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STEPPING OUT OF THE COMPETING CONSTITUTIONAL RIGHTS CONUNDRUM: A COMPARATIVE HARM ANALYSIS

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I. INTRODUCTION

The United States Supreme Court has not developed a way to identify and balance competing constitutional rights.[1] Instead, the Court[2] has relied upon three-part tests, tiers of scrutiny and levels of review, along with unreasoned morality rhetoric in upholding or rejecting competing interests.[3] These tests or levels of review attempt to create a neutral Court, blind to differentiating characteristics such as race, gender and socio-economic status. Neutrality or objectivity is intended to eliminate personal interpretations and biases in the name of justice. The Court's neutrality tests have become doctrine, yet none of them have actually removed or minimized biases and inequities—a crucial flaw.[4] In fact, these tests have created further inequities because they fail to address and explore the underlining problem, and they have not provided meaningful guidance and direction to the lower federal courts.[5] This need for bias

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1. *E.g.*, Locke v. Davey, 124 S. Ct. 1307, 1317 (2004) (Scalia, J., dissenting) (pointing out that competing claims were not identified).

2. I will refer primarily to the cases of the United States Supreme Court, yet when I suggest employing a comparative harm analysis I am speaking more broadly to the federal judiciary. I expand the conversation more broadly because the federal courts are usually the only federal expertise reviewing constitutional rights cases. Whereas it is preferred that the Court sets the national standards for constitutional review, lower federal courts review most constitutional cases thus the discussion cannot be limited to the Supreme Court. *See* Edward Purcell, *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 682 (1999) (critiquing Justice Frankfurter, who posited that the lower federal courts serve as an in-take office for the U.S. Supreme Court thereby indirectly regulating the types of cases that will be heard). Purcell, and many others, criticizes Frankfurter for misunderstanding the role of the lower federal courts and for overemphasizing the role of the Court. *Id.* at 688. I will also embark on the same "misunderstood" journey placing too much emphasis on the Court, yet I do so for the purpose of arguing for a national standard of review that would be best established by the Supreme Court.

3. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (establishing a three-part test to balance First Amendment and community interests); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all racial classifications); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (applying rationality review to disabled persons because such persons neither fell into a racial classification, which receives strict scrutiny, nor did such persons fall into the gender classification, which receives intermediate scrutiny); Bowers v. Hardwick, 478 U.S. 186 (1986) (arguing that upholding dominant societal mores is sufficient to withhold constitutional protection).

4. *See* Purcell, *supra* note 2. Purcell claims that this desired neutrality and objectivity failed. *Id.* at 686.

5. *See id.* at 724.

minimization is essential in order to overcome systematic inequities. This article sets forth the notion that only through discourse[6] will judges act as fair arbiters. The elimination or minimization of personal biases is important particularly when competing claims arise.

Systematic inequities are most visible when constitutional claims compete because the Court is able to reach a decision without explicitly identifying the competition, thereby glossing over the tension. As a result, the Court is faced with a conundrum when opposing parties bring valid yet competing rights claims. One party's claim is often ignored and not adequately articulated, usually the claim from a person who is marginalized or from a disliked group.[7]

Competing claims arise because law and society are intimately interwoven.[8] When an individual exercises his or her liberties, there exists a possibility that the exercise of liberty will result in a deprivation to another. Individuals and groups seek to remedy the harm inflicted upon them by an opposing party. When a law or party adversely affects a person or group, that person or group claims harm. Harm is a ubiquitous claim placing responsibility on someone or something. The Court has attempted to use the notion of harm to resolve constitutional claims although it has not provided insight into what harm is or when it is permissible to trump constitutional rights.

This notion of harm is seen in various constitutional contexts from commerce and morality to the First Amendment. An understanding of harm is particularly important in equality claims where the impact of the discriminatory action is not overtly visible. The most common legal scenario involves a member of a marginalized group who attempts to gain an equal share of constitutional pie at the perceived expense of another.[9] This creates a challenge for the courts because each party claims harm. The courts must determine whose claim will prevail. As the Court articulated in *Lawrence v. Texas*,[10] a just society cannot allow the majority's

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6. This is often referred to as ethical or moral discourse but it is not intended to refer to societal norms or personal mores. Instead, ethical discourse is the process in which judges engage in dialogue about the constitutional values at issue and challenge their own internal biases. Through this discourse, reasoned, non-discriminatory analysis emerges, i.e. ethical and moral dialogue. *See* JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS, 17, 30, 84 (Ciaran R. Cronin, trans., The MIT Press 1993) (1990).

7. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (upholding the exclusion of gays and lesbians from participating in a St. Patrick's Day parade); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (rejecting that equality of the laws would trump an organization's right to freely associate with non-gays).

8. *See generally* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985) (discussing how the intention of law is to impact society). Indeed, the legal system was created in this country for societal purposes, particularly to distribute property for economic vitalization and to maintain the class stratification of society. *Id.* at 177-88, 488-93 (referring to laws that limited women's and African-Americans' access to power).

9. Constitutional pie is used here as in pieces, which make up a bundle of rights within the "pie" and not finite pieces intended to be shared by all.

10. 539 U.S. 558 (2003).

values to infringe upon the rights of a minority group.[11] The Court must strike an adequate balance between competing rights in order to uphold the Constitution. Generally, two types of competing claims arise.

The first type surfaces when one's liberty claim trumps another's equality claim, or when two liberty claims collide.[12] An example of this first type includes free speech versus equal protection claims between private actors.[13] The second type occurs when governmental actions are at issue. This conflict is more accurately described as a competition between constitutional principles.[14] Implicit and explicit principles include those that can be found based upon the structure and text of the Constitution.[15] For example, courts give great deference to military policy-making. Courts and those supporting deference argue that the structure of the Constitution limits judicial review of military action because it is essential to national security.[16] They claim that the federal and state governments possess a compelling interest that should withstand intrusion

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11. *See Lawrence*, 539 U.S. at 558 (reaffirming that the law cannot be used to suppress a minority group and impose the dominating group's values on them). The terms majority and minority are used to refer to the quantity of individuals belonging to each group, i.e. the number of heterosexuals is larger than the number of gays and lesbians.

12. *See generally Dale*, 530 U.S. 640 (denying equal protection of the laws where equality would trump the First Amendment); Roberts v. Jaycees, 468 U.S. 609 (1984) (upholding equality over First Amendment rights). The idea that a liberty claim, in particular the First Amendment, must trump other amendments in order to preserve equality is erroneous. Equality and liberty are interchangeable, and without one, the other fails to exist effectively. R. v. Keegstra, [1990] 3 S.C.R. 697. To illustrate, those involved in the civil rights movement of the 1960's had to violate segregation laws in order to protest segregation. Tsahai Tafari, *The Rise and Fall of Jim Crow*, Public Broadcast Station, *at* http://www.pbs.org/wnet/jimcrow/struggle_court.html (last visited Mar. 10, 2005). The First Amendment protection did not apply to African-Americans, who were deemed second-class citizens, because they were not afforded full equality. *Id.*

13. Private equality claims will not be addressed as something distinct and separate from public claims because private deprivations are no less severe or injurious than governmental infringement of equality. *See* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444-49. Further, the Court has applied constitutional principles to both private and public actors somewhat consistently. *See, e.g., Roberts*, 468 U.S. 609 (1984); Virginia v. Black, 538 U.S. 343 (2003) (holding private actions were subjected to constitutional scrutiny).

14. Article III of the U.S. Constitution grants judicial review of competing constitutional claims because such claims are of national concern and incorporate the values of the Constitution. "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982) (White, J., dissenting) (referring to the competing and implicit structural principles of the Constitution). *See also* Palmore v. United States, 411 U.S. 389, 407-08 (holding that issues involving national concerns are appropriate for federal courts).

15. *Palmore*, 411 U.S. at 407-08. *See also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9-13 (1999) (explaining that thick constitutional principles involve structural arguments such as federalism and comity).

16. Thomasson v. Perry, 80 F.3d 915, 926-27 (1996) (finding that Article I of the Constitution grants Congress military power, and thus, military deference is consistent with constitutional principles). *But see* Ann Scales, *Militarization: The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. SOC. JUST. 541, 551-52 (2003) [hereinafter *Militarization*].

from the courts.[17] As a result, military deference and national security have trumped individual rights and protections.[18]

In both types of claims, the Court has failed to identify competing tensions, and has not developed a sufficient analytical framework for balancing them.[19] It is essential to acknowledge that both harms exist in order to bring to light the constitutional rights at issue. The Court, as supreme arbiter of the Constitution, must determine which claim will prevail. This article seeks to begin the discussion to resolve the competing tensions, and in doing so, suggests a comparative harm analysis. A comparative harm analysis should be applied across the spectrum whenever constitutional interests compete; however, for illustrative purposes this article will focus on the conflict between equality and liberty.

This article will first explore the reluctance to equally distribute constitutional rights. Second, this article will outline the Court's harm analyses and the rationale behind them in various constitutional contexts including the Dormant Commerce Clause and First Amendment cases. In exploring the harm analyses used by the Court, it was discovered that the Court often relied on unreasoned morality rhetoric, which the Court ultimately rejected, and eventually grew to adopt and accept causative factors directly linking the harm to action at issue. Third, a comparative harm analysis will be suggested to resolve competing constitutional claims. A comparative harm analysis seeks to identify valid constitutional infringements. This article argues for the implementation of reasoned, practical discourse in evaluating and balancing competing claims, and rejects the Court's implicit notion of proving causative harms. This article also presumes that both the Equal Protection Clause and the Due Process Clause establish a non-discriminatory policy.[20]

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17. *Thomasson*, 80 F.3d at 926-27.

18. *See id.*; *see also* Bd. of Dir. of Rotary Club v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

19. The rationale behind military or congressional deference is to prevent unwarranted judicial interference. U.S. Americans have historically been skeptical about any form of governmental encroachment since our early inception, and understandably so. *See* FRIEDMAN, *supra* note 8. "[F]reedom of expression has greater value in a political context . . . and therefore more conducive to finding a fair and just compromise between the two competing values . . ." *Keegstra*, [1990] 3 S.C.R. at 737. However, we seem to allow government interference when we need to prevent intrusion most. For example, military and congressional deference allows governmental intrusion into our fundamental liberties. *See, e.g.*, O'Brien v. United States, 391 U.S. 367, 376 (1968); Dennis v. United States, 341 U.S. 494 (1951); *Thomasson*, 80 F.3d 915. Yet, the Court and the Third Circuit failed to review the competing rights claims in the cases cited above because it believed the Executive and Legislature have exclusive, non-reviewable authority to act. *Id.* The separation of powers doctrine requires the Court to review competing constitutional claims that involve explicit rights and implicit principles. *See Lawrence*, 539 U.S. 558.

20. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1222 (suggesting that the Equal Protection and Due Process Clause favor non-discrimination in both the intent and/or effects of legislation and private actions) [hereinafter *The Emerging Third Strand*]. This presumption is made despite Justice Scalia's claim that the Equal Protection Clause has reached "full maturity" or complete stagnation. *Lawrence*, 539 U.S. at 587-89.

II. UNDERSTANDING THE RESISTANCE TO SHARE THE CONSTITUTIONAL PIE

A. Power and Security Theory in Legal Discourse

Political economic scholars employ comparative analysis theories in understanding conflicting interests and power structures. For example, Kenneth Waltz explores one state's need to discriminate against another.[21] Usually the discriminating state possesses more power or dominance.[22] The powerful seek to impose their value system on the less powerful, while the less powerful resist those values.[23] Waltz concludes that the powerful seek to maintain their existing status and perceive the opposing state as a threat.[24] Therefore, the dominant ones reason that the opposition must be eliminated or suppressed in order for the powerful to prevail, according to Waltz.[25] Waltz criticizes these discriminating states for failing to understand how diversity can produce greater (economic) gains.[26]

Whereas Waltz uses this theory to understand nation states and their economic structure, this is also the scenario usually played out when constitutional claims conflict. I posit that this same theory can transcend political economic discourse and apply to law and society. The discriminating or dominating group perceives the opposition as harmful and threatening.[27] The group will often achieve societal concurrence by fueling an irrational fear.[28] In some scenarios, the fear is valid, while in others, the fear is irrational. For instance, dominant groups fear their fall from power, while the subordinate ones fear domination.[29] A group's success in maintaining or overcoming dominance relies largely upon societal consent.[30] Thus, either group must have ideological buy-in or

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21. *See generally* KENNETH WALTZ, THEORY OF INTERNATIONAL RELATIONS (1959); KENNETH WALTZ, LAWS AND THEORIES 27-46 (Koehane ed., 1986).
22. KENNETH WALTZ, LAWS AND THEORIES 27-46 (Koehane ed., 1986).
23. *Id.*
24. *Id.* at 35-40.
25. *Id.*
26. *Id.* at 46.
27. *Id.* at 27-46.
28. *Id.*
29. Interestingly, many political economists through examining history conclude that dominating others in an effort to resist perceived vulnerabilities will ironically lead to that exact result, i.e. loss of power and a weak state because as a group grows larger and more powerful others begin to question the legitimacy of the dominant, and the less powerful seek to weaken them. BENJAMIN J. COHEN, THE QUESTION OF IMPERIALISM: THE POLITICAL ECONOMY OF DOMINANCE AND DEPENDENCE 229-57 (1973); STEPHEN D. KRASNER, STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM 32-58 (1985); David A. Lake, *Power and the Third World: Toward a Realist Political Economy of North South Relations*, 31 INT'L STUDIES Q. 217 (1987).
30. *See generally* Stephen R. Gill & David Law, *Global Hegemony and the Structural Power of Capital*, 33 INT'L STUDIES Q. 475 (1989); Stephen Gill & David Law, *Global Hegemony and the Structural Power of Capital*, *in* GRAMSCI, HISTORICAL MATERIALISM AND INTERNATIONAL RELATIONS 93-124 (Stephen Gill ed., 1993).

consent from society, or at least key members of society, in order to receive credibility, legitimacy and security.

The legal discourse between the gay rights and anti-gay movements exemplifies the power and security theory. In *Romer v. Evans*,[31] the proponents of Amendment 2 sought to restrict gays and lesbians from accessing the political process in an effort to conserve the resources of the state for more valued groups.[32] The proponents informed voters—predominantly heterosexuals, people of color and the religious—that queers threatened their legal and societal status.[33] They sought concurrence by perpetuating a perceived harm and explained that Amendment 2 would preserve the voters' legal rights.[34] The voters responded and authorized the State of Colorado to legally discriminate against gays, lesbians and bisexuals. The voters believed the harm—political protection of queers—not only existed but also threatened them.[35]

B. Survival Theory and Discrimination

The survival theory explains a related yet distinct reason private actors and the government seek to distribute burdens in an onerous way. Unlike the power and security theory where dominant groups and individuals seek to uphold and maintain power, the survival theory seeks to maintain sameness. The survival theory posits that a discriminating group seeks to preserve its own existence by preventing those who possess different belief systems from affecting change.[36] Those who discriminate believe they need to maintain homogeneity in order for their ideals to survive. The survival theory is often at the crux of most competing claims, and it explains why some groups advance arguments insufficiently grounded in constitutional law. As a result, this theory will be examined further in several contexts below.

In examining religious and cultural survival, Professor Thomas Giegerich explains that the United States government historically used both religion and property to discriminate and promote homogeneity.[37] He argues that the promotion of religion and culture directly conflict with liberty and equality.[38] This conflict exists because the promotion of sameness is in opposition with individuality. Giegerich also concludes that homogeneity does more than merely perpetuate survival of the most

31. Romer v. Evans, 517 U.S. 620 (1996).
32. *Romer*, 517 U.S. at 635.
33. *See* Evans v. Romer, 882 P.2d 1335 (Colo. 1994).
34. *Evans*, 882 P.2d at 1340.
35. *See id.*
36. *See* S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1283-86, 1298-1300 (1997) (arguing that the survival theory erroneously presumes that minority groups will corrupt the majority).
37. Thomas Giegerich, *Freedom of Religion as a Source of Claims to Equality and Problems for Equality*, 34 ISR. L REV. 211, 212 (2000).
38. *Id.* at 214.

powerful groups. Homogeneity, Giegerich opines, fosters authoritative and totalitarian regimes.[39] Whereas homogeneity is essential for perpetuating survival of the most powerful, pluralism is essential for perpetuating equality, liberty, and thus individualism.[40]

In offering his explanation of why the United States relies upon homogeneity, Professor John S. Baker[41] references Plato and Socrates, like many conservative pundits, in making his argument.[42] Believing James Madison interpreted Greek philosophy similarly when Madison helped structure the Constitution, Baker referenced *Federalist Ten* as his evidence to support his belief that the U.S. federalist structure allows for the delicate balance between giving the minority a voice while giving power to the majority.[43]

Baker explains that the majority holds the key to morality and virtuous conduct.[44] The U.S. government permits some individualism in order to allow limited expression and to prevent civil uprisings and cultural wars from occurring.[45] Baker also states that the minority is not meant to have power.[46] According to Baker, minority power would promote rampant individualism, and consequently, the downfall of society, whereas giving power to the majority preserves the virtue and mores of society.[47] This, he says, is "brilliant" because society needs homogeneity of ideals and morals in order to survive.[48] Homogeneity will allow the United States to continue its economic and cultural superiority.[49] In other words, Baker posits that the federal government needs to protect moral majoritarism, but should do so quietly in order not to cause a minority uprising.[50]

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39. *Id.* at 219.
40. *Id.*
41. John S. Baker, Louisiana State University law professor, Lecture to the University of Denver College of Law (Oct. 9, 2003).
42. Strong, *supra* note 36, at 1268-80 (explaining that conservatives rely upon Plato and Aristotle in arguing for moral majoritarism). In his reference to Greek philosophers, I posit that Baker and others ignore the 6th Century B.C.E. founder of Greek philosophy and culture. By ignoring the founder, Sappho of Lesvos, Baker neglects the very foundation of Greek philosophy beginning some 300 years before Socrates and Plato. COLUMBIA ENCYCLOPEDIA 2512-13 (6th ed. 2000). Sappho, in the midst of tragedy, calls for humanity. She foreshadows that survival depends upon the love and tolerance of humankind, which furthers the advancement of civility by engaging in natural "law" instead of resisting it. Natural law refers to the innate propensity to pursue physical, emotional and spiritual desires. History erroneously refers to Sappho as only a poet. Perhaps this erroneous reference can be best explained by Baker's contention that majoritarism must prevail in order to "preserve" society.
43. John S. Baker, Louisiana State University law professor, Lecture to the University of Denver College of Law (Oct. 9, 2003).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

Baker explains his position against same sex relations by proclaiming that only small communities can foster virtue. The family unit, defined as man, woman and child, populates the type of small community in danger most often.[51] When minorities threaten significant and essential morals, such as upholding the values of the traditional family, the federal government needs to proclaim and define acceptable conduct.[52] Yet, in less severe circumstances, Baker suggests that the federal government should refrain from engaging in cultural wars, and the judiciary should refrain from engaging in political questions.[53]

Despite Baker's support for homogeneity and oppression, he possesses a worthwhile suggestion: balance. Unfortunately, Baker would favor implicit religious and cultural dominance in order to strike the "balance."[54] Giegerich also favors balance, yet cautions against religious and cultural dominance since such dominance leads to authoritarian regimes.[55] Giegerich encourages the balancing of equality and liberty for they are both "partners and competitors."[56]

Professor Julie Nice, much like Giegerich, argues that the tensions articulated above serve as partners as well as competitors. Professor Nice best captures the current tension by describing ten antinomies, or contradictions, that result from the Court's two-strand, equal protection analysis.[57] Nice also emphasizes that the first antinomy, assimilation and subordination, ultimately explains the remaining nine antinomies, in that the struggle for power causes legal discourse.[58] As a result of the discourse, contradicting legal theories or antinomies emerge. The contradicting theories either will perpetuate subordination by encouraging assimilation or disrupt subordination by welcoming heterogeneity. Nice illustrates that assimilation promotes homogeneity and thus perpetuates subordination.[59]

The power and survival theories are, in their most definitive translation, the rationale for maintaining dominant, homogenous legal structures

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51. *Id.* As an aside, from a global perspective, the United States is a "small" community within a much larger community.

52. *Id.*

53. *Id.*

54. *Id.*

55. Giegerich, *supra* note 37, at 219.

56. *Id.* at 212.

57. Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1394-96 (2000). The Court relies on a two-strand test to determine whether the Equal Protection Clause applies: fundamental right and suspect class. *Id.* at 1419-20.

58. *Id.* at 1394.

59. *Id.* at 1413. Nice argues for the disruption of hierarchical power relations and suggests the implementation of the third strand: the co-constitutive approach. The third strand resolves the Equal Protection Clause's antinomies by examining the relationship between the class and the right, and the *effects* of the discriminatory law on society. *Id.* at 1421-22.

designed to keep power vested in the hands of a few.[60] The law, from its very inception in the United States, has been used consistently to maintain and distribute power (and wealth) in society.[61] By so doing, the powerful individuals are able to survive or maintain their positions by structuring the laws in a way that prohibit the disruption of that power scheme.[62] This article seeks to overcome the inherent dominant power structure, and preserve liberty and equality in their unadulterated form. Yet, the Court must first overtly acknowledge and identify valid competing liberty and equality claims.

III. THE SUPREME COURT'S USE OF HARM ANALYSES

The Court's historical and modern harm analyses involve the First Amendment, equal protection, political participation and the Dormant Commerce Clause. Before a comparative harm analysis is proposed, an assessment of the Court's use of harm will be analyzed. The Court attempts to employ objective tests and rationales that fail to consistently acknowledge and balance competing claims. In attempting to achieve neutrality, the Court requires a causative demonstration of harm in many cases. The Court's attempt at objectivity and neutrality fails, and the tension between competing claims remains. Only when the Court employs reason and discourse does it succeed in balancing interests.

A. Harm and the First Amendment: Illegal Advocacy, Fighting Words, the Diluted Message and Societal Effects

1. Illegal Advocacy and Fighting Words

In *Dennis v. United States*,[63] the Court conclusively reasoned that Dennis's actions caused the risk of overthrowing the government.[64] Dennis organized a Communist organization during the McCarthy Era.[65] The government dismantled Dennis's organization for violating the Smith Act.[66] Dennis's First Amendment claim failed because the Court ruled that the government possessed sufficient justification in prohibiting speech that elicited violence, terrorism, and a "clear and present dan-

60. See Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 49 (1989) (referring to H.L.A. Hart that the obvious purpose of law is survival).

61. FRIEDMAN, *supra* note 8, at 115-20 (referring to the problems associated with apportionment and suffrage, and the debate about reallocating political power before and during the drafting of the U.S. Constitution).

62. *Id.*

63. Dennis v. United States, 341 U.S. 494 (1951).

64. *Dennis*, 341 U.S. 494.

65. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 983 (Aspen Publishers 2001) [hereinafter CHEMERINSKY]; *Dennis*, 341 U.S. at 505. The timing of this case can not be ignored since communism was a perceived threat to the U.S. government in the 1950s.

66. *Dennis*, 341 U.S. at 505. Perhaps the most troubling part is that the government chose to restrict speech in the most important context, political participation. *See supra* note 19.

ger."[67] The extent of the Court's analysis involved the determination of whether the government's "fear of being overthrown [was] reasonable?".[68] The Court answered affirmatively because the fear of communism threatened U.S. security, and the Court deferred to Congress.[69] Justice Vinson for the majority exclaimed that "no proof is necessary to overthrow the government."[70] The 1951 clear and present danger test was criticized and replaced by the illegal advocacy and fighting words doctrine.[71]

In *Beauharnais v. Illinois*,[72] the Court decided its first modern hate speech case involving illegal advocacy.[73] The Court found the Chicago statute prohibiting conduct that "is productive of breach of the peace or riots" constitutional.[74] "'The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized [sic] by events familiar to all.'"[75] The Court's well-documented advancement that racial tension and violence were a significant problem affirmed the right of the legislature to pass a law trying to curtail such acts.[76]

As a result, the Court found Beauharnais's derogatory and aggressive expressions targeted at African Americans unprotected speech.[77] The Court favored equality over liberty and held that hate speech is not afforded constitutional protection because it perpetuates inequality. The Court reasoned that it is "precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[78]

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67. *Dennis*, 341 U.S. at 508.

68. *Id.*

69. *Id.*

70. *Id.* at 505. Justice Vinson "rejects the contention that success or probability of success is the criterion" for determining the likelihood of overthrowing the government, hence, a reasonable fear is all that is necessary to trump First Amendment protection. *Id.*

71. *Id.* at 525-26 (Frankfurter, J., concurring) (criticizing the clear and present danger test); CHEMERINSKY, *supra* note 65, at 983.

72. Beauharnais v. Illinois, 343 U.S. 250 (1952).

73. *See Beauharnais*, 343 U.S. at 250.

74. *Id.* at 251 (citing Ill. Rev. Stat. 1949, c. 38, Div. 1, § 471).

75. *Id.* at 261 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

76. *See id.* at 267 (disagreeing with the rationale of the state legislature, but the Court upheld the statute because it could not find anything unconstitutional about it. The dissent described the conduct of Beauharnais as constitutional because he was petitioning the legislature for policy reform regarding the segregation of blacks and whites, and noted that this type of political representation is precisely what the Constitution is set to uphold. *Id.* (Black, J., and Douglas, J., dissenting). *See Dennis*, 341 U.S. at 580 (applying the same rationale which found that the conduct of the defendant is expressly what the Constitution is set to uphold).

77. *Id.*

78. *Beauharnais*, 343 U.S. at 262-63 (citing American Foundries v. Tri-City Council, 257 U.S. 184 (1921)).

Almost two decades later, the Court favored liberty and overlooked an equal protection claim. In *Brandenburg v. Ohio*,[79] the State of Ohio passed a law prohibiting advocacy of lawless activity, arguing that such advocacy harmed societal welfare and security.[80] The leader of a Ku Klux Klan rally was convicted under the Ohio statute for encouraging criminal activities.[81] The Klan leader advocated for "bury[ing] the nigger; that is what we are going to do to the niggers; freedom for whites."[82] He claimed that the Ohio law infringed on his First Amendment right to advocate such statements.[83] The Court found the Ohio statute unconstitutional.

> The Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform; or who publish or circulate or display any book or paper containing such advocacy; or who justify the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or who voluntarily assemble with a group formed to teach or advocate the doctrines of criminal syndicalism.[84]

Implicit in the Court's rationale is that Ohio intended to impermissibly punish political advocates by opining that the act unduly punishes those "advocat[ing] or teach[ing] . . . as a means of accomplishing . . . political reform"[85] To conclude that the Klan leader was a political advocate who intended to generate reform, is to ignore that the leader used threats and the promotion of violence to accomplish the goal of inequality. The Court missed the competing harm claim, and as a result, its "balancing" test did not weigh nor did it in fact balance constitutional interests.

The Court established a three-part test to determine when the government can restrict free speech.[86] The Court evaluated: 1) imminent harm; 2) likelihood of producing illegal activity; and 3) intent to cause

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79. Brandenburg v. Ohio, 395 U.S. 444 (1969). The progress of the civil rights movement at this point in history advanced considerably compared to the lack of progress in the early 1950s when *Beauharnais* was decided. It is interesting that the Court sought to limit equality just as the civil rights movement was gaining momentum. This suggests that dominant society was seeking to maintain security and survival.

80. *Brandenburg*, 395 U.S. at 445.

81. *Id.* at 444-45.

82. *Id.* at 446 n.1 (noting that some of the comments were inaudible although it was clear that the Klan leader was making violent threats against African-Americans).

83. *Id.*

84. *Id.* at 448.

85. *See id.* at 448-49.

86. *See generally id.* at 447 (discussing three factors which must be considered when making determinations of whether speech incites imminent lawless action); CHEMERINSKY, *supra* note 65, at 989-90.

imminent illegality.[87] The Court found that the Ohio statute was overbroad and did "not distinguish [sic] from incitement to imminent lawless action."[88] In short, the Court did not believe that the Klan leader's remarks would incite criminal actions and there was no evidence of his intent to do so.[89]

Virginia v. Black[90] illustrates the Court's recent application of the fighting words doctrine.[91] This case involved two separate cross-burning incidences.[92] The first petitioner burned a cross at a Ku Klux Klan rally.[93] The second case involved two petitioners who burned a cross at the home of an African-American family.[94] The Virginia legislature passed a law seeking to prohibit cross-burning both in a private and public setting.[95] The Virginia statute deemed the act of cross-burning prima facie evidence that parties intended to intimidate.[96] As a result, the Virginia Supreme Court found the statute unconstitutional.[97]

Justice O'Connor, speaking for a plurality, examined the history of cross-burning extensively concluding that it has been used as symbolic speech *and* for the purposes of racial intimidation.[98] Because cross-burning had been used for symbolic speech, O'Connor found the Virginia statute unconstitutional on its face:[99]

> Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'[100]

Justice O'Connor would have found the statute constitutionally permissible had the Virginia legislature sought to ban cross-burning that was used to intimidate without concluding that *all* cross-burning causes intimidation.[101] Black's case was vacated, and Elliott's and O'Mara's

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87. *Brandenburg*, 395 U.S. at 447.
88. *Id.* at 448.
89. *Id.* at 451.
90. Virginia v. Black, 538 U.S. 343 (2003).
91. *See generally Black*, 538 U.S. at 343 (discussing the recent application of the fighting words doctrine).
92. *Id.* at 348-50.
93. *Id.*
94. *Id.*
95. *Id.* at 348.
96. *Id.*
97. *Id.* at 350-51.
98. *See id.* at 353-58.
99. *See id.* at 363 (disagreeing with the Virginia Supreme Court, which held that content-based prohibition is always unconstitutional on its face).
100. *Id.* at 362 (quoting R.A.V. v. City of St. Paul, 505 U.S. 307, 391 (1992)).
101. *Id.* at 361 (citing *R.A.V.*, 505 U.S. at 391, "[w]e did not hold in *R.A.V.* that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech.

case was remanded to determine whether their cross-burning was used to intimidate.[102]

The Court acknowledged that content-based prohibition is permissible when the message or conduct seeks to elicit anger, resent or alarm.[103] This prohibition sets forth the goal of "keeping the peace," not for purposes of perpetuating equality.[104] Here again, possible riots or violence is the harm, and not the equality of blacks or other targeted groups.[105] Although the Court did not explicitly indicate that parties must prove the alleged harm, the Court implied it by stating that it is necessary to demonstrate that respondents intended to intimidate.[106]

The Court was unwilling to trump a constitutional right when the respondent did not directly intend harmful consequences and declined to hold that all those who burned crosses intended to cause intimidation and perpetuated the inequality of African-Americans and other targeted groups.[107] Black argued that his cross-burning was not intended to cause intimidation.[108] In relying upon the historical, celebratory use of cross burning, the Court rationalized that since cross-burning was not always used to intimidate, it is unconstitutional for a state to prohibit all cross-burning.[109] Because the statute did not account for celebratory purposes, the Court held that a prima facie evidence provision, therefore, violated the Constitution.[110]

Black's cross-burning *was* intended to send a message of racial inequality and intimidation.[111] Black targeted African-Americans, Mexicans, and those who support their equality.[112] Yet, the Court found that Black's conduct did not create a "true threat" because Black did not possess the requisite intent to directly intimidate.[113] The Court argued that Black's burning took place on a private road thereby minimizing the intimidation that could arise.[114] Not only did a police officer stop to

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Rather, we specifically stated that some types of content discrimination did not violate the First Amendment").

102. *See id.* at 389 (Thomas, J., dissenting) (dismissing the idea that cross-burning could ever be used in a modern day application as expressive speech due to its absolute link to racial intimidation).

103. *Id.* at 360.

104. *See id.*

105. *See id.*

106. *See id.* at 361.

107. *Id.* at 364.

108. *Id.* at 356.

109. *See id.*

110. *See generally id.* at 390 (Thomas, J., dissenting) (explaining that cross-burning is rarely, if ever, used as a non-racial celebratory expression in the present day).

111. *Id.* at 349-51. Black concedes that his conduct targeted those racially diverse and those who supported their equality, and his derogatory and inciting comments were meant to mobilize his base to take action in support of racial denigration.

112. *See id.* at 349.

113. *Id.* at 356.

114. *Id.* at 351.

watch the burning but so did those passing by.[115] The road was not very private after all. Black may not have known that his cross-burning would directly intimidate or harm specific individuals since only whites were presumably present at the rally. However, his actions perpetuated intimidation and inequality. The Court's distinction would have been less flawed had Black's conduct been irrelevant to the intimidation often associated with cross burning and celebratory for reasons other than racial denigration.

In the second scenario, the Court remanded O'Mara and Elliott's case because it found that their cross-burning specifically targeted African-Americans at their home.[116] Elliott and O'Mara burned a cross in the yard of an African-American man "'to get back' at" him.[117] The Court found that respondents possessed the required intent to cause harm.[118] Yet, in both scenarios, cross burning was used to denounce racial equality and proclaim white supremacy either through physical threats or promotion of Klan ideals and actions.[119] For this reason, the Court's rationale is flawed.

2. Diluted Message

Roberts v. United States Jaycees[120] illustrates a second type of First Amendment harm: the diluted message.[121] The Jaycees prohibited women from joining the organization claiming that the presence of women diluted the organization's message promoting young men.[122] The Court found that claimant's equal protection claim trumped the Jaycees' First Amendment claim.[123] The Court reasoned that the presence of women would not dilute the Jaycees' message promoting men.[124] The Court balanced the restrictions on the First Amendment with the Equal Protection Clause.[125]

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppres-

115. *Id.* at 348 (noting that passing drivers observed the cross burning and stopped to inquire).
116. *See id.* at 350-51.
117. *Id.* at 350 (quoting the trial court).
118. *Id.* at 351.
119. *See generally id.* at 367-68 (Thomas, J., dissenting) (discussing that the intent to intimidate is in the history of cross-burning).
120. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).
121. *See generally Roberts*, 468 U.S. at 609 (discussing the First Amendment harm of the "diluted message").
122. *Id.* at 613-16 (also discussing the private versus public accommodations debate finding the Jaycees fell under both since it used public venues, and therefore, found the Minnesota's public accommodation statute applicable).
123. *See id.* at 630.
124. *Id.* at 630.
125. *Id.* at 622.

> sion of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.[126]

The Court concluded that the Jaycees message has not been and will not be unduly burdened by the presence of women.[127] The Court held that the state's compelling interest to prevent gender discrimination is a warrantable restriction on free speech, particularly when it is done in the least restrictive manner possible.[128] The Court reasoned that the Jaycees's alleged First Amendment violation was invalid or unsubstantiated:

> It is similarly arguable that, insofar as the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women as voting members will change the message communicated by the group's speech because of the gender-based assumptions of the audience. Neither supposition, however, is supported by the record. In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions.[129]

The Court held that excluding women perpetuated the subordination and oppression of women in society.[130] Creating equality under the law "reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women."[131]

In *Boy Scouts of America v. Dale*,[132] the Court faced a very similar situation as in the *Jaycees* case. The Boy Scouts of America (BSA) alleged that Dale, a scout leader who was gay, diluted the organization's message promoting traditional family values.[133] They argued that the mere presence of Dale diluted the BSA's message.[134] The BSA claimed that to continue its message promoting traditional families, the organiza-

126. *Id.* at 623.
127. *See id.* at 627-28.
128. *See id.* at 630-31.
129. *Id.* at 627-28 (citations omitted).
130. *See id.* at 628.
131. *Id.* at 626.
132. 530 U.S. 640 (2000).
133. *See Dale*, 530 U.S. at 656.
134. *Id.* at 653.

tion had to exclude Dale from its association.[135] Dale argued the State of New Jersey possessed a compelling state interest in prohibiting the discrimination in public accommodations.[136] The high court of New Jersey found that the Boy Scouts were, in effect, a public organization that enjoyed great access to public places and resources.[137] Implicit in this argument is the right to equal protection as an active member of the gay community.[138] The tension between the two claims is obvious. The BSA wanted to exercise free association with non-gays, and the state and Dale sought a non-discrimination policy. The Court found the BSA's argument persuasive and agreed Dale's presence would dilute the organization's message.[139]

However, the Court failed to adequately balance Dale's competing claim as it did in *Roberts v. Jaycees*.[140] The Court also failed to draw a reasonable distinction between the Jaycees and Boy Scouts cases. Instead, it concluded that gays would dilute BSA's message promoting heterosexuality, even though the BSA had a policy not to discuss sexuality at all.[141] Instead, the Court held that although "homosexuality has gained greater societal acceptance . . . this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views."[142]

3. Harmful Societal Effects: Obscenity, Pornography and the First Amendment

a. Obscenity

In *Stanley v. Georgia*, the Court held that Georgia's obscenity definition impeded individual thought because the law extended to activities occurring in one's own home.[143] The Court found that viewing obscene material privately was a victimless act, and not even society or morality was harmed.[144]

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he

135. *See id.* at 652.
136. *See id.* at 645.
137. *Id.* at 646.
138. *See id.* at 645. The Court did not address Dale's claim, nor did it address New Jersey's compelling state interest in promoting equality under its public accommodations law. *Id.*
139. *Id.* at 656.
140. *See id.* at 660.
141. *Id.* at 654-55.
142. *Id.* at 660 (citation omitted). The Court held that "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 661.
143. *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969).
144. *See Stanley*, 394 U.S. at 566-67.

> may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[145]

The Court also rejected the state's argument that obscene material causes anti-social behavior[146] because it found a lack of evidence proving that private viewing harmed society.[147] A formidable competing claim was not made other than to say the government has an interest in preventing anti-social behavior. The anti-social behavior may include rape and violence to women, and if so, the equal protection doctrine could have been summoned.

Four years later when the Court was faced with the commercial distribution of obscene materials it found that harm to morality, and thus harm to society, was evident. In *Miller v. California*,[148] the Court would not extend constitutional protection to sexually explicit material lacking in social value.[149] The appellant mailed sexually explicit materials to unsolicited or unsuspecting individuals in violation of a California statute.[150] The Court found that the state was within its constitutional parameters when it sought to prohibit unsolicited, obscene material.[151] The Court recognized that the state sought to protect society at large, and particularly, the recipients of obscene material.[152] The Court also recognized the importance of protecting material that contains "serious" literary, artistic, scientific and educational value so not to silence valuable speech.[153] Again, an adequate competing claim was not made although arguably one could have been made. The harm to society claim would have been more adequate had it been rooted in constitutional law. For example, if the obscene material harmed a particular group in a way that prevented access to rights or privileges, then an adequate constitutional claim would have been made.[154]

In an attempt to balance competing interests,[155] the Court established an obscenity rule protecting unsuspecting adults from receiving pornographic material, otherwise understood as time, place and manner

145. *Id.* at 565.
146. *Id.* at 566-67.
147. *See id.* at 566.
148. Miller v. California, 413 U.S. 15 (1973).
149. *Miller*, 413 U.S. at 36-37.
150. *Id.* at 17-18.
151. *See id.* at 30-31.
152. *See id.* at 24 (seeking to restrict distribution of material that is 'patently offensive' in order to protect society).
153. *Id.* at 24.
154. Further, the Court's rationale is contradictory because it concludes that offending community standards warrants a constitutional trump. This contradicts Lawrence v. Texas, 539 U.S. 558, 571 (2003), where the Court held that imposing the majority's views on the minority is impermissible. *See supra* note 11. The Court's holdings would possess greater effectiveness if constitutional values complemented instead of contradicted each other.
155. *See Miller*, 413 U.S. at 19-20. Here, the Court stated that the competing interests were the state's right to protect public morals and the pornographers' right to produce obscene material.

restrictions on First Amendment speech.[156] Obscenity has been defined as:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . .; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[157]

Finding that harm existed when society's sexual mores were offended, the Court placed another restriction the First Amendment.[158]

b. Child Pornography

The *New York v. Ferber* Court found that photographs and films depicting minors engaged in sexual activity harmed children.[159] The Court reasoned that the "distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[160] The Court made this determination because congressional data indicated that child pornography harms children's psychology and physical well-being, and because pedophiles use pornographic images to entice children to have sex with them.[161] Relying on the data, the Court concluded that the government possessed a compelling interest to ban child pornography. The Court again held that sexually explicit images should be taken as a whole in order to avoid criminalizing images with social, educational, artistic or political value.[162]

In *Ashcroft v. Free Speech Coalition*, the Court found congressional evidence insufficient to prove that virtual child pornography harms actual children.[163] Without actual harm, the Court could not justify the overreach of the Child Pornography Protection Act ("CPPA") which

156. *See id.* at 24. However, the appellant's First Amendment claim received little attention because the Court was focused on qualifying the ambiguous *Roth* obscenity test in order to help resolve the many obscenity cases that sat before federal and state courts. *See id.* at 29.

157. *Id.* at 24 (citation omitted). It is important to note that the average person may not apply community standards from a gender neutral viewpoint. In other words, such definitions may not take into account the oppression of females in pornography if evaluated by male standards of sexuality. *See* Catherine A. Mackinnon, *Not a Moral Issue*, *in* FEMINISM AND PORNOGRAPHY 169-175 (Drucilla Cornell ed., 2000) [hereinafter *Not a Moral Issue*]. Further, even if community standards reflect the objectification and consequently the harm of women, the Court may find the material protected speech because it contains some value, probably a male value. *See id.* at 176.

158. *See* New York v. Ferber, 458 U.S. 747 (1982).

159. *See Ferber*, 458 U.S. at 758.

160. *Id.* at 759.

161. *See id.* at 758 n.9 (referring to congressional findings).

162. *See id.* at 778 (Stevens, J., concurring).

163. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).

banned virtual child pornography.[164] As a result, the Court found that the CPPA "chill[ed]"[165] protected speech because Congress had overstepped constitutional boundaries by prohibiting speech, not otherwise considered criminal, in an attempt to stop the crimes of pedophiles.[166] "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[167] The Court referred extensively to *Ferber*.[168] Concluding that *Ferber* permitted restrictions on free speech when *actual* children were harmed, the *Ashcroft* Court held that *Ferber* only intended to reach pornography made with real children.[169] Thus, virtual porn did not directly harm minors, according to the Court.[170]

Congress compiled a report outlining findings that virtual porn harmed children.[171] Congressional findings indicated that perpetrators use virtual child porn as an instrument to encourage children to engage in sexual conduct.[172] The congressional report also indicated that virtual children are indistinguishable from actual children.[173] Indistinguishable photos pose a serious problem when trying to prosecute pornographers using real children.[174] Finally, Congress sought to deter the making of virtual pornography to curb the child porn industry.[175]

The government argued that the use of virtual photos perpetuates the abuse of children and the desires of child molesters, which justifies a compelling government interest to stop virtual child pornography.[176] The government also argued that the Court should not protect sexually explicit material whose *only* focus portrays hard pornographic images of children.[177] Specifically, the government claimed that it sought to eliminate material promoting or advertising images depicting individuals that "appear to be a minor."[178] The government explained that Congress intended to protect children.[179] In order to protect children, the government needed to criminalize virtual child pornography that is indistinguishable

164. *See Ashcroft*, 535 U.S. at 251.
165. *See id.* at 244.
166. *Id.* at 253.
167. *Id.*
168. *See id.* at 239-56.
169. *See id.*; *see also* JAMES A. HENDERSON JR., ET. AL., THE TORTS PROCESS 110 (Aspen Press 5th ed., 1999) [hereinafter HENDERSON] (explaining that direct causation is found where evidence demonstrates a direct link between respondent's actions and the alleged injury).
170. *Ashcroft*, 535 U.S. at 241.
171. *Id.* at 270.
172. *Id.* at 263 (O'Connor, J., concurring in part and dissenting in part).
173. *Id.* at 264 (O'Connor, J., concurring in part and dissenting in part).
174. *Id.*
175. *Id.* at 254-55.
176. *Id.* at 252.
177. *Id.* at 250.
178. *Id.* at 254.
179. *Id.*

from actual child pornography claiming that it endangers the physical and psychological well being of children.[180]

Congressional findings and deterrence theory did not convince the Court that a sufficient harm existed.[181] Yet, similar findings in *Ferber* did convince the Court of a sufficient harm.[182] The Court rejected the statute when the connection between virtual porn and the harm to actual children became attenuated.[183] The Court did not find a causal relationship between virtual child pornography and harm to actual children.

The Court refused to protect pornography made with actual children because it found the material directly harmful to children's psychological and physical well-being.[184] The fact that child porn was also used by sexual perpetrators to entice and abuse their victims was an additional reason to restrict speech; [185] yet, this alone would not warrant a constitutional trump because virtual child porn did not directly harm children.[186] The Court is inconsistent when balancing harm and the First Amendment.

In summation, there exists a lack of discourse in the Court's rationale because, in part, it required a direct, causal showing of harm reflecting the Court's fluid, changing understanding of direct injury. For example, in the child pornography cases, the Court required a demonstration that specific children were harmed by the making and distribution of pornographic images. Yet, *Miller* did not require a demonstration of harm other than to say that when a community is offended then society is harmed, which is circular and conclusive in reason. *Miller* also does not help to address an equal protection harm resulting from the production and distribution of pornography.[187] In addition, whereas the Court favored gender equality over First Amendment rights, queer equality took a back-seat to the First Amendment. Arguably, the Court employs a harm analysis in order to apply an objective standard although this standard achieves anything but neutrality. Perhaps neutral on its face, in effect the Court's holdings allow for the perpetuation of inequality and denial of liberty in most cases.[188]

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180. *Id.*

181. *Id.* at 249-50.

182. *Id.* The Court also considered whether those accused under the CPPA would otherwise be convicted of criminal activity. *See id.* at 254. Because the Court answered this question negatively, it found the CPPA overreaching. *See id.* at 258.

183. *Id.* at 261.

184. *See supra* notes 158-162.

185. *Id.*

186. *See Ashcroft*, 525 U.S. at 250.

187. *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987).

188. *See* Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (asserting that laws should not "aggravate" or "perpetuate" the subordinate status of a "specially disadvantaged group").

B. Harmful Societal Effects: Political Participation and Morality

Whereas Georgia, in *Bowers v. Hardwick*,[189] sought to explicitly maintain the criminality of homosexuality,[190] other states like Colorado sought a more systematic approach in keeping queers suppressed in society. In *Romer v. Evans*,[191] Colorado amended its constitution, forbidding queers from gaining political and legal protection.[192] The Court recognized the societal effects of Amendment 2, noting that the amendment would severely curtail queers from advancing in a democratic forum and from seeking any legal relief.[193] The Court implicitly recognized the interrelationship of law and society.[194] The Court also rejected the state's claim that the amendment did nothing more than restrict "special rights."[195] The Court found that extending political protection to queers would not harm others, and concluded that the only victims of Amendment Two were the lesbians and gays of Colorado.[196]

In *Lawrence v. Texas*,[197] the Court overturned *Bowers* and held that the Equal Protection Clause and the Due Process Clause protect queers from government intrusion.[198] The Court employed both clauses to explain that the State of Texas cannot discriminate against queers in order to suppress them in society.[199] The Court did not explicitly find same sex sodomy constitutional; instead, it opined further and stressed that queers are entitled to the same liberties as heterosexuals.[200] The Court again recognized the detrimental effects of sodomy statutes on queer equality and acceptance in society as it did in *Romer*.[201] It also found that Texas's rationale to protect society was illegitimate and implausible.[202] As a result, the Court again held that the only victims were queers.[203]

The Court concluded queers cannot be denied individual rights because Texas and Colorado failed to demonstrate that queers caused socie-

189. 478 U.S. 186 (1986).

190. *See Bowers*, 478 U.S. at 190-92 (asserting that queers are not afforded constitutional protection because gays harm society and morality).

191. 517 U.S. 620 (1996).

192. *Romer*, 517 U.S. at 631.

193. *See id.* (holding that Amendment 2 imposes special disability upon queers).

194. *See id.* (finding that the protections withheld by Amendment 2 are taken for granted by most people because they are the protections that constitute ordinary civic life in free society).

195. *Id.*

196. *Id.* at 626-28 (holding that Amendment 2 withholds from homosexuals, but no others, specific legal protections caused by discrimination).

197. 539 U.S. 558 (2003).

198. *See Lawrence*, 539 U.S. at 577-78 (holding that Justice Steven's dissent in Bowers v. Hardwick should have been controlling).

199. *Id.* at 563-64.

200. *See id.* at 567 (acknowledging that the Constitution grants queers the right to engage in intimate conduct in the same manner it allows heterosexual couples to do so).

201. *See id.* at 581-82 (holding that sodomy laws brand queers as criminals, creating automatic stigmatization).

202. *Id.* at 578.

203. *Id.*

tal harm.[204] In *Lawrence* and *Romer*, the Court valued equality over comity of states.[205]

C. Harmful Effects on Commerce: Dormant Commerce Clause

The Dormant Commerce Clause ("DCC") gives the Court power to limit state regulation that would otherwise burden interstate commerce.[206] In determining whether state laws impede interstate commerce, the Court evaluates whether a state may discriminate against out-of-staters by balancing the benefits of the law against the burdens imposed on out-of-staters.[207] In other words, the Court first identified the harms; then, finding that a reasonable harm existed, the Court determined whether the discriminatory law would remedy the injury.

Professor Chemerinsky best articulates the harm found in DCC cases. In justifying the need for the DCC, Chemerinsky argues that "protectionist legislation" obstructs the free flow of commerce across state borders and impedes the economic sufficiency of states, which ultimately affects the sufficiency of individuals.[208] Those trying to compete in the interstate market are harmed by states that attempt to obstruct the free flow of commerce. Generally speaking, in all DCC cases, the obstruction of interstate commerce is the harm.

To illustrate, in *Philadelphia v. New Jersey*,[209] New Jersey faced excessive pollution and waste problems.[210] Disposing of excessive refuse resulted in increased environmental and health hazards.[211] In an attempt to remedy these problems, the state prohibited non-New Jersey companies from using its landfills.[212] New Jersey argued that the discriminatory law would improve the state's environmental and health concerns.[213] The state of Pennsylvania argued that the discriminatory law burdened interstate commerce because Pennsylvanians would no longer be able to dispose of their trash in New Jersey. The Court evaluated and balanced New Jersey's harm against the harm imposed on other states.[214]

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204. *See id.* (holding that the Texas statute furthered no legitimate state interest). *See also Romer*, 517 U.S. at 626 (holding that Amendment 2 withdraws from homosexuals, but no others, specific legal protection discrimination).

205. *But see* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 91 (2003). Tushnet argues that these cases reflect a cultural change on the Court more so than a finding that queer equality trumped state interests. *Id.*

206. CHEMERINSKY, *supra* note 65, at 317.

207. *Id.* at 318.

208. *Id.* at 321 (referring to the positions of Professor Regan and Justice Jackson).

209. 437 U.S. 617 (1978).

210. *Philadelphia*, 437 U.S. at 625.

211. *Id.*

212. *Id.*

213. *Id.* at 626.

214. *Id.* at 625-26. Assuming, as in *Philadelphia*, that the Court found both alleged harms present, the Court then weighed the derived benefits. *Id.* at 626-27. By doing so, the Court considered the relevancy of the discriminatory law to the problem presented. *Id.* at 628-29. In *Philadel-*

The following cases are examples of the Court's requirement that parties prove direct harm. In *Hunt v. Washington State Apple Advertising Commission*,[215] Washington Apples was stripped of its ability to compete in the North Carolina apple market.[216] The Court held that North Carolina failed to demonstrate how the discriminatory law ameliorated the state's apple market.[217] The discriminatory law may have been permissible, according to the Court, had it provided a meaningful benefit to North Carolinians.[218] Where meaningful benefits are derived, the Court will sometimes permit discrimination if it does not unduly burden interstate commerce.[219] North Carolina restricted Washington Apples from competing in its apple market in an effort to benefit in-state companies, not to remedy a compelling state problem.[220] Washington Apples was directly affected by the discriminatory law, and as a result, it was no longer able to compete in the North Carolina apple market.[221]

In *Kassel v. Consolidated Freightways Corp. of Delaware*,[222] the Court concluded that the State's scientific data was unsubstantiated and insufficient to outweigh the burdens on interstate commerce, and found the Iowa law unconstitutional.[223] In fact, the Court found that the state "remedy" could create added expenses and danger to in-staters.[224] The Court held that a direct, causative link was necessary to conclude that benefits outweighed and remedied the injury.[225] The Court found that the state had failed to prove that the discriminatory law would benefit in-staters.[226]

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phia, the Court did not find that the state's environmental and health problems would improve as a result of the prohibition of non-resident dumping. *Id.* at 629.

215. 432 U.S. 333 (1977).

216. *Hunt*, 432 U.S. at 340 (explaining that the North Carolina apple market was suffering as a result of Washington Apples' success).

217. The North Carolina law discriminated in both its purpose and effect against Washington Apples. *Id.* In determining whether the law is discriminatory, the Court finds whether the law is facially neutral or facially discriminatory. *Id.* at 350-52. The Court found laws facially discriminatory when the law overtly retaliates against other states, or when the discriminating state seeks to protect itself. *Id.* Facially discriminating laws are unconstitutional. *Id.* at 352-53. The Court determined a law unconstitutional when the purpose and/or effects of the law discriminate. *See, e.g.*, C & A Carbon, Inc. v. Clarkstown, New York, 511 U.S. 383, 389-90 (1994).

218. *Hunt*, 432 U.S. at 349-51 (citing Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 766 (1945)).

219. *Id.* at 350.

220. *Id.* at 352-53.

221. *Id.* at 351-52.

222. 450 U.S. 662 (1981).

223. *Id.* at 671 (finding that "the State failed to present any persuasive evidence" that sixty-five foot double-length trucks are less safe than fifty-five foot single-length trucks).

224. *Id.* at 674-75.

225. *See id.* at 670-71 (citing Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 441 (1978)); *see e.g.* HENDERSON, *supra* note 169, at 110.

226. *Id.* at 671. In *Exxon Corp. v. Governor of Md.*, the Court also did not find a link between the alleged harm and the state benefits derived from the discriminatory law. Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978). The Court upheld the Maryland law since the law did not discriminatorily benefit in-state companies. *Id.* at 127-28. The law also did not impede interstate

The Dormant Commerce Clause supports the argument for a comparative harm analysis in two ways. First, the Court explicitly identifies competing harms.[227] Second, the DCC provides support for judicial activism because Congress cannot effectively ensure constitutional protections at all local and state levels.[228] Opponents of the DCC rarely, if ever, question the regulation of commerce at the federal level because the Constitution explicitly authorizes Congress to regulate commerce via the Commerce Clause.[229] Thus, where Congress can act, the judiciary can review those actions.[230] The DCC allows the judiciary to serve as an appropriate check on state actions impeding interstate commerce.[231] The Court is more consistent in this application than in other harm contexts because interstate commerce is a clearly defined area of constitutional law where the harm is easily identifiable, generally speaking.

There is also the implication that the Court requires a causal harm.[232] It is tempting to argue that a showing of a causal harm should be necessary to trump constitutional principles. Harm found in commerce is probably the best example of where requiring a causal showing works in a constitutional context. Yet, it is unlikely that sociological data proving a causal connection in other harm contexts will consistently get the Court out of a constitutional conundrum.[233] Because causation cannot truly be demonstrated in most contexts, this article argues for discourse that encourages dialogue from the perspective of the "victim" and transcends personal biases in uncovering discrimination.

D. Conclusions Based on the Court's Harm Analyses

First, what is meant by "harm" is not adequately explained by the Court's use of the word. The Court has used harm in various contexts without identifying the injury or its consequence, thus, failing to apply consistent reason. The exception to this is found in the Dormant Commerce Clause cases where the Court identified the competing harms and

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commerce. *Id.* at 127. The Court did not find the law discriminatory nor did it hold that interstate commerce suffered. Thus, no harm existed and Exxon's claim failed. *Id.* at 128-29.

227. *Kassel*, 450 U.S. at 673-75. The Court used strict scrutiny when examining the discriminatory effects on the law because the freedom to participate in interstate commerce is a fundamental right.

228. *See id.* at 675-76.

229. U.S. CONST. art. I, § 8, cl. 3.

230. *See generally* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

231. CHEMERINSKY, *supra* note 65, at 317.

232. The Court also finds an inverse causal relationship by determining whether the means fit the ends. In other words, the Court determines whether the "remedy"—often a discriminatory action or legislation—will actually resolve the harm. A direct link between the harm and the remedy therefore exists.

233. *See* Deborah Cameron & Elizabeth Frazer, *On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect*, *in* Feminism and Pornography 240-53, 241 (Drucilla Cornell ed., 2000) (asserting that true causation is not possible because intervening variables affect a causal relationship and encouraging development of the discussion beyond cause and effect).

balanced them in a reasoned manner—most of the time. Second, the Court attempted to resolve tensions by implementing "objective" tests in order to achieve neutrality in some scenarios, yet it fell short of resolving the actual tension. These objective tests also fail to identify a competing claim. The *Miller* test, for example, does not account for harm to equality—a potential competing claim where degrading pornographic images portray women as submissive creatures who want to be dominated and raped. Third, the Court's harm analyses usually rely on causative injury, an unrealistic venture.[234] Requiring a showing of causation does not resolve the uncertainty of knowing whether the harm arose out of the said conduct or law.[235] It may decrease a subjective uncertainty, but it will not significantly eliminate it due to intervening variables that are often immeasurable.[236] Requiring causation is also self-defeating when seeking to transcend the inherent inequalities in the legal system, and it just continues to perpetuate law in a non-transformative way.[237]

E. Canada's Use of Harm in Resolving Competing Claims

Professor Vivian Curran posits that a greater understanding of international legal systems lends greater insight into the legal system of one's

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234. The federal standing requirement prescribes the notion that a causative injury must be established in order to bring and win a lawsuit. U.S. CONST. art. III, § 2, cl. 1; FED. R. CIV. P. 17. As Prof. Chemerinsky explains, "The Supreme Court has declared that both causation and redressability are constitutional requirements for standing." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 74 (4th ed. 2003) [hereinafter FEDERAL JURISDICTION].

235. *See* Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 20-21 (1992) [hereinafter Scales].

236. Several problems arise with a causal requirement. There is no definitive link which will unquestionably account for the harm. For example, Professor Judith Butler posits that anti-pornographers fail to draw a causal link between pornography and the subordination of women. Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess, in* Feminism and Pornography 497 (Drucilla Cornell ed., 2000). Butler suggests, in a much more comprehensive manner than I explain here, that there is no ontological proof that pornography causes harm to women and people of color. *See id.* at 488. She posits that radical feminists such as Professor Catherine MacKinnon, whom Butler describes as anti-pornographers, are actually disempowering women instead of protecting them because the very act of trying to protect women actually disempowers them. *Id.* at 496-97. Butler argues that women are victims as a result of the anti-pornography movement. *See id.* 503-04. Finally, she suggests that the real harm is restricting speech protected by the First Amendment. *See id.* at 504.

Others argue that submissive, degrading portrayals of women perpetuate the epidemic of sexual assault including rape, sexual molestation, incest and domestic violence, and therefore, the deprivation of equality. CATHARINE A. MACKINNON, ONLY WORDS 37 (1993); *see* Mari Matsuda, *Progressive Civil Liberties*, 3 TEMP. POL. & CIV. RTS. L. REV. 9, 16-17 (1993) (articulating the ways in which hate speech affects targeted groups); *see Militarization*, *supra* note 16, at 551-52. Obviously, a legal struggle exists between the radical feminists and Butler. This struggle will not be resolved by the *Miller* test. The *Miller* obscenity test guides the Court in determining when material is considered obscene, yet it falls short when guiding the Court to determine the true question presented—the identification and resolution of the competing harms. For example, assume women brought an equal protection claim against pornographers arguing that pornography caused inequality. Pornographers could argue that the First Amendment protects their material because it contains expressive, valuable content. Under the *Miller* obscenity definition, the pornographic material could be considered protected speech because it contains expressive content.

237. *See Militarization*, *supra* note 16, at 551-52.

native country.[238] Curran discusses the importance of conducting comparative legal analysis with other systems, especially when their approach is different from the U.S. approach.[239] In so doing, I will address the Canadian approach to competing claims below.

The Canadian Charter grants the Supreme Court of Canada explicit authority to analyze competing claims.[240] The Supreme Court of Canada understands that where constitutional claims conflict, harm is at the core of the tension.[241] Rather than employing levels or tiers of scrutiny to resolve the tension, the Supreme Court of Canada uses a balancing approach.[242] The two cases discussed below illustrate Canada's express identification and balance of harm in competing claims.

The first case involved freedom of expression and racial equality. In *R. v. Keegstra*, a teacher brought a freedom of expression claim because he was convicted of violating a hate speech statute.[243] The teacher made anti-Semitic statements in his classroom and expected his students to repeat these "facts" on examination answers.[244] Alberta prosecutors argued that hate speech causes violence and fosters inequality.[245] The Canadian Supreme Court held that hate speech is not protected speech,[246] and found that the statute banning hate speech is constitutional because, in part, the Canadian Charter seeks to nurture equality and multiculturalism. The Canadian Court reasoned that equality is more valuable than promoting derogatory ideas.[247]

The second case involved tensions between gender equality and freedom of expression. In *R. v. Butler*, the Supreme Court of Canada reinterpreted the definition of obscenity to include harmful depictions of women, finding that Section 163 of the Code is aimed at preventing harm to society, "a moral objective that is valid under s. 1 of the Charter."[248] The prosecution[249] argued that the material depicted harmful and exploitive images of women, and as a result, the defendant's freedom of speech claim should fail.[250] The Supreme Court of Canada created workable

238. *See* VIVAN GROSSWALD CURRAN, COMPARATIVE LAW: AN INTRODUCTION 7-8 (Carolina Acad. Press 2002).

239. *Id.* at 10.

240. Frank Iacobucci, *The Supreme Court of Canada: Its History, Power and Responsibilities*, 4 J. APP. PRAC. & PROCESS 27, 31 (2002).

241. *Id.*

242. *Id.*

243. R. v. Keegstra, [1990] 3 S.C.R. 697, 2.

244. *Keegstra*, [1990] 3 S.C.R. 697, 2.

245. *Id.* at 3.

246. *Id.* at 2 (referring to Parliament's legislative findings defined in the Criminal Code and the Charter of Rights and Freedoms).

247. *Id.* at 3-4.

248. R. v. Butler, [1992] 1 S.C.R. 452, 4.

249. In Canada, the selling and possession of obscene material falls under criminal conduct. *See Butler*, [1992] 1 S.C.R. 452, at 8.

250. *Id.*; *see also* Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of Butler*, *in* FEMINISM AND PORNOGRAPHY 322-23 (Drucilla Cornell ed., 2000).

tests to determine whether the images advanced a risk of substantial harm that society is unwilling to tolerate.[251]

The Canadian Court did not assert that the harm must be measurable, or that the prosecution had to demonstrate the harm. Instead, the Canadian Court stated that "[i]f the community cannot tolerate this *risk* of harm, then . . . these materials, even though they may offer a non-violent, non-degrading, non-dehumanizing content, will constitute undue exploitation of sex and fall under the definition of obscenity" (emphasis added).[252] Canada, in balancing competing rights, found that equality trumps free expression.[253]

I do not suggest that the Canadian system is without flaws or without impermissible infringements. The Canadian Court required first that claimants demonstrate a causative harm.[254] In *Keegstra*, the Canadian Court concluded that "the harm caused by hate propaganda represents a pressing and substantial concern in a free and democratic society."[255] Requiring a causal demonstration is problematic for the same reasons briefly articulated above. A demonstration of causal harm creates a feint, and consequently, perpetuates inequalities by allowing the Court to believe it is implementing an objective standard while failing to address the actual harm that underlies the conflict.

The Court then concluded that a causal showing of injury is not necessary. In *Butler*, the Court held that "a risk of harm" can trump free speech,[256] which could allow for a great many impermissible infringements. A *risk* of harm is unnecessary in most scenarios where there are valid injuries. For example, in *Dennis v. United States*,[257] the Court trumped First Amendment rights because Dennis's speech advocating communism created a risk of overthrowing the government. The Court found that this potential risk was sufficient to outweigh liberty interests.[258]

IV. A COMPARATIVE HARM ANALYSIS

Professor Richard Pildes opines that the Court needs a new strand of constitutional analysis to resolve competing claims.[259] The new strand, Professor Pildes argues, should incorporate and truly balance societal

251. *Butler*, [1992] 1 S.C.R. 452, at 3, 16.
252. *Id.* at 37.
253. *See id.* at 9.
254. *Keegstra*, [1990] 3 S.C.R. 697 at 48.
255. *Id.* at 34.
256. *Butler*, [1992] 1 S.C.R. 452, at 26.
257. *Dennis*, 341 U.S. at 505.
258. The Court will not find a *potential* injury sufficient when private parties argue for preventative action to curtail harm. *See, e.g.*, FEDERAL JURISDICTION, supra note 234, at 74 (discussing the causation requirement upheld in Allen v. Wright, 468 U.S. 737, 751 (1984)).
259. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998).

complexities.[260] The current conception of rights weighs individual rights versus the good of the community where one interest trumps the other, according to Pildes.[261] He argues that the current conception is a misnomer because it really allows the Court to screen for impermissible governmental regulation and infringements, and does not weigh competing interests.[262] In some incidences, infringement will be necessary. Where the infringement of individual or community rights is necessary, the infringement must comply with the principles of the Constitution.[263]

Professor Pildes's postulation supports the comparative harm analysis for two reasons. One, Pildes acknowledges that the Court's balance test is a "rote exercise" only.[264] He explains that the Court really does not weigh competing interests.[265] Instead, the Court considers the cause of action within the relevant structural conception of the constitutional principle at issue.[266] The structural conception presumes that all individuals and groups already enjoy constitutional protection. The Court fails to identify competing interests, and reviewing claims based on a structural conception, which ignores systematic inequalities.[267] Two, Pildes posits that individual rights exist and have meaning due to their social context.[268] The goal of a comparative harm analysis is to identify the harm, and then as Pildes suggests, determine its constitutional value and its effects in society.[269] By identifying competing harms, the Court acknowledges both claims, and must decide which constitutional principle prevails.[270]

An elementary comparative law principle supports a competing harm analysis. Comparative law professors recognize that the identification of both similar and differentiating elements is essential in trying to understand various legal systems.[271] When trying to compare, one must identify what is at issue, and often, it is the differences or polarities that cause legal tension.[272] As Professor Curran explains: "To deny difference is to deny recognition to the particulars that constitute [identification]

260. *Id.*
261. *Id.* at 727-28 (referring to Ronald Dworkin in *Taking Rights Seriously*).
262. *Id.* at 731. The current conception refers to the two strands of constitutional analysis: suspect class and fundamental right. *Id.* As an aside, screening for impermissible infringements is a worthwhile and needed objective.
263. *Id.*
264. *Id.*
265. *Id.* I also note that the Court balanced competing interests in *Jaycees v. Roberts* and the Dormant Commerce Clause cases. *Supra* notes 120-31, 206-233.
266. Pildes, *supra* note 259, at 731.
267. *Id.*
268. *Id.*
269. *Id.*
270. However, one constitutional right does not work independently of another. Rights are interwoven, and without one, the others fail to exist. *See* TUSHNET, *supra* note 15.
271. *E.g.*, COMPARATIVE LAW: AN INTRODUCTION 8 (Vivian Grosswald Curran ed., 2002).
272. *Id.*

itself; in that sense, it is to camouflage and erase identity."[273] Thus, to compare is to identify, and to fail to identify erases that which is at issue. This comparative law principle applies to competing constitutional claims because, like the tension between countries, tensions exist between parties.[274] In order to get at the root of the tension, one must identify the polarity, hence, identify the competing harm.

Like Professor Nice's co-constitutive approach, the comparative harm analysis seeks to address the 'immediate, continuing, and real injuries,' as they relate to competing claims.[275] The remainder of this section seeks to explore the types of harms that are legally permissible using queer equality, pornography and hate speech as illustrations.

A. Harm to Self

Two assertions usually exist when gay opponents claim that queers are harmful to themselves. First, queers harm themselves because they deny the primary purpose of their body: procreation.[276] This assertion of harm possesses little or no value because its rationale would then find impotent men, sterile couples, and those choosing not to parent, unlawful in their actions or inactions. Second, immoral conduct harms one's ability to live up to his or her potential and fulfill his or her dreams.[277] Here again, this assertion is valueless for many reasons including that this claim is based entirely upon the belief system of a few dominant forces in society. Even among the dominant members of society, one will find subjective and varied understandings of what "ability" and "liv[ing] up to [one's] potential" means.[278] The Court cannot evaluate either assertion without drawing upon personal experiences. Moreover, the Constitution establishes the principle of individual autonomy and privacy, which prohibits governmental interference with private conduct that does not injury others.

B. Harm to Society and Morality

The harm to society notion posits that the actor benefits from his or her actions while observers are harmed. In examining competing claims involving queers and proponents of traditional families, Professor Thomas Clark articulates three ways in which society and courts have used

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273. *Id.* (acknowledging that most modern theorists recognize similarities between the systems; however, Professor Curran calls for identification of the differences between various legal systems).

274. *See id.* (discussing the importance of identifying both the similarities and differences between countries).

275. *The Emerging Third Strand*, *supra* note 20, at 1231 (citing Romer v. Evans, 517 U.S. 620 (1996)).

276. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 102 (1996) (referring to arguments made by gay opponents).

277. Strong, *supra* note 36, at 1287.

278. *Id.*

popular prejudice disguised as moral harm[279] to withhold constitutional rights for gays.[280] One, natural behavior dictates natural law, i.e. procreation.[281] Two, the preservation of heterosexual relationships is the primary objective of society.[282] Three, queers are just outside the norm and undeserving of the benefits traditionally afforded to heterosexuals.[283] These reasons had been sufficient to deny queers constitutional protections such as privacy, equality and due process.[284]

The Court has favored subjective, moral harms over actual constitutional harms when examining competing interests of unpopular groups, with no critique of reason.[285] Moral debates based in personal interpretations will detract from the actual harm. [286] Such personal interpretations are often based in ecclesiastical doctrine.[287] Moreover, the Court has historically failed to acknowledge the harmful consequences of anti-gay policy in the workplace, the family, the military and school—key societal institutions. Subjective moral harms are rarely, if ever, a plausible argument.[288]

Finally, in making her argument that queers harm society, Professor Anita Allen cautions the courts against reducing individual accountability for the sake of privacy.[289] She encourages accountability in order to uphold traditional family values and societal mores.[290] A similar argument was made in *Baker v. Vermont*.[291] Vermont argued that the state entitled a few privileged individuals to marry because those individuals

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279. Morality used here is a very different morality from that described by the moral-practical discourse.

280. *See* Thomas Clark, *Secularism and Sexuality, the Case for Gay Equality*, THE HUMANIST, May-June 1994, 23, 26. This article was published before the Court's *Lawrence* decision. Lawrence v. Texas, 539 U.S. 558 (2003).

281. Clark, *supra* note 280 at 24-25.

282. *Id.* at 28.

283. *Id.* at 27.

284. *Id.* at 23.

285. *Id.* at 27. "Recent court decisions . . . have recognized that indeed it is bias, not a rational interest, that motivates unequal treatment of gays." *Id. See* Bowers v. Hardwick, 478 U.S. 1039 (1986); *see also* Boy Scouts of America v. Dale, 530 U.S. 647 (2000).

286. Clark, *supra* note 280, at 26. Clark suggests that courts have been influenced by "the traditional assumption that something is wrong or immoral about [homosexuality] . . . this assumption has no foundation in any objective harm constituted by gay sex." *Id.*

287. *Id.* at 23. Clark explains: "[P]ublic policy codifying this [anti-gay] bias verges on a government establishment of religion." *Id.*

288. *See generally id.* In addition, Professor Nancy Knauer offers the "pro-family" explanation as to how queers harm society. Nancy. J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 78 (2003). According to the opposition, queers engage in sexually deviant behavior, molest children, and cause the breakdown of the family and society. *See id.* The victims of queer conduct include children, heterosexual marriages, and ultimately, society. Knauer concludes that these arguments are unsubstantiated, particularly because they are centered on subjective moral views. *Id.* at 85.

289. *See generally* Anita Allen, *Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 ALA. L. REV. 1375 (2003).

290. *Id.*

291. *See* Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (holding that denying same sex marriage rights is a violation of the Vermont Constitution).

have the natural capacity to procreate.[292] The government has an interest in extending the marital privilege to protect those most likely to beget children.[293] The government reasoned that marriage protects children, and ultimately society, by making parents legally accountable as husband and wife.[294] Yet, this rationale fails to demonstrate how extending marriage to queers harms heterosexual couples and their children.[295] The harm to personal morality is also not sufficiently grounded in constitutional doctrine, and therefore, it is not a sufficient reason to trump rights. The Court supports this proposition as evidenced by *Romer v. Evans*[296] and *Lawrence v. Texas*.[297] The Court rejected the use of subjective morality as evidence that queers harm society.[298]

C. Harm to Others and the Practical Discourse Model

Harm to others is the only incidence where the Court should abridge a constitutional right. The Court should consider trumping a constitutional right when it causes injury that is detrimental to the integrity and principles of the Constitution. Where no negative and harmful externalities exist, no victims or injury exist.[299] Put simply, negative injury that adversely affects individuals or groups and their access to constitutional rights and privileges must exist. Without this, the alleged harm is insufficient to trump another's constitutional right.

Permitting constitutional trumps when claimants establish a "harm to others" claim is a more reasoned approach. Harms should be measured by the implementation of "ethical" and "moral-practical discourse."[300] Some scholars debate whether practical discourse can be achieved.[301] Professor Jurgen Habermas posits that it can be done without employing the erroneous and fated "theoretical objectification."[302] Before discussing *how* moral-practical discourse can be done, it is important to be clear about *what* moral-practical discourse is. Habermas explains: "The moral point of view . . . compels the participants to *transcend* the social and historical context of their particular form of life and particular commu-

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292. *Id.* at 881.
293. *Id.*
294. *Id.*
295. *Id.*
296. *Romer*, 517 U.S. 620. *See supra* notes 191-96 and accompanying text for a discussion of *Romer*.
297. *Lawrence*, 539 U.S. 558. *See supra* notes 197-205 and accompanying text for a discussion of *Lawrence*.
298. *See supra* notes 201-05 and accompanying text.
299. *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73 (2002).
300. HABERMAS, *supra* note 6, at 15.
301. *E.g.*, THOMAS MCCARTHY, IDEALS AND ILLUSIONS: ON RECONSTRUCTION AND DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY 140 (1993) (arguing that Habermas ignores the cultural differences which could create different "ethical" conclusions).
302. HABERMAS, *supra* note 6, at 22-23.

nity and adopt the perspective of *all* those possibly affected."[303] This approach enables judges to consider not only their biases and the biases of the legal and social system but also enables them to consider the lives of those adversely affected. The "ought to" rationales are *not* part of the moral-practical discourse.[304]

To act immorally or unethically is to deny someone personhood.[305] Judges must respect persons' rights to act autonomously. Implicit in this notion is that when an injury has occurred, reason needs to be applied. To evaluate when injury has occurred, judges must overcome their assigned social memberships.[306] It is often difficult to respect the personhood of others when entrenched in one's own social membership. Such memberships create privileged status.[307] Where there are individual self-understandings that cannot be overcome, these differences must be given full access in discourse, creating argumentation of a "maximally exhaustive interpretation" and thereby minimizing the differences.[308] Argumentation and discourse provide the "procedure for the exchange and assessment of information, reasons, and terminologies."[309] Discourse must be void of "impartial judgment of interpersonal practical conflicts" in order to minimize inequities.[310]

Inequities are perpetuated by the implementation of objective reasoning, empirical proof and justifications.[311] Habermas explains: "Moral practical discourse detaches itself from the orientation to personal success and one's own life to which both pragmatic and ethical reflection remain tied."[312] In other words, morality and ethics embody the process, through discourse, where rational ideas are played out and separated from personally-motivated applications. The morals discussed by Habermas entail the belief that society and the government seek to employ a non-discriminatory policy. In addition, ethical discourse should be applied on an individual, legal basis because each problem "follow[s] a unique logic of its own that had nothing to do with the logic of the next problem."[313] Also, trying to implement logic that would be applied in other scenarios creates a new problem of diversion. This is an interesting premise that should be considered, yet I would add that the judiciary is

303. *Id.* at 24.
304. *Id.* at 40 (discussing that morals are not part of religious and metaphysical contexts, and thus avoiding irrational justifications).
305. *See id.* at 58.
306. *Id.* at 45.
307. *Id.* at 46.
308. *Id.* at 58.
309. *Id.*
310. *Id.* at 25.
311. *Id.* at 17, 30, 84 (arguing that "problems are always rooted in something objective").
312. *Id.* at 15 (rejecting the use of the word "ethics" in legal discourse to denote personal, religious-based beliefs).
313. *Id.* at 17.

working from the same legal basis that flows from the Equal Protection and Due Process Clause.

Critics argue that judges, for example, are not motivated to use ethical discourse. Even if they did, Habermas fails to account for the cross-cultural differences that result in no *right* answer.[314] Yet, due to the nature of discourse, these cross-cultural differences will be minimized and ethical decisions will be achieved. Further, the alternative is to normalize norm-conformity, which guises the objectification of the problem.[315] This norm-conforming fuels inequities. Objectifying the problems also creates "weak transcendental proof . . . [which] can only be placed in [personal] interpretations."[316] Therefore, to objectify is to employ irrational, personal beliefs—precisely what critics fear by Habermas's approach.

A practical discourse model should be employed when judges evaluate competing claims. Professor Ann Scales advances a similar argument supporting the transcendence of inequalities.[317] In order to overcome personal conflicts that objectify the problem, a judge needs to become more aware that neutrality is not possible.[318] As Scales explains: "Consciousness-raising exposes the points of view implicit in the objective norm, liberates participants in the process of consciousness raising . . . and transforms what is meant by 'reality.'"[319] In so doing, a judge must also be particularly aware of the principle of equality and become conscious of the oppressed persons' points of view.[320] This consciousness *is* moral and ethical, and constitutionally permissible. Professor Scales also supports the proposition that discourse needs to be applied on a case-by-case basis.[321] In this way, transformation occurs, steadily having the best strategic answers unfold as society begins to adopt and accept the new realities, making the legal reality a first step to social reality.[322]

D. Judicial Activism and Review of Fact Finding

There are many discussions taking place in the United States surrounding judicial review, or as pundits seeking to maintain the status quo like to argue—judicial activism. Whereas other countries struggle to some extent with this topic, it has not become the political hot bed as in

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314. *See generally* MCCARTHY, *supra* note 301, at 135-40.
315. *See id.* at 135.
316. HABERMAS, *supra* note 6, at 84.
317. *See generally* Scales, *supra* note 235, at 10.
318. *Id.* "Better to relinquish neutrality as a surrogate fore justice, because the ideal of neutrality obscures more than enhances the debate." *Id.*
319. *Id.* at 25 (citing Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988)).
320. *Id.* at 29.
321. *Id.*
322. *See id.* at 29-31.

the United States. Some argue that the judiciary should just apply the law as it stands, as if the law has but one interpretation. Others acknowledge that there can be more than one interpretation. Therefore, the judiciary needs to achieve neutrality so not to render an unfair judgment.

Some argue that society, and particularly the judiciary, cannot arrive at the "right" answer. These opponents argue for objectivity. Yet, "[o]bjectivity is the epistemological stance of which objectification is the social process."[323] In other words, no one is truly objective, and the act of judging "objectively" objectifies that which is judged. The United States has placed such a tremendous emphasis on this notion of a neutral arbiter. In early cases, neutrality served us well since discrimination was more overt. Now that prejudice and discrimination have found hiding places in dark corners, the judiciary needs the tools to locate those biases, and we should encourage their use. After all, the judicial role is to review claims and redress harms.[324]

1. Judicial Review and Activism

I hesitate to rehash the judicial review discussions in great length, so I offer just a few key points. The judge's role as interpreter will not be effectively democratic unless she incorporates social, economic and political factors in understanding and interpreting the law.[325] A judge must be willing to examine the law within the context of the environmental conditions surrounding the circumstances in which the law was made, and who the law affects.[326] Legal precedence has a shelf life, and a judge must actively overrule laws that no longer serve societal and constitutional needs.[327]

The understanding that law is not made in a vacuum and must be reviewed in light of its interrelationship with society has been apparent since the very beginning of the U.S. legal system.[328] Professor Lawrence Friedman sets forth a legal history that uncovers both local and national intent to make law that fosters economic and social policy.[329] As economic and social needs changed, legislative and judicial functions changed.[330] Old ideas were abandoned for a new or qualified approach

323. *Not a Moral Issue*, *supra* note 157, at 175 (referring to the objectification of women in pornography and explaining that pornography cannot be judged objectively).

324. CHEMERINSKY, *supra* note 234, at 74 (explaining that the role of the judiciary is to redress constitutional harms).

325. *See generally* BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR 6 (2003).

326. *Id.* (citing Roger Traynor, *La Rude Vita, La Dolce Guistizie: or Hard Cases Make Good Law*, 29 U. CHI. L. REV. 223 (1962)).

327. *See* FIELD, *supra* note 325, at 6-7.

328. *See generally* FRIEDMAN, *supra* note 8.

329. *See generally id.* at 76-163.

330. *See id.* at 148-49 (explaining that legislation such as the Judiciary Act of 1789 codified the judicial power of review and noting the controversy surrounding judicial review during the implementation of the Judiciary Act).

that effectively met societal needs.[331] The judicial role is to review and uphold constitutional ideals as those ideals become more apparent to a changing society.[332] As a result, the law is not a fixed and immutable concept between principles and fact—it is reactive.[333] The law is a set of workable rules that should stand only as long as they functionally fulfill societal and constitutional goals.[334]

The role of the judiciary is also reactive.[335] Justice Traynor combines a pragmatic, realist approach with judicial innovation to preserve democracy.[336] In his approach, Traynor advocates for the use of "policy analysis" and review of the "most current and available sociological data."[337] The Post-New Deal Era illustrates this reactive judicial role, when constitutional ideology prevailed.[338] Traynor examines the legal harms affecting consumers, women and political participants,[339] and concludes that the judge must determine a rational and objective outcome in favor of the public interest in order to foster democratic ideals.[340]

Often, constitutional principles conflict with public sentiment.[341] Racial tensions epitomize this conflict between popular opinion and equality. In 1947, Traynor opposed antimiscegenation laws, illustrating judicial protection of constitutional principles despite strong contrary public opinion.[342] During the period from 1865 to 1970, a reported 1% of couples were interracially married.[343] Yet many U.S. Americans claimed that interracial marriage would become commonplace and undermine the

331. *See generally id.* at 76-163.

332. *See generally id.* Sometimes those new ideas violated democratic ideals, and they were eventually abandoned. *Id.* (referring to undemocratic legislation such as the Alien Act and Sedition Act). The argument for separation of powers cuts both ways in that the legislative actions are subject to review by the judiciary to effectively reconcile unnecessary restrictions on equality and liberty. It is not that the judiciary must kowtow to the legislative branch because they are given explicit law making powers. The very nature of judicial review is an active process which affects and alters existing law. FIELD, *supra* note 325, at 121. (explaining how through interpreting the law, the judge is an active oracle) (citing Roger Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 2 (1977)). *See also* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 816 (2004) (explaining that life tenure for judges is "a necessary feature of a federal judiciary entrusted with the power and duty to invalidate legislative acts at variance with the Constitution (i.e., the power of judicial review)).''

333. FIELD, *supra* note 325, at 7.

334. *Id.* at 7-8.

335. *See id.*

336. *Id.* Unlike Traynor, most realists reject the notion that any judge can be objective.

337. *Id.* at 8.

338. *See generally id.* at 16-18.

339. *Id.* at 17 (referring to Perez v. Sharp, 32 Cal. 2d 711 (1948); DeBurgh v. DeBurgh, 39 Cal. 2d. 711 (1948); People v. Cahan, 44 Cal. 2d. 434 (1955); Escola v. Coca Cola, 24 Cal. 2d. 453 (1944); Greenman v. Yuba Power Products, 59 Cal. 2d. 57 (1963)).

340. *See* FIELD, *supra* note 325 at 6-7.

341. *Id.* at 21.

342. *Id.* at 20-21. Traynor sat on the California Supreme Court when the state's antimiscegenation statute was invalidated. *See generally Perez*, 32 Cal. 2d 711.

343. FIELD, *supra* note 325, at 21.

privileges associated with the white race, and particularly white men.[344] In fact, ninety-two percent of western whites surveyed in a 1958 Gallup poll opposed interracial marriage, sending a clear message that the public did not support the legalization of marriage between blacks and whites.[345] Public sentiment should not be upheld when such sentiment contradicts the principles of the Constitution.

Under a comparative harm analysis, a judge would have, in theory, discovered that white males' alleged harm was a potential loss of power and survival of his race whereas blacks claimed harm through the inequitable distribution of rights and privileges.[346] The sociological data would suggest that the white men's claim was unreasonable, because only 1% of the population was interracially married. This minute percentage underscored the fact that the white race was not in jeopardy. Therefore, inconsistency between alleged harm and fact existed.

Given that only 1% of marriages were interracial at the time, it would be wholly unforeseeable that the remaining 99% of marriages would somehow be jeopardized along with the white race. Even assuming this harm was somehow legitimate, its resolution directly conflicts with the constitutional notion of equality.[347] The resolution of the harm was inconsistent with equality principles, and therefore, the constitutional rights of African-Americans were directly violated. By permitting interracial marriage, whites are not suffering any constitutional deprivation. Thus, their harm does not amount to a constitutional violation. Interracial marriage is a straightforward example where the harms are easily distinguishable, not only because hindsight permits clarity but also because only one valid constitutional issue is presented.

Active judicial review also has its problems. One, legal instability and "false, inconsistent legal patterns" could emerge when judges consistently change the laws and reinterpret societal needs.[348] This is more of a fear than a reality, particularly if using Traynor's limitation on judicial policy making.[349] Traynor argues for policy change when precedence is outdated and no longer meeting society's needs, thus minimizing legal instability.[350] During times of great societal change, the law will consequently move through a period of change and instability. Some legal

344. *Id.* White men are distinguished here because most antimiscegenation laws said that black men could not marry white women; thereby, protecting the white man's interest only.

345. *Id.*

346. The constitutional principles at issue are white men's First Amendment freedom of association and African-Americans' and females' interests in equality and also freedom of association.

347. U.S. CONST. amend. XIV, § 2.

348. FIELD, *supra* note 325, at 126-27.

349. *Id.* at 126.

350. *Id.* at 126-27. This proposition also seems plausible considering there is little evidence to suggest the Framers had a fixed idea of the role of precedence. Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 805 (2004).

instability and change is evitable with legal interpretation and common law.[351] The facts of each case are not fixed or predetermined, and thus, are expected to change constantly. To illustrate, equal protection of the laws first applied to gender and racial disparities, and now to gays and lesbians.[352] As a result, courts will not alter legal principles; they will apply the fixed principles to the changing societal needs and fact patterns. It is also unrealistic to expect Congress to always foresee and resolve constitutional problems through law-making.

The second problematic aspect of progressive judicial interpretation concerns the separation of federal powers. Opponents of active judicial review evoke a separation of powers argument, claiming that judges are engaging in lawmaking by expanding laws to protect additional groups. Opponents argue that the judiciary is not an elected body, and therefore, it should not give unpopular or underrepresented groups constitutional access because doing so expands the law.[353] Historically, courts have been the one check in the system that does protect unpopular groups *because* it does not sway with the masses, as most politicians do in seeking reelection.[354] Courts are not making law by declaring that an unpopular or underrepresented group is entitled to constitutional access; instead, it is reviewing the actions of state and federal legislatures and private actors for constitutional infringements.[355] Moreover, once competing claims arise, the legislative and executive branches have already acted, and the courts are attempting to bring clarity to or evaluate such actions in a constitutional framework.

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351. *See generally id.* at 805-15.

352. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. at 609 (holding that exclusive, all-male club membership was unconstitutionally discriminatory, despite the male members' First and Fourteenth amendment rights); Virginia v. Loving, 388 U.S. 1 (1967) (invalidating Virginia's law against interracial marriage); *Lawrence*, 539 U.S. at 578 (invalidating a Texas anti-sodomy law as unconstitutionally violative of the right to privacy).

353. *See* MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 5-6 (1988) (critiquing judicial review from the perspective of liberal and republican traditions).

354. *See, e.g.*, *Loving*, 388 U.S. at 1 (discussing the extreme public sentiment against interracial marriage); *see supra* notes 341-45 and accompanying text; United States Dep't Agric. v. Moreno, 413 U.S. 528 (1973) (allowing non-traditional "families" access to state benefits); *Romer*, 517 U.S. at 620 (protecting homosexuals despite voter support for Colorado's Amendment 2); *Lawrence*, 539 U.S. at 558 (further protecting homosexuals' rights to privacy and certain intimate contact).

355. A historical analysis of early American laws would establish that the interests of the "smallholders," that is middle class property owners who were a "politically potent class" had a great deal of influence over how the laws affected them as evidenced by the homestead exception. FRIEDMAN, *supra* note 8, at 244-45. The middle class property owners, usually farmers, served an important economic interest. *Id.* It was later evident that those without a political voice needed to be protected by a federal system so that state and local laws did not unduly burden and punish those without the power to advance within the legal system. *Id.* It was discovered that the politically weak members of society were bad for the nation's economic and democratic interests, and laws emerged to protect women, the poor and African-Americans. *See id.* at 391-488. The U.S. Supreme Court either enforced or established many of these protectionist laws that are now commonplace. *Id.*

On the one hand, the Constitution grants judicial power to review legislative abuses that infringe on constitutional principles.[356] On the other hand, the judiciary is limited from creating law since the Constitution explicitly gives that power to the legislature.[357] Opponents of active judicial review implore the use of the political question doctrine to prevent the courts from deciding controversial issues.[358] When the courts do decide issues that are deemed controversial, opponents claim that this is law-making.[359]

In section two of this article, I explored reasons why some resist expanding constitutional rights for groups who do not enjoy and benefit from such rights. For example, in examining the political question doctrine, Justice Brennan, speaking for the Court in *Baker v. Carr*, created a set of criteria that attempted to recast the political doctrine question so not to prevent a number of disenfranchised groups from accessing the constitutional pie.[360] Justice Brennan's recast positioned the political question doctrine as one decided almost exclusively as a separation of powers matter.[361] The Court sought to permit constitutional review particularly where the matter involved important constitutional rights.[362] His recast has been interpreted to maintain the status quo when the Court finds an unusual need for adhering to the public policy so not to reverse societal direction.[363] Those who seek to maintain the status quo are attempting to prevent access to the Constitution, which is viewed as finite. I concede that federalism and separation of powers are essential to the U.S. republic. I just question when these principles are employed as limitations in cases that involve the sharing of the constitutional pie with those who do not enjoy full access.[364]

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356. *See supra* note 6.

357. *See infra* note 364.

358. *See supra* note 53.

359. *See* Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 LAW & SOC. INQUIRY 105, 114-15 (2004).

360. Baker v. Carr, 369 U.S. 186, 209-10 (1962).

361. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURT AND THE LAW OF FEDERAL-STATE RELATIONS 434 (4th ed. Foundation Press 1998) (the political question doctrine has been applied primarily in Guaranty Clause cases).

362. *See id.*

363. *Id.*

364. The Court is not the only one with limitations. The Constitution limits Congress from reviewing constitutional claims. *See generally* U.S. CONST. art. I; U.S. CONST. art. III. This is true with one exception; Congress indirectly hears and reviews cases in its administrative courts. *See supra* note 348. As the complexity of the U.S. legal system grew so did the need to develop a more complex legislative and judicial body. FRIEDMAN, *supra* note 8, at 439-41. Congress's administrative courts deal with finite legislative issues that require expertise in specific subject areas. *Id.* To learn the subject matter every time a new issue presented itself would be an inefficient use of judicial resources. *See* Levin, *supra* note 359.

2. Review of Fact Finding

The Court is the expert on constitutional law.[365] The judiciary has and must continue to review findings of fact to determine whether infringements are necessary on redress. The Court must do so in order to determine whether the facts amount to a constitutional harm. Professor Paul O. Carrese explores why judicial power must include the authority to evaluate findings.[366] In reviewing the work of Montesquieu, Carrese explores judicial power while discussing the importance of cloaking such power under the guise of moderation.[367] I use the word "guise" to articulate that Carrese, by discussing Alexander Hamilton's critique of Montesquieu, supports active judicial review but believes judicial review must be "cloaked" by moderation to address potential fears that will inevitably arise.[368] Individuals become fearful of judicial activism because they fear that politicking would encumber judging, according to Carrese.[369] Those that fear active judicial review are concerned that they will lose security and power in our finite constitutional scheme.[370] Arguing on behalf of Montesquieu, Carrese posits that the judiciary should reform the laws quietly yet steadily.[371] This approach seems to suggest that tolerance and equality of the laws should be done behind closed doors so not to upset the masses who do not want to share the constitutional pie.[372] Whereas Professor Carrese's postulation supports judicial power,[373] his approach does not foster sound societal ideals and in many ways perpetuates inequality of the laws.

To review findings of fact requires a shift in power authorizing the judiciary to evaluate sociological data and other "evidence."[374] The judiciary must determine what is a "natural right" and "natural law" particularly because "'the [modern] Supreme Court presides over the priority of right.'"[375] In order to determine what natural laws and rights are, the Court must evaluate the prevailing sociological conditions.[376] It is per-

365. U.S. CONST. art. III. *See also* Marbury v. Madison, 5 U.S. 137, 174-75 (1803).

366. *See* PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 6 (2003).

367. *See id.* at 2.

368. *See id.* at 7.

369. *See id.* at 17.

370. *Id.*

371. *See id.* This approach would probably have been possible during Hamilton's era although it now seems impossible to address legal reform quietly, particularly when equal protection of the law is at issue. Equal protection issues are often at the forefront of political campaigns which are launched through television, radio and the Internet.

372. *See id.*

373. *See id.* at 258.

374. *See id.* at 240-41.

375. *Id.* at 258 (quoting MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 28 (2000)). Sandel challenges the new liberal reconstruction of judicial review which claims that it is both natural and reasonable for there to be incompatible and pluralistic constitutional doctrines. Sandel is correct insofar that his proposition supports the notion that the Court must decide when certain rights will trump based on a case by case basis.

376. *See id.* at 240-41.

fectly reasonable for the judiciary to determine whether the findings support a constitutional trump since the Court is the ultimate arbiter of the Constitution.[377] This does not prohibit Congress from collecting evidence to prepare legislation. The Court should nonetheless be free to review the findings and determine whether they support a constitutional limitation for particular individuals or groups.[378] The Court independently evaluated the findings of fact to make its own determination in the Dormant Commerce Clause[379] and pornography cases, to name just a few.[380] The Court is responsible for ensuring that the findings are relevant to and bring forth the alleged harm, protecting constitutional rights.[381] This must continue, and can be effectively furthered by a comparative harm analysis.

V. CONCLUSION

The Court has not explicitly acknowledged when competing claims exist, and has not developed a sufficient guideline for balancing them. Instead, the Court relied upon feint causal demonstrations and morality rhetoric to trump rights. The Court's harm analyses have failed to resolve constitutional tensions. When the Court did not use conclusive reasoning or require a demonstration of causative injury to step out of the constitutional conundrum, it used "objective" tests to balance interests. This was the Court's attempt to achieve neutrality so not to incorporate biases and consequently perpetuate inequities.

To recapture the Court's flaws, in *Virginia v. Black*, the Court was unable to identify and evaluate the harm with cross-burning. The plurality was able to identify that possible riots or violence were harmful, but it did not explicitly identify African-Americans or other targeted groups as victims. The Court ignored the competing claims, and failed to resolve the legal tension. Instead, the Court favored claims allegedly demonstrating a direct injury.

The Dormant Commerce Clause cases serve as an exception because the Court adequately identified and balanced competing claims. The harm in commerce is more clearly identifiable and definitive unlike the notion of harm to others. With harm to others, individuals and groups seek to share the constitutional pie creating a backlash from those already enjoying the pie. In other words, there is more resistance when

377. *Id.* at 258 (explaining that "[t]he more realistic, progressive conception" of the judiciary acknowledges: "Judges actually make new law, in large or small doses, case by case"). *See also supra* notes 143-233 and accompanying text, emphasizing that the Court already determines constitutional trumps as the Constitution's ultimate arbiter.

378. *See* CARRESE, *supra* note 366, at 241.

379. *See also supra* notes 206-37 and accompanying text.

380. *See also supra* note 377 and accompanying text.

381. The Justices of the Court possess the ultimate authority on the interpretation of the Constitution, and the Court must check for constitutional infractions. *See Marbury*, 5 U.S. at 178.

individuals and groups seek constitutional protection. There is little societal interest and bias when states compete in the interstate market. Therefore, the greater 'alleged' clarity that exists in the Dormant Commerce Clause cases should be of no surprise.

A comparative harm analysis offers a way for the Court to more explicitly identify competing claims because it requires the explicit identification of harm. By explicitly identifying competing interests, the Court ensures that valid constitutional claims are advanced. In pornography cases implicating free speech, for example, the competing claim is harm to women due to the objectification and oppression of females in pornographic images. Pornographers are injured by being denied the right to express a certain form of sexuality, arguably male sexuality. Once the harm is identified, then the Court must determine which harm is more important to guard against, and which remedy is more consistent with constitutional principles. The *Miller* test does not account for competing interests, nor does it balance them in a meaningful way.

I concede that social and political science data should be incorporated cautiously in helping the judiciary to reach a fair decision since there are often inherent biases with such data. Sociological data will assist the judiciary in determining whether the alleged harm is valid. For example, sociological data was used to debunk the notion that interracial marriage, if accepted, would become commonplace. Moreover, even if interracial marriage did become commonplace, the resulting harm was unclear other than potentially disrupting the status quo of whites.

When competing claims conflict, the alleged harm must be constitutionally valid before the judiciary attempts to balance interests. Arguments such as "interracial marriage will become commonplace" are not constitutionally sound, and therefore, should not survive and abridge the rights and liberties of others. By comparing harms, the judiciary will find that often there are *not* two valid constitutional claims and will rarely be faced with balancing legitimate, competing interests. A comparative harm analysis will, and should, focus on whether the claims brought forth are actual constitutional claims; thereby, eliminating the need for so-called objective, causative analyses in the majority of cases. Where legitimate competing claims exist, the courts must balance constitutional interests. In these few incidences where *two* constitutional claims are presented, some rights will be trumped in favor of other rights. How to evaluate and trump certain rights is left for another conversation. Yet, in striking this balance, the legislature need not be precluded from entering the competing rights discussion so long as it does not attempt to encroach

upon the judicial role and amass enough constitutional authority to effectively destroy the integrity of the separation of powers doctrine.[382]

The judiciary should evaluate and balance competing harms by engaging in practical discourse. Discourse, in theory, will enable the courts to transcend personal biases and employ well-grounded reason. Further, practical discourse requires the judiciary to view the injury from the victim's perspective. The courts should also ensure that the "remedy" will resolve the harm in a meaningful way and will not contradict constitutional principles. This responsibility rests with the federal courts, and particularly the U.S. Supreme Court, because it is the supreme arbiter of constitutional law. Because the courts review constitutional rights, the courts should also review limitations on those rights. Discourse is essential in order to overcome inequities and the propensity to deny liberties for less powerful groups.

However, discourse does not guarantee that the courts will reach an unbiased decision in every incidence. In other words, the courts will reach the wrong conclusions occasionally and will need to remedy these wrongs when more information becomes available. Error cannot and perhaps should not be avoided. Neutrality pretends misjudgment does not exist whereas discourse examines the opportunity for misjudgment. It is also important to emphasize that litigation is just one of the first steps in the long uphill struggle for equality and liberty; yet, litigation is an important step for it sets standards to address the constitutional conflict that was overlooked or encouraged by the other branches of government, and rights the immediate wrong.

382. It is unlikely that the legislature will attempt to amass the necessary authority for constitutional review since in a survey administered to congressional members asking whether they believe they are in a better position to interpret the Constitution than the judiciary, they overwhelmingly agreed that the judiciary is better equipped for constitutional interpretation. *See* Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29 LAW & SOC. INQUIRY 127, 165, 168 (2004) (discussing the survey results indicating that the majority of Congress members and/or their staff believe that the courts are in a better position to interpret the Constitution.).