the Court itself.
INTRODUCTION

In its role as the guardian of fundamental rights guaranteed in the United States Constitution, the Supreme Court faces a conundrum: in order to protect the purpose of those rights, namely, to limit state power over individuals, it often becomes the regulator of what those rights entail. Beyond the power that comes from merely interpreting abstract claims, the Court often inserts itself into a conflict about rights in order to maintain control over individual or legislative interpretations of those rights, and does so in a manner that preserves particular normative judgments even in the face of contradictory results. Because of the strong public sentiment regarding the rights enumerated in the First Amendment, the free exercise clause provides a useful example of this challenge. In order to preserve the free exercise of religion, the Court must decide what constitutes a proper religious belief. For example, in the recent case of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012), Justice Thomas’ dissent makes clear that rather than allowing the religious institution to define the role of a minister for itself, the Court walks through its purported rationale and then ratifies the validity of each claim. In this sense, the Court’s role as “guardian of liberty”—as protector of individual rights from the intrusions of the state—ultimately is what guarantees its usurpation of the ability of individuals to define how they exercise these rights for themselves.

This article argues that rather than considering the implications of this paradox in order to find ways to limit its own authority, the Court has, on the contrary, never acknowledged that such a conundrum exists at all. This is because the Court relies on the rhetoric of legal objectivity—facially neutral language conferring purportedly rational, limited decisions—as a means to mask its own arrogation of power from the general populace. This article will apply this line of reasoning to several key Supreme Court cases on the free exercise of religion, including Braunfeld v. Brown (1961), Sherbert v. Verner (1963), Employment Division v. Smith (1990), and Hosanna-Tabor v. EEOC (2012), to show
that even when the Court seems to restrict state control over religion, what it actually does is apply arbitrary distinctions in such a way as to preserve particular normative judgments as well as the power to dictate to Congress and ordinary citizens how individual rights may be defined.

To illustrate these arguments, this article will apply Michel Foucault’s notions of govermentality and power to the doctrine of judicial review to show that the Court creates a specific discourse to mask its own subjective positionality and to ultimately preserve its own regulatory power. Although Foucault never developed a systematic theory of law, and in fact frequently subordinated legal considerations to notions of discursive and social change that he believed to be more fundamental, this article will contend that judicial decision-making is not hermetically sealed off from larger cultural constructions of rights and power.¹ Foucault’s concept of power is that it is constructed through social and political institutions. It provides us with an instructive means to consider the larger implications of the Court’s purpose and role in regulating free exercise.²

I. DISCURSIVE POWER AND JUDICIAL REVIEW

Michel Foucault identifies power as something that circulates among free individuals who have the potential to resist it.³ Accordingly, power is not repressive, nor is it imposed on individuals. Instead it is invested in a series of relations between individuals and “the body, sexuality, the family, kinship, knowledge, technology and so forth.”⁴ Power is always already in the fabric of social relations and is simply reconstituted and reaffirmed through the instruments that formulate and accumulate knowledge.⁵

The characteristic feature of power is that some men more or less entirely determine other men’s conduct – but never exhaustively or coercively. A man who is chained up and beaten is subject to force being exerted over him. Not power. But if he can be induced to

⁴ Id. at 122.
⁵ See Hans-Georg Gadamer, The Universality of the Hermeneutical Problem, CONTEMPORARY HERMENEUTICS 293 (1980) (reminding us that individuals constantly reproduce tradition “inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves”).
speak when his ultimate recourse could have been to hold his
tongue, preferring death, then he has been caused to behave in a
certain way. His freedom has been subjected to power. He has been
submitted to government.\textsuperscript{6}

In order to subject individuals to power, they must internalize rules
of right, or rationalized norms, which are implemented through discourse.
In other words, implicit rules are produced, not just by institutions, but by
individuals, in determining what is the proper function of society (or law)
and what is not.\textsuperscript{7} The rules of right produce an illusory legitimization of
routine forms of power and control to which individuals are subjected.
Those subtle mechanisms of discipline, control, and authority also produce
discourses of truth, which further justify, reinforce, and in turn reproduce
those very same forms of power.\textsuperscript{8} Foucault refers to this process as the
triangle of power, right and truth. In other words, the essential role of a
theory of right is to “fix the legitimacy of power.”\textsuperscript{9} This legitimation is
necessary because relations of power, which permeate the social body,
cannot themselves be implemented without the production of a functioning
discourse. Power exercised through subtle mechanisms of regulation and
control creates apparatuses of knowledge, or discourses, which reinforce
the need for power to be exercised over individuals who internalize the
discursive regime as a series of voluntary choices and fail to realize the
influence of underlying mechanisms of control.\textsuperscript{10}

If Foucault’s influence on legal theory has been more limited than
it has in humanities fields, it is largely because Foucault believes in a
productive theory of power in which power is seen as being embodied in
the everyday, not merely codified in law.\textsuperscript{11} Nevertheless, Foucault’s later
work on governmentality, which was his description of “the dramatic
expansion in the size and scope of government” through the increase in the
codification of methods of bureaucratic administration and calculation with
the rationalization of the state in the nineteenth and twentieth centuries,
clearly manifests itself in legal discourse.\textsuperscript{12} Foucault’s understanding of the
relationship between power and law can be articulated as a theory of

\textsuperscript{6} \textsc{foucault}, \textit{supra} note 3, at 141.
\textsuperscript{7} Sally Engle Merry, \textit{Culture, Power, and the Discourse of Law}, 37 N.Y.L. SCH. L. REV. 209,
\textsuperscript{8} \textsc{foucault}, \textit{supra} note 3, at 93.
\textsuperscript{9} \textit{Id.} at 95.
\textsuperscript{10} \textit{Id.} at 102.
\textsuperscript{11} Baxter, \textit{supra} note 1, at 477.
\textsuperscript{12} \textsc{alan hunt} & \textsc{gary wickham}, \textsc{foucault and law: towards a sociology of law as
governance} 76 (1994).
The law creates both hidden and explicit norms that function to produce truth through the production of the rituals, domains, and objects through which truth is produced. In the context of constitutional adjudication, the term “power/knowledge” exemplifies the constitutive nature of these two inseparable concepts. Power “perpetually creates knowledge and, conversely, knowledge constantly induces effects on power.” Thinking of knowledge as an end rather than a perpetual process undermines the mechanisms of power that are inherent in the origins of that knowledge and that also continue to shape it. However, those perceptions are only internalized through the agency of the individual and require methods of subtle coercion and control, such as discursive techniques, to maintain their legitimacy. Ultimately, individuals have the ability to inform the mechanisms of power once those mechanisms are unveiled. The next section of this article will reveal the mechanisms of juridical power, and in particular, the discursive techniques used by the Supreme Court to perpetuate a regulatory function, beyond mere interpretation, of legislative and constitutional enactments.

II. GOVERNMENTALITY, SOVEREIGNTY, AND JURIDICAL POWER

Theories of democratic self-government have been championed as the foundation of major legal codes by virtue of the public right of collective sovereignty, which provides an illusory sense of control over the public decision-making process and masks mechanisms of disciplinary coercion. The organization of a legal code centered on collective sovereignty has permitted “a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques” and to purportedly guarantee the exercise of autonomous power.

The belief that the government operates under a set of rules chosen by the electorate is the exact mechanism that enables subtle control of a population and results in the proliferation of state power. For Foucault,
the modern system of governmentality is “characterized on the one hand, by a legislation, a discourse, an organization based on public right, whose principle of articulation is the social body and the delegative status of each citizen; and, on the other hand, by a closely linked grid of disciplinary coercions whose purpose is in fact to assure the cohesion of the same social body.”¹⁹ Thus, government denotes not only the technical nature of bureaucratic decision-making and functioning but also the way in which society at large conceives of which questions are properly addressed to the state and which are not, ideas that are shaped through the ability of the state to shape those discourses by holding itself out as the protector of the rights and well being of its citizens—a power that Foucault understood as “pastoral power.”²⁰ In other words, the modern state serves many of the functions of the pre-modern Church, guaranteeing the “salvation” of its citizens (at least on earth) through ensuring that it is the conduit through which people have access to their basic needs.²¹

Juridical power operates in a similar fashion. Although Foucault often equates juridical power with repressive force – one that defines and dictates the limits of individual action – he fails to account for the productive power of the discourse of judicial review, and by extension, judicial interpretation of legislative statutes and fundamental rights.²² The true power of the Supreme Court and the judiciary lies in the discursive technique of constitutional interpretation, and the finality and authority under which such a scheme operates. In particular, the nature of judicial decision-making lends itself to a Foucauldian discourse model precisely because in legal analysis, the analysis given is specifically delimited by the questions being asked.²³ In this sense, even though Foucault rejected the idea that power was vested in law and sovereignty in general, his analytics lend themselves well to the critique of constitutional interpretation, as legal communication is vested in the discursive and rhetorical tactics that characterize productive power.²⁴

In other words, legal systems produce not only remedies but also implicit understandings of what may and may not be rectified through law.²⁵ These understandings determine who has access to the law, who will

¹⁹ FOUCALUT, supra note 3, at 105-6.
²¹ Dore, supra note 13, at 744.
²² Id. at 119; see, e.g. Baxter, supra note 1, at 452.
²³ Stahl, supra note 2, at 441.
²⁴ Baxter, supra note 1, at 477-79.
²⁵ Merry, supra note 7, at 210-11.
talk about the law, who will view the courts as the proper venue for their disputes, and upon what circumstances the courts may be relied.\textsuperscript{26} Since these conceptions happen at the nexus of judicial decision-making and legal discourse and the popular perception of this decision-making (which is itself, in turn, shaped by key decisions), we may say, based on Foucault’s understanding of power and the law, that law is important in ways constituted through social relations, giving force to interpretations of society even as it is being shaped by those same relations.\textsuperscript{27}

Juridical power can best be understood within a similar pedagogical framework of right, truth, and power. As the self-appointed guardian of a \textit{democratic} constitution and the champion of minority rights, the Supreme Court employs the doctrine of judicial review to establish itself as the arbiter of a natural rule of right.\textsuperscript{28} In other words, just as with principles of collective sovereignty, the authority of the Supreme Court ultimately is thought to derive from the citizens as a whole, who implicitly sanctioned the authority of the judiciary by enacting the United States Constitution and who still retain the ability to control the decision-making power of the courts through the amendment process.\textsuperscript{29} In addition, the Supreme Court is seen as the very guardian of democracy itself, ensuring that majoritarian legislative enactments do not deprive individuals of their own free will and the preservation of fundamental rights. In this way, judicial interpretation can shield itself from the acts of violence and control that its decisions perpetrate.\textsuperscript{30}

Moreover, legal positivism creates a discourse of objectivity and truth, which reinforces the natural rule of right and perpetuate the power of the courts. Despite criticism from Critical Legal Studies scholars among others, the Court has not altered the way in which its decisions make claims to objectivity.\textsuperscript{31} This form of juridical power is not simply repressive, but is also productive, in the Foucaldian sense, because it “induces pleasure, forms knowledge, and produces discourse.”\textsuperscript{32} Moreover, the Supreme Court uses its positivist claims to objectivity not only to mask the arbitrary nature of Court decisions but also to create new mechanisms of regulatory control. In order to be cognizant of the impact of these discursive regimes, we must

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\textsuperscript{26} Id. at 210-11.
\textsuperscript{27} Id. at 213.
\textsuperscript{28} \textsc{John Hart Ely, Democracy and Distrust: A Theory of Judicial Review} 172 (1980).
\textsuperscript{29} \textsc{Christian G. Fritz, American Sovereigns: The People and America’s Constitutional Tradition before the Civil War} 21 (2008).
\textsuperscript{30} Robert M. Cover, \textit{Violence and the Word}. 95 \textsc{Yale L. J.} 1601 (1985-86).
\textsuperscript{32} Foucault, \textit{supra} note 4, at 119.
\end{flushright}
first analyze the effects of truth produced within such discourses, “which in themselves are neither true nor false.” The next section of this article will begin that analysis by analyzing judicial review as a natural rule of right and legal positivism as a discourse of truth.

III. JUDICIAL REVIEW AS A RULE OF RIGHT

Far from delimiting the sources of power to the sovereign body, Foucault argues that in thinking of the mechanisms of power, we should also consider “the point where power reaches into the grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives.” The internalization of the Supreme Court’s proclamation of judicial review – the ability of the courts to provide the final interpretation of rights in order to limit the overreaching power of the legislative and executive branches of government – functions as a mechanism of power because it establishes a new rule of right, which runs through the very fabric of society and produces a population of obedient citizens voluntarily bound to the dictates of Court decisions. Ultimately, the ability of the Court to delineate constitutional rights on behalf, and in lieu of, individual interpretation and deliberation of such rights increases both the perceived legitimacy and the regulatory function of the Court itself.

The discourse of judicial review provides legitimacy for judicial intervention in defining the limits of governmental (i.e., legislative and executive) power in the face of constitutionally guaranteed rights. However, it is this very intervention that increases the regulatory power of the judicial branch because the assertion of judicial review provides the courts with the discursive authority to define the contours of those rights. The very nature of the free exercise clause, in Roger Stahl’s words, implicitly defines “what it means to ‘exercise’ a ‘religion’” in the first place. And the fact that this intervention is legitimated, and championed, as a mechanism that limits governmental power is exactly what makes this control effective. The assertion that the Court has been constituted to protect individuals through their adjudicatory power masks the way in which this discursive technique

33 Id. at 118.
34 Id. at 39.
35 See, e.g., Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation 110 HARV. L. REV 1359 (1997) (arguing that judges are the exclusive interpreters of the Constitution, and that public officials who ignore their interpretations may be violating their oath of office).
36 Stahl, supra note 2, at 440.
co-opts the discourse on rights by discouraging public deliberation about the nature of these rights.

IV. LEGITIMATING JUDICIAL REVIEW

In establishing the doctrine of judicial review, the Supreme Court created a legal discourse of rights, which centers on the notion of the Court as the defender of those rights, and the entity responsible for the larger juridical role of policing governmentality, sovereign power, and individual autonomy. Over time, the doctrine of judicial review has come to be accepted as a necessary check on governmental power, even if such a check may not have been originally intended. As Jean-Luc Nancy has shown, then, in constitutions “the people” are only constituted as subjects that can be spoken for, not subjects that speak in themselves; this allows the courts to enunciate what “the people” actually are and to speak for what actually defines their rights.

The doctrine of judicial review has become rationalized even among criticism that it strips individuals of collective decision-making. Richard Fallon, in establishing a case in support of judicial review, argues that in “most bills of rights, a general right of political majorities to govern themselves by processes of majority decision-making does not occupy the same status as fundamental individual rights protected against legislative infringement.” The regulatory role of the judiciary is legitimized by the belief that it is necessary to protect individuals from legislative overreaching. Accordingly, individuals are willing to give up the right to collective self-determination and the process of deliberating the contours of these rights in exchange for judicial protection in the form of the adjudication of rights. The resulting regulatory function of the Court

enables it to intervene in the delineation and implementation of rights more often than needed.

Moreover, judicial review “does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; it distracts them with side-issues about precedent, texts, and interpretation.”\(^{41}\) The process of judicial review disenfranchises ordinary citizens and takes from them the ability to participate in the final resolution of issues about rights. \(^{42}\) Judicial review perpetuates the assumption that rights are somehow transparent, objectively understood, and therefore easily delimited by judicial interpretation. This means that ultimate moral authority is bestowed undemocratically on the judiciary, which appropriates from the people the power to determine for themselves what is best for them. Allan Hutchinson

There is simply no basis in a strong democracy to be held hostage to the possibility, however remote, \textit{that such truths exist} or that experts, like judges and jurists, might have some special access to them. Moral authority is a quality to be earned in democratic exchange, not bestowed from elsewhere; there is no independent or superior standard of moral legitimacy than that derived from the processes and procedures by which laws and legal decisions are made. \(^{43}\)

When courts construct their own legal methodologies to create distinctions and limitations in their adjudication of fundamental rights, they become apparatuses of knowledge. Rather than simply interpreting, the Court creates, \textit{sui generis}, a new discursive theory of rights in which the Court is assigned as their guardian, and by extension, the guardian of individuals depending on those rights. Accordingly, regardless of whether individuals agree with the interpretation of rights, the process of judicial adjudication of rights is regarded as ultimately not only necessary, but voluntarily chosen by individuals for their own benefit. \(^{44}\)

\(^{42}\) Id. at 1346, 1353.
\(^{44}\) Ely, \textit{supra} note 11, at 7-8.
V. LEGAL POSITIVISM AND THE DISCOURSE OF TRUTH

Moreover, courts generally employ a methodology of legal positivism, a process that offers a legal “truth”: a right answer that legal reasoning uncovers. Legal positivism assumes that “describing the law as it is” is possible without making arbitrary distinctions. These descriptions are then articulated through the lens of legal formalism, which “presumes that there is an objective solution to legally-defined disputes.” This discursive technique lends legitimacy and objectivity to an otherwise subjective process. In fact, legal doctrines often embody moral concepts drawn from non-legal sources of knowledge.

The inability to account for the positional nature of knowledge results in a veiled perpetuation of a disparate power dynamic. These “objective” standards are often ascribed to individuals by stronger parties and become internalized in discourse as “external” realities. For example, constitutional discourse on issues such as religion operate and become internalized in discourse as “external” realities. Moreover, courts generally employ a methodology of legal positivism, a process that offers a legal “truth”: a right answer that legal reasoning uncovers. Legal positivism assumes that “describing the law as it is” is possible without making arbitrary distinctions. These descriptions are then articulated through the lens of legal formalism, which “presumes that there is an objective solution to legally-defined disputes.” This discursive technique lends legitimacy and objectivity to an otherwise subjective process. In fact, legal doctrines often embody moral concepts drawn from non-legal sources of knowledge.

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For a description of legal positivism, see John J.A. Burke, The Political Foundation of Law and the Need for Theory with Practical Value: The Theories of Ronald Dworkin and Roberto Unger, 44, 87-88 (1992) (stating that positivism has three central tenets: (1) special rules that can be identified by the manner in which they were adopted, (2) legal rules as exhaustive of the law, and (3) legal obligation as solely derived from legal rules). Margaret Davies and Nan Seuffert, Knowledge, Identity, and the Politics of Law, 11 Hastings Women’s L.J. 259, 266 (2000); H.L.A. Hart, The Concept of Law Ch. 6 (1961). See also, Margaret Thornton, Among the Ruins: Law in the Neo-Liberal Academy, 20 Windsor Y. B. Access Just. 3, 11 (2001) (referring to the dominant view that the law is a “self-referential” system, which is self-authorizing). See Burke, supra note 45, at 85.

See Katherine Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 880-887 (1990) (stating that “positionality retains a concept of knowledge based upon experience”); Burke, supra note 45, at 44 (demonstrating that Roberto Unger’s deviationist doctrine is an attempt to refute the premise that law emanates from an objective source and is instead based on conflicts of interest).


Delgado, supra note 50, at 820-821. See also Steven L. Winter, The “Power” Thing, 82 Va L. Rev. 721, 802 (1996) (stating Michel Foucault’s premise that power is the “concatenation of myriad tactics and confrontations pursued for discernable aims that, nevertheless, pervade society without emanating from an identifiable source….”)
Positivist claims ultimately reinforce the particular interests of those who created the norms. Additionally, those norms are shielded from critical exploration. Discourses that reorganize notions of right create environments of repression by normalizing knowledge into neutral concepts. A positivist vision of law normalizes prevailing social norms and regards all countervailing views as a deviation. Because discursive power entails control of the mechanisms of social construction, it is able to monopolize knowledge and truth. As a result, legal discourse can be created from a single vantage point that promotes a particularized view as a normative standard, which results from the “mastery and uses of political power.”

Furthermore, under the guise of rules and classifications, the judiciary escapes responsibility for perpetuating inequality. Legal rules validate the “objective” reasoning used to reach a legal conclusion. However, conceiving of “rational rules with universal application” ignores the “cognitive processes of legal reasoning that judges use to decide legal questions.” Ronald Dworkin reminds us that “judges use principles in addition to rules to decide cases.” But illusory claims of legal objectivity prevent the underlying normative framework of those laws from changing, even as social norms change. The application of legal rules operates as a discourse in the Foucauldian sense of the word, as the Court uses seemingly “egalitarian jurisprudence” as a means to exclude issues that it wishes to remain outside of its constitutional discourse.

VI. THE JURIDICAL TRIANGLE OF RIGHT, TRUTH, AND POWER: APPLYING THE FOUCALDIAN MODEL TO KEY SUPREME COURT CASES

The Supreme Court’s interpretation of the free exercise clause of the First Amendment in the following three instances demonstrates the
nature and function of the juridical triangle of right, truth, and power. In the first instance, the Supreme Court masks the positionality of its decision to intervene in the case of perceived religious discrimination resulting from a state law restricting the employment benefits of a Seventh Day Adventist petitioner, and yet reaches the opposite conclusion for a case involving state laws restricting the employment and the sale of commercial goods impacting an Orthodox Jewish petitioner. The respective dissenting and concurring opinions in each case speak to the lack of distinction between the two cases and the religious predispositions influencing the ruling.

Second, the Court dispensed with a precedent establishing strict scrutiny as the standard for reviewing state interference with the free exercise of religion. In doing so, the Court made wholly arbitrary distinctions in order to claim that it was not, in fact, entirely overruling the previous precedent. When Congress intervened and passed legislation to reinstate a higher standard of review for state free exercise cases, the Court invalidated that law, in order to maintain discursive control over the categorization and interpretation of what constitutes free exercise.

Finally, in its most recent free exercise decision, the Supreme Court intervened to define what actions are sufficient to constitute a ministerial exception under the First Amendment in connection with employment discrimination claims. Ironically, the Court claimed that it recognized this exception because neither the judiciary nor the legislature can interfere with the hiring of religious ministers for religious organizations. But the concurrence suggests that a true recognition of such a limitation would simply have deferred the definitional analysis to the religious organization, rather than creating a new regulatory role for the Court itself.

A. **JUDAISM, CHRISTIANITY, AND PURPOSEFUL CONTRADICTIONS**


*Braunfeld v. Brown* involved a Philadelphia merchant who was engaged in the sale of clothing and home furnishings. A Pennsylvania criminal statute prohibited the sale of certain enumerated commodities on Sunday. Braunfeld claimed that as a member of the Orthodox Jewish faith, he was required to abstain from all manner of work from nightfall on Friday until nightfall on Saturday. Accordingly, he kept his business open on Sunday, and transacted a substantial amount of business on that day. He claimed that the Pennsylvania criminal statute was a violation of his right
to free exercise of religion under the First Amendment.\textsuperscript{59} Braunfeld further claimed that an inability to remain open on Sunday would result in a significant loss of revenue and would cause him to lose his capital investment in the business.\textsuperscript{60}

In a majority opinion signed by six justices, the Court ruled that “the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.” \textsuperscript{61} The Court added that the practice only inconveniences some members of the Orthodox Jewish faith who choose to work on Sunday, which does not entail the entire community. The Court also noted that though the adherence to these religious principles may result in “some financial sacrifice,” working on Sunday was a choice.\textsuperscript{62} Exercising this option is not equivalent to making a religious practice itself unlawful.

As part of its jurisprudence on legislative restrictions based on the First Amendment, the Court held that “to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion (i.e., legislation which does not make unlawful the religious practice itself) would radically restrict the operating latitude of the legislature.”\textsuperscript{63}

However, if the purpose of the law were to discriminate invidiously between religions, such a regulation would be considered constitutionally invalid even if it were to only indirectly burden the free exercise of a particular religion. The Court goes on to note that requiring states to exempt those who rest on a day other than Sunday “might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs,” a practice which itself runs “afoul of the spirit of constitutionally protected religious guarantees.”\textsuperscript{64}


Two years later, the Court, without reversing the \textit{Braunfeld} ruling,
contradicted its reasoning in the case, *Sherbert v. Verner*. In this case, a member of the Seventh-day Adventist Church, Adell Sherbert, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When Sherbert was unable to obtain employment because she chose not to work on Saturday, she filed a claim for unemployment compensation under the South Carolina Unemployment Compensation Act. The state denied the benefits, utilizing reasoning analogous to that issued in *Braunfeld*. In particular, they found that claimants must be able to work and claimants who voluntarily deny available opportunities are ineligible for benefits. Sherbert claimed that the denial of benefits abridged her right to free exercise under the First Amendment.

In the majority opinion, the Supreme Court found that the disqualification of benefits imposed a burden on the free exercise of religion, even though such burden results from the indirect effect of welfare legislation. It cited the precedent in *Braunfeld*, that laws that intentionally discriminate invidiously between religions are considered invalid, and found that Sherbert’s ineligibility for benefits derived solely from her practice of religion. The Court argued that the decision forced Sherbert to “choose” between exercising her religious beliefs, therefore foregoing an employment benefits, and abandoning her beliefs in order to accept work. Without explaining how this reasoning can be distinguished from that in *Braunfeld*, in which the merchant was held responsible for his choice to practice religion, the Court claimed that “governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”

In a concurring opinion, Justice White argued that the majority opinion is inconsistent with *Braunfeld*. He claimed that while the Court found there was a less direct burden upon religious practices in that case, “I think the Court is mistaken, simply as a matter of fact.” Justice White points out that Braunfeld was subject to criminal penalties rather than a denial of civil benefits. Moreover, Braunfeld faced the potential loss of revenue, loss of capital investment, and ultimately of his entire livelihood if he continued to exercise the religious mandate of the Jewish Sabbath. In this case, White saw “the impact upon the appellant's religious freedom” as “considerably less onerous.” First of all, it was much more likely for Sherbert to be able to find suitable non-Saturday employment, and even in the unlikely event that she was not able to do so, she would at worst “be

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66 *Sherbert* 374 U.S. at 417.
67 *Id.* at 417.
denied a maximum of 22 weeks of compensation payments.” Justice White agreed with the decision that the possibility of that denial “is enough to infringe upon the appellant’s constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the court must explicitly reject the reasoning of Braunfeld v. Brown.”

Moreover, in a dissenting opinion, Justice Harlan argued that compelling the state to pay benefits for a religious reason is particularly inappropriate “in light of the indirect, remote, and insubstantial effect of the decision” on the exercise of religion and in light of the direct financial assistance to religion that the decision now provides. In other words, not only did Sherbert face a burden that was substantially lower than the burden faced by Braunfeld, but also the Court might be compelling the state of South Carolina to violate the Establishment Clause of the First Amendment by mandating the creation of a religious exemption that must be supported by public funds. While the Court claimed fidelity to the decision in Braunfeld, it is clear that the Court was in fact “inventing a new paradigm for judgment.”

Although the Supreme Court has overturned its own precedent in several instances – often decades after an initial decision, and often because social norms have changed – the question we must ask is why the Court was unwilling to expressly abandon the precedent set forth in Braunfeld, a precedent espoused only two years earlier, and one which it all but eliminates in Sherbert.

An application of the Foucauldian triangulation of power suggests that the Court is controlling and preserving the legitimacy of its own discourse, which accomplishes two aims. First, the illusory distinction between the two cases preserves the discourse of truth that legal reasoning claims to provide. And second, it masks the positionality and purpose underlying such contradictions, as identified by the Justice Black’s dissent in Braunfeld. Justice Black concluded that while the Court attempted to portray the Sunday laws in Braunfeld as a civil regulation, “the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities.” He argues that

68 Id. at 423.
69 Stahl, supra note 2, at 448.
70 See generally O’Connor dissent in City of Boerne v. Flores, 521 U.S. 507 (1997) (finding that doctrine of stare decisis does not prevent reconsideration of precedent when adherence to a decision involves collision with a doctrine “more embracing in its scope, intrinsically sounder, and verified by experience”).
71 Sherbert, 374 U.S. at 573. See, e.g., Feldman, supra note 50, at 840 (noting that “any theory of religious freedom necessarily rests upon particular, often tacit, background beliefs or assumptions”).
the Court supports the state’s use of the First Amendment as a vehicle enabling the dominant religious group to control the minority because it fails to “defer to the majority’s religious beliefs.”

He further finds that while states can create requirements for a day of rest based on health reasons,

[the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the 'weaker brethren,' to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?]

B. JURIDICAL POWER AND THE DISENFRANCHISEMENT OF ORDINARY CITIZENS

*Sherbert* established a new judicial “test” for the regulation of state legislation impacting free exercise of religion, which requires the demonstration of a compelling government interest when the state directly or indirectly burdened religious practice. This test was essentially eliminated in *Employment Division v. Smith*, 494 U.S. 872 (1990), an oft-cited opinion generating prolonged discussion. In response to this decision, Congress reinstated the exacting strict scrutiny standard for matters dealing with religious exercise through the Religious Freedom Restoration Act (RFRA). However, that act was invalidated in its application to state law in the case of *City of Boerne v. Flores*, 521 U.S. 507 (1997). The opinion was based on an interpretation, which clashed with congressional interpretation, of the fundamental nature of free exercise protection and congressional jurisdiction to control state conduct. While the clash in interpretations could have been used to create a dialogue about the ownership of constitutional interpretation of rights, “the Court presupposed that the judiciary has exclusive authority to interpret the Constitution,” and ruled that “Congress had no right to legislate on the

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72 Id. at 575.
73 Id. at 576 (emphasis added).
basis of an interpretation of the Constitution contrary to judicial precedent.”


In Employment Division v. Smith, respondents Alfred Smith and Galen Black were fired by a private drug rehabilitation organization for their sacramental use of peyote, a hallucinogenic drug, during a ceremony at their Native American Church. They were denied unemployment benefits due to an Oregon state law that rendered ineligible employees discharged for work-related misconduct.

Although Smith and Black sought review of the legislation consistent with the balancing test outlined in Sherbert, wherein governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, the Court rejected the applicability of that standard in this circumstance because it involved a neutral law of general applicability.

The Court once again constructs an arbitrary distinction when it finds that the Sherbert test was developed in a specific context that lent itself to individualized assessment of the reasons for particular conduct. The Court claims that this test is inapplicable to a general criminal prohibition of specific conduct because it has “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”

However, this distinction does not hold up to closer scrutiny, because the distinctions made either render the free exercise clause superfluous or fail to explain why the distinguishing facts create any material distinction between the two factual circumstances.

Because the Court was now “[c]onfronted with a considerable body of precedents which certainly seemed to suggest the opposite, [the majority opinion] attempted to recast the prior case law into two categories that would not contradict [their previous] pronouncement.” However, these explanations were more of a confirmation of the Court’s arbitrary and conflicting reasoning. While the Court claimed that the compelling interest standard was applicable in cases involving hybrid rights, or in cases where an individual’s religion was singled out for disparate treatment, both lines

77 Sherbert, 374 U.S. at 573.
78 See Bonventre supra note 62, at 1412.
79 Sherbert, 374 U.S. at 879.
80 See Bonventre supra note 62, at 1412.
of reasoning collapse under simple scrutiny. Under the former, a recasting of precedent simply renders free exercise entirely superfluous.\textsuperscript{81} Under the latter, the Court uses Sherbert as an example of religious hardships being subordinated to other hardships in an employment context.\textsuperscript{82} However, that analysis fails to account for the contradictory reasoning applied in Braunfeld.

Moreover, this reasoning begs the question of whether the state would ever be likely to devise laws that targeted specific religions or legislated “belief itself.”\textsuperscript{83} This facially neutral distinction making in Smith, it should be noted, was one that specifically disadvantaged a religious minority. By altering free exercise jurisprudence to essentially eliminate the strict scrutiny standard previously applied to state laws restricting religious practice, the Court in fact expands the protection of Christian religious beliefs and makes non-Christian beliefs more vulnerable to state regulation under the guise of generally applicable laws.\textsuperscript{84} The contradictory holdings in Braunfeld and Sherbert, and the reasoning in Smith demonstrate that state “legislative actions,” which naturally reflect the “Christian beliefs and practices” of the majority, would also be protected.\textsuperscript{85} And after Smith, it “became clear that the reach of First Amendment religious liberties had been substantially restricted and even imperiled with respect to minority sects.”\textsuperscript{86}


In response to the new, circumscribed interpretation of the Free Exercise Clause resulting from the Smith decision, Congress passed a law in 1993 with the explicit purpose of circumventing Smith and reinstating the test in Sherbert as the appropriate means of determining whether a statute passed constitutional muster in terms of the Free Exercise Clause. In other words, Congress attempted to pass legislation to restore strict scrutiny review to free exercise jurisprudence. Congressional reasoning revealed a concern that laws that were facially neutral on religious questions could nevertheless have effects that were just as harmful to religious practice as laws that specifically proscribed such practices.\textsuperscript{87} The law passed both houses of Congress easily, in the House of Representatives by a voice vote

\textsuperscript{81} Id. at 1412.
\textsuperscript{82} Id. at 1412.
\textsuperscript{83} Stahl, supra note 2, at 450.
\textsuperscript{84} Feldman, supra note 50, at 860.
\textsuperscript{85} Id. at 860.
\textsuperscript{86} Friedelbaum, supra note 74, at 1066.
and in the Senate by a vote of 97-3.88


In *Flores,* the Supreme Court partially overturned the Religious Freedom Restoration Act. To do so, it made arbitrary distinctions about the permissibility of the remedial powers granted to Congress to address prior Court rulings. Although it held that Congress has the remedial power to prohibit laws with discriminatory effects—in order to prevent racial discrimination in violation of the Equal Protection Clause—it found the enactment of RFRA to be impermissible because the sweeping nature of the legislative act failed to provide congruence between the means used and the ends to be achieved.89 This interpretation and application of federal power is based on a narrow interpretation of the purpose underlying the Fourteenth Amendment. The Court held that “RFRA is so out of proportion to a supposed remedial or preventive object [to prevent laws with the unconstitutional object of targeting religious beliefs and practices] that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”90

The majority opinion goes on to note that RFRA “imposes in every case a least restrictive means requirement,” a requirement it purports was not used in the pre-*Smith* jurisprudence RFRA purported to codify—even though it is the test the Court established in *Sherbert* and one that was applied to all cases of religious discrimination, regardless of the general applicability of the law (as noted in Justice O’Connor’s dissent).91

Ultimately, the Court held that congressional legislation “which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”92 Congress does not have the power to “determine what constitutes a constitutional violation.”93 That discursive mechanism is limited solely to the courts. “Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions of [the Fourteenth Amendment].’”94 Accordingly, the premise is that the Supreme Court’s interpretation is not subject to reconsideration or public

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90 Id. at 509.
91 Id. at 535.
92 Id. at 519.
93 Id. at 519.
94 Id. at 519.
deliberation.\textsuperscript{95} In resolving the case in this manner, the Court relies on a very narrow view of the history of congressional remedies under the Fourteenth Amendment in order to disenfranchise the public from the deliberative process.\textsuperscript{96}

The dissenting opinion is instructive in its identification of two issues. First, Justice O'Connor notes that RFRA was passed to address the legitimate concern of a majority in Congress, and by extension, their constituents, who believed that the Supreme Court improperly restricted religious liberty when it issued the \textit{Smith} decision.\textsuperscript{97} Second, although Congress' remedial power is limited by a requirement of congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end, “that recognition does not, of course, in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning. Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates.”\textsuperscript{98}

Justice O'Connor reiterated her belief that the Smith case was improperly decided and “supported neither by precedent, nor by history.”\textsuperscript{99} Instead, the dissent claims, the decision has harmed religious liberty. The opinion goes on to cite several instances where the Smith standard was used to defend a state practice that, while generally applicable, nevertheless burdened the exercise of religion.\textsuperscript{100}

\textsuperscript{95} McConnell, \textit{supra} note 76, at 154.
\textsuperscript{97} Flores, 521 U.S. at 545.
\textsuperscript{98} Id. at 545.
\textsuperscript{99} Id.
\textsuperscript{100} \textit{See Id.} (“For example, a Federal District Court, in reliance on Smith, ruled that the Free Exercise Clause was not implicated where Hmong natives objected on religious grounds to their son's autopsy, conducted pursuant to a generally applicable state law. Yang v. Sturner, 750 F. Supp. 558, 559 (D.R.I. 1990). The Court of Appeals for the Eighth Circuit held that application of a city's zoning laws to prevent a church from conducting services in an area zoned for commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area. Cornerstone Bible Church v. Hastings, 948 F.2d 464 (8th Cir. 1991); see, e.g., Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (no free exercise claim where city's application of facially neutral landmark designation law “drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs”), cert. denied, 499 U.S. 905, 111 S. Ct. 1103, 113 L.Ed.2d 214 (1991); State v. Hershberger, 462 N.W.2d 393 (Minn.1990) (Free Exercise Clause provided no basis for exempting an Amish farmer from displaying a bright orange triangle on his buggy, to which the
Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.\[^{101}\]


In *Smith*, the Supreme Court rejected the respondent’s request for the Court to restrict the compelling state interest analysis to instances in which the conduct prohibited is central to the individual’s religion. In rejecting this argument, the Court found that it is not appropriate for judges to determine the centrality of particular religious beliefs or the relative merits of differing religious claims.\[^{102}\] However, in the recent *Hosanna-Tabor* case, the Court contradicts this reasoning by determining that certain actions taken by a teacher, allegedly employed as a minister, constituted ministerial duties. By doing so, it arrogates to itself the regulatory authority of defining ministerial eligibility.

*Hosanna-Tabor* involved an employment termination claim on behalf of a teacher who worked at the Hosanna-Tabor Evangelical Lutheran Church and School. The school hires both lay and “called” teachers. Called teachers are asked to complete certain requirements, including the study of theology, upon the successful completion of which they receive the formal title of Minister of Religion. Cheryl Perich, the teacher who was ultimately terminated from the school, was asked to serve as a called teacher and completed the necessary academic requirements. Ms. Perich challenged her termination based on an employment discrimination involving the American with Disabilities Action. The Court recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of such legislation to claims concerning the farmer objected on religious grounds, even though the evidence showed that some other material would have served the State’s purpose equally well). These cases demonstrate that lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of “reasonably accommodating religious practice”).


\[^{102}\] *Smith*, 494 U.S. at 887-88.

The Court held that a judicial mandate or prohibition as to the retention of a minister “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”\footnote{Id. at 706.} The Court attempts to reconcile its decision with \textit{Smith} by claiming that the distinction between the two cases turns on “a distinction between two categories: ‘only outward physical acts’ (Smith), and ‘internal church decisions that affect the faith and mission of the church itself.’”\footnote{LEADING CASE: Constitutional Law: First Amendment: Freedom of Religion—Ministerial Exception: Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 126 Harv. L. Rev. 176, 183 (2012).}

The Court fails to provide a rationale explaining why the context of employment at the church should not also be considered an outward physical act.\footnote{Id. at 706.} The Court’s “unconvincing distinction” serves to further complicate free exercise jurisprudence and also increases the necessity of judicial regulation of rights discourse due to the enactment of unnecessarily nuanced and arbitrarily distinguishable legal standards.\footnote{Id. at 176, 183.}

Moreover, having affirmed the availability of a ministerial exception grounded the First Amendment, the Court next considered whether the exception applied in the case of Hosanna-Tabor. While some legal scholars perceive Hosanna-Tabor as a victory for autonomous decision-making in religious practice, those interpretations fail to account for the regulatory nature of the decision.\footnote{See e.g., Paul Horwitz, \textit{Act III of the Ministerial Exception}, 106 Nw. U.L. Rev. 973, 980 (2012) (“Courts cannot decide religious disputes. They may not resolve questions of church doctrine or governance. And they may not interfere in a church’s decision about who constitutes an acceptable leader or member. These principles are all confirmed by the Court’s decision in Hosanna-Tabor”); Leslie Griffin, \textit{The Sins of Hosanna-Tabor}, 88 Ind. L.J. 981, 992 (2013) (finding that Hosanna-Tabor decision takes ministers “outside the protection of the courts” in order to promote “religious freedom”); Mark Chopko & Marissa Parker, \textit{Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor}, 10 FIRST AMENDMENT LAW REVIEW 233, 235 (2012) (finding that the Court’s decision in Hosanna-Tabor is consistent with First Amendment guarantees of free exercise of religion).}

Although reluctant to pronounce a rigid test for deciding when an employee qualifies as a minister, the Court nevertheless concludes, “given all the circumstances of her employment,” the ministerial exception covers Perich.\footnote{Id. at 707.} The opinion walks through the numerous aspects of Perich’s employment that meet the definition of a minister, verifying the legitimacy of each classification. However, the right to define religious service “is overridden when a court reviews the church’s
decision to rescind a minister's call.\textsuperscript{110}

Justice Thomas’ concurrence highlights the distinction between the establishment of a new regulatory function and the operation of mere interpretation in defining the ministerial exception. The concurrence questions the necessity for the Court to undergo its own verification of the ministerial exception. In his concurrence, Justice Thomas writes separately to note that:

\begin{quote}
[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. As the Court explains, the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a “minister” under the organization's theological tenets.\textsuperscript{111}
\end{quote}

The concurrence clearly outlines what was already made clear in the reasoning of \textit{Smith}, namely that the judiciary should not insert itself into the internal decisions of a religious organization. Justice Thomas argues instead that the only evidence required to confirm the application of the ministerial exception is whether Hosanna–Tabor sincerely considered Perich a minister. That sincere belief would be sufficient to conclude that Perich's suit is barred by the ministerial exception.

\textbf{CONCLUSION}

\textit{Hosanna-Tabor} once again raises the question of why the Court, given its previous pronouncements in \textit{Smith}, found it necessary to verify that a ministerial claim was met based on some “objective” determination and assessment of the requirements of a ministerial duty. The Court’s application of facially neutral reasoning in determining whether Perich was a minister in fact constitutes a form of defining a minister; among other things, it assumes that ministers are defined rationally, and, as Justice


\textsuperscript{111} \textit{Id.} at 710.
Thomas points out, that it is the job of the Court to make that determination in the first place.\textsuperscript{112}

Based on a Foucauldian analysis, the purpose of the Court’s ruling is clear: to maintain control of the definition of that exception, thereby increasing its regulatory function, without drawing attention to the zero-sum disenfranchisement of the individual (or organizational) interpretation of what constitutes a minister for purposes of a particular religion. An examination of the Court’s free exercise jurisprudence reminds us that judicial decision-making is also judicial discourse designed to maintain power relations through the process of treating certain normative judgments as generally applicable and distinguishing cases that deviate from those norms.\textsuperscript{113} In each of these cases, the Court has attempted to avoid the accusation of arbitrariness by reframing the issue at hand through the use of immaterial distinctions between the cases.

In Foucauldian terms, the Court’s ability to reframe contradictory and arbitrary standards in order to create the facial appearance of consistency with previous decisions is the ultimate exercise of power. Reframing is an exercise “of the power of naming—the power to assert what a problem is and what should be done about it.”\textsuperscript{114} Members of the Court hold the power to reframe issues because of their position and specialized expertise in interpreting the meaning of rights. Accordingly, this legitimizes the Court’s authority to smooth out contradictions through normative legal language.\textsuperscript{115} Ultimately, the Court preserves the perception of its rightfulness based in the accepted rule of right that establishes the Court as the proper interpreter of the Constitution. It further preserves its democratic legitimacy through a discourse of truth in the form of legal positivism, which ultimately mask the role of subjectivity, positionality, and personal experience in the decisions of the Court, thereby perpetuating the inequities created by its decisions.

\textsuperscript{112} Laycock, \textit{supra} note 110, at 851.
\textsuperscript{113} Cisneros, \textit{supra} note 58, at 1094.
\textsuperscript{114} Merry, \textit{supra} note 7, at 218.
\textsuperscript{115} \textit{id.} at 218.