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The Paradox of Plenty: How Saudi Arabia's Oil Wealth Has Kept It Less Free than Dubai

Cameron Langford

This paper examines a 1980's Minneapolis pornography ordinance in its feminist legal context. By examining court cases from the 19th century to the 1980's, this paper characterizes legal feminism in the United States as a move from a "protectionist" to a "liberal" view. In the protectionist view, women's needs are best secured through recognition of their biological difference – and by extension, their inferiority; in the liberal view, by contrast, equality between the sexes is seen as impossible to preserve by treating women as a "separate but equal" social class; instead, equality requires a feigned ignorance toward biological difference. This paper notes that by this analysis of legal feminism, the Minneapolis pornography ordinance – which was spearheaded by feminist Catharine MacKinnon – at first seems to represent a step backward toward protectionism. The key difference, I suggest, is that MacKinnon recognizes that a need for female legal protection is rooted not in biological inferiority but in historical exclusion. True equality, the ordinance suggests, can only be grounded in recognition of difference.

PART I. INTRODUCTION

On December 30, 1983, by a 7-6 vote, the Minneapolis City Council passed an ordinance banning pornography.[1] The so-called MacKinnon-Dworkin ordinance, named for its authors lawyer Catharine MacKinnon and writer Andrea Dworkin, declared, "[P]ornography is central in creating and maintaining the civil inequality of the sexes" and that as such it "harm[ed] women's opportunity for equality of rights in

[1] Randall D.B. Tigue. "Civil Rights and Censorship—Inconvenient Bedfellows." *William Mitchell Law Review* 11 (1985): p. 82-3.

[fields such as] employment [and] education."[2] The ordinance was revolutionary not only for its definition of pornography, which relied on porn's underlying themes of "exploitation and subordination" rather than its obscene nature, but also on the ordinance's dismissal of First Amendment rights to free speech.[3] For MacKinnon and Dworkin, pornography represented "free speech" only if one happened to be a man; for women, they argued, pornography was silencing.[4]

On one hand, the ordinance signaled an important return to legal feminism's protectionist roots in the fight for equality. Since the 1960's, feminists had been faced with two options: contend with men on their terms – what MacKinnon characterized as "[s]et your standard; let us meet it" – or "ground equality in difference."[5] By and large, they had chosen the former approach for fear that, as the landmark civil-rights case *Brown v. Board* had declared in 1954, "separate…[is] inherently unequal."[6] But early feminist movements had not shied away from acknowledging difference, and indeed had argued that women's condition could be improved only through recognition of biological reality. On the other hand, the ordinance also drew from feminism's liberal strain in arguing that the division between men and women was based on socially constructed differences rather than biological ones. This paper will argue that the Minneapolis Pornography Ordinance represented both a return to a defense of female protection in the law and a revision of the protectionist notion that women were inherently different from, and necessarily dependent on, men.

Part II begins with a brief overview of feminism in the 19th century, focusing on the predominance of the "protection" standard that placed women in the private sphere, where men and government could protect them. Part III hones in on the relationship between the civil rights movement and feminism and is divided into three sections: The first discusses the predominance of the protection standard in the early 20th century, while the second introduces the early comparisons between race and sex equality as civil rights. The third and final section then analyzes the ultimate rise of the *sameness standard* and the rhetorical strategy of employing civil-rights language in the service of equal rights for women. Finally, Part IV discusses the MacKinnon-Dworkin Ordinance and the rise of a *difference standard* that attempted to protect women without excluding them from the public sphere.

PART II. LA FEMME COUVERTE

In the summer of 1860, a woman named Elizabeth Packard was committed to the state insane asylum in Illinois, where she had moved two years earlier with her

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[2] Ordinance to amend MINNEAPOLIS, MINN., CODE OF ORDINANCES Title 7, chs. 139, 141 (1982) (passed Dec. 30, 1983; vetoed Jan. 5, 1984).

[3] Ibid

[4] Catharine MacKinnon's testimony, Government Operations Committee, Session I: Monday, Dec. 12, 1983, reprinted in MacKinnon and Dworkin, *In Harm's Way*, p. 41-2.

[5] Marcus, Isabel, Paul J. Spielgelman, Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, and Carrie J. Menkel Meadow. "Feminist Discourse, Moral Values, and the Law—A Conversation." *Buffalo Law Review* 34 (1985): p. 11-87.

[6] *Brown v. Board of Education* 347 US 483 (1954)

husband, who was a Presbyterian minister.[7] Her crime? Espousing the virtues of contemporary religious movements like spiritualism, which ruffled the conservative Calvinist congregation of Mr. Packard's church and which she refused to abandon even when commanded by her husband.[8] Mrs. Packard had no say in the decision: as a woman in the 19th century, she was subject to a legal concept known as *coverture*, which bound man and wife as one legal entity – but as she protested, "[T]hat one is the man!"[9] Her husband's voice subsumed hers, at least in a legal sense.

While committed, Packard began to put her ideas against coverture and the present legal status of women into writing. Her work, entitled *Modern Persecution*, offered a glimpse into the earliest glimmers of American feminism. Interestingly, her writing asserted the "right to be a married woman" – that is, it asserted married women's right to a separate, dependent legal sphere. In this sphere Packard believed wives ought to be protected by their husbands.[10] Her argument was that the chief aim of legitimate government "was to protect the weak against the usurpation of the strong" and that therefore government "should not allow the husband to rule over the wife in any sense but that of protection."[11] In Packard's view, the legal system had failed her not because her husband ought not have the right to commit her but because the law allowed him to abuse that privilege.

In her criticism Packard thus made an observation about the role of women in the public sphere that would remain largely ignored for the next century. What women wanted, Packard argued, was simply the "right to be protected by our man government."[12] Such a right respected that while women's rights were "not man rights…yet both are inalienable, and both equally sacred."[13] For Packard, that difference was best described by way of analogy with the public and private spheres. Women were a part of the private sphere, or the home, where they could not vote or participate in civic life. In exchange, they received protection from men, who in turn made up the institutions that defined the public sphere. A woman, in Packard's view, could not participate in the public sphere any more than she could become a man. But in exchange for this biological reality, she was owed a certain degree of defense from public institutions like law when her husband failed in his role as protector.

In this way, Packard's philosophy differed drastically from contemporary feminists like Elizabeth Cady Stanton, who rejected the notion of female legal dependency wholesale.[14] In Stanton's view, women had the right to be treated as

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[7] Hendrick Hartog. "Mrs. Packard on Dependency." *Yale Journal of the Law and Humanities* 1 (1988): p. 79, 81.
[8] Ibid, p. 80-1
[9] Elizabeth Parsons Ware Packard, *Modern* Persecution, or *Insane Asylums Unveiled, as Demonstrated by the Report of the Investigating Committee of the Legislature of Illinois,* vol. 1 (Hartford, 1875): p. 163-5. Cited in Hartog, p. 86.
[10] Hartog, p. 93
[11] Packard, p. 114
[12] Ibid
[13] Ibid
[14] Ibid

individuals rather than be defined by their womanhood.[15] What Packard wanted, by contrast, was not the right to be a man, legally speaking; she wanted the right to be protected *from* men.[16] Packard thus acknowledged a fundamental difference between men and women: men subject, while women are subjected. Fairness, in Packard's view, required giving this inherent difference its due. With this observation, she foreshadowed a tension between substantive and formal equality that would haunt the feminist movement into the 1980's and the modern era.

PART III. RACE, SEX, AND THE PUBLIC SPHERE

A. THE PROTECTION STANDARD

Though rejected by Elizabeth Cady Stanton and other abolitionist feminists in the 1800's, Packard's "protection standard" continued as the predominant legal norm for much of the twentieth century. A prime example of this was 1908's *Muller v. Oregon*, in which an employer, Muller, charged that Oregon's law limiting female workers to ten-hour shifts violated freedom of contract. Unanimously, the Court sided with Oregon, arguing that such a limitation was a permissible exception to liberty of contract given the state's interest in protecting "healthy mothers[, who] are essential to vigorous offspring."[17] The Court believed that, as Hendrick Hartog wrote of Packard's views, "if…women had the legal right to protection – the freedom – that Mrs. Packard considered their legitimate due, they could fulfill their duty to society as mothers…."[18] The state saw its purpose as Packard did: to protect women's gendered roles.

But *Muller* also marked a shift away from Packard's ideal view of femininity. The case, after all, dealt with laws concerning workingwomen – a phrase that by Packard's standards was an oxymoron, as the working world *by definition* excluded women. Still, the core of Packard's beliefs were upheld by the Court in *Muller*, as it was premised on the notion that state power should protect women from the public sphere. Inherent in the Court's argument was the idea that motherhood and employment were innately antagonistic demands. In this way, the Court relied on a "difference standard" that refracted the "general knowledge…that woman's physical structure and the performance of maternal functions place her at a disadvantage" into "a difference in legislation."[19] Law, in other words, was seen as a vehicle for protecting the gendered roles of women against the challenges of the workplace.

Throughout the early part of the twentieth century, many organizations were founded with this protectionist mission in mind. As Heidi M. Bergrenn writes in her article "US Family-Leave Policy: The legacy of separate spheres":

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[15] Elizabeth Cady Stanton, "The Solitude of the Self," qtd. in Karylyn Kohrs Campbell, "Stanton's 'The Solitude of the Self': A Rationale for Feminism" in *The Quarterly Journal of Speech* 66 (1980): p. 305.

[16] This line of thinking was not unique to Packard; it could also be seen in the larger debate being waged over divorce in this era. See Elizabeth B. Clark. "Matrimonial Bonds: Slavery, Contract, and the Law of Divorce in Nineteenth-Century America." *Critical Matrix* 3 (1987).

[17] *Muller v. Oregon* 208 U.S. 412 (1908)

[18] Hartog, 97

[19] *Muller v. Oregon*

> Reformist groups including the General Federation of Women's Clubs, the National Women's Trade Union League, and particularly the National Consumer's League sought, and generally won, state- and local-level restrictions on the number of hours women could work, exclusions of women from night shifts, prohibitions against women performing hazardous or immoral work, and against women working for a period before and after giving birth.[20]

The issue became a federal rather than a local one in 1920, when the US Labor Department established the Women's Bureau.[21] The purpose of the new organization was to "safeguard…the health and safety of…women who were meeting in many instances the requirements of new and unaccustomed tasks" in their post-World War I jobs.[22] The Bureau worked to distinguish between the needs of men and women in this new workforce. But some worried that such a focus on difference would disadvantage women; the Women's Bureau, for example, worried that employers might uniquely subject women "to sub-standard working conditions and wages."[23] Ultimately, however, the consensus was that "some jobs were just too injurious to women if occupational hazards threatened childrearing."[24] Though women were no longer restricted to the home, their essential role remained that of mothers, and reminding employers of that difference persisted as the Bureau's chief aim.

Indeed, integral to the difference mission was Packard's notion that women did not belong outside of the home at all. Protectionist organizations like the National Consumers' League not only promoted decent working conditions for women but also lobbied heavily for "a family wage for men so that women would not be forced into factories in the first place."[25] This "breadwinner liberalism" became the driving theory beyond President Lyndon B. Johnson's Great Society, which characterized men's work as "public, remunerative, and family sustaining, while women's work was domestic, caregiving, and, if it was remunerative, was supplementary to their husband's income."[26] In this view, women could remain insulated from the public sphere if protected by their husband's income; the best-case outcome of protectionist activism was a world in which women were free to return to the home.

B. The Brown Analogy

Initially, the protectionist mission retained its staying power even as the Civil Rights Movement began to dismantle long-held assumptions about black inferiority and racial difference. As one man wrote in a 1954 *New York Times* letter to the editor, the year *Brown v. Board* ended racial segregation in public schools, there was "one form

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[20] Heidi M. Berggren."US Family-Leave Policy: The legacy of 'separate spheres.'" *International Journal of Social Welfare* 17 (2008): p. 317

[21] U.S. Senate Congress. *Women's Bureau*. Report no. 477. N.p.: Mr. Kenyon, 1920.

[22] Ibid

[23] Maastracci, p. 86

[24] Ibid

[25] Bergren, p. 317

[26] Robert O. Self. *All in the Family: The realignment of American democracy Since the 1960's*. New York: Farrar, Straus and Giroux (2012).

of segregation which is perfectly legal…. This is segregation of the sexes."[27] Thus even as race came to be seen as a social construction, sex was still seen as an inescapable biological fact. The divergence between the legal status of race and sex was perhaps nowhere more evident than in the sex segregation movement in public schools spurred by *Brown v. Board.* As Serena Mayeri writes in her article "The Strange Legacy of Jane Crow," fears of black aggression and miscegenation spurred the belief that girls needed government protection from black boys in now-integrated schools. To make the "moral turpitude" of racial integration publicly tenable, school officials began to advocate for single-sex schools.[28]

Though sex segregation was by some accounts simply a way of resisting racial integration in the same vein as white flight and closing mixed schools,[29] the practice's larger implication was that white girls, as the weaker sex and as potential mothers of mixed-race children, were especially endangered by integration. The public charged that sex-integrated schools would subject innocent white girls to the possibility of bearing mixed-race children.[30] As such, sex segregation remained largely immune from charges of sex discrimination[31]; because of the unique disadvantages integration was understood to pose to white girls, separate was not understood to be unequal. Indeed, school officials argued that sex-segregated schools actually provided *superior* educational environments for both men and women by better meeting their unique biological needs. Louisiana school official Joseph Davies illustrated this point when wrote in 1967, "[O]ne of the most ageless and fundamental complications of teaching [is] the fact that boys are different than girls."[32] These "great differences" ultimately manifested themselves in divergent curricula between all-male and all-female schools, with male education focusing on science, math, and physical education while female education centered on reading and verbal skills.[33] By acknowledging difference, school officials implied, both sexes would have their educational needs better attended to, and truer equality – grounded in the reality of difference and the need to protect white girls from the harms of integration – would be preserved.

The case study of education reflects the larger trend of sex-discrimination cases, which largely upheld Packard's protectionist difference standard. In the 1961 case *Hoyt v. Florida*, for example, the Supreme Court ruled that certain classes of citizens, including women, could be excluded from jury duty when doing so was "in the interest of the public health, safety, or welfare."[34] Though exclusion from jury duty on the basis on race had long been ruled unconstitutional, the Court ruled in *Hoyt* that the exclusion

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[27] Mitchell Rawson, Letter to the Editor, Segregation by Sexes, N.Y. TIMES, Dec. 2, 1954, at 33. qtd in Mayeri, Serena. "The Strange Career of Jane Crow: Sex segregation and the transformation of anti-discrimination discourse." *Yale Journal of Law and the Humanities* 18 (2006): p. 187-272.

[28] This phrase was used in a letter to the editor published in the years after *Brown v. Board*. This quote, from Albert Jackson of Oakland, CA, is qtd. in ibid, p. 198.

[29] Ibid, p. 196

[30] Ibid

[31] Ibid, p. 202

[32] Qtd. in ibid, p. 218

[33] Ibid

[34] *Hoyt v. Florida* 368 U.S. 57 (1961). The footnote quoted is a citation in the case from 28 U.S.C. § 1862.

of women was fundamentally different than racial exclusion because "woman [was] still regarded as the center of home and family life."[35] In the Court's view, women required the state's protection of their gendered roles as mothers. Similar cases preceded and followed *Hoyt.* In the 1948 case *Goesaret v. Clearly*, for example, the Court upheld a Michigan law banning female bartenders on the basis that women needed to be protected from the "moral and social problems" posed by liquor-serving establishments.[36] Likewise, in 1974's *Khan v. Shevin*, the Court upheld a $500 tax exemption for widows and not widowers on the basis that "the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing a man."[37] State power therefore understood itself as improving the condition of woman on the basis of inherent differences between the sexes.

In other cases, though, "separate but equal" legislation clearly disadvantaged women. One such arena was public education, about which the tide of public opinion began to turn as the rhetoric of the Civil Rights Movement became increasingly salient. The first near-victory for advocates of coeducation came in the 1958 Supreme Court case *Heaton v. Bristol*, in which W.T. McDonald, a federal district judge in Texas, held that "as a matter of law separate but equal [school] facilities are inherently unequal as applied to males and females." [38] McDonald furthered that "any attempt at classification of males and females for education purposes…[was] irrational and immaterial to the educational objectives sought."[39] Though the Texas Court of Civil Appeals ultimately overruled McDonald,[40] his argument gained traction in legal circles, and twelve years later, the women's rights movement had one of its first successes using the same line of reasoning in *Kirstein v. Rector*. In *Rector*, Jo Anne Kirstein won a class-action suit against the University of Virginia for failing to admit women.[41]

The idea that separate was indeed inherently unequal in the realm of sex-segregated education came to the fore when Susan Vorchheimer, a fifteen-year-old girl, brought a suit against her Philadelphia school district. Vorchheimer had been denied admission to the male-only Central High on the sole basis of her sex, and rather than attend the Girls' High to which she was assigned, she decided to attend the nonacademic, coed school in her neighborhood.[42] In her testimony, Vorchheimer argued that segregation "impose[d] upon female students a badge of inferiority, teaching them expressly and by example that they [were] not qualified to compete with male students in academic pursuits."[43] Vorchheimer argued that the existence of a female option to Central in Girls' High did not mitigate the fact that Central was the academically superior option, with access to courses like science, math, and Latin that

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[35] Ibid
[36] *Goesaret v. Clearly* 335 U.S. 464 (1948)
[37] *Kahn v. Shevin*.416 U.S. 351 (1974)
[38] *Heaton v. Bristol* 317 S.W.2d 86 (1958)
[39] Ibid
[40] Mayeri, "Jane Crow," p. 203
[41] *Kirstein v. Rector* 309 F.Supp 184 (1970)
[42] Ibid, p. 57
[43] *Vorchheimer* 400 F.Sup 326 (1976), originally from *Frontiero v. Richardson* 411 U.S. 677 (1973).

were withheld from girls.[44] On August 7, 1975, the Court ruled in Vorchheimer's favor, contending that the adverse impact sex segregation had on women could not be justified by any of the School Board's "legitimate interests."[45] Importantly, in its opinion, the Court expressly criticized protectionism by citing Justice Brennan's critique of "'romantic paternalism' which, in practical effect, put women not on a pedestal but in a cage," holding women back rather than allowing them to move forward.[46] With Vorchheimer, it thus seemed that the women's rights movement had finally achieved public recognition of what the Civil Rights Movement had pointed out two decades earlier: substantive equality could not be premised on difference.

C. BEYOND EDUCATION: THE SAMENESS STANDARD

For women's rights activists, the race/sex comparison had long been obvious. As Pauli Murray, a black woman and advocate of both civil and women's rights, declared in 1963, "[N]o civil rights campaign can be permanently successful which does not stand foursquare for *all* human rights."[47] For Murray, this meant that the Civil Rights Movement could not ignore its sister struggle, women's rights. It also meant that the women's rights movement already had a template for success. As Donna Langston described in her article "Black Civil Rights, Feminism and Power":

> Liberal feminism paralleled the black civil rights movement in an analysis which minimized the differences between men and women (blacks and whites); a vision of equal opportunity and integration in the public sphere; and strategies which worked within the existing system to make legal changes in government and business, and to educate men and women about mistaken cultural ideas.[48, 49]

Fundamental to this strategy was the assumption that difference – whether between blacks and whites or between men and women – was merely a social and legal construction. Education and "removing [legal] barriers to individual equality in the public sphere" thus became the ways that feminists, like the civil rights activists before them, fought for equality.[50] Feminists and civil rights activists trusted that, once the right legal and cultural doors were open, women would finally be allowed fair equality of opportunity and full participation in public life.

The feminist comparison to racial subjugation was not new. Hartog writes that as a rhetorical strategy, "[l]abelling the legal situation of the white married women as equivalent to that of the Black chattel slave was an argumentative tactic that had been used…since the 1830's."[51] In fact, the note following the title of Mrs. Packard's first

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[44] Ibid
[45] Ibid
[46] Ibid
[47] Serena Mayeri. *Reasoning from Race: Feminism, law, and the civil rights revolution.* Cambridge, MA: Harvard UP, 2011.
[48] Donna Langston. "Black Civil Rights, Feminism and Power." *Race, Gender, and Class* 5 (1998).
[49] Many argue that this analogy was ultimately harmful to black women because it saw race and sex as parallel rather than intersected struggles. For more on this question, see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex," *University of Chicago Legal Forum* (1989): p. 139-167
[50] Ibid
[51] Hartog, p. 87.

book read, "Edited by a Slave, Now Imprisoned in Jacksonville Insane Asylum, Placed There by Her Husband for THINKING."[52] Post-Civil War, the slavery comparison gained new power, with "bondage bec[oming] the metaphor of choice for pro-divorce feminists"[53] – perhaps unsurprising, given that many nineteenth-century feminists had been abolitionists before and during the Civil War.[54]

If bondage was the problem, then emancipation was the solution. Just as slaves had been literally emancipated from their masters, and just as blacks had been legally emancipated from exclusion from public life, so too did women seek to be emancipated from the protection of men. The battle was understood largely as a legal one: if like their black male counterparts women were seen as independent legal individuals, feminists reasoned, then perhaps they too could finally achieve substantive equality in the public sphere. In this vein, the National Organization for Women (NOW), founded in 1966, billed itself as the "NAACP for women"[55] and sought to "take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."[56] Emancipation, in NOW's eyes, required women to participate fully in public life alongside their fellow male citizens – and for that to happen, they needed to be seen as legal equals, not as members of a particular category.

In this fight for formal equality, NOW took as its central mission the dismantling of workplace regulations on female labor. The case of Lorena Weeks, a Georgia telephone operator for the company Southern Bell, was NOW's first major opportunity. Weeks had taken five years off to raise three children but returned to work as soon as the youngest was capable of being left along so that she, along with her electrician husband William, could provide for her children's college education.[57] In an effort to bring home a higher salary, Weeks sought a promotion to switchman but was denied on the basis of her sex: Georgia law held that women could not lift more than 30 pounds on the job.[58] Weeks argued that this universal exclusion of women was unconstitutional, as many women (herself included) were capable of handling such loads – in fact, in her role as telephone clerk, Weeks had to lift a 34-pound typewriter onto her desk each day.[59] In retort, Southern Bell argued, "Generally recognized physical capabilities and physical limitations of the sexes may be made the basis for occupational qualifications in generic terms," reflecting the long history of female protectionist legislation.[60]

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[52] Qtd. in Linda Carlisle. "'New Notions and Wild Vagaries': Elizabeth Packard's Quest for Personal Liberty." *Journal of the Illinois State Historical Society* 93 (2000): 48.
[53] Ibid
[54] Clark
[55] Mayeri *Reasoning from Race*
[56] Ibid
[57] Gail Collins. *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*. New York: Little, Brown, and Company, 2009.
[58] *Weeks v. Southern Bell* 408 F.2nd 228 (1969), Section 54-122(d) of the Georgia Code
[59] Collins
[60] *Weeks*

But in 1966's *Weeks v. Southern Bell,* the Supreme Court denied Southern Bell's line of reasoning, siding with Weeks on the idea that "stereotyped characterization[s]" of sex are unconstitutional. The Court further denied protectionist legislation on a theoretical level, preferring instead to "vest…*individual women* with the power to decide whether or not to take on unromantic [professional] tasks" (emphasis mine).[61] This element of choice gave women the option the right men had always had "to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle."[62] A similar line of reasoning had been followed in the Court's decision in *Bowe v. Colgate-Palmolive Co.* two years earlier, in which it was ruled unconstitutional for a company to restrict women to the lowest-paid, least dangerous jobs solely on account of their sex.[63] Individual choice and qualification, rather than categorical stereotypes, were now the name of the game.

IV. PORN AS POLITICS

On December 30, 1983, the Minneapolis City Ordinance passed the infamous MacKinnon-Dworkin pornography ordinance, claiming the language of civil rights as its case. Though the ordinance was the culmination of a long series of hearings and public talks,[64] it was nevertheless almost immediately vetoed by Minneapolis's mayor on the basis of free speech.[65] Despite its failure as a piece of legislation, however, the ordinance struck an important chord with feminists, as pornography stood at the crossroads of the debate over individual choice and categorical protections – over sameness and difference. Porn, radical feminists charged, was one way in which sexual difference was highlighted rather than minimized. As Loren Glass wrote of pornography and the sexual revolution more broadly in her article "Second Wave: Feminism and Porn's Golden Age," "[R]ather than mitigating or eliminating gender difference, [pornography] tended to exaggerate it by enhancing the public focus on genital sexual difference."[66] More perniciously, sex could, as MacKinnon charged, "obscure inequality, eroticize subordination, and entrench hierarchy."[67]

Most other antipornography laws, by contrast, took the obscenity angle, charging that porn was unlawful because it appealed to "prurient interests" by exciting lustful thoughts.[68] In this view, obscenity was characterized by its utter lack of "redeeming social importance,"[69] which was usually taken to mean any sexual material lacking *ideas*; the First Amendment protected all other materials, regardless of their sexual

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[61] Ibid
[62] Ibid
[63] *Bowe v. Colgate-Palmolive Co.* 272 F.Supp 332 (1967)
[64] See Catherine MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Andrea Dworkin, 1997).
[65] Tigue
[66] Loren Glass, "Second Wave: Feminism and Porn's Golden Age" in *Radical Society* 29 (2002): p. 55.
[67] MacKinnon, qtd. in Jennifer C. Nash, "Strange Bedfellows: Black Feminism and Antipornography Feminism" in *Social Text* 26 (2008): p. 51-76.
[68] *Roth v. US*
[69] Ibid

content. MacKinnon did not follow this line of reasoning, however, and instead argued that pornography was problematic precisely because it *was* embedded with ideas. The ideas in question were ones of sexual hierarchy – an issue that MacKinnon felt was particularly problematic in the issues of pornography and rape, both of which could be construed as violence against women.[70] The violence in question was that of subjection, as women in porn were seen only as objects of men's interests.[71]

For MacKinnon, this meant that pornography was an exclusively male domain, and that as such, laws meant to protect the so-called "free speech" that was porn at the expense of protecting women were inherently unjust. Wrote MacKinnon:

> Feminists argue that women have generally been excluded from the marketplace of ideas, which the first amendment is designed to protect. Men dominate the sphere of public speech, often with the aid of law. The marketplace of ideas cannot promote truth or democracy when historical injustices handicap half the population. Based upon this theory, women may legitimately demand some special consideration aimed at promoting their participation in the marketplace of ideas or at protecting them from the abuse and exploitation permitted by a marketplace that ignores their concerns.[72]

In this way, MacKinnon both revitalized and revised the protectionist standard that had defined early twentieth-century feminist legislation. What she was demanding of the Minneapolis government was clearly protection, but it was not the kind of protection that made particular assumptions about what characterized female difference – at least beyond the general statement that men and women were unequally treated. Rather than arguing that women deserved protection as mothers and caregivers – a form of categorization that, as MacKinnon noted, had been used more often to exclude than to meaningfully protect[73] – MacKinnon's argument was that protectionist legislation could make note of a more limited reality: that at least empiricaly speaking, as Packard had noted a century earlier, women are defined by their subjected status to men.

V. Conclusion

The MacKinnon-Dworkin pornography ordinance represented a return to the protectionist mission that characterized the difference standard of women's rights. Importantly, however, the ordinance was also conscious of something its difference-preoccupied predecessors had not been: that protection has historically amounted to exclusion. MacKinnon wholeheartedly rejected that notion, but so too did she reject the idea that the sameness standard was the way to put men and women on equal footing. For MacKinnon, the historical reality of women's exclusion from the public sphere necessitated the law's assistance in making equality possible – but her equality was based not on the notion that women ought to be protected in their capacity as mothers

[70] Cf. The Mitchell Lectures, p. 32
[71] Ibid
[72] Ibid
[73] Ibid

and homemakers, but instead that they ought to be ushered by gender-sensitive law into the public sphere, where by an acknowledgement of difference historical if not biological, their voice could finally be heard.

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The Paradox of Plenty:
How Saudi Arabia's Oil Wealth Has Kept It Less Free than Dubai

Lincoln Richards

Starting in the mid-1900s Dubai and Saudi Arabia's distinct policies towards their oil sectors caused a continuing fissure between their two economies. This economic gap allowed Dubai to liberalize and become freer while Saudi Arabia became more conservative and controlling of its population. This paper will explore what indeed happened to cause such dramatic and uneven developments, or lack thereof, on the Arabian Peninsula. Then, it will explore how and why those differences became self-fulfilling to the extent that they have today.

INTRODUCTION

Dubai, one of the seven emirates that comprise the United Arab Emirates (UAE), is a mere four-hour drive from the Saudi Arabian border, yet the lifestyles in these two areas of the Arabian Gulf are drastically different. Dubai is globally regarded as a bastion of luxury and a model of 21st century success. Saudi Arabia is known for its economic underdevelopment, unemployment, severe censorship and restrictive laws regarding women. These two places were nearly identical just 60 years ago. For most of history Dubai would have been indistinguishable from any small Saudi village. During the Great Depression of the 1930s, the community was almost wiped out due to starvation and poverty.[74] Dubai has since undergone a transformation that Saudi Arabia

[74] Ahmed Kanna, "Dubai in a Jagged World," *Middle East Report* 243, no. Summer (2007): 22-29, accessed April 17, 2014, http://www.jstor.org.proxy.lib.duke. edu/stable/pdfplus/25164788.pdf?acceptTC=true&jpdConfirm=true.

has not. Why are these two states that share such close proximity and pre-modern history so different from each other today? Why do the people in present-day Dubai enjoy freedoms such as access to religious rights and entertainment when Saudi Arabia prohibits alcohol and does not allow movie theaters inside its borders?[75]

This paper will examine why Dubai had a different experience from Saudi Arabia over the last 60 years and how that led to its greater relative freedoms. First, how did Dubai and Saudi Arabia's different policies regarding their oil industries affect the development of freedoms in their respective countries? And second, how do these two states' tourism policies today affect those liberalizations in the modern world?

Throughout this paper I will explore arguments made by other researchers. These arguments assert that Dubai and Saudi Arabia's distinct polices towards their oil sectors caused this continuing fissure between their two economies. I will support and then further these arguments by demonstrating how this economic gap allowed Dubai to liberalize and become freer while Saudi Arabia became even more conservative and controlling of its people. In a region that remained relatively unchanged for centuries until the discovery of oil in the mid-1900s, it will be interesting to explore what indeed happened to cause such dramatic and uneven developments, or lack thereof, on the Arabian Peninsula.

Dubai and Saudi Arabia are both ruled by powerful monarchal families like many other countries in the Middle East. In Dubai, the Al Maktoum family has ruled since 1929, and, in Saudi Arabia, the Al Saud family has done similarly since 1932.[76] After oil was discovered in these states in the mid-20th century it became integral to their futures. The royal families of both Saudi Arabia and Dubai kept oil in mind when they made most major policy decisions. To understand the rift in relative freedoms between Dubai and Saudi Arabia today, one must understand the implications of such policies.

In Saudi Arabia, oil became the sole focus of the state when it was discovered in 1938. King Aziz directed a large majority of the country's resources towards growing and maintaining the oil export industry for decades.[77] By 1973, oil exports comprised over 60% of Saudi Arabia's Gross Domestic Product (GDP).[78] Agriculture and other forms of industry could not produce as much potential revenue when compared to the oil sector. Their development all but stagnated due to the lack of attention from the Saudi government. Saudi Arabia's monarchy concentrated on maximizing oil revenue and distributed that wealth amongst the ruling class rather than using the money to

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[75] US Department of State, "Saudi Arabia," accessed April 14, 2014, http://travel.state.gov/content/passports/english/country/saudi-arabia.html.

[76] Michael Matly and Laura Dillon, "Dubai Strategy: Past, Present, Future," Harvard Business School, Dubai Initiative, Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard University, 27 Feb. 2007: 1. http://www.cfci.org.cn/Images/UploadFile/D_20101105/20101105102051.pdf.

[77] M.A. Ramady, *The Saudi Arabian economy policies, achievements and challenges*, (New York: Springer, 2005): 14.

[78] International Monetary Fund, "Saudi Arabia: Selected Issues," *International Monetary Fund Country Report* N.A., no. 12/172 (2012): 6.

broaden the development of the national economy and then collecting a portion of that income through taxes.[79] The state had little incentive to develop its private sector because it would not experience an increase in tax revenue. Because people could not produce for themselves, the government became responsible for propping up its limited economy with its momentous oil wealth.

The Saudi monarchy soon became accustomed to the hefty income stream it derived from oil production and sales. In order to maintain this revenue flow the state had to import western technologies and skilled labor as operations grew.[80] This was necessary because Saudi Arabia did not possess the machinery or professionals with the expertise required to operate advanced oil extraction technology. The state's underdevelopment in regards to America and other oil-producing countries such as the Soviet Union is what opened the door for western corporations to gain a foothold in the state.[81]

Many villagers in the Saudi countryside were subsistence farmers or in a similarly fragile economic situation. Large western corporations were not common in Saudi Arabia and although corporations such as the Arabian American Oil Company (ARAMCO) provided some work for the suffering tribes, it was not enough to quell the economic disparity and nationwide underemployment.[82] As these Saudis not involved in the oil industry fell farther behind, the state had to reinforce its traditionally powerful control over an increasingly agitated and restless population to maintain peace. In an attempt to mute voices of discontent the government restricted protest and strengthened censorship policies already in place while implementing new forms of state-controlled print media.[83]

Soon the spread of radio spurred the state government to extend its authority to the airwaves. Improvements in technology led to a reduction in the price of radios, making them widely accessible to poor Saudis in the 1950s. Citizens around the country increasingly listened to Egyptian signals because Saudi Arabia did not yet have its own stations. The government did not approve of its citizens listening to often hostile foreign radio messages and formed state-sponsored radio stations by the mid 1960s to counteract the Egyptian broadcasts.[84]

The Saudi king of the time, King Faisal, used Islam to legitimize his attempt at complete control of the airwaves.[85] This behavior continued into the 1970s, '80s and '90s with state programming on television and a ban on foreign films. This quest for control even persists to today with stringent monitoring and censorship of the Internet. Presently, the Saudi government directs all Internet traffic within its borders through a

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[79] Martin Hvidt, "Public-Private Ties and Their Contribution to Development: The Case of Dubai," Taylor & Francis Online, Routledge, n.d. Web. 17 Feb. 2014: 562, http://www.tandfonline.com/doi/full/10.10.
[80] Rashid Masood. *Industrialization in oil-based economies: a case study of Saudi Arabia*. New Delhi: ABC Pub. House, 1984: 134-135.
[81] Alex Wietfield, "Understanding Middle East Gas Exporting Behavior," *Energy Journal* 32, no. 2 (2011):208, accessed April 14, 2014.
[82] Madawi Al-Rasheed, *A history of Saudi Arabia*, 2nd ed. New York: Cambridge University Press, 2010.
[83] Kai Hafez, *Mass media, politics, & society in the Middle East*, (Cresskill, NJ: Hampton Press, 2001): 24.
[84] Hafez, *Mass media, politics, and society in the Middle East*, 45-46.
[85] Ibid.

central server to monitor activity and to remove "information contrary to Islamic values and dangerous to … society."[86] This includes but is not limited to sites that provide gambling, pornography, religious conversion, dating, anything related to gays or lesbians or contradictory views to Sharia. In the realm of television, satellite dishes that provide foreign broadcasts are illegal yet still exist in some places.[87]

The Saudi government embraces its stringent control over the media and the web. It declares that the media exists to build national unity and to broadcast government views to the people. The state's fundamental laws do not guarantee freedom of the press and the penalty for defaming Islam in any way is death. To many countries around the world this system seems archaic, however it is prevalent and implemented in Saudi Arabia today. For example, in 2012, a 23-year-old Saudi journalist, Hamza Kashgari, was jailed after state officials read tweets they declared were offensive to the Prophet Muhammad. If convicted for defaming Muhammad, Kashgari would have been put to death in accordance with the law. However, after a global outpouring of condemnation for his imprisonment the Saudi government freed Kashgari in October of 2013.[88]

Cases like that of Hamza Kashgari's are common in Saudi Arabia, but are relatively unusual in the emirate of Dubai, just 280 miles away. In fact, Dubai is different from Saudi Arabia in most of the aforementioned areas. Internet traffic in Dubai does not pass through a central server and is less regulated, satellite television is widespread, and there are 'free zones' in which media is completely unrestricted. These phenomena and how they came to be will be further explored and developed in the coming pages.

When the Middle East experienced the oil boom of the 1950s, it was apparent that Dubai's oil reserves were only a fraction of those of its neighbors, especially Saudi Arabia's. The area of the Dubai emirate is 4,114 sq. kilometers. When compared to the 2.15 million sq. kilometers of Saudi Arabia, it is dwarfed in comparison.[89] Thus, even if oil were deposited evenly across the Arab Gulf region, Dubai would still have far less. As was the case, oil in the region was not deposited evenly and Dubai even only had 1/20 the oil reserves of its neighbor emirate, Abu Dhabi.[90] Sheikh Rashid Al Maktoum knew that Dubai's revenues from the oil boom would deplete much faster than its peers' and he did not make oil production the state's sole focus in the 1960s and onward. Instead, he kept his country competitive on the international economic stage through investing in Dubai's already-existent strengths—imports.[91]

The first way in which the Sheikh enhanced Dubai's imports was through his modernization of the emirate's ports. Historically Dubai had been a regional hub for the

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[86] Michael Oghia and Helen Indelicato, "Ruling the Arab Internet: An Analysis of Internet Ownership Trends of Six Arab Countries," *Arab Media and Society* 2012 (2012): 5, accessed April 14, 2014, http://www.arabmediasociety.com/articles/downloads /20110531142634_Oghia.pdf.
[87] FreedomHouse.org, "Saudi Arabia," Freedom House, 2013, accessed April 14, 2014, http://freedomhouse.org/report/freedom-press/2013/saudi-arabia#.U1WxouaVnyc.
[88] FreedomHouse.org, "Saudi Arabia."
[89] "Google Maps," Google Maps, accessed April 15, 2014, https://www.google.com/maps/preview.
[90] Matly and Dillon, "Dubai Strategy: Past, Present, Future," 1.
[91] Hvidt, "Public-Private Ties and Their Contribution to Development: The Case of Dubai," 561.

trade of pearls, gold and slaves. However the increased size of ships in the 1960s coupled with a collection of sediment in Dubai's ports had put the commerce industry under strain because boats could not fit in the harbor. To remedy this, the Sheikh dredged and modernized the ports which in turn led to more shipping traffic that helped the city's economy grow. This renewal of the ports boosted shipping through the city so much that Dubai built two major ports in the 1970s: Mina Rashid in 1972 and Jebel Ali in 1979. Both of these ports are the largest in the Middle East and the Jebel Ali is the ninth largest in the wolrd today, boasting 23 container ship berths.[92] [93]

Additionally, the Al Maktoum family strived to make Dubai an international business hub. The royal family attempted to attract foreign investment (FDI) through the refurbishing and expanding of its national airport, the construction of the Dubai World Trade Center and a calling for the UAE dirham to be pegged to the US dollar which indeed happened in 1978. [94] These developments proved to be worthy investments for the emirate and sent a message to the world that Dubai was taking a different route in the mid-20th century than many of its Arabian Gulf peers. For instance, the emirate's luxurious airport served to depict Dubai as the bridge between Europe and Asia. Furthermore, the pegging of the UAE dirham to the US dollar provided a sense of stability in a historically volatile region.

Social and ideological liberalization accompanied the emirate's improved infrastructure in order to make Dubai more business-friendly. The effort to make the emirate a destination for foreign, mostly western, monies caused the state to relax Islamic rules such as the forbiddance of alcohol, highly conservative dress codes for women, and limited freedom of religion. For example, restaurants in Dubai can serve alcohol and there are churches and temples in the city.[95] This lessening of state control over once-cultural taboos also gave way to an increase in media freedom. Although Dubai's media is far from being as free as American or European presses, it is one of the freest in the Arabian Gulf alongside that of Qatar.

One such example of this increased media freedom serves as a testament to Dubai's modern allure as the business and media hub of the Middle East. The Dubai Media City (DMC), opened in 2001, is a free zone where news companies can publish what they please and have access to unfettered Internet. This free zone and others like it, such as Dubai Internet City (DIC), are integral to Dubai's attractiveness to companies looking for a presence in the Middle East.[96] Major international news companies such as CNN and BBC have built regional headquarters in Dubai for access to these freedoms. Access to the Internet and unrestricted television programs have spread from these free zones into the rest of Dubai. Students studying at public universities have unrestricted

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[92] Matly and Dillon, "Dubai Strategy: Past, Present, Future," 2.
[93] "DP World UAE Region," DP World UAE Region, accessed April 14, 2014. http://www.dpworld.ae/en/home.aspx.
[94] Matly and Dillon, "Dubai Strategy: Past, Present, Future," 6.
[95] Joan Henderson, "Tourism in Dubai: overcoming barriers to destination development." *International Journal of Tourism Research* 8, no. 2 (2006): 88, accessed April 14, 2014, http://dx.doi.org/10.1002/jtr.557.
[96] Dana El-Baltaji, "Dubai: An Emerging Arab Media Hub," Arab Media & Society, The Middle East Centre, St. Anthony's, Oxford, n.d., http://www.arabmediasociety.com/articles/downloads/20071001153053_ams3_dana_el-baltaji.pdf.

Internet access, allowing them to reach websites they would not be able to if surfing the web at home. This is because Dubai censors websites for everyday civilians, but not to the same degree as Saudi Arabia. For instance, like Saudi Arabia, the state censors gambling, pornography, dating sites, and others; but all Internet traffic is not directed through a central server. This gives citizens opportunities to voice complaints on any subject, even the state.[97] This is especially true on blogs written in languages other than Arabic, which is actually quite common when one takes into account that 80% of Dubai's 2 million residents are foreigners. Furthermore, satellite television is legal and prevalent around the emirate, providing those with dishes uncensored international content. [98]

As illustrated in the previous sections, the citizens of Dubai enjoy relative freedoms that those in Saudi Arabia do not. In the mid-20th century when the Arabian Gulf experienced its oil boom, the two states deviated from each other in their policies. The Saudi Arabian policy of maximizing oil returns at the expense of building a diverse economy prevented the state from liberalizing and mandated a stronger government presence in the private lives of individuals. On the other hand, the emirate of Dubai did not have the option of relying on its oil industry and instead developed its infrastructure to attract shipping commerce and foreign investment, allowing it to advance..

However, Dubai is still transforming today. Recently, in addition to its thriving ports and bustling business parks, the emirate has become a tourist destination for travelers worldwide. In 2012, Dubai recorded 9.9 million unique overnight visitors.[99] In that same year, Saudi Arabia received 15.2 million unique overnight visitors.[100] While Saudi Arabia's tourism numbers are roughly 50% higher than Dubai's, these statistics mean very different things. To begin, Saudi Arabia is an entire country while Dubai is only a city-state and a fraction of the size. Additionally, most of the travellers to Saudi Arabia are from the Middle East and are on a religious pilgrimage.[101]

This brand of tourism is very different from that of Dubai's. While travelers on a pilgrimage in Saudi Arabia must eat and sleep, the main purpose of their trip is to worship, not to shop. Conversely, shopping is one of Dubai's greatest attractions. Dubai boasts tax-free luxury shopping in extravagant air-conditioned malls. Alongside the shopping, the emirate provides guests with entertainment in the form of shows and nightlife. This kind of atmosphere attracts wealthy visitors from America, Europe, and East Asia who are looking for an exotic vacation spot.

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[97] Neha Vora, "Free speech and civil discourse: producing expats, locals, and migrants in the UAE English-language blogosphere," *Journal of the Royal Anthropological Institute* 18, no. 4 (2012): 795.

[98] FreedomHouse.org, "United Arab Emirates," Freedom House, 2013, accessed April 14, 2014. http://freedomhouse.org/report/freedom-press/2013/united-arab-emirates#.U1W71OaVnyc.

[99] "Press Releases," Dubai Department of Tourism and Commerce Marketing, accessed April 14, 2014. http://pr.dubaitourism.ae/.

[100] World Tourism Organization, "Saudi Arabia - International tourism," Saudi Arabia.

[101] *Economist Intelligence Unit: Country Profile: Saudi Arabia,* Economist Intelligence Unit N.A. Incorporated, Accessed April 14, 2014, *Academic OneFile*.

Earlier parts of this paper have explained how Saudi Arabia and Dubai have come to find themselves in different positions in the 21st century. Now I will explain how these two states' tourism policies affect the liberties in their respective societies today.

Saudi Arabia is known as the most conservative of the Gulf States. In addition to the aforementioned religious restrictions such as the prohibition of alcohol, women are also forbidden by law from driving automobiles. Additionally, potential visitors to the Kingdom must have a sponsor from someone inside the country before they can enter.[102] This hurdle for entry combined with an oppressive reputation diminishes the amount of tourism that Saudi Arabia might otherwise enjoy.

Although Saudi Arabia did have about 15 million visitors in 2012, 11 million of them were from other Arab countries. Another significant statistic is that 40% of these visits were for religious purposes, 20% were for visiting friends and family, and 14% were for business.[103] This leaves little room for leisure tourism or visits from westernized tourists that would be the most outspoken in regards to the lack of liberties people suffer there.

The country's largest tourist attractions often happen to be two of the holiest sites in Islam: the Masjid al-Haram in Mecca and Al-Masjid al-Nabawi in Medina.[104] Most pilgrims to these sites are compelled by their beliefs. This constant flow of religious tourism reinforces Saudi Arabia as an Islamic state in the minds of foreigners and citizens alike. This creates an expectation that the state will maintain traditional, conservative, Islamic values such as the primacy of men over women and an inability for citizens to redress the government. Therefore, continuing its stringent monitoring on civilian behavior helps preserve the country's reputation as a pious Islamic state. However, as will be explained in a later section, it is not ideal for the government to force Islam on its subjects. In fact, such compulsory worship could be labeled as insincere, which the Koran explicitly forbids.[105]

Further, Saudi Arabia's dearth of recreational tourism limits its population's exposure to foreign ideas and different cultures. The Saudi government's restrictive policies hinder the spread of ideas, which are an essential component of freedom. Saudi Arabia's isolation perpetuates this distinct lack of liberties. This phenomenon creates a vicious circle and will likely continue unless the Saudi state unclenches its grip on the media and its people, allowing for more rights and free communication.

Some argue that public discourse as mentioned above is vital to the success of a modern Islamic state. This argument also claims that all worship should be done so by the worshipper's own conviction. Providing people with the choice to worship Islam, Christianity, another religion or no religion at all sets a precedent for an open dialogue

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[102] Ann Jordan. *The making of a modern kingdom: globalization and change in Saudi Arabia*. Long Grove, IL: Waveland Press, 2011: 128.

[103] Saudi Commission for Tourism and Antiquities, "Tourism Statistics 2011,"*Tourism Information and Research Centre* 1 (2011), accessed April 14, 2014.

[104] "Guardian Of The Holy Places," Saudi Arabia Embassy, accessed April 14, 2014, http://www.saudiembassy.net/about/country-information/Islam/guardian_of_ the_Holy_Places.aspx.

[105] Mustafa Akyol, *Islam without extremes: a Muslim case for liberty*, (New York, NY: W.W. Norton, 2011): 256.

on other issues.[106] A prime illustration of this concept is the policy followed in Dubai. The emirate is 96% Islamic but houses churches and temples, and people of different faiths live peacefully with one another. Although proselytizing is illegal in Dubai, religious freedom does exist and permeates to other aspects of social life, allowing the state to grow and globalize with the rest of the world. This in turn attracts tourism that speeds the process of liberalization.

Dubai provides a stark contrast to the relationship Saudi Arabia shares with tourism. To reiterate, the small nation-state of Dubai hosted almost 10 million tourists in 2012. Eventually making the emirate into a 'destination city' was one of Sheikh Rashid Al Maktoum's final visions for Dubai.[107] To accomplish this goal the state first funded ambitious endeavors to help Dubai secure its position as the region's transportation hub. This involved the founding of its national Emirates airline and the construction of numerous luxury hotels. To further comfort and entertain visitors with layovers on their way to Europe or Asia, the government funded world-class shopping malls complete with amenities like ice rinks or magnificent fountains. These investments paid off and transformed Dubai from a layover city into destination for vacationers worldwide. Along with its airline being one of the best in the world, in 2013 Dubai was the 7th most popular city to visit on the globe.[108]

The emirate's high tourism rates bring hordes of foreigners through who witness everyday life in the city. These visitors remember what they see and recount their observations to their friends and family once their vacation has ended. The experiences of its guests have helped Dubai foster an international reputation for lavishness and elegance. This in turn propels Dubai's success as a tourist destination and spurs the government to further increase its charm. As more wealthy westerners and other travelers visit the emirate in the coming years they will anticipate the freedoms and lifestyle they have heard about from friends and other news sources. This expectation will likely prevent the Sheikh from reneging on any of the freedoms he has allowed his people because he would not want to disrupt the city's thriving tourism sector or damage its reputation.

However, this is not to say that all reviews of Dubai have been lauding. Visitors have complained about what they perceive as Dubai's modern slave labor and have since advocated for reform. The 'slave labor' that they speak of is the workforce responsible for Dubai's rapid modernization and growth. Many of the construction workers that build the emirate's hotels are immigrants from other areas in the region and are sometimes victims of human rights abuses. In some cases these employees are exploited and have their passports confiscated upon their arrival in Dubai, only to have them returned when they travel home to visit family.[109] Although the state tries to keep the

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[106] 'Abd Allāh Aḥmad Na'īm, *Islam and the secular state negotiating the future of Shari'a*, (Cambridge, MA: Harvard University Press, 2008): 8.

[107] Matly and Dillon, "Dubai Strategy: Past, Present, Future," 6.

[108] Yuwa Hedrick-Wong, "Top 20 Global Destination Cities in 2013," MasterCard WorldWide Insights, accessed April 14, 2014, http://insights.mastercard.com/ position-papers/top-20-global-destination-cities-in-2013/.

[109] Nicholas Cooper, "City of Gold, City of Slaves: Slavery and Indentured Servitude in Dubai," Journal of Strategic Security, 6, no. 3 Suppl. (2013): 67.

workers out of sight from tourists, some visitors seek out the laborers and write articles to raise global awareness of the workers' plights.

Because Dubai enjoys its reputation as one of the most liberal and welcoming areas in the Gulf, it must try to preserve that image amongst its western investors and tourists, and therefore cannot ban such articles.[110] A relatively free press is integral to Dubai's progressive image, exerting a strong pressure on the government to continue to relax rules on the media control that Saudi Arabia strictly enforces. Although the state-sponsored news outlets in Dubai do not publish information on its foreign labor force, tourists can say what they please and news companies can report freely in the numerous free zones such as the aforementioned Dubai Media City. With these allowances, Dubai ranks higher than Saudi Arabia in terms of countries or city-states with the freest medias. The UAE as a whole places 46 spots higher than Saudi Arabia on the World Press Freedom Index of 2014 and one can assume Dubai by itself may fare even better. Saudi Arabia is ranked 164 out of the 180 world countries researched while the UAE is ranked 118—one of best scores in the Middle East.[111]

In summary, having a freer media is only part of what makes Dubai an all-around more progressive place than Saudi Arabia. Alongside the emirate's other liberties such as religious tolerance and access to a robust nightlife, Dubai has charted a path for itself separate from those of its peers in the 21st century. Today only a fraction of Dubai's GDP comes from its oil sector and the emirate itself counts for less than 6% of the UAE's aggregate oil production.[112]This was made possible through Sheikh Rashid Al Maktoum's decision in the mid-1900s to build on his emirate's preexisting advantages and move its economy away from oil dependence. Because Saudi Arabia and the other Gulf States almost exclusively built their oil sectors at the expense of other development, their everyday population fell behind economically, and thus politically. Rather than withdrawing and allowing its people more liberties like the Al Maktoum family in Dubai, the Al Saud family did the opposite. The prevailing existence of these policies today is a direct consequence of the state's flawed pursuit of modernization in the late 20th century.

Furthermore, these policies are self-fulfilling for both states. As discussed above, global reputations and tourism will likely propel these countries farther down their respective paths. And even if Saudi Arabia were to attempt liberalizations, it would most likely not relinquish its full control over its people—increasingly necessary steps for modernization in today's globalized world. However, the Internet's increasing permeability along with satellite television leaves much unknown about the future of freedoms the country. As seen recently in the Egyptian revolutions, the ability to communicate makes organized change an easier feat to accomplish.

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[110] Barrett Hathcock, "Our World: United Arab Emirates," Full Text Electronic Journal List, Great Neck Publishing, (1 Aug. 2011. Web. 19 Feb. 2014), http://getitatduke.library .duke.edu/?sid=sersol&SS_jc=TC0000905258&title=Our%20world.%20United%20Arab%20Emirates.

[111] "World press freedom index 2014," Reporters Without Borders, Accessed April, 14, 2014, https://rsf.org/index2014/en-index2014.php.

[112] US Department of Energy, "U.S. Energy Information Administration - EIA Independent Statistics and Analysis," United Arab Emirates, accessed April 14, 2014, http://www.eia.gov/countries/cab.cfm?fips=tc.

With the already-soaring number of visitors to Dubai increasing every year, the country is likely to expand its current industries in every direction and is poised to liberalize even further. So long as Dubai's new and glistening skyline continues to attract.

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Ahlquist v. Cranston: The Establishment Clause and Public School Prayer

Marissa Marandola

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances". This is the First Amendment to the United States Constitution, arguably the most controversial of the twenty-seven additions to the original document. The popular understanding of the First Amendment is that it provides for freedom of speech, freedom of the press, and freedom of religion. However, throughout American history, questions have often arisen as to the application of these principles. The 2012 US District Court case Ahlquist v. Cranston is a modern example of the conflict that can result from attempts to understand and utilize the religion clauses of the First Amendment. The plaintiff, Jessica Ahlquist, was a student at Cranston High School West, a public high school in predominantly Catholic Rhode Island. Cranston West had a display labeled "School Prayer" in its auditorium, which contained a mural, a gift from the school's first graduating class. The mural included an obviously Christian prayer beginning with the phrase "Our Heavenly Father".[113] Ahlquist, a self-described atheist, argued that the mural was a violation of the establishment clause, which prevents governmental endorsement of religion, and filed suit against the Cranston School Committee through the American Civil Liberties Union. A number of factors, including constitutional interpretation, community dynamics, cultural evolution, and the law, provide the nuanced context in which Ahlquist v. Cranston transpired.

[113] See Appendix 1.

First Amendment Background

The First Amendment deals with a wide variety of rights, but this study focuses on the impact of the First Amendment on religious practice and presence in the United States. The First Amendment addresses religion through two distinct clauses: the free exercise clause and the establishment clause. The free exercise clause bars Congress from passing any law that interferes with an individual's practice of the religion of their choice; the establishment clause prevents Congress from creating a national church. Beyond these, the explicit prohibitions in the text of the amendment, the permissible interaction between church and state and the extent to which free exercise must be protected have been debated through the centuries. Often, the religious rights of various individuals and bodies come into conflict, forcing the courts to place greater priority on certain rights over others. As the United States evolved from its traditionally Protestant, Christian origins, new questions, particularly concerning the establishment clause, developed.

In the present day, Americans generally accept the concept of total separation of church and state unblinkingly, believing that it has been a guiding principle of the nation from the time of its founding. At a minimum, this indicates that church and state are distinct from one another and that neither church nor state should have any influence in each other's internal affairs.[114] However, history shows that the Founding Fathers did not share a unified vision of exactly what the separation of church and state might entail. John Adams sought a model under which a "theologically thin public religion" would provide for some consensus and also allow for freedom of conscience, while Thomas Jefferson proposed the famed wall of separation between church and state.[115] The Framers certainly believed that Americans should have the freedom to practice the religion of their choice, but did so under the assumption that all of these religions would be, at least loosely, within the Judeo-Christian tradition. Additionally, while the Founders were opposed to the idea of an established church, similar to the Church of England, taking root in the United States, they believed that some public faith and the morality that often stems from religious belief would be essential to the success of a republican government.[116]

Originally, the First Amendment, like other constitutional rights, was understood to apply only to the federal government, not to the states or to local governments. Although Congress could not legislate a national religion, the First Amendment did not always prevent individual states from establishing a church within their boundaries or towns from explicitly endorsing specific religions. The ratification of the Fourteenth Amendment in 1868 extended the protection of constitutional rights to citizens' dealings with state and municipal governments as well as the federal government. This transformation occurred through the constitutional doctrine of incorporation, which the

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[114] Thomas C. Berg, *The State and Religion in a Nutshell* (Dr. Eagan, MN: West Academic, 2004), 15.
[115] Steven D. Smith, "Constitutional Divide: The Transformative Significance of the School Prayer Decisions", *Pepperdine Law Review* 38.4 (2011): 968.
[116] Thomas L. Krannawitter and Daniel C. Palm, *A Nation Under God?: The ACLU and Religion in American Politics* (Lanham: Rowman & Littlefield, 2005), 3.

Supreme Court has understood to mean that the Fourteenth Amendment incorporates some elements of the Bill of Rights into state and local governments.[117] Gradually, from the time of the amendment's ratification through the mid-20th Century, the Court used the Fourteenth Amendment's due process clause to selectively incorporate constitutional rights, on a case-by-case basis, into state and local governments. Proponents of incorporation of the First Amendment's religion clauses contend that the original intent of the First Amendment was to preserve an individual right to conscience; therefore, efforts to prevent interference by state and municipal governments make sense.[118]

The Framers wanted to prevent government interference in controversial religious problems. In the late 18th Century, this referred to disputes between Protestant denominations, not to conflicting ideologies derived from distinct faith traditions or the lack thereof.[119] The First Amendment, at the time of its adoption, seemed to allow for a general acceptance of the Christian faith. The rise of non-Judeo-Christian faiths, such as Islam and Buddhism, and a growing population of nonbelieving or nonreligious citizens in the United States has complicated the notion of a public theology or morality in the modern era. At the same time, a significant majority of Americans express a desire for their government to be guided, to a certain extent, by religious faith and principles.[120] Most Americans will automatically state their support for the separation of church and state, but two-thirds support a moment of silent prayer or meditation and the teaching of religious accounts of creation in public schools. A quarter endorse a spoken, religious prayer in public schools.[121] Clearly, American society is conflicted about the true meaning of the First Amendment and the situations in which it should be strictly enforced.

The Constitution has always prohibited certain church-state interactions, such as religious qualifications for national office. It has never supported a particular religion explicitly or mandated a totally secular government.[122] However, the "secular movement among cultural elites" beginning in the 20th Century marked the advent of a shift from a government accepting of religion in the public sphere towards a deep divide between the government and religion.[123] To a greater and greater degree, religion has been relegated to places of worship and individual homes and banished from public places and gatherings. Growing concern for the rights of religious minorities in the face of a predominantly Christian society and government also prompted support for an increasingly secular government.[124] In a series of decisions about the presence of religion in public schools, the Supreme Court constitutionalized a much stricter separation of church and state than had been known in the past. This

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[117] Krannawitter and Palm, *A Nation under God?*, 3.
[118] Berg, *The State and Religion,* 8.
[119] Berg, *The State and Religion,* 12.
[120] Berg, *The State and Religion,* 1.
[121] Robert Booth Fowler, Laura R. Olsen, Allen D. Hertzke, and Kevin R. Den Durk, *Religion and Politics in America* (Boulder, CO: Westview, 2010), 236.
[122] Smith, "Constitutional Divide", 983.
[123] Smith, "Constitutional Divide", 978.
[124] Berg, *The State and Religion,* 16.

process began with the 1947 US Supreme Court case *Everson v. Board of Education,* which upheld a New Jersey law that reimbursed parents of children who attended parochial schools for transportation costs by identifying a strict divide between the religious function of parochial schools and the state's secular goal of getting children to school.[125] While the justices disagreed about the specific issue of transportation to religious schools, all affirmed the notion of a strict separationist policy.[126]

The ACLU, through cases such as *Everson*, has successfully used the court system more than any other organization to promote a highly secular interpretation of the First Amendment.[127] Decisions pertaining to religion and education, such as *Engel v. Vitale*, *Lemon v. Kurtzman,* and *Lee v. Weisman* have elevated a significantly secularist conception of the First Amendment and specifically of the establishment clause to "formal constitutional status".[128] Supreme Court decisions related to education tend to have a particularly strong impact on public opinion, because public schools are the source of "core democratic conceptions and values" for the next generation of citizens.[129] The prominent use of the secularist understanding of church and state in such decisions has cemented the place of this understanding in the collective American psyche. For religious Americans, this creates a conflict between traditional expressions of religion, such as benedictions at graduation ceremonies, and the secular society that the Supreme Court seems to endorse. Yet, American history does not reveal a strictly separationist state. Rather, religion, especially Christianity, has always been connected to the state and to the principle of republican government.[130] The desire to preserve this history and tradition in a meaningful way often conflicts with modern ideas about the secular state and a strict, impermeable wall of separation between church and state.

INTERPRETING THE ESTABLISHMENT CLAUSE

Legal interpretation of the First Amendment's religion clauses attempts to determine the position that the free exercise clause and the establishment clause, when examined together, require. The Framers recognized that a republican government introduces the threat of faction and undue influence of various extra-governmental forces, including religion, and that religious faith is stronger when not compulsory.[131] The principles of "separation, equality, and religious liberty" compete with each other for priority when the courts handle questions of religion and government.[132] Equality, in its most basic form, means that no religious denomination should be given preferential treatment. In the present day, this conception of equality can translate, with

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[125] 330 US 1 (1947).
[126] Erik J. Chaput and James P. Shea, *Rhode Island and the Establishment Clause* (Rhode Island Historical Society, 2012), 8.
[127] Booth Fowler, Olson, Hertzke, and Den Durk, *Religion and Politics*, 229.
[128] Smith, "Constitutional Divide", 992.
[129] Smith, "Constitutional Divide", 994.
[130] Booth Fowler, Olsen, Hertzke, and Den Durk, *Religion and Politics*, 247.
[131] David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington, DC: Cato Institute, 2004), 17.
[132] Berg, *The State and Religion*, 14.

some controversy, to an implication that religion should not be preferred to "nonreligion".[133] The separation principle can be analyzed to imply varying degrees of contact between church and state, ranging from close contact about non-theological issues to absolutely no contact. The most common understanding of separation suggests a model under which only "essentially secular" contact between church and state is permissible.[134] Religious liberty indicates that government should not act in any way that would even indirectly impact an individual's religious choice. At different times in American history, each principle has been understood to enforce distinct constitutional duties on the government and guarantee various rights for American citizens.

Beginning with *Everson v. Board of Education*, the Supreme Court has tended to adhere to the wall of separation ideology articulated by Thomas Jefferson.[135] However, Justice Black's opinion in *Everson* demonstrates that he intended for government to be separated only from the explicitly religious aspects of churches.[136] This seems to be in accordance with the Founders' intentions regarding the establishment clause: that religion should not chain government and, equally, that government should not bind religion. Church and state are both highly valued in American society, in part because religious practice is left to the free choice of individual citizens.[137] The influx of new immigrant populations altered the original purpose of nonestablishment, to eliminate friction between Protestant denominations. The establishment clause became a means of preserving peace between Protestants and Catholics in the late 19th Century. Increasing religious diversity, rising numbers of nonbelievers, and a divide between mainline and evangelical Protestants introduced new challenges for establishment clause interpretation in the mid-20th Century.[138] The ambiguity of the establishment clause means that it could be seen to enforce a complete division between church and state or to allow for some neutral interaction between religious bodies and the government.[139]

Supreme Court cases concerning the establishment clause in the second half of the 20th Century attempted to define acceptable transactions between church and state and to explain what actions on the part of the government constitute an endorsement of a certain religious tradition. In 1940, the First Amendment became binding on the states and localities in the Supreme Court case *Cantwell v. Connecticut*.[140] It was after this ruling that the Supreme Court issued its first landmark decisions regarding the religion clauses of the First Amendment. The courts tend to allow practices that acknowledge

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[133] Berg, *The State and Religion,* 18.
[134] Tinsley E. Yarbrough, "Church, State, and the Rehnquist Court: A Brief for Lemon", *Church and State* 38.1 (1996), 59.
[135] Kermit L. Hall and John J. Patrick, *The Pursuit of Justice: Supreme Court Decisions That Shaped America* (Oxford: Oxford University Press, 2006), 172.
[136] Yarbrough, "Church, State", 60.
[137] Leonard Williams Levy, *The Establishment Clause* (Chapel Hill, NC: University of North Carolina, 1994), 181.
[138] Barry W. Lynn, Marc D. Stern, and Oliver S. Thomas, *The Right to Religious Liberty: The Basic ACLU Guide to Religious Rights* (Carbondale: Southern Illinois University Press, 1995), 8.
[139] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlan, *The First Amendment* (New York: Wolters Kluwer Law & Business, 2012), 659.
[140] 310 US 296 (1940).

the religious history of the United States in a way that is not exclusionary and does not promote an image of the United States government as explicitly Christian.[141]

The first twenty-five years of Supreme Court cases dealing directly with establishment, 1947-1971, featured great consensus over a basic understanding of the principle of separation. Divisions generally occurred when the majority appeared to allow a greater link between church and state than is permissible.[142] The 1947 case *Everson v. Board of Education* marked the formal adoption of a strictly separationist perspective.[143] This case introduced the doctrine of rigid church-state separation that prevails in the minds of many Americans. The Founders' original intent, to protect religion from the interference of government, was supplemented by an additional goal, to preserve government from the interference of religion.[144] The language of *Everson* indicated a shift towards strict separation, but the actual ruling, which upheld public funding for transportation to religious schools, suggested a principle of neutrality.[145] The Court maintained a position of separation in cases such as *Engel v. Vitale* and *Abington School District v. Schempp*. During the 1950s and 1960s, the media increasingly used the phrase "the Constitution's separation of church and state", leading to the commonplace belief that this wording exists in the body of the Constitution.[146]

In 1971, the Supreme Court heard *Lemon v. Kurtzman,* a series of cases dealing with state laws that provided salary supplements to parochial school teachers whose instruction included only secular subjects. The Court's opinion in *Lemon* produced a test designed to serve as a standard to determine whether or not a particular law or government action violates the establishment clause. Known as the *Lemon* test, this three-pronged examination attempts to determine the religious versus the secular character of a specific instance of church-state interaction. It distinguishes between the purpose of an act or law and its effects. Often, the Supreme Court has cited a religious effect, despite a secular purpose, as grounds enough to invalidate a law as unconstitutional.[147] According to the *Lemon* test, a law is constitutional when it serves a secular legislative purpose, neither advances nor inhibits religion, and does not create "excessive entanglement" between government and religion.[148] *Lemon* does not automatically require strict separation of church and state. Rather, it imposes a standard of neutrality towards religion, for the sake of religion and of the state.[149] In the context of *Lemon,* neutrality means that a law or governmental action does not explicitly differentiate between adherents of a certain faith tradition and nonreligious

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[141] Neal Devins, "Religious Symbols and the Establishment Clause", *Journal of Church and State* 27.1 (1985), 29.
[142] Yarbrough, "Church, State", 62.
[143] Lynn, Stern, and Thomas, *The Right to Religious Liberty,* 2.
[144] Krannawitter and Palm, *A Nation Under God?*, 90.
[145] Berg, *The State and Religion*, 24.
[146] Krannawitter and Palm, *A Nation Under God?,* 73.
[147] Kent Greenawalt, *Religion and the Constitution Volume 2: Establishment and Fairness* (Princeton, NJ: Princeton University, 2008), 185.
[148] Booth Fowler, Olson, Hertzke, and Den Durk, *Religion and Politics,* 257.
[149] Berg, *The State and Religion*, 29.

individuals.[150] Since 1971, the Supreme Court and lower federal courts have typically referred to the *Lemon* test when deciding establishment clause cases. The *Lemon* test is the most prominent among a variety of methods utilized by the Supreme Court in recent years, including consistency with historical tradition or usage, coercion, and the endorsement test.[151]

Lynch v. Donnelly, a 1984 Supreme Court display case concerning a Nativity scene sponsored by a city, introduced the non-endorsement rule in response to critics of the *Lemon* test who believed that its ambiguity made it difficult to uniformly apply. While the non-endorsement rule has not supplanted the *Lemon* test in establishment clause analysis, it has been cited in some recent federal decisions. Under the non-establishment rule, the government is not allowed to send any sort of message that it either endorses or disapproves of religious belief generally or in reference to a specific denomination.[152] The *Lynch* ruling, which allowed the city to continue displaying the Christmas crèche, indicated a small shift in the Supreme Court's approach to establishment clause cases. In contrast to the wall of separation erected in *Everson*, *Lynch* suggests that there are certain circumstances under which government interaction and overlap with religion is acceptable.[153] Most of these situations involve the preservation of tradition or the recognition of American history, which inevitably involves the Judeo-Christian tradition. Even when the courts use the *Lemon* test instead of the non-endorsement rule, the principles behind the non-endorsement rule seem to influence the application of *Lemon.* Since *Lynch v. Donnelly*, the courts have tended to defer to religion when considering the three-pronged *Lemon* test unless a situation clearly favors religion and has an explicitly non-secular purpose and effect.

THE ESTABLISHMENT CLAUSE AND PUBLIC SCHOOL PRAYER

Modern establishment clause cases have involved a variety of situations and institutions, but the best-known and most influential cases have centered on the presence of religion in public schools. The first Supreme Court case dealing with religion and the schools was *Everson v. Board of Education.* However, *Everson* dealt with public funding of religious schools, not religion in public schools. The school prayer decisions, in contrast, were a "constitutional turning point" which marked a change in constitutional understanding and the American comprehension of the First Amendment.[154] In the present day, Americans generally understand the establishment clause as a means of protecting impressionable children in public schools who could "perceive official support or discouragement" of a particular religion.[155]

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[150] Greenawalt, *Religion and the Constitution*, 181.
[151] Greenawalt, *Religion and the Constitution*, 156.
[152] Berg, *The State and Religion*, 32.
[153] Devins, "Religious Symbols", 45.
[154] Smith, "Constitutional Divide", 947.
[155] Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court* (Waco, TX: Baylor University Press, 2008), 575.

Since the 1960s, the Supreme Court has essentially removed religion from public school classrooms, beginning in 1962 with *Engel v. Vitale.*[156] This landmark case, raised in response to a New York school district's implementation of a daily, recited morning prayer, forbade school-sponsored prayer in any capacity. A year later, in *Abington School District v. Schempp*, the Supreme Court struck down laws requiring Bible readings and recitations of the Lord's Prayer in public schools.[157] Although the Court prohibited the use of the Bible and other religious texts for faith-based purposes from this point forward, it did permit the study of the Bible for "its literary and historical qualities".[158] Finally, in 1971, the Supreme Court heard *Lemon v. Kurtzman* and struck down state laws supplementing the salaries of parochial school instructors teaching secular subjects. The Court never took any action to bar all instruction about religions or references to a deity given in a secular context from public schools, despite common perceptions to the contrary.

Public reaction to the school prayer decisions was overwhelmingly negative; the American public saw the Court's opinions as "radical" and contradictory of American history and tradition[159]. In many particularly religious communities, especially those in the Bible Belt, school systems chose to openly flout the Court's decisions.[160] A 2000 Gallup poll indicated that 77 percent of Americans are in favor of "allowing students to say prayers at graduation ceremonies as part of the official program", 70 percent support "allowing daily prayer to be spoken in the classroom", and 74 percent would back "a constitutional amendment to allow voluntary prayer in public schools".[161] Such opinions gained political credence during the 1970s and 1980s, leading to a backlash against the school prayer decisions and the general removal of religion from the public realm in the 1980s.[162] This era of religious revival and conservatism produced Supreme Court decisions such as *Lynch v. Donnelly*, in which the Supreme Court allowed a Rhode Island city to maintain its display of the Christmas crèche despite its religious connotation.[163]

The temporary resurgence in support for religion in public schools diminished again in the 1990s, when a mostly conservative Supreme Court rejected the presence of clergy-led prayers at graduation ceremonies in *Lee v. Weisman.*[164] In 2000, voluntary, student-led prayer came under the Court's scrutiny, and ultimately was declared unconstitutional, in *Santa Fe Independent School Districts v. Doe.*[165] The most recent United States Department of Education guidelines for handling issues of religion in public schools urge schools to actively ensure "that no student is in any way coerced" to

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[156] 370 US 421 (1962).
[157] 374 US 203 (1963).
[158] Patrick Marshall, "Religion in Schools", *CQ Researcher* 11.1 (2001).
[159] Smith, "Constitutional Divide", 948.
[160] Levy, *The Establishment Clause,* 186.
[161] Marshall, "Religion in Schools".
[162] Lynn, Stern, and Thomas, *The Right to Religious Liberty*, 9.
[163] 465 US 668 (1984).
[164] 505 US 577 (1992).
[165] 530 US 290 (2000).

participate in religious activity.[166] In the past, schools attempted to accommodate non-practicing students by offering them the opportunity to be excused from religious exercises. However, recent conflicts have produced the viewpoint that "if excuses have to be offered", the exercise is unconstitutional, as a student must choose to be ostracized if he or she wishes to abstain from religious practice.[167] For public school students, particularly those in elementary school, this is a form of coercion.

According to the ACLU, public schools may no longer display religious items, such as the Ten Commandments, without an obvious educational purpose out of respect for the religious diversity of their students and under the establishment clause.[168] They also may not use religious messages or language to instill virtue and morality in their students. Public schools are charged with the formation of future republicans, and this duty requires the formation of civil values and civic-mindedness. While such values are not banned from schools because they may overlap with the values espoused by religions, they cannot be taught in a way that uses religion to convince students of their worthiness.[169] Historical displays, such as school creeds, that list the values and moral code encouraged by a school, often reference God or religion in some way, depending on the time of their origin. *Ahlquist v. Cranston* arose as a result of the ambiguous line between a school's acknowledgement of its history and tradition and an endorsement on the part of the school of a religious tradition prominent in its past.

ENGEL V. VITALE

In 1951, the New York State Board of Regents authored a prayer that they recommended school districts adopt for the moral formation of their students. The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country".[170] The Board of Regents did not require schools to recite the prayer, but left the matter at the discretion of school boards in each district. In 1958, the Herricks School District, located in Nassau County, New York, voted to mandate a daily recitation of the prayer. Participation in the prayer was nominally voluntary: objecting students could sit in silence or choose to leave the classroom while other students said the prayer. However, "social and psychological pressures" made it difficult for young children to exercise the opt-out option.[171] The parents of some objecting students filed a request with the Herricks school board to cancel the prayer. The board rapidly denied the request on the grounds that parents

[166] Charles C. Haynes and Oliver Thomas, "Student Religious Expression in Public Schools: United States Department of Education Guidelines", *Finding Common Ground: A Guide to Religious Liberty* (Nashville, TN: First Amendment Center, 2001), 127.
[167] Levy, *The Establishment Clause*, 188.
[168] Lynn, Stern, and Thomas, *The Right to Religious Liberty*, 12.
[169] Haynes and Thomas, "Student Religious Expression", *Finding Common Ground*, 128.
[170] "Engel v. Vitale," The Oyez Project, accessed August 8, 2013, http://www.oyez.org/cases/1960-1969/1961/1961_468/.
[171] Smith, "Constitutional Divide", 952.

could ask that their children be excused from the prayer, making it an optional exercise.[172]

Following the school board's refusal to remove the prayer from Herricks classrooms, the ACLU filed suit in the New York State Supreme Court on behalf of a group of objecting parents. The lawsuit caused outrage in Herricks, where a majority of parents supported the school board's decision to implement the prayer. The divide in opinion over the Regents' Prayer was largely along neighborhood lines: the prayer's advocates mostly lived in heavily Roman Catholic areas of the town; its opponents were from a mostly Jewish section.[173] Justice Bernard S. Meyer of the New York Supreme Court decided the case on August 24, 1959, after months of exhaustive legal and historical research. He ruled in favor of the school board, claiming in a very considered, sixty-seven page long opinion that, although the prayer was religious, it did not violate the First Amendment.[174] Years after the US Supreme Court heard and decided *Engel*, Meyer told the attorneys for both sides that he had initially written an opinion declaring the prayer unconstitutional. Subsequent research persuaded him of its legality, and he wrote a revised opinion upholding the Regents' Prayer.[175] The plaintiffs appealed Meyer's decision to the New York Supreme Court Appellate Division. This court, the highest in New York, affirmed the previous ruling in a 5-2 decision on October 17, 1960.[176]

The United States Supreme Court heard *Engel v. Vitale* during its 1962 session. William J. Butler, representing the plaintiffs, argued that the prayer was "plainly sectarian", offensive to the plaintiffs' non-Christian beliefs, prejudicial against nonbelievers, and coercive, as elementary school students recited it.[177] The defense's attorney, Bertrand Daiker, maintained that the prayer was in line with the spiritual tradition of the nation. The Herricks School Board was merely recognizing "the existence of a supreme deity", something mentioned in the Declaration of Independence and in nearly all of the state constitutions.[178] The Supreme Court decided *Engel v. Vitale* in a 6-1 vote on June 25, 1962. The shocking ruling invalidated the Regents' Prayer and laws in eleven states that mandated religious exercise in public schools.

Writing for the majority, Justice Hugo Black declared that the Regents' Prayer was "wholly inconsistent with the establishment clause" and that Justice Meyer and the school district had previously acknowledged the religious nature of the prayer.[179] This alone was enough evidence to find the prayer unconstitutional. The opinion proceeded to state that "it is no part of the business of government to compose official prayers for any group of the American people", as the Constitution prohibits any establishment of

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[172] Bruce J. Dierenfeld, *The Battle over School Prayer*: *How Engel v. Vitale Changed America* (Lawrence, KS: University of Kansas Press, 2007), 102.
[173] Dierenfeld, *The Battle over School Prayer*, 106.
[174] *Engel v. Vitale*, 191 N.Y.S.2d 453 (NY 1959).
[175] Dierenfeld, *The Battle over School Prayer,* 116.
[176] Smith, "Constitutional Divide", 954.
[177] Dierenfeld, *The Battle over School Prayer,* 120.
[178] Dierenfeld, *The Battle over School Prayer,* 125.
[179] *Engel v. Vitale*, 370 US 421 (1962).

religion.[180] Black wrote that "it is neither sacrilegious nor anti-religious" to bar government from writing or sanctioning prayer and to ensure that religious functions are left to the choice of the people.[181] In a concurring opinion, Justice William Douglas wrote that the First Amendment forces the government into a position of "neutrality" towards religion, which serves the best interests of religion.[182] Justice Potter Stewart, the lone dissenting vote, lamented the Court's decision to "deny [schoolchildren] the opportunity of sharing in the spiritual heritage of our Nation".[183] His was the view shared by the majority of Americans, 85 percent of whom disapproved of the ruling, according to a Gallup poll taken at the time.[184]

Engel v. Vitale was the first in a line of cases through which the Supreme Court, using the establishment clause, would eventually eliminate religion from the public sphere almost entirely.[185] Legal scholars have noted that *Engel* presented the Court's decision, that school prayer was unconstitutional, while a later, related case, *Abington School District v. Schempp,* offered the justification of that decision.[186] The *Schempp* case considered a Pennsylvania law that mandated the daily reading of Bible verses and the recitation of the Lord's Prayer. In the decision that struck down the Pennsylvania statute, the Supreme Court interpreted the establishment clause to require neutrality, which means that the state must act with "secular purposes".[187] From the time of *Engel* and *Schempp* to the present, the presence of religion in public schools and other public venues has been challenged in the courts, generally with success. The decisions were, and remain, deeply unpopular among the American public, but have dictated the trajectory of establishment clause decision-making for more than fifty years.

LEMON V. KURTZMAN

Rhode Island demographics were reshaped in the late 19th and early 20th Centuries by a heavy influx of Catholic immigrants. Catholic families feared that the obvious presence of Protestant beliefs and teachings in public schools would interfere with their attempts to raise their children in the Catholic faith. In response, they built an extensive system of parochial schools to avoid the potential religious coercion of public education. As a result, by the mid-20th Century, Rhode Island depended on non-public education to a greater extent than any other state.[188] In 1969, approximately one-quarter of Rhode Island students attended non-public elementary schools, 95 percent of which were Catholic schools. When students attending non-public high schools were

[180] *Engel v. Vitale*, 370 US 421 (1962).
[181] *Engel v. Vitale*, 370 US 421 (1962).
[182] *Engel v. Vitale,* 370 US 421 (1962) (Douglas, J., concurring).
[183] *Engel v. Vitale,* 370 US 421 (1962) (Stewart, J., dissenting).
[184] Dierenfeld, *The Battle over School Prayer*, 138.
[185] "Engel v. Vitale," The Oyez Project, accessed August 8, 2013, http://www.oyez.org/cases/1960-1969/1961/1961_468/.
[186] Smith, "Constitutional Divide", 950.
[187] Smith, "Constitutional Divide", 960.
[188] Chaput and Shea, *Rhode Island,* 19.

considered, more than 40 percent of eligible students were not in Rhode Island's public schools.[189]

Many parochial schools were experiencing financial difficulties in the 1960s, a situation that concerned legislators, as the public school system could not handle the overflow of students that would result if parochial schools were forced to close. State legislators passed the Teacher Salary Supplement Plan as a solution to this problem. Under the law, the state would provide a fifteen-percent salary supplement to parochial school educators for "teachers of grades one through eight . . .teaching only secular subjects . . .using only teaching materials that are used in public schools".[190] Local media sources estimated that, with these qualifications in place, about 180 parochial school teachers were eligible for salary supplements.[191] Around the same time, Pennsylvania passed a similar statute to address the floundering finances of parochial schools in that state.

Joan DiCenso and five other Rhode Island taxpayers, with the assistance of the Rhode Island ACLU, filed suit against Rhode Island on December 16, 1969, saying that the Teacher Salary Supplement Plan violated the First Amendment by using taxpayer money to fund religious schools.[192] John Earley, the parent of children in parochial schools, filed suit against DiCenso et al, claiming that his free exercise rights, to send his children to parochial school, trumped the establishment clause conflict in this case.[193] In June 1970, the US District Court for Rhode Island found that the law created an "excessive entanglement with religion", because the parochial school system was "an integral part of the religious mission of the Catholic Church", and therefore was invalid.[194] The state appealed the decision to the United States Supreme Court, which chose to hear the case along with the related Pennsylvania case, *Lemon v. Kurtzman.*

Lemon v. Kurtzman and *Robinson v. DiCenso* were argued together before the United States Supreme Court on March 3, 1971, with John Earley and other parents intervening as defendants in *DiCenso*.[195] The issue of "public aid to parochial schools" caused great controversy and debate, so the Supreme Court's decision in these cases was the object of great scrutiny.[196] The Court announced its opinion on June 29, 1971, with Chief Justice Warren Burger writing for the majority. In a nearly unanimous decision, 8-0 with Justice Thurgood Marshall abstaining, the Court found the Rhode Island and Pennsylvania statutes unconstitutional. More importantly, the Court articulated for the first time the three-pronged test that would be used from this point forward in Establishment Court cases. Subsequently known as the *Lemon* test, the criteria penned by Burger demanded that, in order to be constitutional, "first, the

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[189] Joseph Richard Preville, "Constitutional Quarrels: Roman Catholics, Jews, and the Aftermath of Lemon v. Kurtzman (1971)," *Catholic Historical Review* 78.2 (1992): 220.
[190] Carol Young, "180 Teachers Eligible", *Providence Evening Bulletin*, December 18, 1969.
[191] Young, "180 Teachers Eligible".
[192] Preville, "Constitutional Quarrels", 218.
[193] Chaput and Shea, *Rhode Island*, 21.
[194] *Robinson v. DiCenso*, 316 F. Supp. 112 (D. R.I. 1970).
[195] Milton Stanzler, "The ACLU and Church-State Issues in Rhode Island," *Rhode Island Jewish Historical Notes* 12.4 (1998): 506.
[196] Preville, "Constitutional Quarrels", 217.

statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion".[197]

On the basis of the third prong alone, the Court invalidated the Rhode Island and Pennsylvania laws. The reason for the very existence of parochial schools, the Court determined, is "the propagation of a religious faith".[198] State grants to institutions founded with the primary purpose of instilling religious belief constituted excessive entanglement under the new *Lemon* test. In particular, Burger cited the US District Court's decision in *DiCenso*, which relied on findings that indicated parochial schools often abutted churches, contained religious symbols in the classroom, and attempted to maintain a one-to-one ratio of religious to lay faculty in order to maintain a religious atmosphere.[199] While some legal scholars, most notably Justice Sandra Day O'Connor, criticize the Lemon test for its ambiguity, it is still valid law and shaped, to a significant extent, future Supreme Court decisions regarding the establishment clause.[200]

Public response to the Court's decision in *Lemon* and *DiCenso* was mixed. American Catholics, particularly in states like Rhode Island and Pennsylvania with extensive parochial school systems, were disappointed. The ruling made it more difficult to address the economic challenges faced by a system with 11,683 schools and 4.6 million students. Likewise, a number of conservative Jewish sects perceived a threat to the continuance of their educational traditions.[201] However, editorials in prominent newspapers, such as the *New York Times* and *Washington Post*, applauded the decision for accomplishing church-state separation while permitting some accommodation.[202] The ACLU and its supporters celebrated a great victory: the establishment of "a constitutional doctrine" that made the lingering presence of religion in the public sphere "tenuous".[203] Regardless of the varied reactions, the *Lemon* ruling and test became law, and, despite later attempts to shift establishment clause interpretation, has since been the dominant tool for analysis.

Lynch v. Donnelly

For 40 years, Pawtucket, Rhode Island, a small city abutting the state capital of Providence, erected an annual Christmas display in the city's shopping center. The display was owned and maintained by the city, but stood in a privately owned property, Hodgson Park, in the downtown Pawtucket business district.[204] It included a lit Christmas tree, carolers, a holiday village scene, Santa Claus, and a Nativity scene,

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[197] *Lemon v. Kurtzman*, 403 US 602 (1971).
[198] Lemon v. Kurtzman, 403 US 602 (1971).
[199] Preville, "Constitutional Quarrels", 222.
[200] Kermit L. Hall and John J. Patrick, *The Pursuit of Justice: Supreme Court Decisions that Shaped America*, (Oxford: Oxford University Press, 2006), 177.
[201] Preville, "Constitutional Quarrels", 223.
[202] Hall and Patrick, *The Pursuit of Justice*, 176.
[203] Krannawitter and Palm, *A Nation Under God?*, 75.
[204] Karen Ellsworth, "US Court Bans Pawtucket Nativity Scene," *Providence Evening Bulletin*, November 10, 1981.

among other symbols of the season.[205] Daniel Donnelly, a Pawtucket resident, was offended by the city's sponsorship of a display including religious symbolism that contradicted his own beliefs. With the ACLU, Donnelly filed suit against the city. The lawsuit caused outrage in Pawtucket. The city and the ACLU received thousands of letters and phone calls from concerned citizens, over 90 percent of whom supported the city's display.[206] Donnelly was verbally harassed and attacked by individuals who disagreed with his complaint. Many felt that the ACLU was "making a mountain out of a molehill" and that the religious elements of the display were minor at most. Some went so far as to assert that Pawtucket had the right to "sponsor and support the religious views of the majority".[207]

Lynch v. Donnelly was heard in US District Court in 1981. The district court reached its decision in November, determining that the placement of the crèche in the city's display was a violation of each prong of the *Lemon* test: purpose, effects, and entanglement.[208] Judge Raymond Pettine's opinion in the case cited the "political disputes along religious lines" caused by the display as proof of its religious nature, and wrote that the crèche comprised an endorsement of Christianity on the part of Pawtucket.[209] The federal Court of Appeals affirmed Pettine's decision, at which point the city chose to appeal the case to the US Supreme Court.

The Supreme Court heard oral arguments for *Lynch v. Donnelly* in October 1983. The justices appeared to be primarily concerned with the boundary between government reflecting a "common cultural heritage" and endorsing religious beliefs.[210] William McMahon, representing the city, argued that, in modern times, Christmas is a "secular folk festival" with religious roots, celebrated by many Americans who do not practice Christianity.[211] Given this context and the fact that the crèche was not the only element of Pawtucket's holiday display, the Nativity scene was not religious, but merely an acknowledgment of the history of Christmas celebration. Amato DeLuca, attorney for the ACLU, argued that it was impossible to distinguish the obvious religious significance of the crèche from a potential secular symbolism. The arguments in *Lynch* raised two issues about display and religious symbol cases: whether an item linked to secular and religious events remains religious and if a religious object can have a "predominantly secular meaning".[212]

The Court released its 5-4 decision on March 5, 1984, finding Pawtucket's Nativity scene constitutional. Chief Justice Burger, writing for the majority, stated that "the Constitution does not require complete separation of church and state", and that the Court meant for its interpretation of the establishment clause to reflect the Framers'

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[205] See Appendix 2.
[206] Stanzler, "The ACLU", 513.
[207] Stanzler, "The ACLU," 511.
[208] Chaput and Shea, *Rhode Island*, 22.
[209] Ellsworth, "US Court".
[210] Karen Ellsworth, "Pawtucket's Nativity Scene Debated before Supreme Court," *Providence Evening Bulletin*, October 5, 1983.
[211] Ellsworth, "Pawtucket's Nativity Scene".
[212] Devins, "Religious Symbols," 32.

understanding.[213] The opinion determined that religion did not benefit from the crèche and that Pawtucket had a secular purpose for the display: to celebrate a national holiday and to promote commerce in the city's business district. Burger also cited the District Court's decision, which considered the three criteria of the *Lemon* test and found "an absence of administrative entanglement".[214] As the Court found that Pawtucket's crèche did not violate any prong of the *Lemon* test, it upheld the display. In a concurring opinion, Justice Sandra Day O'Connor articulated an endorsement test, to clarify the *Lemon* test. If the *Lemon* test is properly applied, according to O'Connor, the Court should find invalid only those actions through which "the government intends to convey a message of endorsement or disapproval of religion".[215] The endorsement test was an attempt to remove some of the ambiguity of the *Lemon* test; O'Connor hoped that it would supplant *Lemon* in future establishment cases.[216] Justice William Brennan wrote the dissenting opinion, which condemned the Court's decision as "a long step backwards" to the time before *Engel v. Vitale*, when claims of spiritual heritage allowed for the advancement of majority religious beliefs by the government.[217] The *Lynch* decision lowered the standard of strict separation introduced by the school prayer cases, and appeared, to supporters and critics alike, to open the door for greater accommodation of religion in future cases.

Lee v. Weisman

Nathan Bishop Middle School, a public school located in Providence, RI, annually invited a local clergyman to offer a benediction at the school's graduation ceremony. The principal of the school had discretion to choose the clergyman, and representatives of various faiths were invited to give a nonsectarian prayer. Students were not required to respond to or participate in the prayer, but were made to stand and remain silent as the prayer was said. Daniel and Vivien Weisman, practicing Jews whose two daughters attended Nathan Bishop, first encountered the graduation prayer in 1986, when their oldest daughter graduated from middle school. The family was offended by the prayer, which was offered by a Baptist minister, and made their concerns known to the principal and the school district.[218]

In 1989, when the Weismans' youngest daughter, Deborah, was to graduate from Nathan Bishop, the principal asked a local rabbi to offer the traditional prayer, perhaps seeking to appease the Weismans. Daniel Weisman contacted the school prior to the graduation to again express the concerns he and his wife had held in 1986, and was told that a rabbi would give the benediction "so that he would not be disturbed".[219] However, the Weismans' legal objection was not simply because of their Jewish faith,

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[213] *Lynch v. Donnelly,* 465 US 668 (1984).
[214] *Lynch v. Donnelly,* 465 US 668 (1984).
[215] *Lynch v. Donnelly*, 465 US 668 (1984) (O'Connor, J, concurring).
[216] Yarbrough, "Church, State," 76.
[217] *Lynch v. Donnelly*, 465 US 668 (1984) (Brennan, J, dissenting).
[218] Chaput and Shea, *Rhode Island*, 22.
[219] Henry J. Reske, "And May God Bless: Does Prayer Belong at Graduation?," *American Bar Association Journal* 78.2 (1992): 47.

but also because of their belief that any prayer at a public ceremony was a violation of the establishment clause.[220] The ACLU filed suit on the Weismans' behalf and sought an injunction against the prayer at Deborah Weisman's graduation while the suit was pending. Steven Brown, the executive director of the RI ACLU, and the ACLU's legal counsel saw the issue of a graduation prayer as "identical to that of routine school prayer during the day": unconstitutional.[221] One day before Nathan Bishop's 1989 graduation exercises, a federal judge denied the injunction, and on June 20, 1989, Rabbi Leslie Y. Gutterman offered a benediction to 127 Nathan Bishop graduates, including Deborah Weisman.[222]

Lee v. Weisman reached US District Court in the fall of 1989; Chief Judge Francis J. Boyle reached a decision on January 9, 1990. Calling the ruling "difficult but obligatory", Boyle found that prayer at public school graduations promotes religion and therefore is unconstitutional.[223] While Boyle believed that school prayer could be helpful to students facing challenges, the Supreme Court's view of school prayer (seen first in *Engel v. Vitale)* forbade it. The school district's legal counsel had suggested that, while the specific prayer said at Nathan Bishop might be unconstitutional, perhaps another prayer would be permissible. Boyle dismissed this proposal as impractical, since federal judges would then be called upon to judge the constitutionality of individual prayers. The city of Providence appealed Boyle's decision to the US Supreme Court. President George H. W. Bush's administration asked the Court to accept *Lee v. Weisman,* and, in an *amicus curiae* brief, asked the Court to "repudiate" the three-pronged *Lemon* test.[224] Chief Justice William Rehnquist, a Reagan appointee, saw in the case an opportunity to challenge the *Lemon* test and the practice of strict separation in favor of the traditional, more permissive view of the establishment clause held prior to the mid-20th Century.[225] During oral argument, the Court appeared inclined to adopt a coercion test, which would evaluate the power of a religious activity to forcibly persuade citizens, instead of the *Lemon* test. US Solicitor General Kenneth Starr noted that school prayer would still violate a coercion test, but that a simple graduation invocation was not among the sort of religious coercion the Founders sought to prevent through the First Amendment. The Weismans' attorney, Sandra A. Blanding, held that a coercion test would mark "a radical departure" from previous Supreme Court rulings and could overturn decades of establishment clause decisions.[226]

The Court released its decision in *Lee v. Weisman* on June 24, 1992. With the Court split 5-4, the ruling declared prayer at public school graduations (and other public ceremonies) unconstitutional. Writing for the majority, Justice Anthony Kennedy cited the psychological pressure on adolescents whose peers were actively engaging in prayer as strong evidence of coercion. In response to the school district's argument that a student opposed to the prayer could choose not to attend the ceremony without

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[220] Chaput and Shea, *Rhode Island,* 23.
[221] D. Morgan McVicar, "Prayer at Graduation Protested," *Providence Journal*, June 17, 1989.
[222] Tom Mooney and John Castellucci, "School Ritual Includes Prayers," *Providence Journal*, June 20, 1989.
[223] Judy Rakowski, "Prayers Barred at School Rites," *Providence Journal*, January 10, 1990.
[224] Levy, *The Establishment Clause*, 200-201.
[225] Dierenfeld, *The Battle over School Prayer,* 201.
[226] Reske, "And May God Bless", 48-49.

forfeiting a diploma, Kennedy wrote "a student is not free to absent herself from the exercise in any real sense of the term 'voluntary'".[227] In a concurring opinion, Justice Harry Blackmun wrote that, while coercion is not "necessary" to prove that a government action is unconstitutional, it is "sufficient".[228] Justice David Souter, writing a separate concurring opinion, stated that allowing the prayer would "effectively favor religion over disbelief" by showing concern for the sensitivities of religious people while ignoring the sentiments of nonbelievers.[229] The establishment clause, according to Souter, was designed to prevent such favoritism. The dissenting opinion, written by Justice Antonin Scalia, contended that nonsectarian prayer at public ceremonies was a "longstanding American tradition" and therefore constitutional.[230]

The ruling in *Lee v. Weisman* was surprising to many court observers, who expected the mostly conservative justices to rule that a nonsectarian prayer had "the sanction of tradition".[231] More significantly, the Court neither reconsidered the *Lemon* test nor implemented a coercion test, as the Bush administration had invited it to do. However, it had decided the case primarily on the basis of psychological coercion.[232] *Lee*, in many ways, maintained the status quo of establishment clause decisions. The prayer was found unconstitutional, in accordance with *Engel v. Vitale* and *Abington School District v. Schempp*. The case had been the best hope of opponents of the school prayer decisions for change. The narrow ruling, made by a conservative Court, indicated that the school prayer decisions were now a permanent component of establishment clause interpretation.

RHODE ISLAND AND THE ESTABLISHMENT CLAUSE

Roger Williams founded the colony of Rhode Island and Providence Plantations in 1636. He had been expelled from the Massachusetts Bay colony for his controversial religious beliefs and settled south of the Massachusetts Bay border with a group of dissident Protestants. Williams proclaimed religious freedom and the separation of church and state in his new colony. Although the smallest state in the union, Rhode Island "pioneered religious liberty and church-state separation" from the time of Roger Williams.[233] The Founders looked to Rhode Island's model of religious toleration while drafting the Constitution and the Bill of Rights. Despite its "unbroken 350-year tradition of separation", Rhode Island has acted as a leading source of Supreme Court cases pertaining to the First Amendment and specifically to the establishment clause.[234]

Rhode Island's prominence as a state producing establishment controversy is the result of demographic shifts in the state during the 19th and 20th Centuries. For the first centuries of its existence, Rhode Island was a primarily Protestant New England state,

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[227] *Lee v. Weisman*, 505 US 577 (1992).
[228] *Lee v. Weisman,* 505 US 577 (1992) (Blackmun, J., concurring).
[229] *Lee v. Weisman*, 505 US 577 (1992) (Souter, J., concurring).
[230] *Lee v. Weisman*, 505 US 577 (1992) (Scalia, J., dissenting).
[231] Levy, *The Establishment Clause*, 200.
[232] Levy, *The Establishment Clause,* 201.
[233] Chaput and Shea, *Rhode Island*, v.
[234] Chaput and Shea, *Rhode Island*, iii.

with no sources of religious dispute. In the late 19th and early 20th Centuries, thousands of Irish, Italian, and French Canadian immigrants arrived in Rhode Island, bringing their Catholic faith with them. By the mid-20th Century, Rhode Island had become "the most heavily Catholic state in the nation", which created a conflict between the Protestant establishment and the new Catholic population.[235] Roger Williams' original concern when founding Rhode Island was that association with the state could damage the church; now, the massive size and growing political clout of the Roman Catholic Church became the biggest issue in Rhode Island politics.[236] By the early 1960s, more than sixty percent of the state's population was Catholic, and twenty-seven percent of students attended parochial elementary schools.[237] The state's dependence on non-public education created an entanglement between the Catholic Church, which was educating nearly a third of Rhode Island children, and the state, which could not have managed the influx of students into public schools if the parochial schools failed. The financial difficulties faced by a number of parochial elementary schools in the late 1960s was concerning to church and state administrators and later produced *DiCenso v. Robinson,* one of the cases considered by the Supreme Court under *Lemon v. Kurtzman*.
The Supreme Court cases *Lemon v. Kurtzman, Lynch v. Donnelly,* and *Lee v. Weisman* all involved plaintiffs from Rhode Island with complaints against an action taken by some state or municipal government institution. *Lemon v. Kurtzman* questioned the constitutionality of a Rhode Island law providing a salary supplement for parochial school teachers, in order to save the floundering parochial elementary schools and spare public schools the potential overflow of students if the parochial schools were to close. The Supreme Court found the law, as well as a similar law in Pennsylvania, to be in violation of the establishment clause. *Lynch v. Donnelly* challenged a city-sponsored nativity display in Pawtucket, RI, a small city abutting the state capital, Providence. The Court allowed the display, because of the secular holiday symbols, to stand as an acknowledgement of the Christmas season. *Lee v. Weisman* sought to bar the reading of a clergy-led prayer at a graduation ceremony for Nathan Bishop Middle School, located in Providence, RI. Through this case, the Supreme Court ended the practice of religious prayer at public ceremonies, particularly graduations.

Today, the Rhode Island population reports as 44.3 percent Catholic. This is a decline from the 2000 census, when sixty percent of the state reported as Catholic. However, Catholicism remains the largest religious denomination in Rhode Island.[238] The Catholic population still comprises "a strong majority" in political and cultural debates, but nonreligious or non-practicing individuals are gaining in numbers and in strength, following a national trend. [239] A new division between religious and nonreligious individuals has replaced the traditional Rhode Island establishment

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[235] Michael Barone and Chuck McCutcheon, "Rhode Island", *The Almanac of American Politics* (Chicago: University of Chicago Press, 2011).
[236] Chaput and Shea, *Rhode Island*, 14.
[237] Chaput and Shea, *Rhode Island,* 9.
[238] Jahnabi Barooah, "Most and Least Catholic States in America", *The Huffington Post,* July 12, 2012, http://www.huffingtonpost.com/2012/07/12/most-and-least-catholic-states-in-america_n_1662076.html.
[239] Barone and McCutcheon, "Rhode Island".

conflict between Protestants and Catholics. In recent years, controversies have arisen over Christmas pageants at schools, war memorials featuring crosses, and, most prominently, prayer banners at public high schools. *Ahlquist v. Cranston* unfolded within this context of an emerging cultural division, as the public response to the issue itself and to the plaintiff indicate.

AHLQUIST V. CRANSTON

The city of Cranston, Rhode Island, located adjacent to the state capital, Providence, has a population of approximately 80,000.[240] 54.57 percent of Cranstonians describe themselves as religious, meaning that they attend services more than twice a month. 52.8 percent of the city's religious residents identify as a member of some Christian denomination, with 45.21 percent overall reporting as Roman Catholic. When church attendance is not a qualification, more than sixty percent of the city identifies as Catholic.[241] The Cranston school system includes two public high schools, Cranston High School East and Cranston High School West, although a large portion of high school students from Cranston attends private or parochial high schools. The city opened Cranston High School West (known to residents as "Cranston West") in 1958, in response to the growth of suburban developments in the western part of the city.

The Class of 1963, the first graduating class to have spent their entire high school tenure at Cranston West, presented their alma mater with a gift: a mural featuring a moral guide written by a Cranston West student. Seventh grader David Bradley wrote the prayer that graced the eight-foot high, four-foot wide mural, prominently labeled "School Prayer". It was largely based on a prayer present in the Hugh B. Bain Middle School, another public school in Cranston, where Bradley had penned a similar prayer with the assistance of administrators and teachers.[242] A similar mural, labeled "School Creed", along with the prayer mural, was hung in the Cranston West auditorium. The prayer read, "Our Heavenly Father, grant us each day the desire to do our best, to grow mentally and morally as well as physically, to be kind and helpful to our classmates and teachers, to be honest with ourselves as well as with others. Help us to be good sports and smile when we lose as well as when we win. Teach us the value of true friendship. Help us always to conduct ourselves so as to bring credit to Cranston High School West. Amen".[243] For several years, the students at Cranston West recited this official school prayer every morning. At the time of the banner's erection, the Supreme Court had already declared school prayer unconstitutional in *Engel v. Vitale* and *Abington School District v. Schempp*.

At some point in the late 1960s, school administrators put a stop to the recitation of the prayer, following complaints from a number of parents. The mural remained,

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[240] "State and County QuickFacts: Cranston, Rhode Island," United States Census Bureau, accessed August 16, 2013, http://quickfacts.census.gov/qfd/states/44/4419180.html.
[241] "Religion in Cranston, Rhode Island," *Sperling's Best Places*, accessed August 16, 2013, http://www.bestplaces.net/religion/city/rhode_island/Cranston.
[242] Chaput and Shea, *Rhode Island*, 6.
[243] See Appendix 1.

passively present in the school auditorium, throughout the following decades. An adjacent plaque noting that the banner was the gift of the Class of 1963 was lost during renovations to the facility. The Rhode Island branch of the American Civil Liberties Union became aware of the banner in 2010, and soon began to search for students and parents willing to vocalize complaints about the prayer. Steven Brown, executive director of the Rhode Island ACLU, received a phone call in June 2010 from a Cranston West parent, Mark Ahlquist, who had seen the banner while attending a school function. Several other parents followed suit, notifying the ACLU of their concerns. However, none of these individuals were willing to serve as an ACLU plaintiff if the matter were to lead to a lawsuit.[244] One student, the child of the parent who voiced his initial reservations about the prayer, was willing to serve as the ACLU's plaintiff: Jessica Ahlquist.

Jessica Ahlquist was completing her freshman year at Cranston West when the prayer banner first came to the attention of the ACLU. During her sophomore year, Ahlquist agreed to act as complainant and, later, as plaintiff in the ACLU's actions against the prayer banner. The oldest of four children, Ahlquist was raised as a Catholic in a religious family. When her mother was diagnosed with cancer, she lost her faith and became an atheist.[245] A 2013 graduate of Cranston West, Ahlquist first noticed the banner as a freshman attending an event in the school auditorium. In an interview, she described her feelings of exclusion and self-doubt upon seeing the prayer and knowing that it belonged to a faith tradition with which she did not identify.[246] In response, Ahlquist began a Facebook page to gain support for removing the banner.[247] While Ahlquist and her classmates were never called upon to acknowledge the presence of the mural or to recite the prayer, the prayer was a noticeable component of the school auditorium, a public facility through which students regularly pass and where school events are frequently held.

Brown wrote a letter to Peter Nero, the Superintendent of Cranston Public Schools in July 2010. In the letter, Brown expressed his concerns about the prayer's constitutionality and its violation of school district policy, which claimed religious neutrality.[248] He also asked the superintendent to remove the prayer from Cranston West, as such an action would be "not only in keeping with school district policy, it [would] demonstrate both the school district's respect for the rights of religious minorities, and its recognition of the importance of complying with the Constitution".[249]

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[244] Maria Armental, "Cranston West Will Keep Its Prayer and Defend It," *Providence Journal*, March 8, 2011.

[245] Alyssa Giacobbe, "High School and its Discontents," *Boston Globe*, February 26, 2012, accessed June 11, 2013, http://www.bostonglobe.com/magazine/2012/02/26/high-school-and-its-discontents/t2vjUpkgjL5bUEBv1UPHSK/story.html.

[246] Abby Goodnough, "Student Faces Town's Wrath in Protest against a Prayer," *New York Times*, January 27, 2012, accessed June 11, 2013, http://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-lawsuit.html?_r=0.

[247] Laura Crimaldi, "Jessica Ahlquist, Rhode Island Student, Confident Her Side Is 'Very Strong' in School Prayer Mural Suit," *The Huffington Post*, October 13, 2011, accessed June 11, 2013, http://www.huffingtonpost.com/2011/10/13/jessica-ahlquist-rhode-is_n_1010091.html.

[248] Steven Brown, letter to Superintendent Peter Nero, July 6, 2010.

[249] Brown, letter.

The letter made clear the ACLU's intention to pursue the matter through legal channels if the school district chose to preserve the banner.

Upon receiving Brown's letter, Nero contacted the principal of Cranston West to see if any parents had complained directly to the school; none had. He claimed that, as the complaining parents had bypassed all school officials in favor of the ACLU, the school district had not had the opportunity to resolve any dispute about the prayer banner.[250] Nero forwarded the letter and the ACLU's concerns to the Cranston School Committee in August 2010, and recommended that the committee examine the possibility of rewording the banner to remove the religious language. The Cranston School Committee established a sub-committee to devise possible solutions to the ACLU's complaint and to study the action to be taken if the ACLU chose to file a lawsuit against the city. School committee members Michael Traficante, Frank Lombardi, and Stephanie Culhane, Superintendent Nero, two Cranston West students, and two Cranston West parents formed the committee, which met in November 2010 and February 2011.[251] At its February 22, 2011 meeting, the subcommittee voted to keep the banner despite "written district policy" confining religious observance to students' homes and churches.[252] The vote ensured that the entire Cranston School Committee would hold a vote and opened the school district to the possibility of litigation from the ACLU.

On March 7, 2011, the school committee held a special meeting to discuss the prayer banner and hear the conclusions of the subcommittee. More than 150 members of the public attended; the majority appeared to defend the presence of the prayer.[253] Those in attendance described the "palpable sense of discord" between the banner's supporters, who wore signs depicting the prayer, and opponents, who were seated together in a corner.[254] The special banner subcommittee developed three options for the school district to pursue: preserve the banner without any alterations, remove the banner entirely, or redesign the area around the banner to acknowledge the religious plurality of the school by incorporating symbols of other faiths. Based on opinions voiced by citizens at the subcommittee meetings, the subcommittee recommended that the Cranston School Committee vote to keep the banner intact and mount a legal defense, should the ACLU choose to file suit.[255] Superintendent Nero echoed the subcommittee and endorsed the suggestion that the city defend the prayer banner in court.

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[250] Cranston School Committee, Minutes of Special Cranston School Committee Meeting, Meeting of March 7, 2011.

[251] Cranston School Committee, Meeting of March 7, 2011.

[252] "ACLU Wants School Prayer Banner Out," *UPI*, United Press International, Inc., February 23, 2011, accessed June 11, 2013, http://www.upi.com/Top_News/US/2011/02/23/ACLU-wants-school-prayer-banner-out/UPI-41131298502377/.

[253] Armental, "Cranston West".

[254] Andrew Metcalf, "School Committee Decides to Defend Banner," *Cranston Patch*, March 8, 2011, accessed June 11, 2013, http://cranston.patch.com/groups/schools/p/school-committe-decides-to-defend-banner.

[255] Cranston School Committee, Meeting of March 7, 2011.

Two hours of discussion and "impassioned" public commentary followed.[256] A number of current students at Cranston West offered their perspectives on the prayer banner, which ranged from advocating the banner's removal to expressing a desire for a greater religious presence in public schools. Eric Borelli, one of the students who served on the banner subcommittee, argued that the city would be "going against what this country and this state were founded on" by removing the banner and that the Bill of Rights exists to protect religion.[257] Taylor Grenga, also a subcommittee member, asked the School Committee how it would explain its decision to defend the banner to students at Cranston West "when programs are cut from their schools that are already lacking money".[258] Grenga believed that, since legal advisors were of the opinion that the School Committee could not win a legal battle, the city should not spend taxpayer dollars meant for education to defend the personal beliefs of some individuals. Pat McAfee agreed with Borelli, telling committee members that West students were not required to read the prayer and that its presence reminded students to try "to be a better person".[259] Ashley Arribee, a student at Cranston High School East, supported the Cranston West prayer banner because it was "historical" and "passive".[260] She, like many others, articulated a belief that the invocation "Our Heavenly Father" did not refer to a specific religious tradition, but to any faith. Julia Ahlquist, the younger sister of plaintiff Jessica, said that, when the school erected the prayer banner in 1963, it was already illegal, and remained so in 2011. Alexandra Pizzuti was in favor of the banner's removal, called its presence discrimination against nonbelievers, and said that, "If somebody wants to pray then they should be sent to a Catholic school".[261] Jessica Ahlquist also took the podium, and stated that the prayer was "a direct violation of separation of church and state" and an endorsement of religion generally and of Christianity in particular.[262]

The students' comments illustrate the challenges of handling establishment clause conflicts. To Jessica Ahlquist, Julia Ahlquist, and Alexandra Pizzuti, the banner's presence constituted a denouncement of their beliefs by their school and demonstrated a clear presence for monotheistic religion, specifically Christianity. Taylor Grenga was not concerned with the banner itself, but with the detrimental effect defending it might have on her education. For her, the government's role was to provide her with a sufficient high school education funded by taxpayer dollars, not to spend money intended for the benefit of her and fellow students in defense of personal religious views. Eric Borelli, Pat McAfee, and Ashley Arribee viewed a potential removal as an endorsement of atheism and the promotion of secularism over their religious beliefs. The ACLU called upon the Cranston School Committee to reach a position of neutrality towards religion. Does removing religion from public schools in any and all forms constitute neutrality or a prejudice towards nonbelief?

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[256] Armental, "Cranston West".
[257] Cranston School Committee, Meeting of March 7, 2011.
[258] Cranston School Committee, Meeting of March 7, 2011.
[259] Cranston School Committee, Meeting of March 7, 2011.
[260] Cranston School Committee, Meeting of March 7, 2011.
[261] Cranston School Committee, Meeting of March 7, 2011.
[262] Cranston School Committee, Meeting of March 7, 2011.

The Cranston School Committee's March 7, 2011 meeting showed how, even in the modern day, the wall of separation envisioned by Thomas Jefferson is a barrier stronger in the public imagination than in practice. The students' comments were followed by time for open public discussion. Even as citizens cited the First Amendment and the burden of non-endorsement it places on the government, opponents and supporters of the banner most often referred to their own beliefs as the motivation for their opinion. Linda French told those who agreed with the ACLU's complaints that "you are entitled to your opinion in however wrong you are, okay. But the fact of the matter is God exists".[263] Kara Russo recited from the Gospel of Matthew while attempting to explain to the School Committee how the prayer banner was constitutional. Gail Bamford called the controversy "just one more example of the decline of this country coming form our young people" and their abandonment of traditional religious beliefs.[264] Liliana D'Ovidio suggested that, without God in public schools, children would not learn about values or character. The banner's supporters presented the School Committee with petitions signed by approximately 4000 Cranston residents who wanted to see the banner remain at Cranston West and believed that the School Committee should pursue the matter in court. Opponents were equally vocal in their comments to the School Committee. Paul Auger said that the banner asked students to appeal for "the help of an imaginary friend in the sky", a concept that was demeaning to students' intelligence.[265] However, the majority of speakers supported the prayer banner and was virulently against any course of action other than a full legal confrontation with the ACLU.

Superintendent Nero, speaking on the matter of the banner, recounted to the audience the prominent role that his devout Roman Catholicism played in his life, and implied that his thoughts on the controversy had been, in part, informed by his faith.[266] The School Committee members seemed to follow the tone set by public commentary as each member cast his or her vote and provided the rationale behind it. Frank Lombardi said that he made his decision "as a lawyer, as a practicing Catholic, and as an elected official". These three roles, according to Lombardi, were "inextricably intertwined": he could not separate his religious beliefs from his duties as an elected official, and therefore voted to keep the banner.[267] Michael Traficante followed suit, saying that "it is very, very difficult . . .to leave your feelings and your faith and your moral values at the door".[268] Paula McFarland's was the third vote supporting the banner; she explained her position from the perspective of having a Jewish mother and a Catholic father and stated her belief that the banner "will enlighten anyone's personal beliefs".[269] The final vote for the banner came from Committee Chairwoman Andrea Iannazzi. An attorney, she claimed to have made her decision on the basis of her knowledge of constitutional law. Iannazzi declined to express her own beliefs, since "most of

[263] Cranston School Committee, Meeting of March 7, 2011.
[264] Cranston School Committee, Meeting of March 7, 2011.
[265] Cranston School Committee, Meeting of March 7, 2011.
[266] Cranston School Committee, Meeting of March 7, 2011.
[267] Cranston School Committee, Meeting of March 7, 2011.
[268] Cranston School Committee, Meeting of March 7, 2011.
[269] Cranston School Committee, Meeting of March 7, 2011.

Cranston knows where [she] went to high school and what [her] own religious beliefs are," and they were not a factor in her vote.[270] Iannazzi is a 2000 graduate of La Salle Academy, an independent Catholic high school in Providence, RI operated by the De La Salle Christian Brothers.

Stephanie Culhane was the first of three School Committee members to vote against preserving the prayer banner. She prefaced her vote by saying that she was an individual "who has been raised as a Catholic Christian who is currently a practicing Catholic" and a CCD (religious education) instructor at her parish.[271] Despite the personal reservations Culhane held about her vote, she believed that it was the correct action given the school district's six million dollar deficit. Janice Ruggieri, speaking next, voted with Culhane, because the religious language of the prayer, while pertinent to many faiths, was not related to all religions, and the city could not, in her opinion, afford the coming legal battle.[272] Steven Bloom also voted against defending the banner, although he believed that the controversy should be settled in court, because of the school district's financial straits.[273] Bloom noted that the banner was insensitive to students such as Ahlquist and advocated, if possible, a solution that would mount other banners related to non-Judeo-Christian belief systems and to nonbelief.

Nearly all of the School Committee members, whether they voted for or against defending the banner, referenced their own religious beliefs as part of the reason behind their respective votes. A March 2012 ABC News/Washington Post Poll indicates that 63 percent of Americans believe that political leaders should not allow their own religious beliefs to influence decisions made in their capacity as public servants.[274] Yet, the citizens present at the March 7 School Committee implored committee members to be influenced by religion and a sense of morality inspired by faith when considering the prayer banner controversy. Do Americans claim to believe that political leaders should act independently of religion only when they fear that the beliefs of a certain political leader may not accord with their own faith?

Five out of seven School Committee members publicly stated that they were Catholics, and a sixth stated that she was raised Catholic, although she no longer practiced. The religious demographics of Cranston suggest that a large portion of the citizens present at the March 7 meeting were probably either practicing Catholics or were raised in Catholic households. Did the School Committee members feel comfortable expressing their religious beliefs in a public setting because they assumed that a majority of those present were of the same faith? The School Committee members' comments call into question the appropriate role religion should play in decision pertaining to the public sphere. Many would argue that Stephanie Culhane acted correctly in setting her personal beliefs aside to act in the best interest of Cranston. Others would contend that Frank Lombardi listened to his constituents, who asked him to consider his sense of

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[270] Cranston School Committee, Meeting of March 7, 2011.
[271] Cranston School Committee, Meeting of March 7, 2011.
[272] Cranston School Committee, Meeting of March 7, 2011.
[273] Cranston School Committee, Meeting of March 7, 2011.
[274] "ABC News/Washington Post Poll," *Polling Report*, March 10, 2012, accessed August 17, 2013, http://www.pollingreport.com/religion.htm.

morality in his deliberations. For Lombardi, morality was inextricably attached to religion.

In a 4-3 vote on March 7, 2011, the Cranston School Committee chose to defend the Cranston West prayer banner. The vote marked the culmination of "exhausting testimony that ranged from discussions of the Columbine shooting, 9/11, swastikas and burning flags to Mother Theresa, the crucifixion, and *To Kill a Mockingbird*".[275] Committee members Lombardi, Traficante, McFarland, and Iannazzi voted in favor of defending the banner, while members Culhane, Ruggieri, and Bloom voted against pursuing the matter in court. The ACLU, "in the hope of avoiding the need for litigation", had waited since July 2010 for the School Committee to determine a course of action that would accommodate the alleged constitutional violation and acknowledge the city's history, but was disappointed in the results of the March 7 vote.[276] On April 4, 2011, the ACLU filed a lawsuit in US District Court for the district of Rhode Island against the city, identifying Jessica Ahlquist as plaintiff and her father, Mark Ahlquist, as co-plaintiff.

Soon after the ACLU filed suit, Allan W. Fung, the mayor of Cranston, expressed his "disappointment" that the ACLU had chosen to sue the city, because the city administration had no authority to dictate the School Committee's decision to defend the prayer banner.[277] Later in the academic year, school officials invited Fung to speak at a diversity assembly at Cranston West. The mayor told the Cranston West student body "he wanted the mural to remain"; in response, students stood and cheered.[278] Local media closely scrutinized the reaction that might be forthcoming from the Roman Catholic Church, given the high density of Catholics in Cranston. Thomas J. Tobin, the Bishop of the Roman Catholic Diocese of Providence, wrote in the diocese's weekly newspaper that he supported the banner because of the healthy ideals it promoted. However, Tobin said, "If it has to be removed, so be it. Faith will survive and the free exercise of religion will go on".[279] As antipathy towards Ahlquist at Cranston West and within the community grew, both Tobin and Fung would defend her rights to free exercise of religion and to free speech.

Attorneys Lynette Labinger, of Providence law firm Roney and Labinger, LLP, and Thomas Bender, of Providence law firm Hanson Curran, LLP volunteered to filed suit on behalf of Jessica Ahlquist and the ACLU. The ACLU's lawsuit was argued on the grounds that the invocation to "Our Heavenly Father" and closing "Amen" featured in the prayer were clear appeals to the Christian God and "thus ran afoul of the Establishment Clause".[280] Joseph Cavanagh, Jr. and Joseph Cavanagh III, of Blish and Cavanagh, LLP, a law firm located in Providence, was co-counsel for the city along with

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[275] Metcalf, "School Committee".
[276] "Judge Rules Cranston School Prayer Mural Unconstitutional, School Committee Votes Not to Appeal," *Rhode Island Civil Liberties* XVIII (January-February 2012): 1, accessed June 11, 2013, http://riaclu.org/documents/JanFeb2012Newsletter.pdf.
[277] Maria Armental, "Cranston-Prayer Banner-ACLU Files Lawsuit," *Providence Journal*, April 5, 2011.
[278] Jennifer D. Jordan, "Cranston-School Prayer Controversy," *Providence Journal*, January 14, 2012.
[279] Thomas J. Tobin, "Teach Us How to Pray-in Cranston," *Rhode Island Catholic*, March 17, 2011, accessed June 11, 2013, http://www.thericatholic.com/opinion/detail.html?sub_id=3950.
[280] Chaput and Shea, *Rhode Island*, 10.

the Becket Fund for Religious Liberty, a non-profit, public interest law firm "dedicated to protecting the free expression of all religious traditions".[281] Cavanagh, Jr. graduated from Cranston High School East, known as Cranston High School prior to Cranston West's opening.[282] The Cavanaghs and the Becket Fund provided legal services for the city free of charge because of the six million dollar deficit faced by the School Committee. The case they prepared for the defense contended that the prayer mural was constitutional because "the display was predominantly secular in purpose and context".[283] The prayer was closely connected to the history and tradition of Cranston West because it was a gift of the school's first graduating class, and therefore had a legitimate place at the school despite its religious content.

The plaintiffs attempted to paint *Ahlquist v. Cranston* as a prayer case, while the defense sought to portray it as a display case. The label that the US District Court chose to use could determine the decision rendered in the case. If *Ahlquist v. Cranston* was a prayer case, then the issue had already been decided decades earlier, in *Engel v. Vitale* and *Abington School District v. Schempp*. The prayer would, plainly, be unconstitutional. However, if it was a display case, then the legal consequences were more nuanced. Federal case law regarding religious symbols and displays is "inconclusive and frequently at odds with itself".[284] In 2005, the US Supreme Court considered the constitutionality of a display of the Ten Commandments on a state-sponsored monument at the Texas State Capitol building in *Van Orden v. Perry.* The Court ruled that the display's historical value rendered it constitutional despite the religious message it contained.[285] In two earlier display cases, *Lynch v. Donnelly* and *Allegheny County v. Greater Pittsburgh ACLU*, the Court found that Christmas crèches, religious displays, were constitutional in public areas if they were placed in some secular context, whether seasonal or historic.[286]

Display cases become complicated when viewers' reactions to the content of a message contained in the display are "mixed", or when the degree to which government supports the religious content of an allegedly secular display is "uncertain".[287] Jessica Ahlquist clearly had a negative reaction to the content of the prayer and expressed a belief that the city signaled its approval of the religious language of the prayer by hanging it. These factors presented significant challenges to the legal case the defense hoped to mount, as they implied that the secular importance the city claimed the prayer held could be secondary to a perceived religious endorsement. The line between a constitutional and an unconstitutional display is

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[281] "Our Mission," *The Becket Fund for Religious Liberty*, accessed August 17, 2013, http://www.becketfund.org/our-mission/.
[282] "Cranston School Department Considers Lawyer," *WPRI Providence*, CBS News, April 4, 2011, accessed June 11, 2013, http://www.wpri.com/news/local/west-bay/cranston-school-deptartment-considers-lawyer-joseph-cavanagh-cranston-west-prayer-banner.
[283] Chaput and Shea, *Rhode Island*, 11.
[284] Devins, "Religious Symbols", 20.
[285] *Van Orden v. Perry,* 545 US 677 (2005).
[286] Booth Fowler, Olson, Hertzke, and Den Durk, "Religious Politics", 256.
[287] Greenawalt, *Religion and the Constitution*, 70.

contingent on the distinction between active "belief" and "historical recognition".[288] Public expressions of faith by elected officials provide evidence that a display reflects religious intent, while the context of a display, such as a date of origin, can lend credence to the theory that it has significant secular historical value that outweighs concerns about religious content.

Soon after the ACLU filed suit in *Ahlquist v. Cranston*, the School Committee chose to remove a prayer banner at Hugh B. Bain Middle School. The wording of the Bain prayer, its appearance, and the circumstances surrounding its presence at the school were strikingly similar to the situation of the Cranston West prayer mural. The removal raised "suspicions" that members of the School Committee seriously questioned the constitutionality of the Cranston West prayer mural and had only voted to pursue the matter in court to appease their infuriated constituents.[289] The city also considered placing a plaque explaining the historical significance of the prayer next to the mural. Such an action might have assisted the city in arguing that the prayer banner served the secular purpose of representing the history and tradition of Cranston West. However, the School Committee, in consultation with legal counsel, decided that it should not interfere with the physical appearance of the banner while the lawsuit was still pending.

While waiting for the lawsuit to be heard in US District Court, the ACLU's attorneys filed a motion for preliminary injunction on May 25, 2011. In the motion, Labinger and Bender explained the establishment clause interpretation on which their legal argument was based. They identified the central principle of the clause as a mandate that "government must remain neutral with respect to religion and religious practices".[290] Families reserve the right to determine which religious beliefs, if any, they wish to communicate to their children. The school, an agent of the government, cannot supplant the power of the family in this regard. This understanding is similar to the neutrality interpretation put forth by the United States Supreme Court in *Lemon v. Kurtzman*.

The motion argued that the prayer's language intrinsically associated being "a good student-citizen at Cranston West" with religious practice and supplication to a deity.[291] While the Cranston West prayer may not have been construed as offensive in 1963, religious beliefs in the 21st Century are "significantly more pluralistic", creating a greater need to avoid religious conflict.[292] Additionally, the attorneys wrote, the Cranston School Committee, in the 1960s and in the present, had provided ample evidence that the prayer banner had a religious purpose. In the early 1960s, the city assigned a student, David Bradley, to write a School Prayer, organized a process by which students were to recite the prayer, and then allowed a "prominent painted display" of the prayer in the school auditorium.[293] According to the plaintiffs, all of

[288] Greenawalt, *Religion and the Constitution,* 72.
[289] Chaput and Shea, *Rhode Island*, 13.
[290] Plaintiff's Motion for Preliminary Injunction, *Ahlquist v. Cranston*, Civil Action No. 11-138, *1 (DRI filed May 25, 2011) ("Plaintiff's Motion").
[291] Plaintiff's Motion at *2.
[292] Plaintiff's Motion at *12.

these actions indicated intent to foster religious belief and practice in Cranston students. Citing language used by Justice Sandra Day O'Connor in *Wallace v. Jaffrey*, plaintiff's attorneys argued that inserting religious language into an attempt to form good student-citizens was unconstitutional. The School Committee's deliberations over the prayer in 2010 and 2011, specifically, the resistance to any suggestion of altering the prayer and the multiple references to personal religion on the part of committee members and citizens alike, were "further evidence" of its religious purpose.[294] The Court did not offer any decision or opinion on the motion for preliminary injunction until a final decision was rendered in the case.

Legal counsel for the plaintiffs and defendants filed their briefs with US District Court on September 9, 2011. The plaintiff brief argued that a student like Jessica Ahlquist could not reasonably be expected to understand that the age of the prayer banner meant that it lacked modern significance, since the School Creed mural, just as old and similar in appearance, "is published in the School Planner every year".[295] Jessica Ahlquist's "sense of spiritual injury, sense of exclusion and ostracism, and psychological injury" together amounted to injury reasonably attributed to the School Committee's decision to display and to preserve the prayer banner.[296] Additionally, the plaintiff's attorneys interpreted the School Committee's decision to remove a "virtually identical" display at Hugh B. Bain Middle School as an acknowledgement by the city that the prayer had clear religious content and meaning and was not simply historical.[297] The plaintiff's brief noted that, although courts typically defer to the secular purpose of a government, the secular purpose must supersede the religious objection. To prove that Jessica Ahlquist's religious objection was stronger that the alleged secular purpose of the banner, the plaintiff's brief referred the court to "the text of the display, the act of displaying the School Prayer itself, and the public comments by the School Committee members prior to their vote".[298]

Clearly, the School Committee's March 7, 2011 meeting was damaging to the city's court case due to the expression of religious sentiment on the part of city officials and citizens. Labinger and Bender argued that Committee Chairwoman Iannazzi's comment that "each person has the ability to practice whatever religion they want. That does not mean they have the freedom from religion being practiced" implies an ongoing endorsement of religious practice in the present day[299]. Additionally, the public discussion of the prayer banner indicated "hostility to those who questioned the propriety of the prayer's continued display" and obvious religious motivations for maintaining the mural[300]. These factors, combined with the lack of any symbol of a significant historical purpose, provided a compelling case for the district court to

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[293] Plaintiff's Motion at *27.
[294] Plaintiff's Motion at *30.
[295] Plaintiff's Trial Memorandum of Law, *Ahlquist v. Cranston*, Civil Action No. 11-138, *17, (DRI filed September 9, 2011), ("Plaintiff's Brief").
[296] Plaintiff's Brief at *32.
[297] Plaintiff's Brief at *21.
[298] Plaintiff's Brief at *45.
[299] Cranston School Committee, Meeting of March 7, 2011.
[300] Plaintiff's Brief at *60.

examine *Ahlquist v. Cranston* from the perspective of a prayer case, rather than a display case.

The plaintiff's brief relied primarily upon the standard of governmental neutrality in its legal argument. The attorneys derived this principle from their understanding of the establishment clause. They did not examine the display from the perspective of the three-pronged *Lemon* test, nor did they attempt to apply the coercion test articulated in *Lee v. Weisman*. Rather, the brief identified the prayer as a mural containing religious language and identified as religious by the comments of city officials. Labinger and Benson appear to have favored the non-endorsement rule preferred by Justice O'Connor in *Lynch v. Donnelly*, and continually sought to prove the various ways in which the city of Cranston and the school district explicitly and implicitly endorsed the prayer banner not in spite of, but because of, its religious content.

The defendants' brief attempted to demonstrate that, because of its context and history, the Cranston West prayer banner was constitutional as an aspect of the school's history and tradition. The Cavanaghs and the Becket Fund cited *Engel v. Vitale, Lemon v. Kurtzman,* and *Lee v. Weisman* in their explanation of the prayer's legality. Their brief analyzed the prayer banner from the perspective of each prong of the *Lemon* test, the *Lynch* endorsement, and the *Lee* coercion test. First, the attorneys argued that Jessica Ahlquist did not have standing to sue in this matter. Ahlquist had made public statements indicating that she was not personally injured by the display, but simply believed it to be unconstitutional. The defense counsel argued that she sought "to make a political point" through the prayer banner, but that, without any injury directly resulting from the presence of the mural, she was unable to sue.[301] After attempting to establish that Ahlquist had no standing to sue, the defendants' brief explored the application of the *Lemon* test (purpose, effects, and entanglement) to the prayer banner. The brief argued that the School Committee's purpose in retaining the banner was wholly secular: "to recognize the history and tradition of Cranston West and respect the students and student artists who donated it".[302] The prayer, from this perspective, was nothing more than an artifact to help students understand a certain era, the early 1960s, at Cranston High School West. The brief further claimed that the committee members' comments were consistent with the secular nature of this purpose. Next, the attorneys wrote that the decision to keep the prayer did not have the effect of advancing religion. A third party, not the school district, gave the banner as a class gift. Therefore, the mural was the donation of "a secular organization-a graduating class" and communicated a secular message, that of history and tradition, not a religious endorsement.[303] The prayer was displayed amid a number of class gifts indicative of history and tradition, including a school creed mural, the school mascot, and class banners, affirming its secular effect of illustrating the school's past. As to the excessive entanglement prong, the defense contended that the prayer was written by a student,

[301] Defendants' Trial Brief, *Ahlquist v. Cranston*, Civil Action No. 11-138, *20 (DRI filed September 9, 2011) ("Defendants' Brief").
[302] Defendants' Brief at *30.
[303] Defendants' Brief at *35.

not an administrator or the School Committee, and that it was displayed by the graduating class of 1963, not the city or a church, and had not been altered since its erection. These factors meant that no entanglement whatsoever had occurred.[304] Thus, the defense concluded that the prayer banner satisfied the *Lemon* test.

The defense argued that, under the same qualifications as the entanglement prong, the banner did not violate the endorsement test, which considers whether the government's action endorses, favors, or promotes religion.[305] *Lee v. Weisman* established the coercion test, applied primarily when state officials mandate a religious exercise. The defendants' brief states that, as the prayer was a passive display and was not recited by Cranston West students, it could not possibly fail the coercion test.[306] In contrast to the plaintiff attorneys' use of a single legal interpretation of the establishment clause, the defense attorneys analyzed the prayer banner under each of the most influential current understandings of the establishment clause. They portrayed the matter as a display case, rather than a prayer case, in the hopes that a federal judge would recognize the passivity and historical worth of the banner as signs of its constitutionality.

US District Court Senior Judge Ronald R. Lagueux heard *Ahlquist v. Cranston* on October 13 and 14, 2011, after a thorough review of the evidence and briefs presented by both sides. After fifteen minutes of oral argument by the plaintiff, Lagueux decided that, before making any ruling on the constitutionality of the banner, "he needed to see it in its context himself".[307] He, along with a US Marshal and attorneys Labinger and Cavanagh, went to Cranston West to examine the banner and its surroundings. Lagueux's desire to contextualize the banner demonstrates the subtle distinction between a prayer case and a display case. The content of the prayer alone would have clearly classified the controversy as a prayer case, but the auditorium's other murals created strong potential for the issue to be understood as a display case. At the conclusion of the hearing, Ahlquist believed that her case was "very strong" and appeared confident that Lagueux would rule in her favor.[308]

As Jessica Ahlquist and the Cranston School Committee awaited Judge Lagueux's decision, another religious controversy erupted in Rhode Island. In December 2011, Governor Lincoln Chafee, then an independent, lit a symbol of the season he referred to as a "holiday tree" at an annual state ceremony.[309] In response, several hundred people mounted a protest at the Rhode Island State House, infuriated at the governor's attempt to secularize an important Christian holiday. This incident, while not of any particular significance, illustrates the friction between religion and

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[304] Defendants' Brief at *40.
[305] Defendants' Brief at *40.
[306] Defendants' Brief at *43.
[307] Alexandra Crowley, "Hearing Today for Cranston School Prayer Banner Case," *ABC 6 Providence*, ABC News, October 14, 2011, accessed June 11, 2013, http://www.abc6.com/story/15685660/hearing-today-for-cranston-school-prayer-banner-case.
[308] Crimaldi, "Jessica Ahlquist".
[309] Jon Street, "Gov. Lincoln Chafee: It's Not 'Tradition' to Call It a Christmas Tree," *CNS News*, December 5, 2012, accessed August 19, 2013, http://cnsnews.com/news/article/gov-lincoln-chafee-its-not-tradition-call-it-christmas-tree.

secularism, church and state, that is prevalent in Rhode Island. New England, the "least religious region of the country", is not an area frequently associated with religious disputes. However, Rhode Island's unique demographic identity as "the nation's most Catholic state" and the influence of practicing Catholics in state and municipal politics often leads to religious clashes that would not occur elsewhere in New England.[310] *Ahlquist v. Cranston* was the descendant of *Lemon v. Kurtzman, Lynch v. Donnelly,* and *Lee v. Weisman*, all of which featured similar conflicts between religious and nonreligious Rhode Islanders.

On January 11, 2012, the plaintiff and defendants in *Ahlquist v. Cranston* learned that Judge Lagueux understood the Cranston West prayer banner case to be a prayer case, in the same vein as *Engel v. Vitale*. Lagueux granted the plaintiff's initial motion for preliminary injunction by ordering a permanent injunction: "the immediate removal" of the prayer from Cranston High School West.[311] He referred to the words of Superintendent Peter Nero, who described "his life-long commitment to his religious faith" at the March 7, 2011 special meeting, and School Committee member Frank Lombardi, whose opening comments referenced his identity as "a practicing Catholic", to establish the religious intent of the prayer itself and of the decision to preserve it.[312] Lagueux described the atmosphere at School Committee meetings pertaining to the banner as similar to "a religious revival", a factor that was greatly influential in his decision.[313] The Cranston School Committee, when handling debate about the prayer banner, "became excessively entangled with religion", in no small part because of the passionate, obviously religious, majority that pressured the committee to overlook considerations of religious minorities' constitutional rights.[314] One must wonder what the ruling might have been if the public hearings held by the School Committee and the comments of committee members had been more tempered in tone.

Lagueux also found that the content of the prayer and the circumstances of its arrival at Cranston West violated the establishment clause. He wrote that nothing could make the prayer anything other than what it was: "a prayer, and a Christian one at that".[315] Lagueux, like the defense counsel, applied the *Lemon* test to the case. Unlike the defense counsel, the judge found evidence that the prayer banner did not satisfy any prong of the *Lemon* test. The prayer itself, when drafted, and the prayer mural "were clearly religious in nature", as they included a supplication to the Christian God and a closing 'Amen'.[316] Their effect, even after Cranston West students no longer were required to recite the prayer, was to imply an endorsement of Christianity and of religious practice generally by school administrators and the city of Cranston. The relevant School Committee meetings demonstrated excessive entanglement, because school committee members' votes were, in many cases influenced by their own faiths, and because citizens encouraged government officials to make a certain decision on

[310] Goodnough, "Student Faces Town's Wrath".
[311] *Ahlquist v. Cranston*, 11 F. Supp. 138 (2012) at *2.
[312] *Ahlquist v. Cranston*, 11 F. Supp. 138 (2012) at *12.
[313] Chaput and Shea, *Rhode Island*, 12.
[314] *Ahlquist v. Cranston,* 11 F. Supp. 138 (2012) at *32.
[315] *Ahlquist v. Cranston*, 11 F. Supp. 138 (2012) at *29.
[316] *Ahlquist v. Cranston,* 11 F. Supp. 138 (2012) at *28.

religious grounds. Tradition, Lagueux wrote, has value, but some traditions "must be put to rest as our national values and notions of tolerance and diversity evolve".[317]

The decision caused uproar across the city of Cranston. Soon after, Superintendent Nero was quoted as saying that, after consulting with the city' attorneys, he was "delaying removing the prayer" despite the ease of doing so and the court's order.[318] Plaintiff attorney Labinger commented that the city's attempt to "reject and trivialize the religious message" of the prayer had failed, and was a disservice to the prayer's opponents and supporters.[319] School Committee Chairwoman Andrea Iannazzi said in an interview that she was "disappointed in the end result" of the lawsuit.[320] The School Committee now had to decide whether or not to appeal Judge Lagueux's findings, in the hopes that the Supreme Court might choose to hear the case and reverse the decision.

Cranston West students and angry adults threatened Jessica Ahlquist over social media platforms. Ahlquist received an escort from the Cranston Police to ensure her safety during the school day in the weeks immediately following Lagueux's ruling.[321] During an appearance on *The Jon DePetro Show*, a popular talk radio show in Rhode Island, State Representative Peter J. Palumbo, a Democrat from a Cranston district, referred to Ahlquist as "an evil little thing".[322] Three local florists refused to deliver a flower arrangement from the Freedom From Religion Foundation, a national atheist group, to Ahlquist's home.[323] Some public leaders spoke in support of Ahlquist and condemned the attacks against her. Cranston Mayor Allan Fung "defended her right to free speech" and her right to attend school without being harassed.[324] Bishop Thomas J. Tobin, of the Roman Catholic Diocese of Providence, admonished those who vilified Ahlquist and asked the faithful to pray for her future well-being and success.[325] Cranston School Committee member Stephanie Culhane, who had voted to remove the banner in March 2011, said in an interview that she was "disgusted by the comments" made about Ahlquist and, as a mother, was appalled by the level of hatred shown towards a young girl.[326] Other officials did not support the enmity towards Ahlquist, but also did not speak against it.

Ultimately, the banner was removed from the Cranston West auditorium on March 5, 2011. Several local institutions, including Immaculate Conception Catholic Regional School, a Catholic K-8 school in Cranston, offered to give the banner a place in their facilities. However, the city chose not to accept any of these proposals. At present,

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[317] *Ahlquist v. Cranston*, 11 F. Supp. 138 (2012) at *30.
[318] "Judge Rules".
[319] "Judge Rules".
[320] "Judge Orders Prayer Banner Removed," *Providence Journal*, January 12, 2012.
[321] Goodnough, "Student Faces Town's Wrath"
[322] Jon DePetro, Interview with State Representative Peter J. Palumbo, *The Jon DePetro Show*, WPRO, January 12, 2012, accessed August 20, 2013, http://wpro-am.fimc.net/Article.asp?id=2371375&spid=18074.
[323] Goodnough, "Student Faces Town's Wrath".
[324] Jordan, "Cranston-School".
[325] Jordan, "Cranston-School".
[326] Jordan, "Cranston-School".

the banner is in storage in an undisclosed location, invisible to the public. The city plans to eventually donate it to the Cranston Historical Society, at a time when the case is further in the past and does not evoke such strong reactions.[327] A number of locally owned business, including restaurants, bakeries, and boutiques, displayed a photograph of the Cranston West mural after the ruling. Some incensed residents put signs supporting the banner in their front yards, visible to passersby. Many of these images remain, a silent show of dismay over the judge's ruling and disappointment in the growing secularism of Rhode Island and of the United States.

In the week after Lagueux decided *Ahlquist v.* Cranston, a poll on the *Providence Journal* website asking readers "Did Judge Lagueux get it right in ordering that Cranston West prayer banner be removed?" produced 17856 responses. 68 percent of those who answered agreed with the ruling. A second question, "Do you think RI needs more or less separation between church and state?" gained 14528 answers. Of these, 74 percent believed more separation of church and state was needed.[328] The readership of *The Providence Journal* is based primarily in Rhode Island and southeastern Massachusetts. The poll may indicate a shift in Rhode Island's church-state trends coming in the future, as more and more people reject establishment clause controversies such as *Ahlquist v. Cranston*. However, the public hearings about the prayer banner show a strong, passionate group of citizens committed to preserving religion in the public sphere. Clearly, Rhode Island's emerging conflict between religion and secularism will continue to be fought in the immediate future. Rhode Island is only one example of the emotional and personal connections that characterize establishment clause questions. The public's response to *Ahlquist v. Cranston* and the influence of the public on the School Committee illustrate the power of reactions to color what can often seem to be cut-and-dry legal issues.

The Cranston School Committee held its regularly scheduled January meeting on January 17, 2012, only a week after Judge Lagueux's ruling. Although the prayer banner was nowhere on the agenda for the meeting, members of the public were eager to comment on the decision and the possibility of an appeal. Jessica Ahlquist was in attendance; predictably, she asked the School Committee not to appeal. She reminded the members that, as a conservative Catholic, Judge Lagueux shared the personal faith of many committee members and asserted that the case had not been "about religion, but about the constitution".[329] Peter Paolella, a lifelong Cranston resident, claimed that Ahlquist was "a pawn" of the ACLU and that the city had a duty to fight the decision.[330] Other citizens suggested that the matter of the prayer banner should not have been settled by the courts, but by Cranston voters in a public referendum.

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[327] Associated Press, "Prayer banner at RI high school taken down," *CNS News*, March 5, 2012, accessed June 11, 2013, http://cnsnews.com/news/article/prayer-banner-ri-high-school-taken-down.
[328] Richard C. Dujardin, "Federal judge orders 'immediate removal of Cranston school prayer mural; appeal unlikely," *Providence Journal*, January 11, 2012, accessed August 20, 2013, http://news.providencejournal.com/breaking-news/2012/01/federal-judge-o-1.html.
[329] Cranston School Committee, Minutes of Cranston School Committee Meeting, Meeting of January 17, 2012.
[330] Cranston School Committee, Meeting of January 17, 2012.

The School Committee's agenda for its regular February meeting included a vote on whether or not to appeal in *Ahlquist v. Cranston.* Attorney Joseph Cavanagh, Jr. spoke at this meeting. He explained his hope that the US District Court would understand the case as a display case, not a prayer case, and that the judge had seen the words "School Prayer" and analyzed the matter as a prayer case. He also detailed the 173,000 dollars in legal fees the victorious ACLU expected the city to fund and the legal expenses that would accrue through the appeals process. Cavanagh estimated that the city would risk about half a million dollars by pursuing an appeal.[331] In an interview, Joseph Cavanagh, Jr. articulated his reasons for taking on the prayer banner case. From a legal perspective, Cavanagh knew that the chances of the city winning the ACLU's challenge were slim. However, he believed that representing the city was "the right thing to do", because religion and spirituality play a special role in the life, law, and culture of the United States. Additionally, Cavanagh hoped that the case would turn public attention to the numerous challenges to religion, some justified under the Constitution and some made for the sake of political correctness, that saturate American society in the present day. Cranston West students, in Cavanagh's opinion, had learned a valuable lesson about the status of church and state in the 21st Century.[332]

Public commentary from Cranston residents was varied, with many expressing financial concerns about an appeal and others asserting that the city should go forward with an appeal on principle. State Representative Charlene Lima told members that "the majority of the residents of Cranston" wanted to see the Committee appeal.[333] Steven Findley spoke in favor of the appeal, saying, "if we ever forget we are one Nation under God, then we are one Nation gone under".[334] David Sears, a Cranston West student, told the assembly that he is "a Catholic first and all else secondly" and then claimed that the prayer banner did not enforce religion.[335] Jeannine Freeborn asked the members not to appeal based on Mr. Cavanagh's explanation of the next steps and the financial factors. Paula Goldberg said that she was offended by repeated assertions that "this is a Christian nation" and was not in favor of an appeal.[336] Domenic Fusco cited the Cranston School Department's budget deficit and financial straits as the reason he did not support an appeal. A larger number of residents spoke against the prospect of an appeal than had encouraged the School Committee to remove the banner in 2011.

In a 5-2 vote, the Cranston School Committee chose not to appeal Judge Lagueux's decision in *Ahlquist v. Cranston*. Committee members Frank Lombardi and Michael Traficante voted for an appeal. Lombardi did not refer to his own morality and religious views, as Judge Lagueux noted he had in March 2011. Rather, he voted for the appeal because the prayer banner was "a traditional historic monument that has bothered no one for 58 years".[337] Traficante prefaced his vote for the appeal by saying that "this

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[331] Cranston School Committee, Minutes of Cranston School Committee Meeting, Meeting of February 16, 2012.

[332] See Appendix 3.

[333] Cranston School Committee, Meeting of February 16, 2012.

[334] Cranston School Committee, Meeting of February 16, 2012.

[335] Cranston School Committee, Meeting of February 16, 2012.

[336] Cranston School Committee, Meeting of February 16, 2012.

[337] Cranston School Committee, Meeting of February 16, 2012.

country was built on Christian principles . . .a diverse God is part of our culture" and that the prayer banner was "secular in nature and it's not religious".[338] Committee Chair Andrea Iannazzi and members Stephanie Culhane, Janice Ruggieri, Paula McFarland, and Steven Bloom voted against the appeal. Each of these individuals referred to fiscal matters as at least part of the reason for their vote. Culhane could not justify spending money "earmarked for the education of our students" on any cost other than those directly related to education.[339] McFarland felt that the city did not have half a million dollars to spend on an appeal effort and that the banner ruling was simply a reminder that "times have changed".[340] Iannazzi, Ruggieri, and Bloom echoed these sentiments. The School Committee did not file an appeal in *Ahlquist v. Cranston*. Judge Lagueux's ruling and permanent injunction in the case stood, and the Cranston High School West School Prayer mural was removed in early March 2012.

CONCLUSIONS

The First Amendment to the Constitution of the United States reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances". This sentence, particularly the two religious clauses it contains, has been the subject of judicial scrutiny since the Founders chose to adopt it. The establishment clause, originally interpreted to indicate that the government could not create a national church, has been a particularly challenging area of legal thought since the mid-20th Century. *Engel v. Vitale*, *Lemon v. Kurtzman, Lynch v. Donnelly,* and *Lee v. Weisman* all present a slightly different understanding of the establishment clause by the Supreme Court. The standard of strict separation (*Engel*), the three-pronged purpose-effects-entanglement test (*Lemon)*, the non-endorsement rule (*Lynch),* and the coercion test (*Lee)*, all seek to prevent improper interaction between church and state, but offer varied benchmarks by which to judge propriety, meaning that a government action or law can be constitutional under one rule and unconstitutional under one of the others.

The establishment clause has often been connected to the role religion should play in education. *Engel v. Vitale* forbade the spoken prayer that was commonplace in American public schools. *Lemon v. Kurtzman* barred public funding for parochial schools. *Lee v. Weisman* raised questions about the acceptability of religious traditions by ending the practice of offering a benediction at public school graduation ceremonies. The American public claims to accept and support the principle of separation of church and state, but a majority of Americans, when questioned, will admit to wishing prayer and religion were constitutionally acceptable in public schools. Establishment clause issues are difficult to handle properly, because they inevitably confront an individual or group's most intimate beliefs. Religious believers cherish their faith and make it central to their lives, public and private. Nonbelievers equally value their opinions about

[338] Cranston School Committee, Meeting of February 16, 2012.
[339] Cranston School Committee, Meeting of February 16, 2012.
[340] Cranston School Committee, Meeting of February 16, 2012.

religious belief, and desire the same respect that religious traditions receive in the public sphere. *Ahlquist v. Cranston* demonstrates the numerous challenges an establishment conflict forces upon an individual, a community, and a government.

The legal reasoning behind *Ahlquist v. Cranston*, on the part of the plaintiff, the defendants, and the judge, accords with some version of establishment clause interpretation articulated by the Supreme Court over the course of the 20th Century. The decision, while not at all surprising, could have been rendered in the School Committee's favor if Judge Lagueux had chosen to examine the case from another interpretive angle. The case was representative of Rhode Island's unique establishment clause history, having produced three Supreme Court establishment cases. The cultural debate between religious Rhode Islanders, primarily Roman Catholics, and non-religious citizens ignites over seemingly small questions, such as the presence of a passive prayer banner at a local high school. The passion behind supporters and opponents of the banner and the impact public reaction had on decisions made by the Cranston School Committee show that establishment clause conflicts are cultural as well as legal, and have ramifications for a community beyond a court ruling. The public reaction to and circumstances and consequences of *Ahlquist v. Cranston* illustrate an establishment clause case in real time and its powerful impact on Jessica Ahlquist, Cranston High School West, the Cranston School Committee, the city as a whole, and the state of Rhode Island.

APPENDIXES

Appendix 1: The Cranston High School West School Prayer Banner.

Richard C. Dujardin, "Federal judge orders 'immediate' removal of Cranston school prayer mural; appeal unlikely," *Providence Journal,* January 11, 2012, accessed August 19, 2013, http://news.providencejournal.com/breaking-news/2012/01/federal-judge-o-1.ht

Appendix 2: The Christmas crèche debated in *Lynch v. Donnelly*

"Lynch v. Donnelly," *Voices of American Law*, Duke University Law School, accessed August 19, 2013, http://web.law.duke.edu/voices/gallery?id=166&pil=8.

Appendix 3: CD recording of author's interview with *Ahlquist v. Cranston* defense counsel Joseph Cavanagh, Jr, July 19, 2013.

Electoral Rules and Public Goods: Outcomes in Brazilian Municipalities

Ziandrea Bauer

This paper investigates the ways in which plurality and majority systems impact the provision of public goods using a regression discontinuity in Brazilian municipality election laws. My main hypothesis is that municipalities with majority systems, which are more competitive according to theories such as Duverger's law, would have higher levels of public good provision than municipalities with less competitive plurality systems. The results of this study lacked the statistical significance needed to establish definitive conclusions, but general trends suggest that majority systems do have a positive impact on the provision of public good services in Brazilian municipalities. Additionally, this study finds that two previously uncontrolled for variables - minority percentages and the percentages of households in the lowest income bracket - call into question the "as-if-random" nature of the regression discontinuity, which provides interesting questions for further research.[*]

PART I: INTRODUCTION

Electoral rules are considered important in the study of democracy because they are commonly assumed to condition the chances of success of competing parties or candidates.[341] Electoral rules shape democracies by determining which parties are elected and how many parties compete for seats, all of which can have important implications for the functioning of democracy. For example, Blais and Carty (1991) find that the average number of parties for each type of electoral system is five for plurality, seven for majority, and eight for proportional representation (PR), showing that

[*]I would like to thank my advisor, Professor Rachel Brulé, for her insight, guidance and support, and my teaching assistant, Maria Carreri, for her patience, time and guidance during this project.

[341] LeDuc at al., 1996

electoral rules do indeed have major implications for how democracies function.[342] The unanswered question is this: how do different electoral rule systems impact their citizens' quality of life? To answer this I look at a discontinuity found in Brazil's mayoral election laws, where municipalities with over 200,000 registered voters use two-round majority systems and municipalities below 200,000 use one-round plurality systems. This discontinuity creates an as-if-random sample made from the municipalities close to the 200,000 threshold, as one can expect these municipalities to be similar in everything except for the electoral rules mandated by the exogenous laws. Using this as-if-random sample, this paper investigates the ways in which plurality and majority systems impact the provision of public goods as well as the number of effective candidates and parties. Additionally, this paper explores how the number of effective candidates and parties impact the provision of public goods, specifically literacy, school enrollment, and sewage provision.

My main hypothesis is that municipalities with majority systems, which are more competitive according to theories such as Duverger's law, would have higher levels of public good provision than municipalities with less competitive plurality systems. The results of this study lacked the statistical significance needed to establish definitive conclusions, but general trends suggest that majority systems do have a positive impact on the provision of public good services in Brazilian municipalities. Additionally, this study finds that two previously uncontrolled for variables - minority percentages and the percentages of households in the lowest income bracket - call into question the "as-if-random" nature of the regression discontinuity, which provides interesting questions for further research.

The next section contains an overview of past literature on electoral rules, competition and public goods outcomes. In Part III the causal model and hypothesis for this paper are discussed, which is followed by a description of the data in Part IV. Part V contains this paper's research design as well as the results from the empirical analysis. Part VI contains my closing thoughts.

PART II: LITERATURE REVIEW

Many scholars (Baum and Lake, 2003; Lake and Baum, 2001; Deacon, 2009) have found a positive relationship between public good outcomes, such as life expectancy, infant mortality, literacy and school enrollment, and democracy as compared to dictatorship. Baum and Lake find that democracy causes higher levels of public health and education but that public health and education do not cause democracy, thus establishing the direction of causation.[343] They theorize that the low entry costs to participating in government in democracies creates high contestability that incentivizes politicians to provide public goods.[344] [345] Deacon suggests that in order to stay in power, democratic leaders must satisfy a large fraction of the population. This is most

[342] LeDuc at al., 1996
[343] Baum and Lake, 2003
[344] Lake and Baum, 2001
[345] Baum and Lake 2003

efficiently done through providing public goods, which have large economies of scale. Both theories indicate the important role elections play in creating better public goods outcomes for citizens of democracies as compared to citizens under autocracies. Given these findings, it is important to understand the ways in which elections within democracies can impact public goods provision.

To understand why electoral systems would impact public goods provision, it is first important to understand how they impact democracies, specifically via the party system and competition levels. Duverger's Law, the cornerstone of electoral theory, states that single-ballot plurality systems will create a two party system at the district level, whereas two-round ballots and proportional representation (PR) create multiparty systems.[346] Lijphart and Fujiwara argue that plurality systems create incentives for voters to vote strategically, whereas two-round majority and PR do not. Plurality systems cause voters to desert third place candidates to vote for one of the top two candidates in order to not waste their vote, effectively reducing the average number of parties from three to two.[347] In two-round majority systems, voters can still vote with their true preferences in the first round because they can vote strategically in the second. This encourages parties to enter candidates in the first round, in the hopes of making it to the second. Fujiwara used the same discontinuity in Brazilian electoral laws to test Duverger's law. Fujiwara found that, as Duverger predicts, dual ballot majority systems have a decrease in voting for the top two vote-receiving candidates and an increase in voting for lower placed candidates.[348] We can therefore expect to find that plurality rules will result in two-party systems and majority rules will result in multiparty system. The number of effective parties and candidates matters because they can be used as measurements of competitiveness, with higher levels of parties and candidates indicating higher levels of electoral competition. However, the impact of competition on governmental performance is still much debated.

One theory that states that multiparty systems, and the high levels of competition they create, can provide better public good outcomes.[349] Greater political competition is often assumed to be associated with increased government responsiveness because it puts pressure on politicians to provide public goods in order to stay in power.[350] Electoral competition decreases candidates' chances of being elected, thus in order to sway voters candidates must either provide more public goods if they are in office or promise to provide more public goods if they are not in office. Much like Deacon, Besley and Burgess theorize public goods provision as a way for politicians to win votes in competitive elections. In their study of state level politics in India, they find that with the presence of competition created by high numbers of newspapers, politicians are more responsive and provide more visible and politicized public goods, such as food distribution, to their constituents. The levels of less visible

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346 Cox, 1997; Fujiwara, 2011; LeDuc et al., 1996; Lijphart, 1995

347 Lijphart, 1995, P. 68

348 Fujiwara, 2011

349 See Milesi and Ferretti (2002), Gerring et al. (2005) and Lizzeri and Persico (2001) for more on the advantages of non-plurality systems.

350 Besley and Burgess, 2002, p. 1441

public goods, such as calamity relief, were not as sensitive to different levels of competition, suggesting that politicians only provide goods that will garner them positive public attention and ultimately electoral support. They also provide more visible public goods closer to elections, further demonstrating that public goods provision is electorally driven.

Chamon et al. look at the relationship between electoral rules and democratic outcomes by using this Brazilian discontinuity and their finding support the theory that competition is the mechanism through which electoral rules impact government performance. They found that the possibility of a runoff election in two-round majority systems lead to increased competition, in terms of the effective number of candidates and the share of votes to lower candidates. Increased competition resulted in increased investment, specifically in the number of schools built, and less current spending, especially in personnel expenses.[351]

However, there is an opposing theory that states that plurality systems with lower levels of competition can provide better public good outcomes than multiparty systems. Mainwaring argues that at the national level, Brazil's extreme multiparty system[352] and lack of party discipline have made it difficult for presidents to enact the policy they would like.[353] Because of the high number of parties, the president's party often has a small share of seats in the National Congress, creating executive and legislative gridlock. He argues that most of Brazil's electoral rules, including the two-round majority system, encourage high levels of multipartyism at both the state and national levels.[354] The literature suggests that municipalities in Brazil using plurality systems, through their increased efficiency and accountability, will have better public good outcomes.

Cleary's study on government performance in Mexico, is supportive of the theory that competition is not the primary driver of public goods. His study finds no correlation between competition and municipality government performance in Mexico. The study instead finding that an engaged citizenry impacts the quality of government.[355] However, Cleary uses literacy and poverty rates as two measures of political participation. These are confounding variables, since both literacy and poverty rates are impacted by the primary dependent variable: government performance. This close relationship between the main independent and dependent variables calls into question the results of his research, as variations in literacy and poverty rates may be caused by a different, omitted variable, such as competition.

Ferraz and Finan also explain different municipality outcomes through mechanisms other than electoral competition, specifically looking at the impact of constitutionally mandated salary caps based on population for municipality legislators in Brazil.[356] They find a positive correlation between higher salaries and better provision

[351] Chamon et al., 2010

[352] An example of this extreme multipartism is the 1990 Brazilian Elections, where nineteen parties won seats to the Chamber of Deputies (Mainwaring, 1999, p. 106)

[353] Mainwaring and Shugart, 1997

[354] Mainwaring, 1999, p. 100, 128

[355] Cleary, 2007

[356] Ferraz and Finan, 2009

of health and education. The threshold used in this regression discontinuity is municipalities with over 200,000 registered voters – the point at which the electoral system switches from plurality to majority systems. Because regression discontinuities are strongest near the threshold, I will examine a smaller subset of municipalities that fall within the same salary bracket.[357] Even though Ferraz and Finan found a positive relationship between salary and public goods, which normally would need to be controlled for, I will not need to control for salary because they are already at the same level.[358] This means that any variation present is a result of different electoral systems and their competiveness rather than salary differences.

Chamon et al. and Fujiwara offer theories formed from the Brazilian municipality-level experience, which is the unit of analysis of this paper, but other major theories, such as Mainwaring's argument, are at the national level. However, the Brazilian federalism allows municipalities enough autonomy that they, in many ways, act as small scale versions of the national political system. The Brazilian Constitution grants municipalities large amounts of autonomy, giving them constitutional power to approve their own laws and collect taxes.[359] Powerful mayors, who receive funds from their state and the federal government to provide for the public welfare, govern the municipalities. Municipalities also have legislative branches that serve as checks to mayors' powers. This means that while mayors have the means to enact their own policies, they still must answer to legislators much like the Brazilian president does. Additionally, it is worth noting that Duverger's law is strongest empirically at the district level, which in this case is the municipality, as each municipality is a single electoral district for the mayoral contest.[360]

Mainwaring and Chamon et al. have contrasting views on the impact of competition, measured in this paper as the number of effective candidates and parties, on democratic outcomes. This paper will endeavor to add clarity as to which system provides the most effective distribution of public goods in Brazil so that we can better understand the ways in which electoral systems can have the desired impact on citizens' lives.

PART III: CAUSAL MODEL AND MAIN HYPOTHESES

Duverger's law states that plurality systems will create two-party systems, whereas majority and proportional representation will create multiparty systems.[361] The multiple rounds in majority systems give more parties incentives to run because parties merely need to receive a second place finish to compete in the second round of voting. Multiparty electoral systems are therefore likely to be more competitive because more candidates and parties are competing for votes.

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[357] I will specifically be looking at municipalities with populations between 125,000 and 275,000.
[358] See Article 29 VI of the Brazilian Constitution for the list of population based salary brackets.
[359] "The Constitution of the Federative Republic of Brazil" 2010, Articles 29-31
[360] Cox, 1997, pp.70, 182
[361] Cox, 1997; Fujiwara, 2011; LeDuc at al., 1996; Lijphart, 1995

It is generally expected that increased competition, which includes higher numbers of effective candidates and parties, incentivizes politicians to increase public good provision.[362] With every additional effective candidate in an election there will be a smaller percentage of votes going to each candidate, thus every additional vote gained becomes more valuable to the candidate. Because each vote is more valuable to politicians in competitive elections, they will provide more public goods. Politicians use public goods rather than individual transfers because they are visible ways for politicians to show that they are providing for the interests of their electorate and because the economies of scale of public goods make them more efficient for larger populations. Therefore, we can expect politicians to provide visible public goods, such as food distribution in Besley and Burgess's study or school enrollment in the Brazilian case, when they rely on winning votes from a large section of the population to stay in office.

As previously stated, the primary hypothesis is that municipalities with majority electoral rules will have better public goods outcomes as compared to plurality systems. This hypothesis is supported by numerous researchers, such as Chamon et al., Gerring et al., and Lizzeri et al. My second hypothesis is that as the threshold between plurality and majority electoral rules is crossed, the number of effective candidates and parties will increase. This hypothesis is supported by the majority of literature on the effects of different electoral systems on party systems. My third hypothesis, which distinguishes this study from Chamon's study that looked at fiscal policy outcomes, is that as the number of effective candidates and parties increases, the rates of public goods provision will increase. This supports Besley and Burgess's findings of a positive relationship between electoral competition and public goods in India.

My causal model states that politicians will provide public goods to signal to the electorate that they are providing for their interests and therefore should be elected or reelected. However, if an incumbent is not running for reelection, there may not be any incentive for him or her to provide public goods. There still may be incentives for politicians to maintain public support as they may have national aspirations or because they do not want to hurt their party's chances in the subsequent elections. It is possible that a stronger link between elections and public good outcomes would be seen if you analyzed the different levels of public goods provision between incumbents who are seeking reelection and those that are not. Unfortunately, time constraints will limit this research to investigating how competition impacts all politicians, regardless of their future electability.

PART IV: DESCRIPTION OF DATA

The unit of analysis is the municipality election year. Brazil has over 5,000 municipalities that follow the same legislation described above, but I limit my analysis to municipalities with between 125,000 and 275,000 voters, following the example of both Chamon et al. and Fujiwara. In total, there are approximately 100 municipalities that fall within this range. The election data includes the municipality, candidate name

[362] Besley and Burgess, 2002

and party, the percentages of the distribution of votes, and total votes for each candidate. Data from the 2000, 2004, 2008 and 2012 elections will be used to measure competition, expanding the number of important observations to over 400. This data was found online at Brazil's Tribunal Superior Eleitoral.[363] The number of voters registered in each municipality for every election was also taken from this website, and this data will be used to determine which electoral system each municipality used during a given election.

The data on public goods outcomes comes from Brazil's 2000 and 2010 censuses, found on the website of the Instituto Brasileiro de Geografia e Estatística.[364] The data contains information on sewage, school enrollment for multiple age groups, literacy rates, racial breakdowns and income levels for each municipality. The census data has some missing information, but most of the missing data is generally for municipalities smaller than the populations I am most interested in. I weighted the census data by years before or after a given census in order to generate separate public good values for each year of interest.[365] The race variable is called " minority" and it is the sum of the percentage of the municipality's population that is black, mixed, Asian or indigenous. The poverty variable is the percentage of households in a municipality with income is less than ¼ the minimum wage, which is the lowest possible income bracket measured by the Brazilian census.

Table 1 contains the summary statistics for all my main independent and dependent variables. The main independent variable for my first two regressions is a majority variable that takes the value of one if the number of registered voters in the municipality is above 200,000, which means it uses the two-round majority system rather than the plurality system. For
my first hypothesis, the important public goods variables are literacy rate, which is the literacy rate by municipality for each election year, the school enrollment rates for three ages groups (zero to 14, 15 to 17, 18 to 24), and the variable no sewage, which is the percentage of households without sewage in a municipality.

TABLE 1: SUMMARY STATISTICS

Variable	Observations	Mean	Std. Dev.	Minimum	Maximum
Total Population	59,050	58,796.56	387,940.2	179	11,253,503
Registered Voters	60,364	41,275.53	280,014.9	1,000	8,619,170
Dependent Variables					
Literacy Rate	59,047	83.50	10.25	40.90	99.2
No Sewage	57,111	11.79	15.26	0	99.2

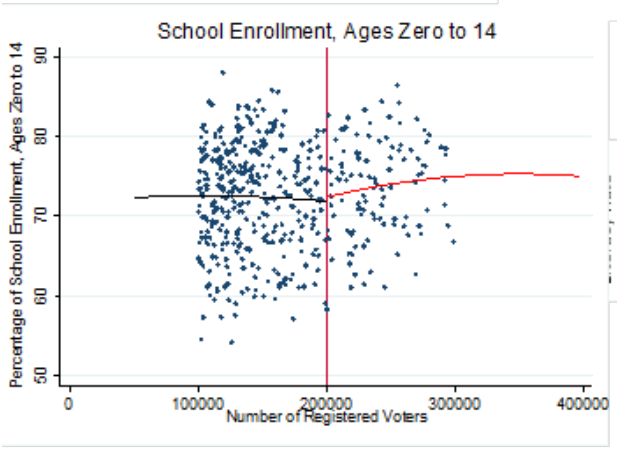
[363] Election data website: http://www.tse.jus.br/eleicoes/eleicoes-anteriores

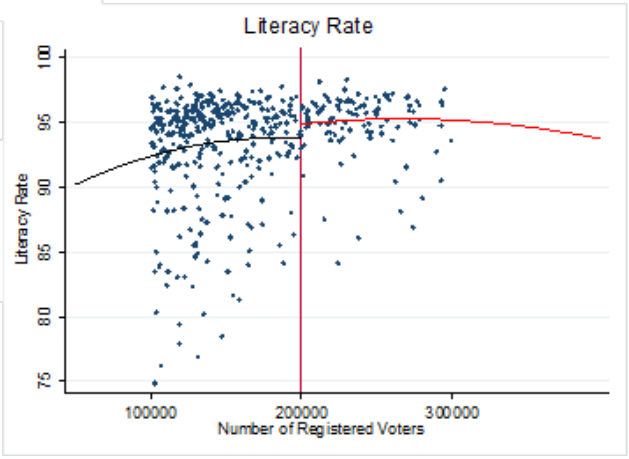
[364] Census website link: http://www.ibge.gov.br/home/estatistica/populacao

[365] For 2004, I generated census data with this equation: Census2004 = (.6xCensus2000 + .4xCensus2010), with Census meaning the dependent variable of interest from that year. For 2008, the equation was: Census2008 = (.2xCensus2000 + .8xCensus2010). Census 2010 was coded as Census 2012 in order to match the election cycle.

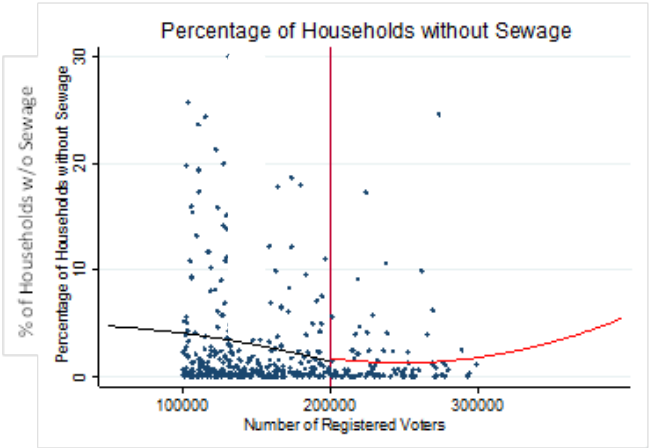
Enrollment Rates					
Age Zero to 14	59,471	70.01	8.01	13.63	93.07
Age 15 to 17	59,177	77.76	8.60	16.87	100
Age 18 to 24	44,286	51.49	22.49	2.10	100
Effective Candidates	60,356	2.19	0.71	0.33	12.46
Effective Parties	45,282	2.35	0.69	0.60	6.52
Control Variables					
% Poverty	59,340	18.21	14.05	0.0	76.90
% Minority	59,570	50.79	24.46908	0.0	99.1403

Graphs 1-3





$$N_p = \sum_1^x \frac{1}{s_i^2}$$

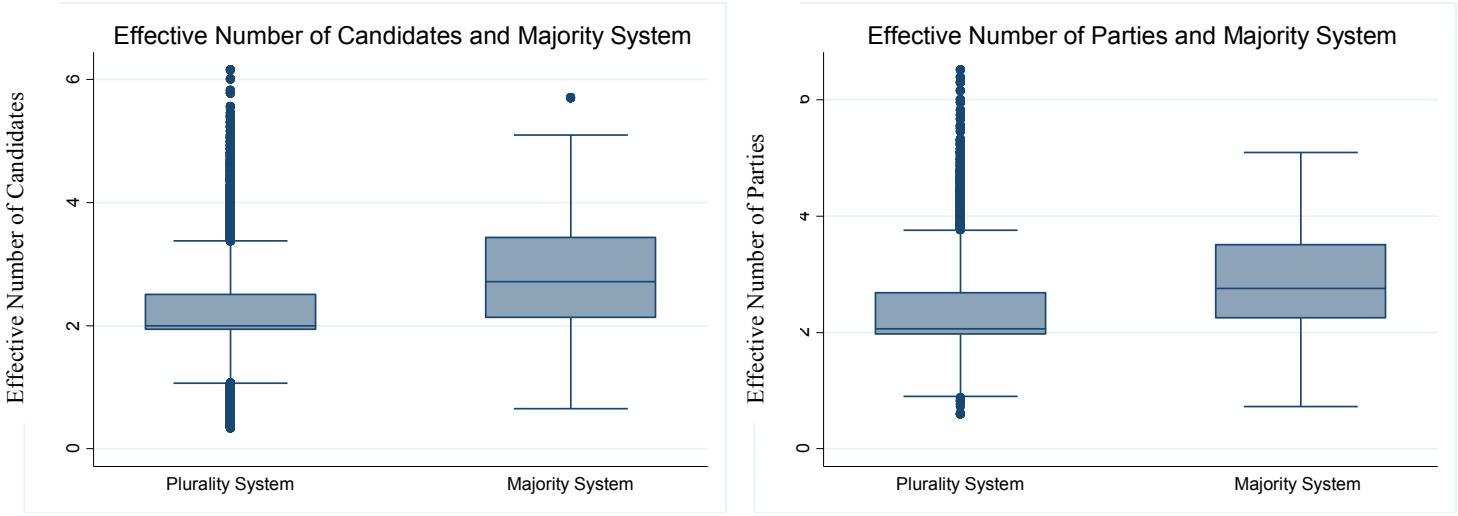


As Graphs 1-3 show, all three variables show a substantial change at the threshold, such as the jump in literacy rates, or the different trendlines before and after the threshold, as seen in the Enrollment and No Sewage graphs. These intial findings support my hypothesis that there is a change in public goods outcomes at the same point at which the electoral system changes. There are some missing observations, which are due

mainly to missing data in the orginial censuses, but these missing observations generally make up less than 5% of the data.[366]

For my second hypothesis, the main independent variable is again the majority dummy variable, which takes the value of one if the municipality is a majority system and zero if the municipality has a plurality system. The dependent variables are the laakso variable, which is the number of effective candidates, and the laakso party variable, which is the number of effective parties. Both variables were calculated using the formula for effective parties proposed by Laakso and Taagepera (1979). The formula is: $= \sum_1^x \frac{1}{s_i^2}$ where N is the number of parties that received at least one vote and S_i is each party's proportion of all votes. Graphs 4-5 show that there is a noticeable jump in the mean number of effective candidates and parties, which supports my hypothesis that majority systems would have a higher number of effective candidates and parties.

GRAPHS 4-5



As show in Table 1, the effective party variable has significantly less observations than the effective candidates variable, with approximately 25% of the data missing. This is due to the fact that the 2012 data for the nominal votes was unusable, which prevented me from calculating the effective number of parties for that year. I decided to run two regressions, one with the effective number of candidates as the main dependent variable and another with the effective number of parties as the main dependent variable, in order to have an alternative measure of competition due to the missing observations for the effective number of parties.

[366] The enrollment rate variable, Zero to 14, is missing 1.5% of the observations, 15 to 17 is missing 1.9% of the observations and 18 to 24 is missing 26% of the observations. The high number of missing observations in the 18 to 24 age range is due to highly irregular data that created enrollment rates for this age group that were above 100, which were then dropped. Because this age group has so few observations, I put more trust in the findings of the first two age groups. Literacy rate is missing 2.18% of the data and No Sewage is missing 5.4% of the data. These low levels of missing data should not significantly impact my results.

My third hypothesis uses the public welfare outcome variables (literacy, school enrollment, and no sewage) as the main dependent variables. It uses the interaction between majority dummy variable and the laakso effective party and candidate variables as the independent variable. The presence of the majority system will be used to estimate political competition with this estimation being used to determine how political competition, as determined by majority rule, impacts public goods outcomes.

PART V: RESEARCH DESIGN AND EMPIRICAL ANALYSIS

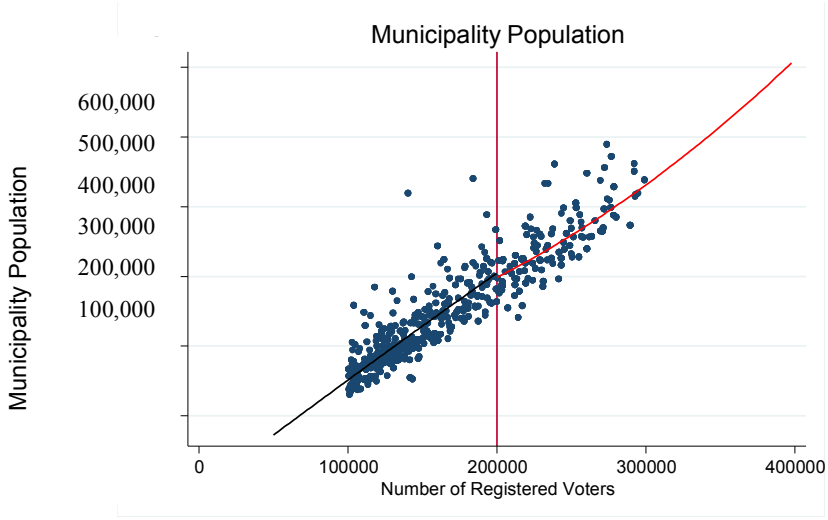
RESEARCH DESIGN

I am interested in the impact that a quasi-natural experiment which shifts electoral rules has on the quality of a government's public goods provision. This research design is powerful because the main independent variable, electoral rules, is assigned "at-random" by a factor exogenous to the main dependent variables of interest. In Brazil, federal legislation mandates that in municipalities with more than 200,000 registered voters, mayoral elections use a majority system, where the top two candidates participate in a second round runoff if no candidate receives fifty-percent plus one in the first round. Municipalities under 200,000 use a single round plurality system. The assignment of electoral systems is based solely on the number of registered voters in a municipality, not any of the characteristics of interest. Because of this, "the reason that [municipalities] are on a particular side of the threshold is due to random uncontrollable events that should not be related to the outcome of interest," which, in this paper, is public goods outcomes (Fujiwara, 2011, p. 203). This "as-if-random" nature of the electoral rules allows researchers to establish causation between the electoral rules and the outcomes of interest.

Because all municipality elections are regulated by federal legislation, which includes mandatory voting above the age of eighteen and uniform election days, voters do not have different incentives to vote depending on which electoral system is in place or when the election is held. Additionally, the federal nature of this legislation makes it unlikely that local politicians self-selected their own electoral rules for their own benefit. Indeed, Fujiwara found no evidence that municipalities tried to manipulate their voter registration data to choose an electoral system, as there was no significant jump in the number of municipalities on either side of the threshold when looking at population and registered voters.[367] Graph 6 shows that for the data used in this paper there is also no significant change in the number of municipalities above or below the threshold, supporting Fujiwara's conclusion that this threshold was not manipulated by local politicians. This strongly suggests that politicians under each electoral system did not self-select to use certain electoral rules to make getting elected or offering less public goods easier. In terms of elections, this means that the only substantial variation in elections across municipalities is the electoral system, which was decided by the federal government.

[367] Fujiwara, 2011, p. 203

Graph 6



Naturally, other factors, such as the municipality population's poverty levels and racial characteristics, could conceivably affect the levels of public goods provided in a municipality. To test the "as-if-random" nature of the municipalities above and below the threshold, I ran descriptive summary tests on the racial makeup and poverty levels of the municipalities. Municipalities near the threshold fall above or below the threshold at random, as the federal government did not take municipality characteristics into account when designating the threshold. Chamon et al. states that because non-controlled factors will be randomly dispersed near the 200,000 threshold, "there is nothing systematic that could affect political competition when we compare municipalities on both sides of the threshold" besides the difference in electoral systems.[368]

In the similar studies done by Chamon et al. and Fujiwara, the characteristics used to test the similarity of the municipalities above and below the threshold were a mixture of geography, per capital monthly income, GINI coefficient, and the education levels and rural poulation variables. Both studies found no significant difference between municipalities on either side of the threshold. Because of the as-if-random nature of the municipalities and their characteristics around the threshold, differences in public goods outcomes on each side of the threshold are caused by the only significant variance – the electoral system. The as-if-random nature of the threshold rule "guarantees that any difference in outcomes between these two groups is a causal consequence of the different electoral rules".[369]

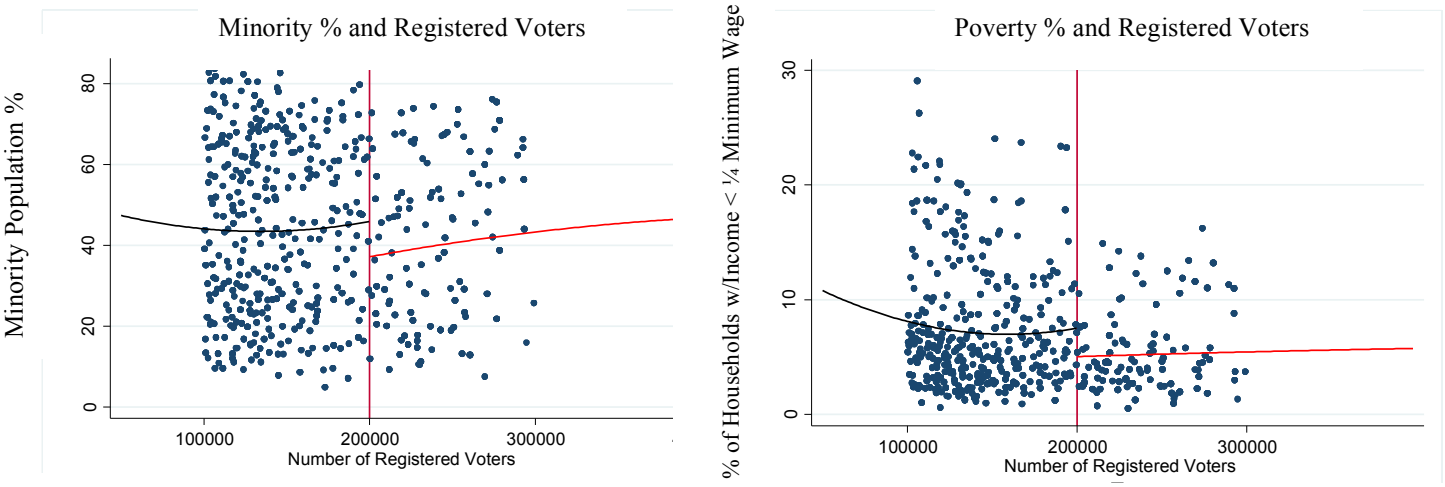
Instead of the characteristics tested by Chamon et al. and Fujiwara, I used the percentage of households with income less than ¼ the minimum wage, which is the lowest possible income bracket measured by the Brazilian census, as the poverty measurement. Due to data availability, I chose to use this particular poverty measurement as a stand-in for a more standard economic variable. The racial makeup measurement was the percentage of the municipality's population. I intentionally

[368] Chamon et al., 2010, p. 13
[369] Fujiwara, 2011, p. 203

included a measure of minority populations, because race can potentially determine who receives certain public goods, and also can determine who decides to run for election, with racism deterring potential candidates from seeking office, thus decreasing overall competition. Racism can create unequal opportunities making it difficult for minority groups to have the resources to run for office and potential candidates might be unwilling to enter the public spotlight due to racism.

Initially I expected that because there was nothing about electoral rules that should impact these two characteristics, it would be unlikely that I would find a significant difference above or below the threshold. However, as shown in Graph 2 and Graph 3, I did find substantial variation above and below the threshold for both race

GRAPHS 7-8



and poverty variables. These findings call into question the "as-if-random" nature of this regression discontinuity, as there seems to be differences in the characteristics of the municipalities above and below the threshold that are not caused by the differing electoral systems. Although the federal government's designation of the municipalities' electoral systems was not determined by poverty and minority characteristics, these characteristics could be driving differences in public goods. For this reason, I included them as controls in all my regressions, because of their possible impact on the dependent variables.

Both graphs unexpectedly suggest that minority and poverty percentages are impacted by the change in electoral rules. As shown in Appendix Table 3, minority and poverty percentages are highly correlated, with the percentage minority predicting nearly 41% of a municipality's households in poverty percentages. However, this is not a perfect correlation, meaning other factors besides the population of minorities determine poverty levels, and one such factor could be the electoral system. After further investigation, it seems that low levels of poverty might be a dependent variable, caused by the same benefits of the majority system that I expected would create higher levels of public goods.

The unexpected decrease in minority percentages in majority systems, as shown in Graph 2, is more difficult to interpret and lacks a clear explanation, as the threshold

rule should have no impact on minority groups. One possible explanation for this relationship is that minorities, especially indigenous communities, may be more likely to live in rural areas in smaller, more homogenous municipalities. If that is accurate, the graph could be demonstrating a natural break in the demographics between smaller and larger municipalities. Because of this unexpected finding, all regressions kept minority percentage as a control variable because this characteristic, although unconnected to electoral rules, certainly has some impact on public goods outcomes.

My third hypothesis does not use a regression discontinuity, but instead uses majority systems as an instrumental variable that predicts the number of effective parties. For an instrument variable to be valid, two assumptions must hold. First, the instrument must be independent of potential outcomes, meaning that it is uncorrelated with any determinates of the dependent variable. The second assumption is that the instrument affects the outcome of interest - in this case, public goods outcomes - only through its impact on the dependent variable of interest - in this case, political competition.

The first assumption should hold because the majority system rule directly impacts the number of parties that form, but it was assigned without regard to the characteristics of the town, including public goods outcomes and municipality characteristics. Although the minority and poverty characteristics are not as-if-random, the threshold itself, as shown in Graph 1, was assigned as-if randomly to the municipalities near the cutoff. As for the second assumption, Appendix Table 6 shows that effective candidates and parties have a strong positive correlation with the majority electoral system in my data set, so it is reasonable to expect that the change in electoral systems is driving the increased competition. I hypothesize that the primary way in which majority systems improve public goods outcomes is through increased electoral competition. Other characteristics of majority systems that could impact public goods, such as more representation for underrepresented groups, could be considered a facet of electoral competition, as majority systems may encourage minority participation, thus increasing overall competition. If the change in electoral system is driving competition and competition is the driver of public goods outcomes, the second assumption for instrumental variables would also hold. Because these two assumptions are met, I can establish causation because the competition measure will be exogenously determined by the electoral system.

Fujiwara (2011) used a local polynomial regression equation to estimate relationships using this discontinuity. His equation included an assignment variable, which was the number of registered voters subtracted by the threshold and the absolute assignment variable, which is the absolute value of the registered voters subtracted from the threshold. This variable tells us how far away an observation is from the threshold, allowing us to create different bandwidths around the threshold. Following Fujiwara's example, I used bandwidths that ran the regression for observations where the number of registered voters is less than 25,000, 50,000, and 75,000 voters away from 200,000. This means that for the smallest bandwidth of 25,000, I looked at municipalities with between 175,000 and 225,000 registered voters. The 50,000 bandwidth included municipalities with between 150,000 and 250,000 registered voters and the 75,000

bandwidth had municipalities with between 125,000 and 275,000 registered voters. Because we would expect municipalities nearest to the threshold to be the most similar in everything except their electoral system, we expec t to see the strongest results at the 25,000 bandwidth. As the equation measures municipalities further from the threshold, the likelihood of the municipalities on either side of the threshold being comparable decreases. This makes the electoral system one of many distinguishing characteristics, thus we would expect to see a weaker connection.

EMPIRICAL ANALYSIS

The first hypothesis is that majority systems will have higher levels of public good outcomes as compared to plurality systems. In this hypothesis, the independent variable is the type of electoral system the municipality uses for each election year and the dependent variables are the public good outcomes by municipality year. Public good outcomes are measured by primary school enrollment, secondary school enrollment, literacy rates and sewage provision. The estimating equation is:

(1) $PublicPublicPublic\ Good_{it} = \alpha + \beta * 1\{Voters_{it} > 200{,}000\}$

(1) $$Public\ Good_{it} = \alpha + \beta * 1\{Voters_{it} > 200{,}000\} + \gamma[Voters_{it}] + \delta' X_{it} + \varepsilon_{it}$$

Where Public Good$_{it}$ is a public good outcome in municipality *i* at time *t*. In general, I found a rise in public good outcomes between 2000 and 2010 due to Brazil increasing development. Because the electoral rules are unchanging and should yield similar levels of competition within each system, I still expected to see a marked difference in public good outcomes between plurality and majority systems. $1\{Voters_{it} > 200$ iis a dummy variable that takes the value of one if the election takes place using two-round majority rules, which is when there are more than 200,000 voters in the municipality. *Voters$_{it}$* shows the variations in registered voters between municipalities at year *t*. 'X_{it} is the matrix for the race and poverty controls used because I found variation in these characteristics above and below the threshold. Fixed effects were included for the year.

Table 2 shows the regressions for the zero to 14 school enrollment percentages, the literacy rate and the percentage of households without sewage at each bandwidth. Although regressions were run for all three age groups, the results were similar and insignificant. For the sake of clarity, only the results for the zero to 14 age group are shown.[370] At the 25,000 bandwidth, where we expect to see the most significant results, the majority system has a negative, but insignificant effect on enrollment in the age group zero to 14. If significant, this would mean that majority systems cause school enrollment rates to decrease. This relationship trend opposes my hypothesis and instead leans towards Mainwaring's view that majority systems lead to worse governance.

[370] The regressions for the 15 to 17 and the 18 to 24 age groups can be found in Appendix Table 1.

Table 2 also shows the regression coefficients for the literacy rates and the percentage of households without sewage. With controls, the majority of the coefficients were insignificant at the optimal 25,000 bandwidth. For the literacy variable, the 25,000 threshold showed an insignificant positive relationship between literacy rates and majority systems. This would mean that municipalities with majority systems would have higher literacy rates as compared to plurality systems, but the strength of this relationship is too weak to confirm my hypothesis. Additionally, at the larger thresholds the relationship becomes negative, which also contradicts my initial hypothesis.

TABLE 2: PUBLIC GOODS OUTCOMES

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Enrollment, Ages Zero to 14			Literacy Rate			No Sewage		
VARIABLES	50,000	25,000	75,000	50,000	25,000	75,000	50,000	25,000	75,000
majority	0.865	-0.972	0.774	-0.568*	0.123	-0.360	0.262	-0.720	0.589
	(1.142)	(1.918)	(1.086)	(0.326)	(0.391)	(0.390)	(0.639)	(0.793)	(0.774)
Voters	-0.000	0.000	-0.000*	0.000**	-0.000	0.000*	-0.000	-0.000	-0.000*
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Votersxmajority	0.000	-0.000	0.000*	-0.000	0.000	-0.000	0.000	0.000*	0.000**
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Minority %	-0.017	0.000	-0.009	-0.013	-0.021	0.003	0.016	0.015	0.000
	(0.042)	(0.048)	(0.038)	(0.018)	(0.018)	(0.016)	(0.023)	(0.023)	(0.019)
Poverty %	-0.240	-0.369*	-0.199	-0.476***	-0.341**	-0.595***	0.362*	0.277*	0.525***
	(0.167)	(0.200)	(0.154)	(0.163)	(0.158)	(0.128)	(0.187)	(0.160)	(0.145)
Observations	914	451	1,480	914	451	1,480	812	398	1,344
R-squared	0.611	0.600	0.577	0.632	0.570	0.701	0.405	0.415	0.528

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

The no sewage regression with controls shows a negative, insignificant relationship between majority systems and the percentage of the population without sewage in a municipality. If significant, this would mean households in majority system municipalities have more access to sewage than households in non-majority system municipalities - supporting my hypothesis that majority systems create better outcomes for citizens. However, its insignificance also contradicts my hypothesis.

As a whole the general lack of significance between majority systems and public goods in these regressions may show a need for more observations. If the lack of significance is because of a need for more observations, additional electoral years and census data could be added to strengthen the results. Based on the trends seen in

literacy rates and sewage percentages, strengthening the results by adding more observations could show stronger support for my hypothesis that majority systems create better public goods. It is also possible that the dependent variables representing public goods provision, which were chosen based on data availability, are not particularly sensitive to changes in government performance.

The lack of significance could also mean that there is no significant relationship between electoral systems and public goods provision, at least within Brazilian municipalities. This would signal that changing electoral rules should have little to no effect on public goods. This could encourage Brazilian policy makers to experiment with electoral rules in order to achieve other policy goals with the knowledge that public goods provision, an issue voters may care about, will not be changed in the process. Conversely, these findings could signal policy makers to look more seriously at other mechanisms to incentivize better public goods outcomes.

The second hypothesis states that municipalities with majority electoral rules will have more effective parties and candidates than municipalities with plurality electoral rules.

The estimating equation is:

$$(2) \qquad POLCOMP_{it} = \alpha + \beta * 1\{Voters_{it} > 200{,}000\} + \gamma[Voters_{it}] + \delta' X_{it} + \varepsilon_{it}$$

$$(2) \qquad POLCOMP_{it} = \alpha + \beta * 1\{Voters_{it} > 200{,}000\} + \gamma^{1\{Voters_{it} > 200{,}000\}}$$

Where $POLCOMP_{it}$ is the number of effective parties at the municipality level i for a given election year t. $1\{Voters_{it} > 200\}$ is a dummy variable that takes the value of one when the municipality use majority rules. $Voters_{it}$ show s the variations in registered voters between municipalities at year t. To test my second hypothesis that majority systems create higher numbers of effective parties and candidates, I used Laakso and Taagepera's effective number of parties formula, which can be found in Part III. Year fixed effects were included.

TABLE 3: EFFECTIVE CANDIDATES AND EFFECTIVE PARTIES

	(1)	(2)	(3)	(4)	(5)	(6)
	Effective Candidates			Effective Parties		
VARIABLES	50,000	25,000	75,000	50,000	25,000	75,000
majority	0.311	-0.152	0.454*	0.348	0.172	0.280
	(0.327)	(0.565)	(0.268)	(0.395)	(0.675)	(0.337)
Voters	0.006	0.026	-0.000	0.004	0.004	0.000
	(0.005)	(0.018)	(0.003)	(0.005)	(0.020)	(0.003)
Votersxmajority	-0.007	-0.005	-0.003	-0.013	0.002	-0.004
	(0.012)	(0.028)	(0.006)	(0.012)	(0.029)	(0.007)
Minority %	-0.008	0.001	-0.007	-0.016**	-0.007	-0.009
	(0.007)	(0.007)	(0.006)	(0.007)	(0.010)	(0.006)
Poverty %	-0.002	-0.019	0.005	0.022	-0.006	0.002

	(0.024)	(0.028)	(0.020)	(0.028)	(0.043)	(0.020)
Observations	914	451	1,480	645	315	1,017
Cluster	76	52	112	66	43	94
R-squared	0.113	0.157	0.094	0.130	0.077	0.089

Regressions were ran at bandwidths 25,000, 50,000 and 75,000 voters away from the threshold
Observations clustered by municipality
Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3 shows the results from the regression. At the 25,000 bandwidth, the number of effective candidates shows a (insignificant) negative relationship with the majority system, indicating that the number of effective candidates goes down with a majority system, which goes against my hypothesis. However, at the largest bandwidth for the number of effective candidates, there is a positive relationship at the 90% significance level showing that majority systems do create an increase in the number of effective candidates. For the number of effective parties, all coefficients are positive, but insignificant, showing a trend that suggests majority systems do increase the number of effective parties. As a whole, these findings suggest a need for more observations, especially because the only significant coefficients are found at the larger bandwidths that have more observations. Both sets of regression have variation across bandwidths, which is unexpected and may also point to a need for more observations.

The third hypothesis states that if the effective number of candidates or parties increases, public goods outcomes will also increase. To test this, I used a two-staged least-squared regression (2SLS), using the first stage to estimate how much political competition is determined by majority systems. The second stage used this estimation to determine how political competition, as determined by majority rule, impacts public goods outcomes.

The estimating equations are as follows:

(3) $\widehat{\text{POLCOMP}}_{it} = \alpha + \beta Majority_{it} + \gamma'$

(4) $Public\ Good_{it} = \alpha + \beta \widehat{\text{POLCOMP}}_{it} + \gamma'$

(3) $$\widehat{\text{POLCOMP}}_{it} = \alpha + \beta Majority_{it} + \gamma' X_{it} + \varepsilon_{it}$$

(4) $$Public\ Good_{it} = \alpha + \beta \widehat{\text{POLCOMP}}_{it} + \gamma' X_{it} + \varepsilon_{it}$$

Where $\widehat{\text{POLCOMP}}_{it}$, the number of effective parties in a given election year t for each municipality i, as predicted by the instrumental variable, the use of majority systems. $Public\ Good_{it}$ is a public good outcome at the municipality level i for an election year t. X_{it} represents the control variables for race and poverty. Year fixed effects were included.

My results for my third hypothesis are highly significant at the 1% level for all my public good variables and supports, for the most part, my hypothesis is that competition increases public good outcomes. Table 4 shows the results for the number of effective candidates. The results for the number of effective number of parties, which showed a similar relationship, can be found in Appendix Table 2.

TABLE 4: EFFECTIVE CANDIDATES AND PUBLIC GOOD OUTCOMES

VARIABLES	(1) Enrollment, Ages Zero to 14	(2) Literacy Rate	(3) No Sewage
Effective Candidates	3.850***	7.265***	3.007***
	(0.976)	(1.311)	(0.930)
Minority Rate	-0.032***	-0.064***	0.050***
	(0.006)	(0.007)	(0.007)
Poverty Rate	-0.038***	-0.504***	0.749***
	(0.014)	(0.015)	(0.018)
Observations	58,919	58,497	56,696
Cluster	5,265	5,265	5,259
R-squared	0.398	0.608	0.602

Regressions were ran at bandwidths 25,000, 50,000 and 75,000 voters away from the threshold
Observations clustered by municipality
Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 4 shows that for effective candidates, there is a significant, positive relationship between all measures of public goods outcomes and the number of effective candidates, which generally supports my hypothesis. For enrollment percentages and literacy rates, the regressions also show that as party competition increases, the enrollment rates for ages zero to 14 and the literacy rates increase. This supports my hypothesis and the theory that electoral competition improves the government's provision of public goods. The positive relationship between the number of effective candidates and the percentage of households without sewage is also positive. This means as the number of candidates increases, the number of households without sewage also increases, which was an unexpected finding that does not support my hypothesis. It is possible that because sewage is an issue that is not widely discussed, candidates may not feel pressured to improve household sewage rates, even in competitive settings

Although municipality poverty percentages were controlled for in all regressions, I was interested in investigating if the levels of poverty of municipalities

were caused by the type of electoral system. The number of households in poverty could be affected by how capable the government is at providing public goods and services since poverty itself could be reduced through the transfer of public goods. To test this, I ran a regression to see to what degree majority systems determine the rate of households with ¼ of the minimum wage.

Table 5 shows the results from that regression, which shows that the majority system appears to significantly decrease the number of households in the lowest income bracket as compared to plurality systems. These results are strongest nearest the threshold, at the 25,000 bandwidth, which is what we expect in a regression discontinuity. Because the coefficients are so significant at the optimal bandwidth, it suggests that the percentage of households in poverty is particularly sensitive to the change in electoral rules at the threshold. These results would strongly suggest that rather than being a control variable, the number of households in poverty is impacted by the type of electoral system. Furthermore, it suggests that majority systems are better at decreasing the number of households in poverty, which in turn could increase public goods outcomes, possibly through increased resources at the individual and municipality level.

PART VI: CONCLUSION

One of the primary roles of any government is to provide public goods for its citizens, and it is believed that democracies offer the best mechanisms to achieve that role. A defining characteristic of democracies are free, fair and competitive elections. This paper investigates ways in which this characteristic allows democracies to better provide for their citizens. LeDuc et al. suggests that there is tradeoff between fairness and responsiveness in non-plurality multiparty systems and the stability and accountability of plurality one-party majority systems. LeDuc et al. discuss differing electoral systems as tradeoffs, stressing the merits of each system, but if policy makers have a specific goal in mind, one system may serve to achieve that goal better than the other. In the hopes of informing policy makers on the implications of electoral rules, this study looks specifically at the policy goal of public goods outcomes as these services have large impacts on the wellbeing of citizens.

TABLE 5: POVERTY AS DEPENDENT VARIABLE

	(1)	(2)	(3)
		Poverty Percentage	
VARIABLES	50,000	25,000	75,000
Majority	-1.470**	-3.001**	-0.917
	(0.716)	(1.199)	(0.735)
Voters	0.009	0.101	-0.004
	(0.018)	(0.062)	(0.013)
Votersxmajority	-0.001	-0.059	0.005
	(0.025)	(0.070)	(0.018)
Minority	0.161***	0.164***	0.172***

	(0.023)	(0.025)	(0.016)
Observations	914	451	1,480
R-squared	0.557	0.597	0.605

*Poverty rate is rate of households with incomes less than 1/4 the minimum wage
Regressions were ran at bandwidths 25,000, 50,000 and 75,000 voters away from the threshold
Robust standard errors in parentheses *** p<0.01, ** p<0.05, * p<0.1

The results of this study lacked the statistical significance needed to say anything definitively, but general trends suggest that majority systems do have a positive impact on the provision of public good services in Brazilian municipalities. This suggests that systems that encourage fairness, responsiveness and competition produce better public good outcomes, as Chamon, Besley and Burgess, and others have argued - contrasting with Mainwaring's argument that high levels of multipartyism can make it hard for governments to rule.

This study adds to the existing literature the finding that two previously uncontrolled for municipality characteristics, minority percentages and the percentages of households in the lowest income bracket, are not dispersed "as-if-random" at the threshold between one-round plurality systems and two-round majority systems. The change at the threshold in the percentages of minority populations cannot be easily explained, and further research would be needed to discover why minority percentages are lower in majority systems and how this impacts the variables of interest in this and other studies.

The poverty percentage variable, which is the percentage of households with incomes less than ¼ of the minimum wage (much lower in municipalities with the majority system), could be thought of as more of a dependent variable that is strongly influenced by the type of electoral system of the municipality. It seems that when municipalities have lower levels of poverty, they are able to provide additional public goods for their citizens. More importantly, it seems that majority systems have characteristics that help them better address poverty in comparison to municipalities with plurality systems.

Establishing causation between majority electoral systems and public good outcomes can give researchers tools to identify the mechanisms through which majority systems provide better public goods outcomes. One hypothesis that this paper has suggested is that majority electoral systems foster competition through multiparty systems and that competition in return leads to better public goods outcomes. This hypothesis is supported by the results of this analysis, as the higher levels of competition created by majority systems created higher levels of literacy and school enrollments, although this was not true for the third public goods outcome, sewage.

Another possible explanation, mentioned briefly in the literature review, is that majority multiparty systems allow smaller parties that better represent underrepresented groups to gain entry into politics. By bringing more voices into politics, multiparty systems could allow the concerns of underserved populations to

gain political importance, thus motivating politicians to provide more public goods. Further research could study how often minority parties, and specifically groups aimed at mobilizing traditionally underrepresented groups, gain mayoral seats on either side of the Brazilian threshold.

Citizens rely on public goods for their well-being, therefore it is important to continue searching for rules and institutions, like electoral systems, that can help governments better provide for their citizens.

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APPENDIX

APPENDIX TABLE 1: ALL ENROLLMENT AGE GROUPS

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Ages Zero to 14			Ages 15 to 17			Ages 18 to 24		
VARIABLES	50,000	25,000	75,000	50,000	25,000	75,000	50,000	25,000	75,000
Voters	0.865	-0.972	0.774	-0.298	-1.473	-0.029	1.668	0.617	0.497
	(1.142)	(1.918)	(1.086)	(0.748)	(1.354)	(0.733)	(3.928)	(6.553)	(3.155)
Votersxmajority	-0.032	0.087	-0.033*	-0.012	0.070	-0.010	-0.049	-0.112	0.005
	(0.025)	(0.071)	(0.017)	(0.019)	(0.054)	(0.013)	(0.063)	(0.249)	(0.045)
[illegible]	0.035	-0.072	0.049*	0.047	-0.020	0.025	0.096	0.323	0.039
[illegible]	(0.039)	(0.097)	(0.029)	(0.032)	(0.063)	(0.019)	(0.134)	(0.275)	(0.080)
% Poverty	-0.017	0.000	-0.009	0.070**	0.104***	0.069***	-0.056	-0.011	-0.026
	(0.042)	(0.048)	(0.038)	(0.033)	(0.038)	(0.025)	(0.072)	(0.126)	(0.055)
Poverty Rate	-0.240	-0.369*	-0.199	-0.363***	-0.437***	-0.377***	0.107	-0.053	0.131
	(0.167)	(0.200)	(0.154)	(0.121)	(0.140)	(0.092)	(0.300)	(0.576)	(0.215)
Observations	914	451	1,480	914	451	1,480	398	209	614
Clusters	76	52	112	76	52	112	55	33	82
R-squared	0.611	0.600	0.577	0.208	0.243	0.198	0.902	0.873	0.902

Regressions were ran at bandwidths 25,000, 50,000 and 75,000 voters away from the threshold
Observations clustered by municipality
Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

APPENDIX TABLE 2: EFFECTIVE PARTIES AND PUBLIC GOOD OUTCOMES

	(1)	(2)	(3)	(4)	(5)
				Enrollment Rate	
VARIABLES	Literacy Rate	No Sewage	Ages Zero to 14	Ages 15 to 17	Ages 18 to 24
Effective Parties	9.546***	3.414**	5.759***	15.121***	26.336***
	(1.995)	(1.526)	(1.463)	(3.101)	(8.778)
% Minority	-0.078***	0.067***	-0.030***	-0.015	0.011
	(0.009)	(0.009)	(0.008)	(0.015)	(0.032)
% Poverty	-0.495***	0.804***	-0.042**	0.020	0.267***
	(0.021)	(0.022)	(0.017)	(0.032)	(0.076)
Observations	43,665	42,304	44,057	43,861	33,989
Cluster	5,192	5,177	5,241	5,239	5,200
R-squared	0.491	0.622	0.151		

Regressions were ran at bandwidths 25,000, 50,000 and 75,000 voters away from the threshold
Observations clustered by municipality
Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

APPENDIX TABLE 3: CORRELATION BETWEEN POVERTY AND MINORITY PERCENTAGES

	(1)
VARIABLES	Poverty %
% Minority	0.413***
	(0.002)
Observations	59,340
R-squared	0.515

*Poverty percentage is the rate of households with incomes less than ¼ the minimum wage

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

APPENDIX TABLE 4: CORRELATION BETWEEN MAJORITY AND COMPETITION

	(1)	(2)
VARIABLES	Effective Candidates	Effective Parties
Majority	0.578***	0.436***
	(0.036)	(0.042)
Observations	22,176	16,625
R-squared	0.011	0.006

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

CRIMES AGAINST HUMANITY AND THE NEED FOR POSITIVE INTERNATIONAL LAW

Ryan Walkenhorst

This paper examines the problems the currently face litigators when they attempt to prosecute crimes against humanity on an international level. It begins by establishing the differences between classifications of crimes, such as war crimes and gross violations of human rights, in order to examine exactly where the written laws and precedents apply. It then sets out the need for more positive law, rather than customary norms, so that further crimes may be appropriately punished, or even prevented, in the future.

INTRODUCTION

Since the end of the nineteenth century, an idea has been growing in the realm of international law that certain crimes violate the basic rights of all humans. For centuries, there has existed the notion that there are certain procedural and legal practices that are adhered to out of a sense obligation, without any written justification. These practices are known as common law and they regulate the treatment of states in their actions with other states and their citizens, but only in the context of armed conflict. Until the twentieth century, the ideas of imperialism dictated how powerful countries interacted with newly developing nations: that countries could claim land for themselves, and subsequently treat the people who resided within their territory how they saw fit. But with the technological advances of the twentieth century, globalization, and the greater cultural understandings states had of one another, concern for basic human rights led to questions of how colonizing countries treated their subjects. Ultimately, this led to the appearance of such ideas in international treaties and conventions. These rights were vague and confusing for the first half of the twentieth century, until international jurists

began to establish written confirmation of these rights and the consequences for violating them. These written rules, known as positive law, stemmed from a multitude of aggressions of citizens and states towards ethnic, racial, and religious groups. By the end of the twentieth century, these hostilities came to be known as crimes against humanity. However, the progression of the classification of these crimes plateaued. Crimes of this nature still occur in the modern age, while this class of positive law remains ambiguous and the methods for determining what constitutes a crime against humanity, and even what that phrase truly means, remain contested. In order to preserve the rights of all humans, and the integrity of the international justice system, further measures must be taken. The international courts must establish a class of positive laws that encompasses the rights of all humans, regardless of gender, race, nationality, sexuality or any other discriminating factor.

THE HISTORY OF CRIMES AGAINST HUMANITY, WAR CRIMES, AND GROSS VIOLATIONS OF HUMAN RIGHTS

The phrase "crimes against humanity" has changed throughout the history of international law. International law first recognized the term in 1915[371], when Great Britain, France, and Russia condemned Turkey in a declaration against the massacres of Armenian citizens. While the Turkish government publicly condemned Turkey for their actions, it was not until 1945, during the Nuremberg Trials of the German judges during World War Two, that any specific attributes of crimes against humanity were established. Currently, international law requires only two distinct elements to constitute a crime against humanity: first, the existence of a wide spread attack, and secondly, that is it against a civilian population.[372] This is distinct from the atrocities that constitute "war crimes" and varies slightly from "gross violations of human rights" as well. International courts and tribunals differentiate between these three categories of crimes with nuances relating to the relationship between the states in question and the intent with which the acts are committed, but all three assume a connotation so negative as to allow international sentencing and jurisdiction above that of a domestic crime.

Crimes against humanity existed only as a nebulous idea for much of the early twentieth-century. It was not until the Martens Clause of the Hague Convention of 1907 that the idea of "laws of humanity" existed as an entity in international law.[373] Named after Professor Friedrich Fromhold von Martens, who represented Russia at the Hague Peace Conferences, [374] the Martens clause states that "the inhabitants and the

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[371] The Martens Clause and the Laws of Armed Conflict. International Committee of the Armed Cross. (1997)

[372] Maragaret McAuliffe deGuzman. The Road from Rome: The Developing Law of Crimes against Humanity. The John Hopkins University Press 22 (2000), 337

[373] Convention (n. IV) Respecting the Laws and Customs of War on Land, with Annex of regulations, 18 Oct. 1907, pmbl., 36 Stat. 2277, 1 Bevans 631

[374] Encyclopedia Britannica:Fyodor Fyodorovich Martens.
http://www.britannica.com/EBchecked/topic/366793/Fyodor-Fyodorovich-Martens

belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity, and the dictates of the public conscience."[375] The Hague convention did not elaborate the specifics of what the laws of humanity were--it is still an issue being refined in modern day international courts-- but the clause did establish the universal existence of certain laws and rights awarded to all of humanity. The Armenian massacres then prompted the first written recording of the term "crimes against humanity," when other sovereign states declared the Armenian genocide to be a crime against "humanity and civilization."[376] From 1919 until 1945, the idea of crimes that violated the law of humanity could not be accurately defined, nor were they established as positive international law, or man-made laws that are written by those in authority to command control. [377] Following the heinous nature of the crimes committed by German Nazis in World War Two however, the international justice system set out to define what may constitute a crime against humanity and how such acts could be punished by international courts. The resulting Charter of the International Military Tribunal (IMT) was the first time the distinction between "crimes against humanity" and "war crimes" had been formally established. The IMT was also the first instance of explicit, positive international law against acts that qualify as crimes against humanity, defining crimes against humanity as: [378]

> "Atrocities of offenses, including but not limited to murder, extermination enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."[379]

Traditionally, the Hague Convention of 1907 and the Geneva Conventions of 1864, 1906, and 1929 defined war crimes prior to World War Two. The laws were meant to protect civilians and combatants in times of war, and ultimately served to codify centuries old common law. Long before the ratification of the two conventions, there were standards of conduct in times of war, but it was not until the creation of the positive, written law, that war crimes committed by states against opposing nationals or nationals of occupied states in times of formal war could be punished.[380] Despite the presence of common law, the international judicial system still set forth positive law regulating the practice of war crimes, but neither convention made reference to crimes against humanity. The IMT, in an unprecedented condemnation of these crimes, frequently conflated issues of crimes against humanity and war crimes. Due to the fact that the crimes committed by the Nazis were enacted during times of war, some overlap

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[375] Supra, note 3

[376] Armenian memorandum presented by the Greek delegation to the commission of Fifteen on 14 Mar. 1919

[377] Supra note 3, at 344

[378] *Id.* at 345

[379] Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity, Control Council Law No. 10 (1946)

[380] Supra at iii; Geneva Conventions

is natural and reasonable. Legal scholar Cherif Bassiouni goes so far as to say crimes against humanity are a "jurisdictional extension" of the precedent against war crimes.[381] However, the IMT does explicitly state that certain inhumane acts of the Nazis did not constitute war crimes, as they were committed against German citizens and not opposing nationals, and that those crimes "were all committed in […] connection with, the aggressive war, and therefore constituted Crimes against Humanity."[382] Clearly then, the IMT did not at this time wish to completely delineate the differences between crimes against humanity and war crimes, due to the lack of precedent. However, the Military Tribunal at Nuremberg provided the first effort to create a separate category of culpability for crimes against humanity and allowed for other tribunals to further the debate and perhaps even begin to establish crimes against humanity as common international law.

One product of the 1945 IMT was the Control Council Law No. 10 (CCL No. 10). Enacted shortly after the IMT in 1945, the CCL No. 10 meant to provide a uniform basis for the prosecution of crimes following World War Two, and enumerated specific crimes that constitute crimes against humanity, which the IMT failed to do. The list specifically enhances the IMT as it pertains to crimes against humanity. It enumerates imprisonment, torture and rape as inhumane, which the IMT did not conclude earlier that year. CCL No. 10 also clarifies that the list is not exhaustive of all inhumane crimes that may be committed in the future and specifically eliminates the requirement that the acts be connected to a period of war, which allows other international courts and tribunals to interpret and expand the list, if and when new acts of inhumane treatment occur.[383] CCL No. 10 therefore establishes crimes against humanity as an entirely unique class of prosecutable crimes for the first time. CCL No. 10 was the first instance of positive international laws against the acts it details; the necessary requirement for future international judiciaries to pursue cases of crimes against humanity.

There is, however, some debate regarding crimes against humanity and what characteristics differentiate them between gross violations of human rights. However, in most cases, the distinctions are so minimal, that the two terms become almost interchangeable in the vernacular of international law. For instance, two of the main cases following CCL No. 10 that expanded the definitions of crimes against humanity, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY, ICTR), both cite crimes against humanity within the transcript of the tribunals as the charges brought before the courts.[384] [385] However, scholars and political scientists often cite "gross human rights offenses in the former Yugoslavia and Rwanda,"[386] and "gross

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[381] Cherif Bassiouni. Crimes against Humanity: The Need for a Specialized Convention 31 (1994) 457-458

[382] International Military Tribunal, Judgment, in Trial of the Major War Criminals Before the International Military Tribunal (1947) 171

[383] Supra note 3, at 348

[384] International Criminal Tribunal of former Yugoslavia (1993)

[385] International Criminal Tribunal of Rwanda (1995)

[386] Menno Kamminga. Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses. Human Rights Quarterly 23 (2001), 941

violations of human rights"[387] interchangeably. The American State Department defines "'gross human rights violations' to mean a small number of the most heinous acts: murder of non-combatants, torture, 'disappearing' people, and rape."[388] All of these charges appear in CCL No. 10, and the ICTY expands the original IMT ruling to include rape as a crime against humanity.[389] Thus, the two, for the purposes of international law, remain generally interchangeable. The ICTY and ICTR do further the distinction between crimes against humanity and gross violations of human rights and war crimes. In 1993, after the ICTY delivered their verdict, crimes against humanity were no longer linked directly to international armed conflict, eliminating the ties between international wars and crimes against humanity.[390] This was the first step towards a complete separation of the definitions of crimes against humanity and war. One year later, in 1994, the ICTR ruled on the crimes in Rwanda, but did not make any references to armed conflict, which effectively severed the ties between crimes against humanity and war crimes, as the first time crimes against humanity existed as its own classification.[391]

To date, however, the Rome statute is the most recent and comprehensive international instrument regarding crimes against humanity. In 1998, the International Criminal Court (ICC) adopted the Rome statute. There were 160 nations present at the time, and 153 voted to adopt the Rome Statue, which grants the ICC jurisdiction over crimes against humanity.[392] Despite the near unanimous ratification, however, the definition of crimes against humanity was highly contested.[393] The ratification of the statute indicates that there is a clear progression towards including crimes against humanity into common international law. The statute lists crimes against humanity as any "widespread or systematic attack directed towards any civilian population with knowledge of the attack"[394] and enumerates several crimes that warrant the title. This list includes nearly all of the offenses previously ascribed to crimes against humanity in Germany, Yugoslavia and Rwanda and also expands the category of sexual crimes from rape to "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity," but ultimately still leaves many aspects of these crimes to interpretation.[395]

For various reasons, international law consistently progressed towards common law, prohibiting actions against humanity and human law during the twentieth century. The accepted practice of international tribunals developed from a vague notion

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[387] Heinz Klug. Amnesty, Amnesia and Remembrance: International Obligations and the Need to Prevent the Repetition of Gross Violations of Human Rights. American Society of International Law 92 (1998), 316

[388] 22 US Code § 2378d – Limitation on Assistance to Security Forces
http://www.law.cornell.edu/uscode/text/22/2378d

[389] Supra note 14

[390] *Id.*

[391] Supra note 15

[392] Supra note 3, at 352

[393] *Id.*

[394] Rome Statute if the International Criminal Court, Article 7 (1998). 3

[395] *Id.*

of the general rights of humans into a concrete standard against which to judge those who do commit atrocities against the human race. Political scientists agree "that human rights laws are universal and internationally justiciable, just as crimes against humanity are."[396] Yet, these rights and laws developed in a very unilateral way, focusing solely on individuals who violate the rights of other humans, while overlooking crimes committed by organizations or states. A myriad of reasons exist for progression in this area, including ideological, religious, cultural and diplomatic concerns regarding the practice of prosecuting perpetrators for human rights violations. While crimes against humanity continues to gain ground through various treaties towards becoming common international law, positive law must be established on an international level that encompasses all the various facets of the issues at hand, before the general belief against crimes against humanity can be cemented as common law across all countries and jurisdictions. Without the implementation of positive, written law, common law standards cannot be concrete. International courts cannot prosecute these crimes without the established precedent. Therefore, the various concerns and interests of all parties, both domestic and international, religious, cultural and ideological, must be taken into account when considering positive law regarding crimes against humanity.

PHILOSOPHICAL CONSIDERATIONS ON THE ISSUES OF CRIMES AGAINST HUMANITY

The twentieth century solidified crimes against humanity as punishable by international law, but the tribunals and cases that established this fact contradict each other and confuse the issues of mere crimes with crimes against the whole of humanity, leading to various interpretations of the laws of humanity and crimes against humankind. There are multiple considerations within the Nuremberg, Rwanda and former Yugoslavia tribunals for what constitutes crimes against humanity, based on religious, moral, ideological and cultural factors within the circumstances of each tribunal. There are differing opinions on the categories of crimes, and the tribunals of former Yugoslavia and Rwanda each set forth lists of the heinous acts that warrant the title of crimes against humanity, but, as political philosopher Christopher Macleod states, "the definitions will still not capture that there is a qualitative difference between crimes against humanity and 'mere' crimes in opposition to human-nature."[397] Multiple interpretations of the term "crimes against humanity" exist, but when all tribunals and cases are taken into account, two main theories are left: that an action is a crime against humanity if it is an action that shocks the conscience of humankind, or it is a crime that damages humankind.[398] The historical backgrounds of each tribunal and country where such crimes occur, from moral disputes to ideological and political beliefs of the states to cultural tension, ultimately provide context for the progression of definitions and opinions on what constitutes crimes against humanity in international law.

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[396] Judith Blau, Alberto Moncada. It Ought to be a crime: Criminalizing Human Rights Violations. Sociological Forum 22 (2007) 367.

[397] Christopher Macleod. Towards a Philosophical Account of Crimes Against Humanity. The European Journal of International Law 21 (2010), 291

[398] Id. at 283-287

Political and cultural ideologies play a role, not only in the decisions of tribunals, but also in the cases that a state brings to the international court's attention. Nation states with democracies, like many found in Western Europe, often find themselves in a position of advocating political freedom to other nations. The USA in particular has a long political history of intervening in the affairs of other nation states and working on the behalf of aliens who bring suits against their home countries for atrocious crimes and crimes against humanity. The United States adheres to a practice that "domestic remedies should be taken into account and ignored or supplemented when they frustrate rather than fulfill the goals of the international community."[399] Clearly then, the US and others seek to further the power of international law. During the IMT at Nuremberg, there were two American judges and one American chief prosecutor for the proceedings as well as judges and prosecutors present from Great Britain, France and the Soviet Union. In other words, the allied powers formed the tribunal to prosecute Nazi war crimes, after having sought to prevent the spread of German subjugation in Europe during World War Two. [400] The countries that defeated the German army, after years of brutal war, then sat in judgment of the military leaders in Germany and clearly had an interest in prosecuting the Germans for their actions. Allied powers held a "common objective […] to punish Nazi atrocities"[401] separate from those punished for war crimes, such as the treatment of Prisoners of War. Legal scholars note the lack of discussion during the Tribunal regarding the newly codified class of crimes, because the allied powers sought only to punish the Nazis to the full extent of the international tribunal's power. [402]

Conversely, the ICTR developed "in the aftermath of violence gross violations of human rights,"[403] by factions within a quasi-totalitarian government. One of two rivalry tribes committed mass genocide, the Hutus slaughtering nearly 800,000 Tutsis.[404] Because this Tribunal arose from a conflict within a single state—a state with a history of undemocratic elections and politics—rather than an international war, and was judged by this undemocratic government, it is therefore unsurprising that the results of the Rwanda tribunal appear to be less effective than that of the Nuremberg Trials. The ICTR was only able to convict approximately 46% of the defendants charged with crimes against humanity.[405] This contrasts the 93% conviction rate of those charged with genocide, which was clearly enumerated in international law, and the 0% convictions of those charged with inhumane acts.[406] This "amorphous designation of a variety of sadistic behaviors, deprivations and other criminal activities" proved incredibly

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399 Richard Lillich. Damages for Gross Violations of International Human Rights Awarded by US Courts. Human Rights Quarterly 15 (1993) 210

400 *Id.*

401 Supra note 3, at 345

402 *Id.*

403 Supra note 17, at 319

404 Frontline Documentary: The Triumph of Evil (1998)

405 James Meernik. Proving and punishing genocide at the International Criminal Tribunal for Rwanda, International Criminal Law Review 4 (2004) 68

406 *Id.*

difficult to prove in Rwandan Tribunals, where the judges were not the victors of an armed conflict and were not charging combatants, but rather citizens of their own state.[407] Ultimately, the Rwandan tribunal, despite expounding on the criteria of crimes against humanity and condemning rape as a violation of the laws of humans, reached conviction rates of less than 50% for such crimes. The Criminal Tribunal of the former Yugoslavia also developed as a result of civil war between two warring factions. Yugoslavia contains several religious and cultural factions: the Muslims, the Croats and the Serbs.[408] Yugoslavia also held a distinct ideology at the time of the ICTY: it was the only country in the Eastern Soviet Bloc to liberate itself from Soviet control.[409] This ideology of a strong partisan movement and an emphasis on self-determination and freedom played a major role in the development of the country's political landscape. The Yugoslavs rewrote their political history following their revolution.[410] This propensity of the citizens of the country to act independently both led the cultural and ethnic crisis, but also likely played a role in the creation of the ICTY and the modifications to the existing ideas of crimes against humanity. The citizens of Yugoslavia also choose to identify themselves by their individual minorities, rather than as a state in whole,[411]leading to the civil war that prompted the ICTY. Only 1.2 million of the 22.4 million inhabitants of the country identified themselves as Yugoslavs.[412] Conversely, 40% of the population identified as Muslim, the religious group that was ultimately attacked.[413] This was a country of fiercely independent factions. The philosophical ideologies of independence, of religious tension and of cultural differences in Yugoslavia certainly contributed to the creation of the ICTY. Without the diversity of the ideals, there would be no causation for the crime against humanity, but there would also be no rational behind the creation of the ICTY and the progression of the crimes that ensued from it. Ultimately however, research into this correlation between political ideologies and the results of the tribunals is difficult to conduct and even more difficult to prove. There is a need for additional case studies and research in the international sphere if any conclusions are to be drawn regarding the topic.

In addition to political differences in ideology, many states and even political scientists hold differing opinions on the moral ideologies surrounding the concept of crimes against humanity. As stated earlier, Macleod believes there to be two main arguments for the prosecution of crimes against humanity. Whether the crimes shock the conscience of humanity or damage humanity as a whole is not clear. There is nothing in the definitions of crimes against humanity that requires the crimes be committed against an egregiously high toll of victims, so the question then becomes

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407 *Id.*

408 Dusko Doder. Yugoslavia: New War, Old Hatreds. Foreign Policy 91 (1993) 19

409 Paul Lendvai and Lis Parcell. Yugoslavia without Yugoslavs: The Roots of the Crisis. Royal Insitute of International Affairs 67 (1991) 252

410 *Id.*

411 *Id.* at 253

412 *Id.* at 254

413 *Id.*

how the tribunals and courts of the twentieth century determined that humanity as a whole was shocked or damaged.[414] Logically, the victims of crimes against humanity may be those who are directly affected by the action that comprises the crime: the Tutsis in Rwanda, the Bosnian Muslims in Yugoslavia, and the Jews, African Americans and gays in Germany. But these groups, being the direct victims of the actions of their aggressors cannot comprise the whole of humanity. Macleod offers a different view; that jurists can interpret the word humanity to mean the "the human race, all human beings" or it can "refer to the thing which is common to the class of all persons […] human-ness."[415] Hannah Arendt, the first philosopher to approach the moral issue following World War Two, stated "the crime against the Jews was also a crime against mankind."[416] Larry May argues,

> "because of the shared interests in peace and basic human rights protection, on the part of all humans in all political communities, there is enough solidarity among humans to speak nonmetaphorically (sic) about the human or international community […] even though the community that is humanity in not a political community, it is a community that can be harmed."[417]

Regardless of the political scientists' definition of humankind, no crime thus far committed has attained a level of destruction as to directly harm the entire human population. Thus, the philosophically moral goal of prosecuting crimes against humanity cannot currently be based on the impact of the morals of the world's population. There is not a specific answer to this ambiguity in any of the tribunals or statutes in effect regarding crimes against humanity, and thus currently, no positive law effectively encompasses the problem of crimes against humanity. Without the clarification and subsequent admission into international law by a written statute or convention by international courts, there cannot be a definitive answer to what a crime against humanity is, and thus such crimes cannot be prosecuted effectively.

CONCLUSIONS

Philosophical concerns relating to crimes against humanity reveal two shortcomings in the available information regarding such crimes. First, that there is a distinct lack of available data regarding the reasons behind the decisions made in the three main tribunals relating to these acts. This information is difficult, if not impossible, to acquire. All judges will claim that they acted in accordance with the law, that their interpretations were in fact grounded and that they possessed ample precedent to come to the conclusions that they did. This line of research, while relevant, may ultimately prove unsatisfying. Culturally and politically, an entire society's experiences contribute to the decisions rendered and the cases heard. The second ambiguity, the lack of clarification on what "humanity" is, and what the universal

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[414] Andrew Altman. Genocide and Crimes Against Humanity. Social Philosophy and Policy Foundation (2012), 301

[415] Supra note 26, at 283

[416] Hannah Arendt via Altman, Supra note 37 at 302

[417] Larry May via Altman, *Id.* at 304

rights of humanity are, is both infinitely more achievable and wholly relevant to the future of the international law. The past decisions cannot be changed, but the way that they are used in the future for interpretation of new atrocities will determine the path that the legal discourse takes.

So how might such a clarification be made? First, each limitation must be acknowledged and addressed. Currently, only "individuals are guilty of committing humanitarian crimes, not a government, not the military, and not an entire state."[418] Yet, according to the Rome Statute, acts can only be crimes against humanity when they constitute widespread or systematic attacks. There are such widespread violations committed by "business entities, municipal governments, nonprofit agencies, and the federal governments,"[419] as well as individual citizens. As recently as 1960, the General Assembly of the United Nations labeled apartheid as a crime against humanity.[420] Apartheid, the policy of segregation or discrimination on the grounds of race in South Africa and includes crimes such as the "systematic murder, torture, persecution on political, racial, religious or ethnic grounds and forced disappearance of persons", is by definition an action by more than one individual.[421] The act itself is punishable by international courts, yet the perpetrators, when acting as a government agency, are immune from the consequences. Thus, for the time being, international courts cannot effectively prosecute all offending parties of crimes against humanity. There is also the concern for the definition of humanity and what constitutes a crime against it. If these individuals, businesses, or governments are to be tried for their actions against humanity, there needs to be an established definition of what humanity encompasses. As Lillich states, "the courts of a single case, of course, cannot provide even a partial solution to the problem," yet currently much of the understanding of crimes against humanity and humanitarian law derives from independent tribunals.[422]Currently, "no actual crime against humanity seems to come close to harming all or most humans," yet crimes against humanity exist as common and positive international law.[423] There must be a link between the crimes' heinous nature and the consequent label of damaging humanitarian law. Without a unified, formal response to these concerns, there cannot be further development towards punishing those responsible for such atrocities.

Therefore, political scientists put forth numerous theories and proposals for the rectification of these issues. Lillich proposes,

> "An international Convention for the Redress of Human rights violations that would obligate states parties to enact legislation […] would be a promising first step. Such a convention could define what […] violations were actionable,

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[418] Supra note 25, at 369

[419] *Id.*

[420] Supra note 17, at 316

[421] *Id.*

[422] Supra note 28, at 216

[423] Supra note 37, at 306

> provide a common choice of law approach for courts to follow […] and provide foe the enforcement of judgments against human rights violators."[424]

Blau and Moncada believe first that organizations, governments and groups be subject to convictions of crimes against humanity, and subsequently propose "economic (penalties) aimed at the state, such as trade sanctions, heavy fines, and marginalization in the world community of nations."[425] In other words, political scientists propose the advent of increased positive law in the international legal model to identify and punish those who commit crimes against humanity. The common law belief that certain crimes do violate the natural rights of all humanity is not contested, so the next step is only to further establish and entrench the reproach for these crimes. But that is not to say that this positive law should undermine the overarching goal of upholding human rights internationally. The goal is to create positive law "in which the atrocities of the past are resolved without endangering the construction of community and the task of nation-building."[426] Ultimately the aim of international law is to punish those who commit deplorable aggressions, in order to protect and preserve the general safety of all humanity; to hold those responsible for crimes against humanity in the future responsible for their actions, and to clarify exactly what these crimes, rights, and perpetrators are.

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[424] *Id.* at 216-217

[425] Supra note 25, at 370

[426] Supra note 17, at 317

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COPYRIGHT LAW IN THE MUSIC INDUSTRY: AN END TO PERPETUITY

Katherine Wilcox

This research paper aims to explore how expiring copyright law terms are being litigated in today's music industry. Considering the Copyright Act of 1976, the essay considers integral facets of music industry law such as work for hire, transfer rights, and termination rights. With such terms expiring as early as 2013, this paper aims to reveal what it truly means to be the legal author of a song and what rights that author is entitled to. Ultimately, a variety of recent case studies reveal how the relationship between artists and record labels soon due for renegotiation. This essay incorporates multiple secondary sources and credible industry perspectives to anticipate where the future of the music industry lies.

INTRODUCTION

Music serves as a form of expression and individuality; it provides a unique way to communicate with others, and therefore establishes an extremely personal and passionate entity. Since as early as the 1700's, artists have expressed a desire to legally protect the music that they create, so that others will not exploit their rights. Protecting the rights to music presents no simple task, as many complex legal questions quickly arise concerning the qualifications for ownership, the specific rights entitled to an owner, the duration of such rights, and the ability to share such rights. Recently litigation between artists and record labels has had an uprising struggle to solve these questions. With the provisions of the Copyright Act of 1976, such as work for hire, transfer, and termination rights, 2013 opened more discussion and lawsuits in the music industry, revealing what it truly means to be the legal author of a song, and what rights that entitled to an owner. Deep analysis of copyright law and case study of currently

emerging lawsuits make clear the overdue renegotiation of artists and record label relations.

Since 1970 the United States of America attempted to protect and develop the concept of ownership with its first draft of a copyright act. In his book *Music Copyright for the New Millennium,* entertainment attorney David J. Moser describes that the need for copyright law derived from the "author's right philosophy," which posits that an author ought to be entitled to control, exploit, and reap the benefits of his intellect (5). Furthermore, in his highly respected book, *All You Need to Know About the Music* Business entertainment attorney Donald S. Passman explains that copyright law aims to "promote the progress of science and useful arts by giving creators exclusive rights to their works" (209). Therefore, copyright law protects the interests and rights of an author or creator while also furthering the enrichment of the greater society. By having this form of a "limited duration monopoly" (Passman 5), not only is an author legally protected to the rights of his work, but it further encourages society as a whole to create their own, original, and individual works.

Under copyright law, owners of songs are entitled to some basic, exclusive rights: the right to reproduce their work, to distribute copies of their work, to perform the work publicly, to make a derivative work, and to publicly display works. However, such basic rights become difficult to successfully manage alone, explaining why artists often turn to resources such as publishers, managers, and record labels to build their careers and utilize the rights they are entitled to under copyright law. Obtaining a record deal can be an integral step to an artist's success because it provides an artist access to industry connections, publicity, marketing, funding, and credibility, amongst other assets that a label can provide. The relationship between a record company and an artist is unique because the company helps to manage and monopolize on the rights that a copyright gives an owner. Record companies will often take advantage of controlling reproduction, distribution, derivatives, and performances of a song.

In offering their services to artists, record labels take large financial risks, essentially betting that an artist will become successful enough to cover the label's costs and make substantial income. In his article "From Ray Charles to "Y.M.C.A. - Section 203 Copyright Terminations in 2013 and Beyond," writer Kevin Parks clarifies this procedure by elaborating that, "Historically, in order to market and distribute their works as broadly as possible, creators ---- authors, artists, musicians ---- have had to contract with larger, more sophisticated entities who enjoy substantial bargaining power and leverage, creating the potential for lopsided deals that "exploited" artists along with their works" (Parks). Due to the variety of services and the large risk that a record label sacrifices for their signed artists, labels standardly claim the rights to ownership of songs in order to best control the income that they receive from artists. The transfer of such rights primarily allows the label to positively exploit the rights that copyright provides, especially for marketing and distribution purposes. However, no legal precedent or code exists to define what record companies are entitled to or how long they can to control the rights that artists give up.

One of the most essential steps towards answering these ambiguous questions would be to specify how long an author should be granted the rights that copyright law

protects. For many years, U.S. Congress has revised and made additions to copyright law in an attempt to codify an appropriate time for an owner to have absolute rights to his or her work. Currently, the Sonny Bono Copyright Act of 1998 mandates that an author of a song be entitled to copyright rights for ninety-five years if the song was made before 1978, or for the duration of the author's life plus seventy additional years if the song was made after 1978. As explained in Tamera H. Bennett's March 2012 article for the Dallas Bar Association, "Who Owns 'Funkytown'?"Termination of Copyright Grants," each song comprises two components: the composition of the song, the written music and lyrics, as well as a sound recording, or master, the recorded version of that song. As per the 1972 Copyright Act, copyright law included the protection of sound recordings, meaning that an artist obtains copyrights for both components of a song, if the artist also writes the compositions of music that they record. While the concept of ownership seems fairly simple and straightforward, the Copyright Act of 1976 had many additions, which created loopholes and added complications to the term length and ownership of copyright entitlements.

Two of the most important provisions artist received from the 1976 Act are the ability to transfer, or sell, their work, as well as the right to termination. Often, in a record or publishing deal, an artist's contract will entail transferring the composition rights to a publisher, or the sound recording rights to a record label. The process of transferring respective entities grants full constitutive powers to each party. Essentially, through a transfer, a record company would not only have complete executive control over a sound recording, but it would also manage all of the income that can be made through the recording. As mentioned before, record companies take substantial risk when signing an artist, so owning an artist's sound recordings serves as a means of security. Using this logic, contracts before 1976 often dictated that record labels would own an artist's songs for perpetuity (Passman 320).

While a transfer can be a beneficial to enable an artist's team to exploit songs and make earnings for all parties, it also has the potential to bind artists in permanent, parasitic deals. Fortunately, to limit the potentially manipulative and destructive powers that a transfer could give to a record label, the 1976 Act also included the right to termination. Passman reassures that through the right to termination, "even if you make a bonehead deal, the copyright law will give you a second shot - thirty-five years later. In other words, thirty-five years after a transfer, you can get your copyright back" (Passman 320). The thirty-five year term length before termination is incredibly important to the relationship between record labels and artists. Although transfers and termination rights were added in 1976, the complex ideas and opportunities were not sorted and effective until 1978. Therefore, if a transfer was made in 1978, it could only be terminated, with the rights reverted back to the original owner, in 2013 - thirty-five years later. For obvious reasons, 2013 has seen and handful of breakthrough lawsuits filed by artists against record labels in attempt to restore their original copyrights.

The only type of negotiation that does not include the right to termination is a work for hire, which was also an opportunity made available by the Copyright Act of 1976. "A *work for hire* happens when you hire someone else to create for you. If you observe the technical formalities, the employer actually becomes the author of the

work" (Passman 315). To clarify, a work for hire entails that one entity, such as a record label, hires an individual to produce for the use of the employer. Furthermore, the employer instantaneously obtains creative control over all produced works and owns all rights to anything developed during the term of employment, in exchange for a one-time deal with the employed artist. To qualify as such, works for hire must fall under one of nine categories; those related to the music industry include a collective work, a part of an audiovisual or motion picture, a translation, a supplementary work, or a compilation (Moser 44). For example, a film company would implement a work for hire if they hired an artist to create a soundtrack for a movie.

In his book, *Music Copyright for the New Millennium*, Moser outlines that after establishing a work for hire relationship, it is necessary that the work produced be within the scope of employment.

"Generally, a work will be within the scope of employment if: (1) it is the type of work that the employee is paid to perform; (2) the work is performed substantially within work hours at the work place; and (3) the work is performed, at least in part, to benefit the employer" (43).

Under a work for hire contract, the creator of the music has no termination rights, as there was no transfer in the first place, and they were never recognized as an author (Passman 320). Therefore, as per the extension of the Sonny Bono 1998 Copyright Act, a work for hire is automatically owned by the author, the employer, for either ninety-five years from publication or one-hundred and twenty years from the creation - whichever expires first. In practical terms, this means that authors work for hire property until the copyright expires and it is open to public use as part of public domain.

Given the additions provided by the Copyright Act of 1976, a record label has a variety of negotiations and contracts available to an artist. As discussed earlier, a record label will often contract the authorship and ownership of songs, as a means to secure and compensate for the large risk taken with artists. It is in the label's best interest to have full control and rights over songs for as long as possible. However, under a regular transfer of rights, a song would only be the guaranteed property of the label for thirty-five years, before an artist has the right to terminate the transfer. To extend their ownership, for their benefit, many record labels require artists to sign that their work is a work for hire so that the record label can maintain rights for at least ninety-five years; here, songs are considered a contribution to a collective work, which is the album, so that the work falls within the scope of a work for hire. "Often, the investor believes he or she owns the copyright in the recording produced simply because he or she paid for it" (Moser 52). A record label can argue that an artist must sign that their contract is a work for hire because their label-artist relationship fits the outline for the scope of employment of a work for hire: the record label funds the artist's project from the start, the record label usually has control over what is produced and what is published, and the work that is performed benefits the record label, thus revealing that a signed artist could be considered a work for hire. Ultimately, labels have manipulated the true intent of a work for hire deal in order to make an industry standard of seizing the maximum amount of rights from their artists, for the longest amount of time possible.

The thought of a record label being entitled to copyrights for such extended periods of time seems unmerited to the artist. The rights should arguably go to the artist, whose creative contribution to the work far outstrips that of the of the record label. Because the 1976 Act outline fails to define the "author" of a work, artists are left to argue for what they are entitled to. Therefore, as the first termination rights arose in 2013, artists have begun to file lawsuits to revoke their copyright transfer agreements from record labels, arguing that they are the true authors of a song, and did not create music as they would in work for hire scenario, and should thus be entitled to termination. In response, record labels argue that "1) the alleged author is not the author of the sound recording; and 2) an untimely notice of termination" is not within the thirty-five to forty year restriction that termination requires (Bennett). Clearly, the argument for authorship and types of employment between a record label and artist can favor either party, as each case has its own unique blurred lines. Ultimately, the only way to predict the outcome of upcoming court cases, is to analyze the few cases that have already been decided.

One of the first people to file for termination rights was Victor Willis, the original lead singer of the 1970's group the Village People, whose big hits include "Y.M.C.A."and "Macho Man". According to Larry Rother's 2011 article for the New York Times, "A Village Person Tests the Copyright Law," Willis recently filed to regain control of thirty-three Village People song compositions. Throughout the article, Rother reports that Willis chose to file for the termination of transfer of his song compositions from the publishing companies Scorpio Music and Can't Stop Productions. Although terminating song composition rights from a publisher is different than terminating sound recordings from a record label, understanding Willis' situation remains integral to predicting the future of termination right lawsuits, as Willis' publishers have argued that they "employed the defendant Willis as a writer for hire, and therefore has no rights"(Rother). Primarily, the publishing groups insist that the Village People was a concept group, created by publishing clients, that chose the people and the costumes for the group (Rother). By contract, Linda Smythe, a spokeswoman for Willis, predicted that Willis could "triple or quadruple" his current income from recordings if he were to gain the rights back from these songs, although these rights would have to be agreed upon by other members of the group and contributors to the songs. All things considered, it seems that the likelihood of Willis winning his termination rights is slim because of the influence that the publishers and record labels had in developing this concept group - making his situation fit more accurately into the scope of a work for hire.

On the opposite spectrum of Victor Willis' concept group is Bob Marley, a man whose soulful reggae music has influenced citizens for decades. In *Billboard*'s 2010 article, "Bob Marley Family Loses Lawsuit Over Hit Records," writer Jonathan Stempel reports how Marley's family lost their lawsuit against Universal Music Group because Marley's songs were created under a work for hire contract. Amongst the albums that the Marley estate wanted to retrieve from Island Records, were some of Marley's best-known songs, including "Get Up, Stand Up," "I Shot the Sheriff," "No Woman, No Cry," and "One Love" (Stempel). Marley's family filed for termination rights, assuming

entitlement to the copyrights for these "quintessential Bob Marley sound recordings." Furthermore, Marley's estate accused Universal Music Group of intentionally withholding artist royalties and of making key licensing decisions, such as using Marley's music for ringtones without consulting Marley's family (Stempel). Despite the exploitation and the millions of dollars in damages that the Marley estate claimed for, the court concluded that, "it was irrelevant that Marley might have maintained artistic control over the recording process. What mattered was that Island Records had a contractual "right" to accept or reject what he produced" (*Ibid*). Whereas the Village People were a true concept group and were greatly controlled by contracts, Bob Marley was the true artists of his works, with full creative freedoms. The verdict of these two exemplary cases predic a grim future for other artists filing for termination rights. Contractual agreements have been triumphing over artistry, despite the level of creativity and individuality invested in song recordings.

Although both the analysis of former copyright laws and specific case studies provide an insight into what the future of termination right lawsuits might hold, the future relationship between record labels and artists remains unpredictable. In *Music Copyright for the New Millennium*, most sound recordings will not qualify under the employment relationship or nine main categories of a work for hire, and be open to termination rights. However, Moser highlights that if termination rights continue as predicted, there will be further disputes concerning authorship when producers and band members are taken into consideration. Passman elaborates on the potential for further authorship complications explaining that, "Even assuming the artist is an author, it is possible that the producer is also an author under copyright law, as may potentially be others who contributed significantly to the work. Also, if an artist is comprised of more than one individual, there could be an issue between the band member s as to who was really an author" (Passman 321). Currently, nearly 10,000 authors have filed notices of termination with respect to specific songs, recordings, and other copyrighted works; such authors include Tom Petty, Billy Joel, and Bob Dylan (Parks). If these artists can reclaim copyrights, they could increase their revenue stream from ten percent of net earnings to upwards of seventy percent (Bennett). However, as Kevin Parks emphasizes in his article "From Ray Charles to 'Y.M.C.A.' - Section 203 Copyright Terminations in 2013 and Beyond," termination rights are "destined to become a litigation battleground," as a "label's success is increasingly dependent on the ownership and exploitation of sound recording assets, especially in the digital environment" (Parks). Of course, each lawsuit will have to take special precautions to decipher the extent each recording artist can be considered a work for hire. Case studies such as that of the Village People and Bob Marley reveal the difficulties of sorting each case's nuances; however after enough cases are decided, verdicts will become more definitive in revising the terms of authorship. Overall, experts such as Passman and Parks assert that as more cases surface, record companies and artists will be forced to negotiate rather than litigate. This could include renegotiating term lengths, record label involvement, or even artist royalty bearings. Ultimately parties will have to find a deal that provides new forms of leverage and power than established before, bringing the

music industry to revised copyright definitions and more importantly to a new standard in label and artist relations.

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