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Shannon Beydler, Lauren Campbell, Emily Gottschalk-Marconi, and Ani-Rae Lovell
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Editor’s Preface to the Fall 2011 Edition

With this edition, we worked hard to increase the readership and quality of the Journal. This edition of the Journal will be published in an accessible and aesthetically appealing online format. Also, we increased our outreach efforts to receive more submissions. As the only national political science journal for undergraduate research, we think it is important to solicit a wide variety of work from students at institutions across the country. In that way, we can showcase the excellent political science research being completed by undergraduates. We certainly hope you can see the outcome of our efforts in this edition of the Journal.

We would like to thank the Pi Sigma Alpha Executive Council and the Executive Committee for their support. Additionally, we want to recognize all of the student Editorial Board members, who joined us each week with detailed and thoughtful reviews of submitted articles. Likewise, we would like to acknowledge our faculty Advisory Board members, whose expertise and assistance ensure the Journal’s quality. Finally, we would like to express our sincere gratitude to our two Faculty Advisors, Ron Rapoport and Chris Nemacheck, for their unwavering support throughout the process.

As always, we have enjoyed the opportunity read many great articles from students across the country, and we look forward to receiving more excellent submissions in the coming years.

We hope you enjoy the Fall 2011 edition of the Pi Sigma Alpha Undergraduate Journal of Politics.

Cheers,

The Editors
Submission of Manuscripts

The Journal welcomes submissions from undergraduates of any class or major; submissions from Pi Sigma Alpha members are especially encouraged. We strive to publish manuscripts of the highest quality in all areas of political science. In general, papers selected for publication have been well-written with a well-developed thesis, compelling argument, and original analysis. Authors may be asked to revise their manuscripts before they are accepted for publication.

Submissions deadlines are October 31 for the Fall issue and March 31 for the Spring issue. Manuscripts are accepted on a rolling basis, so earlier submission is encouraged.

To submit your work, please email it (as a Word document) to psajournal@wm.edu. Please include your name, university, and contact details (mailing address, e-mail address, and phone number). If possible, please also include a short comment about how you heard about the Journal.

Submitted manuscripts must include a short abstract (roughly 150 words), and citations and references should follow the APSA Style Manual for Political Science. The maximum page length for submitted manuscripts is 35 double-spaced pages.

The Journal is a student-run enterprise with editors and an Editorial Board who are undergraduate Pi Sigma Alpha members at The College of William and Mary. There is also an Advisory Board consisting of political science faculty from across the nation, including members of the Pi Sigma Alpha Executive Council.

If you have any questions, please email the Journal’s editors at psajournal@wm.edu or Dr. Chris Nemacheck at clnema@wm.edu.
Modeling Interest Group Interaction: Environmental Groups vs. Auto Companies

Eric Cox, Gustavus Adolphus College

Interest group interaction plays a large role in the outcome of air pollution policy. Two of the main players in the battle over fuel mileage regulation are environmental interest groups and the lobby on behalf of automobile manufacturing corporations. Both of these groups emphasize different strategies in order to influence government regulations. This paper examines interest group interaction over policy using a game theory model based on Brams’s Theory of Moves. This simplified model accurately describes the escalation and de-escalation of government lobbying by these groups and illustrates a cyclic interaction pattern. The 2008 Auto Bailout is one significant event that demonstrates this pattern. The conclusion includes potential strategic changes for environmental interest groups as well as improvements to the model.

At the end of the 21st century, developments in the field of automotive technology provided an optimistic outlook for the future of environmental policy. In 1990, the California Air Resources Board (CARB) passed mandates that an increasing percentage of automakers’ market share be devoted to zero-emission vehicles (Paine 2006), and in 1996, General Motors’ EV-1 electric automobile became the first zero-emission vehicle available to consumers. However, by the year 2000, automakers including GM asserted that there was no need to continue producing electric cars and successfully sued the CARB, significantly weakening zero-emission vehicle mandates. The next year, GM stated that it would not be renewing leases on the EV-1 and it would start reclaiming the vehicles. Despite environmental groups protesting and demanding that the impounded cars be released, and even offering to buy the entire fleet for $1.9 million, it was later discovered that GM had crushed every last EV-1 (Paine 2006). This incident demonstrates the ongoing tensions between environmental groups and automobile manufacturing companies over fuel emission standards and the production of fuel-efficient vehicles.

The auto industry’s policies, particularly regarding regulation levels for air pollution from passenger vehicles, have been increasingly criticized as a consequence of the rise of environmental interest groups since the 1970s. Many questions arise from the competition between the auto industry and environmental groups: What are the political strategies of environmental interest groups and auto manufacturers? Is it possible for these groups to reach a compromise in which air pollution is reduced and auto corporations remain profitable? Is there a pattern of behavior that typifies the conflict between these
two sides over regulation? The answers to these questions can explain how and why air pollution policy has changed to reflect the balance between these two major actors.

One way to answer these questions is by utilizing a dynamic game theory model called the “theory of moves.” Such a model will simplify the situation and help explain why these competing groups make the decisions they do. This analysis will focus on the interaction between environmental groups and auto corporations over the past forty years, with particular emphasis on the last five years when the harmfulness of greenhouse gases came to the forefront of the public agenda. Once strategies and priorities for both groups are determined, the game theory model can be used to explain major events concerning the issue of air pollution regulation. I hypothesize that this game theory model offers an accurate explanation of the strategic relationship between environmental groups and auto manufacturers. This model can accurately describe how both players switch their strategies to maximize their influence and may have some predictive value in future conflicts over air pollution policy.

The remainder of the paper focuses on the development of a game theory model to explain the behavior of environmental and automotive interest groups and answer previously posed questions. The first section outlines several perspectives on pressure strategies of environmental and automotive interest groups as well as conditions for cooperation within and between these two opposing groups. The next section begins to formulate the game theory model by defining the major players involved in the game, followed by a brief explanation of the game theory framework that underlies the model. I consider the strategic choices of both players, how the game unfolds, and the existence of equilibrium states. Next, I apply the game model to the 2008-2009 Auto Bailout, a significant conflict between environmental and automotive groups. In the discussion, I evaluate the accuracy and predictive power of the model while addressing the limitations of a game theory approach to this interest group conflict.

**Perspectives on Group Strategies**

As the environmental movement has evolved over the last half century, environmental interest groups have likewise altered their political tactics. U.S. automakers have been more reactive than proactive in their handling of environmental regulation policy, but they have also employed various tactics to shield themselves from the perceived burdens of environmental regulation. The following sections describe the tactics used by environmental and automotive interest groups to influence public policy, as well as the cooperation between the two groups.
Environmental Interest Group Strategies. There is a substantial amount of research regarding the trends in environmental interest group strategies. Mitchell, Mertig, and Dunlap (1991) find that environmental groups have gained influence by directly lobbying lawmakers, educating the public, and taking direct action by organizing demonstrations or protests on behalf of their environmental goals. Groups started out mainly as educational entities but later realized that education was not aggressive enough; direct action, however, was too aggressive for the mainstream organizations and direct lobbying became the preferred strategy for fulfilling the groups’ goals (Mitchell, Mertig, and Dunlap 1991, 20-21).

McCloskey (1991) finds that education is a primary function of environmental interest groups but sees the government as largely unresponsive to the desires of environmental groups. Instead of a direct approach, he argues that environmental groups should get to the government by way of the people; the public is more receptive than the government to the message that environmental groups have to offer, especially when it involves consumer education (McCloskey 1991, 86). McCloskey recognizes the importance of lobbying that Mitchell et al. describe, but he believes that public education campaigns are more effective than directly targeting the government.

Dalton, Reccia, and Rohrschneider (2003) assert that environmental groups must employ a variety of tactics, both conventional and unconventional, in order to influence policy. Using survey data, Dalton et al. conclude that groups spend a considerable amount of effort on activities that generate public attention, which supports McCloskey’s argument that influencing public perception is crucial to environmental groups. Dalton et al. find that direct actions, like protests and rallies, are relatively ineffective because they are an aggressive way of challenging social and economic norms (Dalton, Reccia and Rohrschneider 2003). This research supports Mitchell et al.’s findings that such extreme action is not always the most effective alternative.

Other research looks at environmental groups’ external cooperation. Rondinelli and London (2003) assert that environmental groups and corporations cooperate in order to establish legitimacy and share information. Partnerships between these two groups, who have seemingly divergent priorities, gives each group credibility; the corporation gets the appearance of social responsibility and the environmental organization benefits from the resources of the corporation. Automakers have the potential to cooperate with environmental groups, especially in the demonstration of improved technologies and this relationship could be mutually beneficial. However, this phenomenon is rare in America because corporations will not collaborate with environmental groups if the partnership would risk exposing critical business practices (Rondinelli and London 2003, 74). The potential is there, but there are still significant roadblocks facing the cooperation of businesses and interest groups.
These studies about environmental interest groups strategies suggest that groups must use a variety of tactics in order to influence governmental regulations. Appeals to the public through educational campaigns and lobbying are the primary strategies that environmental groups have successfully employed in the past. Direct action, while less common, can be effective when combined with primary strategies in order to encourage participation by more radical subgroups of the movement. Recently, corporations and environmental interest groups have formed partnerships in order to facilitate the exchange of valuable information.

**Automotive Industry Strategies.** The literature regarding the auto manufacturing industry emphasizes the reactive nature of the industry. For instance, Penna and Geels (2011) perform a longitudinal study that looks at how the American car industry used delegitimizing tactics to refute the findings of interest group studies on air pollution. Combined with the findings above, education campaigns by environmental groups may end up being discredited by the auto industry, but as public opinion slowly reaches a critical mass the industry may have less leverage by this tactic.

Another common tactic of the auto industry is to criticize pollution regulations as overburdening the industry. This strategy emphasizes, “the costs of regulation, which was claimed to hurt job creation, increase inflation, and disadvantage consumers” (Penna and Geels 2011, 20). Christine Ng (2006) also finds that “pressure to maintain a common industry position [limits] proactive behavior by lead firms” (Ng 2006, 10) This means that no company has the incentive to innovate pollution technology because the monetary risk is so great and industry allies might criticize the innovator for trying something new. In any case, one of the most effective ways for auto companies to influence environmental policy is by banding together and insisting that further regulation of the industry burdens all of them in a world that is technologically advancing at a much quicker rate.

Ng (2006) and Penna and Geels (2011) both find that automotive companies use direct lobbying of lawmakers in order to influence industry regulations. Penna and Geels (2011) discuss how the auto industry has set up “grassroots” campaigns to pressure lawmakers to delay or weaken potentially industry-restrictive bills. Lobbying strategies by the auto industry have been successful, but they are highly dependent on public opinion surrounding the issues of environmental regulation. Success also depends on how well they are able to frame the issue to focus on the potential of increased regulations to have strong negative consequences for consumers.

The literature surrounding the influence strategies of automotive industries suggests that auto corporations are reactive in nature and that they are strongly resistant to changes in regulations. Corporations emphasize the un-
certainty about automobiles’ part in air pollution and the perceived unreasonable costs of regulation. Direct lobbying is the preferred strategy for American auto companies when they wish to combat new regulations in the industry.

Many questions arise from the academic literature. Do present conditions favor one strategy over another for environmental groups (lobbying vs. education vs. direct action)? Is public opinion sufficiently mobilized against the typical arguments of the auto industry? Is there a point where people become frustrated with the auto industry’s lack of innovation and favor regulation in order to reap the collective benefit of clean air? Air pollution policy is heavily dependent on public opinion, so any analysis must consider this. Understanding the strategies of environmental interest groups and automotive industry interests should provide a solid basis from which we can form a game theoretic model for explaining behavior.

Methodology

In order to formulate an accurate game-theoretic model of the relationship between environmental interest groups and the automotive industry, we must understand the players and their preferences.

The Sierra Club, the National Resource Defense Council (NRDC), and 40MPG are three groups that try to influence federal air pollution policy through vehicle emissions standards. The Sierra Club is one of the oldest, most prominent and influential environmental interest groups in America. The NRDC is a non-profit, non-partisan group that focuses on litigation and education campaigns to spread their message. 40MPG is a subsidiary group of the Civil Society Institute, which mainly uses press releases to educate the public about the issue of fuel efficiency. These three groups are all prominent actors in the area of environmental policy.

The Sierra Club, NRDC and 40MPG and other similar groups have made significant attempts to increase the regulation of greenhouse gases from commuter vehicles. For example, a coalition led by the NRDC and the Sierra Club pressured the Obama administration to require 60 mpg standards by 2025 (Crawley 2010). Whereas these two groups function more as blanket organizations, 40MPG is devoted specifically to increasing pollution regulations on passenger vehicles through public appeals. In late 2008, 40MPG urged its members to contact members of Congress in support of a Green Auto Bailout, which would require auto manufacturers to research fuel-efficient technologies and drop lawsuits against states with higher emissions standards in exchange for bailout money (Cox 2008). These groups are primarily concerned with minimizing the effects of global warming by regulating products from the auto industry. They attempt to achieve this goal by researching new tech-
nologies and lobbying and educating on behalf of policies that increase fuel mileage standards for cars.

The Sierra Club, NRDC, and 40MPG work together to achieve their shared goal of reducing air pollution because it is in their best collective interest. Since the three groups have similar interests and often work together to achieve their goals, they will collectively represent the environmental interest group player to oppose the automotive industry.

The “Big Three” will be the major player on the automotive industry side, which consists of the three largest automakers in the United States: GM, Ford, and Chrysler. These three compete with each other over profits, but are unified on the issue of environmental standards. One example of this cooperation was in GM and Ford’s response to the 1970 Clean Air Act. Both companies “developed collective strategies to delay issue progress, so that GM and Ford got more time to develop capabilities” and were able to catch up with emissions control technology (Penna and Geels 2011, 26). In 2006, the Big Three got together with legislators to discuss each of their plans for flexible fuel vehicles and how to compete with foreign carmakers (Associated Press 2006). These examples provide evidence that these companies are willing to work with one another to thwart foreign competitors as long as none of them outpaces the others technologically.

For the sake of this simple model, the Big Three automakers, as a group, will function as the other player in the game. The Big Three all desire more lenient mileage standards because it allows them to spend less on research and development programs for alternative fuel technology and improvement of existing technologies. Thus, the Big Three auto manufacturers will naturally resist the demands of environmental interest groups.

One particularly illustrative example of an event over which environmental groups and the Big Three clashed is Congress’ 2009 decision to use $25 billion of the $700 billion government bailout fund to bail out the Big Three automakers. Environmental groups pushed for requiring the auto companies to meet certain fuel mileage benchmarks in order to receive bailout money or restructure their current loans (Doggett 2008). While environmental groups pushed for benchmarks, the Big Three spent great sums of money lobbying legislators to provide the bailout (Heisey 2008). This event is demonstrates how these groups have tried to increase their influence in order to shape or resist changes in public policy.

**Game Theory Framework**

The two players in the game, the environmental groups and the automotive industry, function within a simple game theory model. This theory “provides
general mathematical techniques for analyzing situations in which two or more individuals make decisions that will influence one another’s welfare” (Myerson 1991, 1). Work by von Neumann and Morgenstern (1953) serves as the classical framework for setting up game trees and strategic game matrices. John Nash (1950) contributed the idea of reaching an equilibrium point, the point at which both players maximize their own utility and do not stand to benefit from switching strategies. Where Nash characterizes players by using a utility function, Brams (1994) thinks of the players as having an ordinal rank of every possible strategic combination. Play commences as players take turns adjusting their strategies in order to improve their current state by moving towards a state that they prefer more than the current one (Brams 1994, 20). Nash’s equilibrium theory still applies to Bram’s models because maximizing state preferences is analogous to maximizing a real-valued utility function. Since simple game theory is a rather pure science, the academic literature is based more on consensus and improving older techniques than any kind of disagreement.

The game model used in this research is based on Brams’s theory of moves. The unique aspect of the theory of moves is that it incorporates a dynamic element of the game, in that players can anticipate the next move of their opponent and adjust their strategy accordingly. Each unique state of the game is defined by the strategy of both players, as will be described later. Players have set preferences that allow them to ordinally rank the states in the game according to their preference or the amount of benefit that state provides. The game plays out as players alter their strategies in an attempt to influence public policy about air pollution controls. As the auto bailout example shows, the strategies and anticipation of both players describes an interesting relationship between environmental interests and auto corporations.

**Group Interaction from a Strategic Perspective**

In order to create a simple yet accurate model, environmental groups and automobile corporations will employ either an active (A) or passive (P) strategy as a means to influence federal fuel emissions standards. The key differences between these strategies will be the mobilization of significant resources, time, and attention in order to sway the opinions of the public and/or policymakers. Neither side will be able to maintain an active influence strategy for a prolonged period because of scarce political resources. This scarcity forces groups to target their efforts at the most appropriate times in the policymaking process.

The active strategy of both sides will reflect the dominant strategies men-
tioned previously. The active strategy of environmental groups involves appeals to the public combined with direct lobbying of lawmakers and utilizing their unique policy expertise. Environmental groups are most likely to switch to the active strategy when a significant policy window, or an “occasion during which a problem becomes pressing, creating an opportunity for advocates of proposals to attach their solutions to it” (Kingdon 1995, 168). Environmental groups use policy window openings to maximize the effectiveness of their active influence strategy.

The active strategy of automobile manufacturing corporations is characterized by an increase in resources devoted to the direct lobbying of legislators and court challenges. Automotive lobbying emphasizes the burdensome nature of fuel emissions restrictions and aims to defend current fuel emissions standards or repeal stricter pollution restrictions.

The groups’ passive strategy appears similar to the active strategy, but the tactics are scaled back. There are functional levels of resources that both sides allocate in order to maintain contact with legislators and the public when there are not issues directly affecting them under consideration. The passive strategy for both groups refers to this functional level of involvement in the policymaking system.

A difficulty with this two-strategy model is establishing a threshold at which a group crosses from one strategy to another. Activity on an issue can be represented by a continuum with clearly identifiable extremes but considerable uncertainty in the middle. Future research in this area may focus on direct and indirect lobbying expenditures of both groups during times of conflict over a significant issue. Though I cannot readily speculate on these specific thresholds, I do offer some inexact indicators of strategy change.

For the purpose of this application, we can describe some group changes that signal a switch from one strategy to the other. The first major change is the elevation of a specific issue’s priority, often in response to the introduction of a bill in Congress. In addition, fulfillment of two or more of the following four criteria signals a shift from the passive to active strategy:

- Increased contact with lawmakers, specifically those who the group does not meet with on a regular basis.

- Organization of a public advertising campaign. This can be anything from mainstream media appeals to providing additional information to members.

- Exerting influence across multiple branches and/or levels of government.
- Forming new coalitions or strengthening existing coalitions with other groups with similar policy preferences or goals.

A group halting two or more of these actions indicates a shift from an active strategy to a passive one. Differentiating between the two strategies is a difficult concept, but these conditions somewhat clarify the issue.

One key assumption of this model is that if the players are using opposite strategies, the player who employs the active strategy increases their chance of achieving their policy goals. This assumption is logical because even if the groups are equally persuasive, the group that is directly lobbying more frequently, mobilizing more grassroots support, or aggressively challenging emissions standards in the courts has effectively magnified its voice within government. As is often the case, the group with the louder voice prevails.

The strategic choices of both players create four possible interaction states:

1. \(A - A\): Environmental groups and automobile manufacturers both increase resources devoted to raising and lowering fuel emissions standards, respectively.

2. \(P - P\): Both sides maintain manageable (downsized from active strategy) interaction levels with legislators and the public.

3. \(A\) (environmental) – \(P\) (auto): Environmental groups expand resources devoted to raising fuel emissions standards and auto companies do not correspondingly increase activity in order to prevent stricter regulations.

4. \(P\) (environmental) – \(A\) (auto): Automobile manufacturers mobilize significant political resources to preserve the status quo or curtail fuel emissions standards. Environmental groups do not actively pursue policy goals surrounding emissions standards.

Next, each state is ranked between 1 and 4 according to how much it benefits each player. One is the worst state and 4 is the best. As per Brams’ theory of moves, these rankings are only ordinal ranks of each state and they do not signify the level of utility to a particular player. In short, a player prefers the higher ranked state to that of a lower rank.

The payoff matrix below shows the ranked states for both players in the game. The number in the lower left corner of each box indicates the preference of the row player (auto corporations) and those in the upper right reflect the preference of the column player (environmental groups). Each state is also assigned a Roman numeral for reference.
What follows is a short justification of the ranks for each state:

I – Confrontation: In this state, both sides are actively trying to influence legislators to support their policy goals. Both players see a policy opportunity and mobilize their resources accordingly. The deliberations preceding the passage of the auto bailout of 2008-2009 is a prime example of this state. This is the second-worst state for auto companies because, as a business, they would prefer to devote resources to company-building purposes rather than defending themselves from restrictive new government policies. This is the second-best state for environmental groups because they are actively pursuing the goals that define them as groups and those that the members expect. At the same time, they are facing active opposition, which makes policy success more difficult.

II – Auto corporation dominance: This state involves automakers significantly increasing resources to combat high emissions standards without a matching increase in intensity by environmental groups. This state is seen less often than the others, but one example is when the Alliance of Automobile Manufacturers, including the Big Three, launched an advertising campaign to foster opposition to a bill that would increase fuel standards in 2007 (Snyder 2007). This is the next-best state for auto companies because they face little opposition from environmental groups, yet they would still prefer to not have any regulations to lobby against. This is the worst state for environmental
groups because the lack of opposition makes policy success for automakers the most likely.

III – Environmental group dominance: The third state is the opposite of the previous one. Environmental groups increase inside and outside lobbying strategies to increase fuel mileage standards while automakers do not respond with an opposite pressure. An example of this situation is when President Obama approved new Corporate Average Fuel Economy (CAFE) standards in 2010. Environmental groups worked hard for this change and automakers were generally accepting of this change (US Department of Transportation, 2010). This is the best state for environmental groups because they face few obstacles on the way towards achieving their policy goals. However, it is the worst state for auto corporations because environmental groups would be passing laws potentially restricting auto companies’ profitability and automakers would not be defending themselves.

IV – Compliance: The final state is that in which both sides are not actively influencing air pollution policy in government. This is essentially the “holding pattern” that exists when there are no significant air pollution policy matters on the policy agenda. This is the best state for auto companies because when fuel mileage policy changes, it tends to change in favor of being more restrictive. This is better for them than state II because they are not diverting resources from producing cars to lobbying for policy repeal with an uncertain fate. This state is the next-worst for environmental groups because they like to be able to demonstrate progress on the issues the members care about. This state is better than state II because there is less of a risk that policy will change in an unfavorable way to environmental groups.

The solution that maximizes the benefit for both sides is state IV in which both sides use a more passive influence strategy, yet the traditional game theory understanding says that this is not the outcome of this particular game. One reason is that the environmental groups have a dominant strategy in their active pursuit of policy goals, where they maximize their benefit regardless of the strategic choice of the other player (Brams 1994, 21). No matter which strategy the auto corporations choose, the active strategy for the environmental groups will always yield a preferable situation. If the auto companies choose the active strategy, environmental groups will follow, and if auto companies choose to be passive, then environmental groups will still be active because this gives them the best chance to achieve their goals due to less opposition. From a practical standpoint, the dominance of the active strategy is derived from the fact that environmental groups have committed members who strive for some policy change through their actions. This tendency to favor the active strategy when the resources exist is important when considering how auto companies will anticipate the moves of environmental groups.
The auto corporations, on the other hand, do not have a dominant strategy. The preferable strategy depends on which strategy the environmental groups utilize. If environmental groups are active, then auto companies will want to match them with equally active influence. However, if environmental groups are passive, then auto companies also prefer to be passive. Thus, the auto companies’ strategy is highly dependent on the strategy of the other player, which fits with the idea that automakers are reactive in addressing demands for policy change.

The intersection of these conditional preferences provides a Nash equilibrium state in which both sides are actively attempting to persuade the government to change fuel emissions policy in their favor (state I). This calculation is included in the Appendix. The implication is that both sides will actively influence government until either policy outcome is determined or the groups run out of resources to maintain their active strategy.

The idea of a limited resource game and threat power is crucial to the understanding of this model. Naturally, both sides have a finite amount of resources to devote to influencing policy outcomes. However, the Big Three have the ability to spend in excess of $50 million per year on lobbying efforts (Attkisson 2008), while groups like the Sierra Club and NRDC spend close to $1 million per year on lobbying and campaign donations (Carey 2010). The active strategy for both groups can only be temporary before one group must scale back its influence tactics if a policy outcome is not achieved. If environmental groups run out of resources (a shift from state I to state II), then automakers will likewise switch to the passive strategy, moving the game to state IV. This will assure that the groups will return to the passive-passive state (IV) to prepare for the next encounter.

Threat power is essential to understanding how the game moves away from the passive-passive state. A player is said to have threat power when they are better able to withstand an inefficient state in order to keep the opponent away from their optimal strategy (Brams 1994, 138-139). As we can see, environmental groups want to move from state IV to state III because it gives them the best chance to achieve their policy goals. But, they can anticipate that auto companies will match their active strategy, pushing environmental groups into their next-best state. Since auto companies have resources superior to environmental groups, they are able to remain at their next-worst state as long as it takes to keep the environmental groups from winning. In essence, if environmental groups are going to mobilize around an issue, they need to be certain of their decision because the automakers would respond quickly to a mobilization and would be committed to defending themselves for an extended period. The environmental groups must be cautious when escalating the conflict because it may hamper their ability to pursue other issues in the future.
A typical cycle of the game plays out in a clockwise flow around the payoff matrix diagram. If the starting point is state IV and the environmental groups choose to mobilize around an issue, the game moves to state III, which is the best for the environmental groups. The automakers recognize that this is their worst state and switch to the active strategy. They defend themselves against the changes desired by the environmental groups, moving the game to state I. This brings the game to the natural equilibrium state, so neither side has any motivation to switch strategies if they operate rationally. However, as mentioned previously, one group may run out of the necessary resources to sustain the active strategy before a decision is made on a certain policy. If the environmental groups run out of resources, a more likely scenario, then the game shifts to state II. This is where automakers are most likely to achieve their policy goals. From there, both groups prefer to transition back to state IV. However, if the automakers switch to a passive strategy before the environmental groups do, which is a very rare scenario based on assumptions about resources and commitment, then the game moves back to state III (from state I). This would be a very irrational move on the part of the automakers because it worsens their situation and improves the situation of environmental groups. If there is relatively little opposition to the environmental groups, the auto groups will most likely achieve their policy goals. From there, the game returns to state IV. Typically, a game plays out in a clockwise direction, or more rarely, moving in a cycle through all states besides state II.

The 2008–2009 Auto Bailout

Amid economic decline, rising gas prices, and declining automobile sales, the Big Three automakers requested bailout funds from the federal government in 2008. Without these funds, General Motors and Chrysler were on a path to file bankruptcy. This would have resulted in shockwaves sent through the economy especially in regard to jobs, as over two million could be lost in one year (Cox 2008). Major concerns with the bailout centered on restructuring benefits plans of union autoworkers, limits on executive pay and perks, and forging a path toward sustainability (MSNBC 2008). Environmental groups focused on this final concern and sought to tie bailout money to stricter fuel efficiency standards for cars (Cox 2008). Congress approved a fund of $25 billion for the troubled automakers and President Bush reduced the amount to $17.4 billion, to be administered by the incoming Obama administration (Neuman 2008). These bailout funds, were not enough to keep GM and Chrysler from filing for bankruptcy in 2009 with both companies planning to restructure (BBC News 2009).
The auto industry bailout provides an example through which we can assess the explanatory power of the game theory model discussed above. The setting for the start of this conflict rests in state IV in which neither side is actively pursuing any air pollution policy changes. There were no significant air pollution bills being considered or being pushed onto the agenda by either player in the months before September of 2008. Common sense suggests that the very act of asking for money would move the game into state II, auto corporation dominance. However, the act of asking for money did not necessitate any increase from the normal activity on the part of the automakers. Indeed, automakers did not meet any of the four requirements that signal the transition to the active strategy. They were certainly prepared to change their strategy and commit resources once opposition arose, but they needed to wait and see which arguments came out the strongest.

It was only after environmental groups, among others, attempted to insert certain stipulations into the bailout money agreement that automakers increased the volume of direct lobbying and appealed to the public for support. In mid-November, about a month before the resolution would pass, environmental groups like 40MPG pressured members of Congress and executive officials both directly and indirectly through appeals to the public. The Civil Society Institute, the organization behind 40MPG, sent out an “action alert” to its members providing information and urging them to contact their members of Congress and President Obama’s transition team to support the Green Auto Bailout (40MPG.org 2008). House Speaker Nancy Pelosi was eventually supportive of tying bailout money to the improvement of fuel-efficient transportation technology (Kiley 2008). In late November, a coalition of 29 groups, including the NRDC, the National Wildlife Foundation, and Greenpeace, sent a report to the Obama administration outlining a plan to improve the environment and repair the economy (Cappiello 2008). These efforts by environmental groups signaled a shift to their active strategy, moving the game from state IV to state III.

The 2008 Auto Bailout example successfully demonstrates how the interaction between these two groups would escalate in a given policy context. However, once the game reaches the stable equilibrium as it does in the auto bailout example, this model does not have the ability to predict the outcome of the particular policy of interest. If there is an issue that is deliberated for a prolonged period of time, enough for one side to run out of the necessary resources to sustain an active campaign, then the model predicts the winner to be the side that does not run out of resources. If both sides maintain their active strategies, the policy result is dependent on factors internal to the government that cannot be explained by the game theory model.
In the case of the Auto Bailout of 2008, the timing of the sources indicates that both sides were able to maintain their pressure on the government until the final decision on December 19, 2008. The final agreement for the bailout did not include any of the strict benchmarks for which environmentalists fought. It only stipulated that automakers submit a “long-term viability plan,” to be approved by the Obama administration’s car czar (Herszenhorn 2008). Automakers were successful in avoiding any major restrictions or alterations to their business models, despite their formidable opposition. Leading up to the passage of the bailout, public opinion was decidedly mixed, and environmental groups were simply unsuccessful in overcoming concerns over the economy to mandate environmental responsibility. Although this game theory model cannot predict the specific outcome of the Auto Bailout of 2008, it can, more importantly, explain the strategic changes that led to the final outcome.

Discussion

The strength of this game theory model of environmental and automotive interest group interaction is that it accurately describes the strategic choices of both groups leading up to a policy outcome. The bailout example shows that, even when the automakers highlight an issue like air pollution, environmental groups will expand their tactics first, necessitating an equal or greater response from the auto industry. One of the most surprising insights that the model accurately explained was this strongly cyclic nature of the interaction between the environmental and automotive interest groups. The addition of limited resources considerations explains how the conflict de-escalates away from the confrontational equilibrium state. Despite the presence of a stable equilibrium state, the game demonstrates the ability for conflict to move away from the equilibrium in a predictable manner. This produces a cyclic interaction pattern of conflict.

The model also shows that environmental groups must manage their resources effectively and utilize policy windows to ensure that they sustain their influence until the final decision. In a way, this model confirms conventional wisdom about influencing policy. Resources need to be targeted very strategically and the tendency is for both opposing groups to get involved in an arms race, devoting more and more resources to support their cause. Interest group effectiveness, which is often difficult to measure, and external factors, including the political climate and public perception, determine which side the resultant policy favors. This model is effective in predicting the typical behavior of the two interest groups involved.
This game theory model also suggests some possible strategy changes that environmental groups could make to increase their chances of success. One possible change the model supports is the pursuit of smaller, incremental changes in air pollution regulation. Taking smaller steps towards reducing air pollution from vehicles would draw significantly less opposition from automakers because small increases in regulation would not have a strong, immediate effect on profit. Incremental policy changes, especially when they do not require the environmental groups to switch to their active strategy, are less likely to be as vehemently opposed by the automobile manufacturers lobby. However, small improvements do not often satisfy passionate members of environmental groups. Air quality is in a rather immediate danger, so members demand drastic policy changes to lessen damage in the future and heal the damage that has already been done. The model indicates that this strategy puts the most strain on environmental interest groups without necessarily achieving their policy goals. The more environmental groups can be successful at achieving policy goals while remaining in state IV (compliance), the better for the movement as a whole.

Another way that environmental groups can pursue their air pollution policy goals is by concentrating more resources at the state and local levels of government. The model focuses on the federal level influence, which draws heavy attention and resources from many different political actors. Auto companies usually spend less time defending states because each state only represents a smaller segment of consumers than the national stage. Environmental groups in the Western United States have been especially successful at helping pass more strict emissions regulations at the state level. Successful implementation of stricter fuel emissions standards in the statewide “laboratories” may eventually lead to more drastic federal action on the issue. Though the game theory model suggests considerable difficulty at the federal level, the American system of federalism offers plenty of other opportunities for environmental interest groups.

Despite the utility of this model, there are still a few limitations. The common criticism with most game theory models is that they are oversimplified. This is especially true for this model since players only have two choices for strategies, each of which encompass a wide variety of influence tactics. Another consideration is the number of players in this particular game. Democratic policymaking is characterized by the involvement of multitudes of actors and there are arguably a myriad of other well-organized groups that factor into air pollution policy decisions. For example, a more comprehensive model could include major players like the United Auto Workers or oil industry representatives, both of which hold a significant amount of influence tied to the auto
industry. Air pollution policy changes have significant effects on employment because increased resources for technology research and implementation cut into employee benefits and more fuel-efficient vehicles offer slimmer profit margins than larger, less economical vehicles. Oil companies have a vested interest in making sure auto companies are providing the means for the public to consume their product. Clearly, there are other players that fit into this game theory model.

Another consideration is that environmental groups and automobile manufacturing corporations do not compete directly with one another. The government serves as an intermediary between the two players, weighing the effectiveness of one group over another. As such, policy outcomes and even the tactics utilized are highly dependent on the composition of the government. The public also serves as an intermediary because it reflects the effectiveness of grassroots campaigns and certain public appeals. The composition of government and the American public are two very important external factors that could be useful additions to this model.

Despite the tendency for this game theory model to play out most often in favor of big business, as is often the case in interest group politics, environmental groups and automobile manufacturers have made some significant progress towards a workable compromise for both parties. Auto companies are starting to make the transition to a more fuel-efficient line of vehicles, transitioning from regular gas engines to hybrids, to full-electric zero-emission engines, and even venturing into hydrogen fuel technology. In this respect, environmentalists have expanded the legacy of the EV-1 to a national scope. In 2011, a decade after systematically reclaiming the EV-1, Chevrolet introduced its first fully electric vehicle, the Volt. Prospects for cooperation between environmental groups and auto companies are important now more than ever because American manufacturers are falling behind foreign competitors in terms of technology. Environmental groups, with their important research capabilities, can work in partnership with auto companies to develop sustainable technologies that help mitigate the effects of climate change. If the prophecy of increased cooperation holds true, an updated game theory model may soon be needed to reflect this new working relationship, forged to pursue global sustainable development for the future.

Appendix

Calculation of Nash equilibrium:

Start by finding the conditional preferences of each group. For example (calculating preferences of environmental groups), if the auto companies choose
an active strategy, the environmental groups prefer their active strategy (since $3 > 1$, looking at the top row and focusing on the environmental groups' preferences). In the reproduced diagram below, boxed entries are the conditional preferences of auto companies and circled entries are those of environmental groups. Then, the Nash equilibrium lies in the intersection of these preferences, which happens to be state I in the upper-left corner.

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When Jurisprudence Runs Counter to Preference: Predicting Justices’ Votes in Socially Contentious Cases

Matthew D. LaBrie, The College of William and Mary

This paper analyzes the constitutional arguments surrounding The Commonwealth of Massachusetts v. United States Department of Health and Human Services (2010) – a case challenging the constitutionality of the 1996 federal Defense of Marriage Act – and seeks to predict how the Supreme Court will rule on this case by examining past rulings and opinions of the individual justices, as well as the predilection of the justices to abandon their traditional jurisprudence in order to ensure an outcome that aligns with their personal ideological preferences.

In July of 2010, the Commonwealth of Massachusetts challenged the constitutionality of the United States Defense of Marriage Act (DoMA) in federal court, and in a controversial, landmark ruling, U.S. District Court Judge Joseph Tauro found that the federal statute violates the U.S. Constitution. Judge Tauro’s ruling invalidating DoMA as an overreaching of federal government authority, results in conflicting law on the subject across the United States. Given this discrepancy and the degree of controversy surrounding the case, The Commonwealth of Massachusetts v. United States Department of Health and Human Services (2010) could well come before the Supreme Court. If it does, the Court’s decision will likely result in a ruling on the constitutionality of homosexual marriage and could establish common law for the entire nation to follow. Cases like Commonwealth of Massachusetts present the Supreme Court with a difficult set of legal arguments in which justices’ preference on the socially divisive policy outcome may be in tension with their typical jurisprudence concerning the authority of the federal government vis-à-vis the states. How do the justices decide such cases?

In the pages that follow, I discuss the arguments in the federal district court case challenging DoMA and the justices’ likely views on the case if it were to reach them. In the first section, I provide an overview of the debate concerning same-sex marriage. In the second section, I explore the arguments specific to the case in Massachusetts in substantial detail. Examining these arguments provides the framework for thinking about how the justices might view the case and the arguments on which they might rely in their analyses. In the third section of the paper, I examine Supreme Court precedent in cases that have presented justices with a tension similar to the one that could come before them in the Massachusetts case. Finally, in the fourth section of the paper, I analyze current justices’ jurisprudence and suggest how they might rule should
they choose to hear *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, a case where most of the justices preferences on the same-sex marriage question would be tension with their typical federalism jurisprudence.

**Introduction**

The controversy surrounding same-sex marriage and homosexual rights first came into the American public conscience in 1969 with the Stonewall Riots when, after multiple police raids targeted at New York City gay bars, the patrons of the Stonewall Inn spontaneously and violently revolted against the police who attempted to raid the establishment. This sparked a city wide, and eventually nation-wide, movement by homosexuals and their supporters to demonstrate and organize, demanding equality in all spheres of public life. Prior to this movement, it was a legal impossibility for same-sex couples to marry (Cain 1993, 932). To the general public and contemporary governments, same-sex marriage was viewed as a contradiction in terms, a violation of historical and Biblical tradition, and pragmatically unsound (Eskridge 1993, 1427).

The primary and perhaps most simplistic argument against same-sex marriage lies in its definition: marriage has been defined and thought of as necessarily heterogeneous for time immemorial. Opponents of same-sex marriage argue that marriage – defined as the union of a man and a woman – existed far prior to the point when the government began to recognize it, thus, the government is constrained by the historical definition. This tradition of marriage has been defended as morally and canonically required: opponents of same-sex marriage claim homosexual marriage is detrimental to the children of such a union and, ultimately, to the two adults themselves (Focus 2011). Finally, many contend that expanding the definition of marriage to include same-sex relationships, regardless of the moral or social concerns, is a pragmatic impossibility for it would cost both state and federal governments millions of dollars in extended marriage benefits (Eskridge 1430). These arguments espoused in the mid 1900s remain the prominent arguments against same-sex marriage today.

Supporters of same-sex marriage, however, choose to ignore the normative moral arguments and focus instead on the constitutionality of the laws. They argue that, by denying homosexuals the right to marry, federal and state governments violate same-sex couples’ 14th Amendment rights to Due Process and to Equal Protection. Many legal scholars contend that the Supreme Court found in *Loving v. Virginia* (1967)° an inferred right to marry, stemming

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° The question before the Court in *Loving v. Virginia* was whether state governments could forbid interracial marriage. The Court ruled unanimously that such a law had no legiti-
from the substantive Due Process rights found in the 14th Amendment. Loving and subsequent cases “have emphasized that the freedom to marry the person of one’s choosing stands as a fundamental due process right… that… can only be abridged to further an important… state interest” (Eskridge 1419).

These supporters further argue that denying the rights of homosexuals to marry is a form of gender discrimination. Thus, according to Supreme Court precedent established in Craig v. Boren (1976)2 any “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” As laws prohibiting same-sex marriage fulfill neither of these requirements, supporters of homosexual marriage argue such laws also violate the Equal Protection Clause of the 14th Amendment.

Despite the Court’s decision in Loving and Craig, little progress in tangible rights had been made in terms of discrimination based on sexual orientation. However, the AIDS epidemic of the 1980s served to more strongly unify the gay community and the demand for equality became more forceful. In 1969, homosexual sex was illegal in 49 states (Rich 2009). By 2003, the Supreme Court in Lawrence v. Texas (2003) found all such remaining laws unconstitutional.

Seven years later in 1993, the Hawaii Supreme Court found for the first time in the United States that barring a compelling state interest, denying the rights of same-sex couples to marry violated the equal protection rights established in Hawaii’s state constitution. A further case at the trial level in 1996 found that the Hawaii had no compelling interest in denying same-sex couples the right to marry, which thereby opened the door for gay marriage. However, before the issue could proceed for any further court treatment, Hawaii rushed to pass state constitutional amendments defining marriage as between one man and one woman, thereby making the state constitutional question moot (NCSL 2011). Many states since have followed a similar path. Indeed, the United States Congress acted similarly in 1996 with the passage of the Defense of Marriage Act (DoMA). The Act defines marriage, for the purpose of all federal laws that concern it (numbering between 1,100 and 1,300), as between one man and one woman.

For another seven years, this law was largely symbolic of national social policy. Since no state recognized same-sex marriages, DoMA simply upheld the status quo. However, in 2003 the Massachusetts State Supreme Court

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2 In Craig v. Boren the Court found that a state could not establish different drinking ages for men and women as such a law served no “important” purpose and no “substantial relationship” between the law and its stated purpose. Thus, the Court decided 7 to 2 that such a law was gender discrimination and failed to meet their newly established intermediate level of scrutiny – heightened scrutiny – for cases of gender discrimination that fell between the requirements of strict scrutiny and rational basis.
declared it unconstitutional per the state’s own constitution, to bar same-sex couples from marrying. The Massachusetts State Supreme Court offered an advisory opinion at the behest of the State Senate which declared that “segregating same-sex unions … cannot possibly be held rationally to advance or preserve” any state interest – thereby legalizing same-sex marriage for the first time in the United States (NCSL 2011). For the first time, DoMA’s “federal discrimination began to have an affect (sic) on U.S. citizens as actual married couples” (GLAD 2009, 2). Massachusetts’s law now contradicted federal law.

Case and Controversy

The ruling in Massachusetts ignited a push against DoMA – Connecticut, California, New Hampshire, Iowa, Vermont, and Washington D.C. all passed legislation or had court rulings institutionalizing same-sex marriage. Maine, Washington, and Illinois all extended versions of domestic partnerships to same-sex couples. In each of these states, the expanded definitions of marriage or institution of domestic partnerships was based in state law and state constitutions. It was not until 2008 that same-sex couples argued that they possessed a right to marry under the U.S. Constitution. The most public of these cases, *Perry v. Schwarzenegger* (2008), was brought in California after a statewide referendum (Proposition 8) redefined marriage as between a man and a woman. This case was brought to federal court, challenging the constitutionality of Proposition 8’s definition of marriage.3

Unlike the “Prop 8” case, *The Commonwealth of Massachusetts v. U.S. Department of Health and Human Services* (2010) (hereafter Commonwealth of Massachusetts) has yet to attract wide media coverage outside of the 1st Circuit. Massachusetts argues that DoMA violates the Tenth Amendment, which preserves state sovereignty, rather than the Fourteenth Amendment, which guarantees Equal Protection of citizens. Yet, like Perry, the plaintiffs argue that they have a constitutional right to have their same-sex marriage federally recognized.

This case was brought by Massachusetts Attorney General Martha Coakley.4 Coakley argued, specifically, that section 3 of DoMA is unconstitutional. As this issue goes to publication, *Perry v. Schwarzenegger* was making its way through the federal courts. The United States Circuit Court of Appeals for the Ninth Circuit had most recently upheld the decision of the federal District Court striking down California’s Proposition 8 as impermissible under the U.S. Constitution, but on more narrow grounds than had the District Court. As of February 23, 2011, the Executive Branch and the Department of Justice, per the order of President Barack Obama and the concurrence of Attorney General Eric Holder, consider DoMA to be patently and unreasonably unconstitutional and will no longer defend the law against suits. Obama and Holder believe “classifications based on sexual orientation should be subject to a… heightened standard of scrutiny” beyond that of rational basis,
Section 3 states that:

“In determining the meaning of any Act of Congress, or of any ruling … of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife” (DoMA 1996).

According to Coakley, the power Congress assumes under Section 3 “exceeds Congressional authority and interferes with the Commonwealth’s sovereign authority to define marriage, in violation of the Tenth Amendment” by requiring the Commonwealth to “create two separate and unequal categories of married couples,” and to “commandeer state employees into implementing federal policy” (Commonwealth Compl. 2009, 3-4). In 2003, the Supreme Judicial Court of Massachusetts ruled that it was a violation of the Massachusetts Constitution to deny the ability of same-sex couples to legally marry. As a result, since 2004, Massachusetts has recognized “a single marital status that is open and available to every qualifying couple, whether same-sex or different sex” (Commonwealth, Memorandum 2009, 7). However, as the federal government per section 3 of DoMA, refuses to recognize the same-sex marriages granted by Massachusetts, “the Commonwealth contends that the statute has a significant negative impact on the operations of certain state programs” by functionally forcing the state to treat homosexual and heterosexual marriages in an unequal fashion, in a violation of both Massachusetts’s Constitution and state laws (Commonwealth Memorandum, 2009, 8).

The case developed after multiple parties were denied benefits they would have otherwise been entitled to under Massachusetts law due to DoMA. The first of these was a male spouse who wished to be interred with his husband in the Winchendon cemetery, one of two veterans’ cemeteries in Massachusetts. However, as the United States Department of Veterans Affairs regulates these cemeteries and requires in order to retain the distinction as a veterans’ cemetery and continue to receive annual federal monetary support (over $20

on which DoMA currently draws its authority from (US DOJ 2011, 1). While the Executive Branch will continue to enforce the law until it is repealed, it will no longer defend its constitutionality. Ironically, Hawaii, the state which propagated the initial push to create DoMA with its court ruling legalizing same-sex marriage and the subsequent legislation criminalizing it, enacted legislation legalizing same-sex marriages on the very day Obama announced that the Executive Branch no longer considered DoMA constitutional: February 23, 2011.

5 For the purposes of this paper, if not otherwise qualified, the word “spouse” will refer to a person – man or woman – who is considered legally married under Massachusetts law to another man or woman.
million to date), the cemeteries must “be operated solely for the internment of veterans, their spouses, [and] children,” which, per Section 3 of DoMA, prevents the internment of a spouse of the same sex as their veteran deceased (Commonwealth Memorandum, 2009 10-11). Coakley charged that as Massachusetts does not recognize a legal difference between homosexual and heterosexual marriage, DoMA unconstitutionally forces the Commonwealth to either violate its own Constitution “by refusing burial of the same-sex spouses of Massachusetts” or accept the applications for internment and unfairly risk federal sanctions for non-compliance for not enforcing federally required discrimination (Commonwealth Compl. 2009, 21).

The second of the cases in which Coakley charged DoMA unconstitutionally intruded upon Massachusetts’s sovereignty as a state involves Medicaid funding. The federal government currently reimburses the Commonwealth for approximately one-half of its Medicaid expenditures ($5.3 billion in 2008). In order to receive this funding Massachusetts must comply with federal regulations set forth by the United States Department of Health and Human Services. One of these regulations is that funds are not provided to “individuals whose income or resources exceed certain limits” (Commonwealth Memorandum, 2009, 14). Under federal assessment policy, the combined income of federally recognized married couples (a man and a woman) is assessed to determine whether the two qualify for Medicare benefits. Section 3 of DoMA prevents Massachusetts from assessing homosexual couples jointly and thus, Coakley charged, incurs a great and involuntary cost to the state. As many more individuals are eligible for Medicare funding when assessed separately, the Commonwealth must pay an average of $2.4 million extra annually. Furthermore, “because the United States Constitution compels [Massachusetts] to treat similarly all individuals” validly married under Massachusetts law, the Commonwealth must provide all benefits a federally recognized spouse would receive from the federal government to all homosexual spouses, incurring even more costs to the state. Coakley contended that by impairing the ability of a state to structure and run its internal operations, federal law forces the Commonwealth to discriminate against those married to a person of the same sex, again creating a further unconstitutional dilemma.

The third and final instance in which Coakley charged that Section 3 of DoMA has unconstitutionally invaded the sovereignty of the Commonwealth involves state taxes that depend on marital status owed to the federal government. The Commonwealth is required to pay Medicare a tax of 1.45% of each of its employee’s taxable income. Federal law states that the value of health

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6 In 2008, Massachusetts passed the “MassHealth Equality Act” to ensure that no legally married couple would be denied the equivalent of federal Medicaid funds due to the sex of their spouse.
care benefits extended to an employee of the Commonwealth’s spouse – as defined under Section 3 – is excluded from an employee’s taxable income and the Commonwealth is not obligated to pay taxes on the value. However, the value of the benefits Massachusetts extends to the spouse in a single-sex marriage is considered taxable and must be calculated as additional employee income for the purposes of the Commonwealth’s obligation (costing an additional $122,607.69 since the recognition of same-sex marriages). Coakley argued that this creates an unconstitutional dilemma for the Commonwealth which essentially reduces its choice to either honoring its Constitutional mandate to recognize same-sex marriages and incurring a large monetary burden both by increased tax obligation and deprivation of federal funds, or allowing state officials to implement a federal policy of discrimination.

Coakley further argued that the Tenth Amendment “expressly reserves to the states all powers except those limited powers granted to the federal government” which protects “the division of powers between the states and federal government” (Commonwealth Compl. 2009, 22). Thus, Congress lacks the authority to create an “extensive federal regulatory scheme that interferes with and undermines the Commonwealth’s sovereign authority” to manage as a state its own internal affairs. Additionally, she charged that “Congress lacks the authority under Article I of the United States Constitution to regulate… marriage,” as the definition of marriage falls into the field of domestic relations, which has been consistently recognized as a confirmed attribute of state sovereignty (22). This sovereignty, she claimed, is violated by Section 3 of DoMA in which the federal government forces the Commonwealth to treat same-sex marriages differently than they treat traditional marriages. Thus, DoMA is a regulation of the Commonwealth as a state which impedes the ability of the Commonwealth to administer its own domestic relation law and thereby, indirectly, defining marriage for not just federal purposes, but for the purposes of the Commonwealth. Finally, Coakley charged that “enforcement of Section 3 of DoMA unconstitutionally commandeers the Commonwealth and its employees as agents of the federal government’s [attempt to implement] a discriminatory federal policy” which Printz v. United States (1997) forbids (22).

The United States Department of Health and Human Services, as the defendant in this case, refuted both the charges that DoMA’s Section 3 unconstitutionally intrudes on traditional attributes of state sovereignty by defining marriage and that it coerces the Commonwealth by presenting an unconstitu-

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7 The question before the Supreme Court in Printz v. United States was whether Congress could require state employees (here, law enforcement officials) to carry out specified duties (background checks on potential hand-gun purchasers) in order to implement federal policy. The court ruled that such a “commandeering” of state officials offended the Tenth Amendment, as it impeded upon the State as a sovereign entity.
tional dilemma between federal funding and Massachusetts’s constitutionally mandated equal treatment of all marriages. It also contended that DoMA does not commandeer state employees to implement its policies.

The United States claimed that according to *New York v. United States* (1992)\(^8\), the federal government retains a right to “[influence] a State’s policy choices” by attaching regulation to the funds it offers states, so long as the influence does not amount to an “unavoidable command.” The United States argued that the Department of Health and Human Services (DHHS) presented Massachusetts “not with a command but a choice: to use federal matching funds or grants for the purposes Congress has specified in authorizing such grants, or to forgo these funds” (Commonwealth, Defendant Memorandum 2009, 11-12). The state, DHHS argued, clearly has options, as evinced by the MassHealth Equality Act, which continued to provide benefits and honor same-sex marriages despite a lack of federal funding. The defense argues that “options [are] increased, not constrained by, the offer of more federal dollars” (*Kansas v. United States* (10th Cir. 2000)). Massachusetts’s argument that to deny federal dollars is to deny a state the capacity to structure its internal operations as it otherwise would as a sovereign entity, was thus in error. Thus, it could not follow that *New York* and *Printz* controlled since no state had been commandeered by the federal government, “directly compelling [it] to enact and enforce a federal regulatory program” (*New York v. United States* (1992)). The Commonwealth made a choice to accept the federal regulation attached with the acceptance of federal funding. “Massachusetts faces, at most, a loss of federal funds [simply] if it uses those funds for purposes Congress has not authorized” (Commonwealth, Defendant Memorandum, 2009, 13). Since Section 3 specifically states that it is only controlling when dealing with “any Act of Congress,” DoMA neither directly nor indirectly attempts to define marriage for the purposes of a state’s functioning as a state (DoMA 1996).

The United States did concede that it regulates marriage for the state as an employer, which does not offend the Tenth Amendment per *Reno v. Condon* (2000)\(^9\) because the act does not “require the States in their sovereign capacity to regulate their own citizens. [It] regulates the States as [employers].” This further supported the United States’ claim that it had not commandeered

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\(^8\) The question before the Court in *New York v. United States* was whether federal legislation could “commandeer state governments into the service of the federal regulatory purposes.” The Court found that such a demand was “inconsistent with the Constitution’s division of authority between federal and state governments.”

\(^9\) The Court found in *Reno v. Condon* that Congress could regulate the State in a capacity other than its capacity as a State: it could regulate it to take action as it could any other entity fitting Congress’s description, in this case, the owner of a database. The statute did not require the State, as a state, to regulate its citizens in accordance to federal policy, which would have been unconstitutional.
the states or its employees for the purpose of implanting federal policy as the “anti-commandeering rule comes into play only when the federal government calls on the states to use their sovereign powers as regulators of their citizens,” that is, when the state is regulated by the government in its sovereignty as a state (Reno (2000)). Since Section 3 does not attempt to interpret marriage for a state, does not regulate a state as a state, commandeer its employees, nor impede upon a state’s ability to regulate and structure its own internal operations, DoMA does not offend the Tenth Amendment.

First Circuit Court Judge J. Tauro, however, soundly refuted every point the United States made. His opinion turned on his determination that the federal regulations placed on the funding surpasses mere “influence” upon the Commonwealth and moves towards “commanding.” As such, it “plainly intrudes on a core area of state sovereignty” and “violates the Tenth Amendment” (Commonwealth (2009, 28)). To reach this conclusion, he applied the test from the United States v. Bongiorno (1st Cir. 1998), which has its origins in Hodel v. Virginia Surface Mining (1981). In order to find that a statute offends the Tenth Amendment, the statute must: “regulate the States as States,” “concern attributes of state sovereignty,” and “be of such a nature that compliance with it would impair a state’s ability to structure integral operations in areas of traditional governmental functions” (Bongiorno (1st Cir. 1998)). Tauro found that the first requirement was “easily satisfied” by the Commonwealth’s case because DoMA “imposes significant additional… costs on the Commonwealth” and greatly impacts its “bottom line.” For Judge Tauro, this was sufficient to determine that Congress was directing a State’s actions as a State (Commonwealth 2009, 22). This, perhaps, is the weakest point in his argument.

Tauro also addressed the second requirement of the test, finding that “marital status determinations are an attribute of state sovereignty” that Section 3 inadmissibly concerns (Commonwealth 2009, 29). He cited United

10 While the test was articulated most clearly in Bongiorno, the core of the test is sufficiently based in still good Supreme Court precedent that the test can, for all intents and purposes, be considered nationally applicable precedent.

11 In this case, it seems counter intuitive to establish first that Congress “touches upon an attribute of state sovereignty,” as Section 3 of DoMA specifically states that its definition of marriage applies to only federal law. Therefore, whether or not the statute passes the second prong of the test and touches upon state sovereignty is dependent upon the conclusion of the third prong of the test. In order to determine that Section 3 does, in fact concern attributes of state sovereignty, it must be shown that states are coerced to accept the federal definition of marriage as its own, as, Massachusetts argues, to reject the definition would be to reject Congressional funds, which would severely impair the ability of a state to structure its internal operations. Once that is established, one can then argue under the second prong that the definition of marriage is an attribute of state sovereignty and, under the third prong, that the statute impairs the ability of the state to structure internal operations in the area of family law and marriage.
States v. Morrison (2000) and affirmed that “the Constitution requires a distinction between what is truly national and what is truly local,” as the federal government can only regulate the former. He further established from Ankenbrandt v. Richards (1992) and Boggs v. Boggs (1997) that “declarations of status, e.g. marriage, annulment, divorce, custody, and paternity’ is often held out as the archetypal area of local concern.” Even the founding generation, he argued, in their extended debates over every conceivable topic, did not bother to discuss a national standard for marriage, as it had always been understood as the role of local government to make such determinations. He cited multiple failed attempts at Congressional definitions and amendments to create a national definition of marriage as further support that not only has marital law historically been left to state determination, but that there remains continued support to leave it so. Finally, he asserted that “the Supreme Court... has repeatedly offered family law as an example of a quintessential area of state concern [which] also persuades [him] that marital status determinations are an attribute of state sovereignty” (Commonwealth 2009, 31).

Finally, Tauro found that state compliance with DoMA “would impair the Commonwealth’s ability to structure integral operations in areas of traditional government functions,” (Commonwealth 2009, 33). He found that in light of the excessive expenses incurred by attempting to follow federal regulations in accordance with DoMA, the Commonwealth could not both follow its own constitutional mandate, and retain the ability to structure its own internal operations in the area of domestic relations. It was effectively punished by the denial of federal funds, for its recognition of same-sex marriages. He cited in United Transportation Union v. Long Island R. R. Co. (1982) that federal regulation to this extent “affects basic state prerogatives in such a way as [it hampers] the state government’s ability to fulfill its role in the Union and [endangers] its separate and independent existence.” He concluded that the “federal government, by enacting and enforcing DoMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so offends the Tenth Amendment” (Commonwealth 2009, 36).

Commonwealth and the U.S. Supreme Court

Considering its content, degree of controversy, and the Constitutional questions at its core, Commonwealth might well come before the Supreme Court. Although the case falls under the Court’s discretionary jurisdiction, by refusing to take the case, federal law and personal rights – here, whether homosexuals can marry – would vary by district, something the Court attempts to prevent by issuing a final and national ruling. Proponents and opponents alike would do well to consider whether they would likely benefit by the Current
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U.S. Supreme Court reaching a decision in this case. By analyzing the Court’s previous rulings and opinions of the current members of the Court in cases that involve similar questions and topics, this paper provides some context for how the Court would deal with the case were it to reach them.

In every case, justices must, of course, interpret the Constitution using their own method and jurisprudence – textualists parse the diction, pragmatists consider real-life applications, originalists will intent. However, in a socially contentious and highly polarizing case like Commonwealth, research suggests that the ideological values of justices’ best predict their votes (Segal and Spaeth 1993). When analyzing the use of the “attitudinal model,” as a predictive tool, Segal and Cover (1989) found an 80% correlation between a U.S. Supreme Court justice’s ideology and his voting record in cases concerning civil liberties. Tracy E. George and Lee Epstein qualified the idea that justices were “single minded seekers of legal policy” by suggesting that while justices vote to further their ideological preferences, they do so in a strategic fashion, compromising on some issues in order to further their overall social agenda (George 1992, 325). Supreme Court scholar, Kevin T. McGuire argued that “the members of the Court vote either liberally or conservatively with considerable regularity – no matter what the written law, the Court’s precedents, or other legal factors might seem to suggest” (116). Though there are differences in degree, political scientists are largely in agreement that justices’ ideologies play an important role in their decisions on the bench. But, what happens when a justice’s preferences for a liberal or conservative policy outcome on an issue like same-sex marriage runs counter to their typical jurisprudence on the proper relationship between the state and federal government?

The landmark case Bush v. Gore (2000) is a case in which the justices’ political preferences, instead of their typical institutional jurisprudence, seem to have determined the outcome of the case. Bush v. Gore (2000) arose out of the controversy surrounding the extraordinarily narrow voting results in the 2000 Florida presidential election. The two questions before the Court were whether the Florida Supreme Court had unconstitutionally made new election law, which per Article II Section I of the Constitution is the role of the state legislature, and whether standardless manual recounts violated the Equal Protection and Due Process clauses. The Court in a per curiam decision answered yes to both questions. It ordered Florida to end its recount, thus finalizing the 537-vote lead Governor Bush had over Vice President Gore and, for all practical purposes, ending the 2000 presidential election race.

David A. Strauss (2001) argued that the Court’s majority in Bush v. Gore

12 As Justices do not publish their notes or deliberations nor speak of how they reach the decisions they do beyond what is in their opinion, we can only predict what their base motivations were; thus, the word “seem.”
(2000) was more concerned with “overturn[ing] any ruling... that was favor-
able to Vice President Gore” rather than the “specific legal questions... like federalism and the relationship between the courts and the political process” (537-538). Although it is not uncommon in narrowly decided cases for the four “conservative” Justices to vote one way and for the four “liberal” Justices to vote the other, with Justice Kennedy serving as the “swing vote” to determine the outcome of the case, one does not normally expect the two blocs of judges to spontaneously hold the jurisprudential views of the other. Yet, in *Bush v. Gore* (2000) that is what happened. It seems each justice abandoned his or her traditional views on federalism to reach an outcome that was at least arguably in line with their own political preferences.

While the plaintiff’s Equal Protection/Due Process argument in *Bush v. Gore* (2000) garnered seven votes, the question of whether the State Supreme Court should stop the on-going Florida recounts was split 5-4. We would expect a justice with a strong deference to states’ rights would find that “comity and respect for federalism compels [him] to defer to the decisions of state courts on issues of state law” (2000). However, the three strongest supporters of federalism and judicial restraint then on the Court – Justices Rehnquist, Scalia, and Thomas – claimed that “this [case] is one of [exceptions]” and overruled the Florida Supreme Court’s decision to continue recounts in quite an activist manner. Similarly, the justices who most strongly support federal oversight – Justices Souter, Breyer, Ginsburg, and Stevens – argued that their “customary respect for state interpretations of state law counsels against rejection of the Florida court’s determinations in this case,” a position almost wholly novel to them (Souter, D., dissenting (2000)).

Similarly, in *Gonzales v. Raich* (2005), another socially contentious and politically divisive case, we find further instances of justices seemingly supplanting their typical jurisprudence with their likely ideological preferences on the policy question at hand. The question before the Court in *Gonzales v. Raich* (2005) was whether Congress could, under its Commerce Clause authority, prohibit home grown marijuana in California, in direct opposition to California law explicitly allowing such practices for medicinal use.\(^\text{13}\) Despite the arguments by the respondents that the activity was purely intrastate commerce and thus outside the scope of Congress’s power to regulate interstate commerce, the majority on the Supreme Court found that since growing marijuana could, in its “total incidence” result in a national threat to commerce, Congress could regulate it. The majority concluded that Congress could regulate intra-

\(^{13}\) In 1996, California legalized medical marijuana and allowed for persons legally permitted to use marijuana to grow it at home. This, however conflicted with the federal Controlled Substances Act, and thus, Drug Enforcement Agency officials sized and destroyed the plants of a number of California citizens, citing authority under their power to regulate interstate commerce.
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state commerce if non-regulation would adversely affect the national market. The Court dismissed the arguments that the California law already sufficiently regulated the growth of marijuana, writing that a state law “cannot serve to place respondents’ activities beyond congressional reach [for] the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail” (2005).

An opinion finding a long reach for Congress under the commerce clause is characteristic of its author Justice Stevens, and most of those who joined him – Justices Souter, Ginsberg, Breyer—who, in other cases concerning the reach of the Commerce Clause (Printz v. United States (1997) and United States v. Lopez (1995)) deferred to Congress and its laws rather than to state legislatures. However, it is again an unusual position for Justices Kennedy and Scalia, to affirm the expansion of federal powers at the expense of states’ rights. If Scalia were to maintain his originalist approach, one would predict he would claim that homegrown marijuana, intended for personal consumption, which never crossed a state boarder, could hardly be regulated as interstate commerce. Justices Kennedy’s and Scalia’s votes in United States v. Lopez (1995) agreeing with the majority that the simple possession of a gun which had never crossed state boundaries could not be considered interstate commerce suggests that in Gonzales v. Raich (2005) they would find the same. We might expect both would find that allowing Congress to regulate home-grown marijuana as interstate commerce would violate the Commerce Clause and would – to paraphrase Kennedy’s language in his Lopez concurrence – tip the balance of federalism away from the states (Kennedy, A., concurring (1995)). Both of these justices would be expected to agree with the dissent in Gonzales v. Raich (2005) that the ruling “stifles an express choice by some states” by “rewriting” the Commerce clause to expand federal power (O’Connor, S., dissenting (2005)).

However, given that marijuana use is a socially contentious issue and given Justices Kennedy’s and Scalia’s politically conservative ideology – they were nominated by Reagan to support his states’ rights and family values platform and confirmed by a Republican Senate (Nemacheck (2007)) – we might well expect the two to abandon their traditional method of Constitutional interpretation in order to find for their personal policy preference: the continued

\[\text{footnote 14} \quad \text{The question before the Court in US v. Lopez was whether the federal government could create and force the states to observe a gun free school zone around public schools under the Authority of the Commerce Clause. The Court found that it could not as it was an unconstitutional use of the Commerce Clause and offended the Tenth Amendment.}\]

\[\text{footnote 15} \quad \text{Ironically, this ruling came just five years after Bush v. Gore where, on the question of federalism, seven of the nine justices held a opposite position concerning federalism and state sovereignty.}\]
strict control of marijuana, a traditionally conservative, Republican position. And, both justices did just that.

**Ideological Preferences and Same-Sex Marriage**

These two cases both suggest that there are certain socially contentious and politically divisive issues for which a justice’s ideological preferred outcome on the social issue might trump his or her traditional methods of constitutional interpretation. The case at question in this paper, *The Commonwealth of Massachusetts v. United States Department of Health and Human Services* (2010) is one of those cases. Like *Bush v. Gore* (2000) and *Gonzales v. Raich* (2005), it deals with a socially contentious issue that hinges on the justices’s understanding of federalism. As such, it is likely that the justices may very well abandon their traditional federalism jurisprudence to ensure they reach an ideologically desirable position on the social issue at hand.

In *Commonwealth*, the ideologically desirable position for the “conservative” bloc of justices – Roberts, Scalia, Alito, and Thomas – is likely to uphold DoMA. I base this assertion on their records in confirmation hearings, opinions, and personal statements that I discuss below. However, given Judge Tauro’s reasoning relying on *Hodel v. Virginia Surface Mining* (1981) as the test for whether DoMA is constitutional under the Tenth Amendment, all four of them, according to their typical federalism jurisprudence, should find DoMA unconstitutional on federalism grounds.

Aside from such anomalous cases like *Bush v. Gore* (2000) and *Gonzales v. Raich* (2005), Justices Scalia and Thomas have consistently voted to limit the reach of federal power and the ability of the federal government to coerce the states. As discussed above, Scalia’s positions in *Printz v. United States* (2005) and *United States v. Lopez* (1995) – both of which were joined by Thomas – suggest he supports a Madisonian view of dual federalism where the state and the federal government retain complete sovereignty in their separate spheres. The state’s sphere, Scalia and Thomas suggest in their joint opinion with Rehnquist in *United States v. Morrison*, includes “family law and other areas of traditional state regulation” (2000). This is precisely what Judge Tauro argued in his opinion finding DoMA to be unconstitutional.

Even though Chief Justice Roberts joined the Court after these cases had been decided, he declared in his confirmation hearings that he agreed with the majority opinions in both *United States v. Lopez* (1995) and *United States v. Morrison* (2000), claiming that the federal government must be limited in its powers (Committee on the Judiciary 2005, 226-440). During his hearing, Roberts was described as “an aggressive scrutinizer of whether Congress acted beyond its enumerated powers” in federalism cases (Liptak 2005). These state-
ments were expected, given that Roberts was a clerk to Chief Justice Rehnquist and was picked by George W. Bush to fill Rehnquist’s seat, a seat that for the past 18 years had been occupied by a staunch supporter of state’s rights (Oyez, Rehnquist 2010). This characterization has proved itself accurate given Roberts opinions over his tenure as Chief, specifically in *McDonald v. Chicago* (2010)\(^{16}\) and in *Citizens United v. Federal Election Commission* (2010)\(^{17}\) both of which, though the central arguments did not turn on the issue of federalism, limited the power of the federal government.

Justice Alito, who also joined the Court after these landmark federalism cases, has shown support for states’ rights from federal encroachment. He wrote in response to a Judiciary Committee questionnaire that the “judiciary should be careful not to usurp the rightful powers of… the states and their subdivisions, for ultimately the separation and distribution of government powers is one of the most safeguards of freedom under our Constitution” (Committee on the Judiciary 1990, 650). He, like Roberts, also stated in his confirmation hearings that he agreed with the majorities of both *United States v. Lopez* (1995) and *United States v. Morrison* (2000) (Committee on the Judiciary 2006, 395). According to Supreme Court scholars, Justice Alito, like Chief Justice Roberts, “believes that individual freedom is enhanced by respecting limits to federal power over the states” (Banks 2008, 615). Again, his position on federalism was evident when he sided with the majority in *Citizens United v. Federal Elections Commission* (2010) and authored the majority opinion in *McDonald v. Chicago* (2010).

Based on their usual positions on federalism issues, it seems that these four justices might well find that DoMA “regulate[s] the States as States,” “concern[s] attributes of state sovereignty,” and is “of such a nature that compliance with it would impair a state’s ability to structure integral operations in areas of traditional governmental functions” (Bongiorno 1st Cir. 1998) and thus violates the Tenth Amendment. However, this may also be a case in which the justices’ typical jurisprudential views on the institutional power of the states and federal government are in tension with their views on the social issue of same-sex marriage. Their views on same-sex marriage might lead to uphold DoMA. In both *Romer v. Evans* (1996), a decision that found unconstitutional a statute barring the official adoption of any protection against discrimination based on sexual orientation, and *Lawrence v. Texas* (2003), a decision that found unconstitutional a law criminalizing sodomy only between

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\(^{16}\) The question before the Court in *McDonald v. Chicago* was whether the Second Amendment right to bear arms could be incorporated as against the states through the Fourteenth Amendment. The Court found that it could.

\(^{17}\) The question before the Court in *Citizens United v. Federal Election Commission* was whether corporations should, per the First Amendment, be allowed to contribute unlimited amounts of money to political campaigns. The Court found that it could.
homosexual couples, Justices Scalia and Thomas dissented. Scalia wrote that the statute in question was simply an effort by the government to “preserve traditional sexual mores” and should, therefore, be allowed because it provides for the General Welfare of Colorado’s citizens (*Romer v. Evans* (1996)). In *Lawrence v. Texas* (2003) Justice Scalia stated that the standard set in *Bowers v. Hardwick* (1986), which upheld the criminalization of homosexual sodomy, should still serve as good precedent. Thomas agreed in both cases.

Although Chief Justice Roberts and Justice Alito have yet to rule on a case involving homosexual rights, both were appointed by President George W. Bush who openly opposed gay marriage and supported the Federal Marriage Amendment, which would have constitutionally defined marriage as between one man and one woman (Allen 2004). Since presidents, as Supreme Court scholar Christine Nemacheck suggests, “seek to appoint to the Court individuals whose ideological preferences are in line with their own,” it is at least arguable that Roberts and Alito have views similar to the former president concerning the institution of marriage (Nemacheck 2007, 133). I would thus argue that, following the pattern of *Bush v. Gore* (2000) and *Gonzales v. Raich* (2005), Chief Justice Roberts and Justices Scalia, Thomas, and Alito will vote to support the Department of Health and Human Services and uphold DoMA.

One other Justice, Antony Kennedy, is also a strong proponent of states’ rights and is the fifth member of the new “States’ Rights Five” (Banks 2008, 615). Like Scalia, he supports dual sovereignty. He established this position in *Alden v. Maine* (1999), a case concerning whether Congress could abrogate a state’s sovereign immunity from private suits in its own courts. Kennedy, who wrote the majority opinion, argued that the states “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty” and, thus, the federal government could not encroach upon their rights as states (1999). He further illustrated his conception of the relationship between the federal and state government by employing his now infamous metaphor from *U.S. Term Limits v. Thornton* that, “by ‘split[ting] the atom of sovereignty,’ the founders established ‘two orders of government, each with its own… set of mutual rights and obligations to the people who sustain it and are governed by it’” (1995). Kennedy firmly believes in the concept of dual sovereignty: each government is sovereign in its own realm.

Such statements reflect Kennedy’s positions on *New York v. United States* (1992) and *Printz v. United States* (1997), where he supported the “idea that the institutions of state government should be protected from direct federal interference” by, in *New York*, refusing the coercion of the take-title provision and, in *Printz*, denying Congress the ability to commandeer state employees (Maltz 2000, 761). He recognizes that an expansion of Congressional regulation and
authority necessitates a swing in the balance of power away from the states and claims in *United States v. Lopez* that such behavior “upsets the federal balance to a degree that renders it unconstitutional” (1995). Thus, he affirmed “the right of states to make policy judgments and implement those judgments without being overruled by… the federal government” (Maltz 2000, 761).

Justice Kennedy’s position on federalism indicates he might well find for Massachusetts and find Section 3 of DoMA unconstitutional as he, like Justices Scalia and Thomas, signed onto both the majority in *United States v. Morrison* (2000) affirming “family law and other areas of traditional state regulation” as the province of the state not the federal government, and in *Lopez* (1995) insisting that the federal government recognize the division between national and local realms of sovereignty. Unlike Justices Scalia, Thomas, Roberts, and Alito, Kennedy will likely find he is in the comfortable position where his constitutional interpretation and personal preference align.

Kennedy is arguably the staunchest defender of the rights of homosexuals on the Court, having authored both majority opinions in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003). Kennedy’s jurisprudence has been largely shaped by his interactions with supreme judicial officials from countries across the globe. He has developed a strong sense of personal liberty: he believes in a “moral reading” of the Constitution and “employs a consistent jurisprudence based on what he considers the ‘full meaning’ of liberty” (Holmes 2010, 19). As such, Kennedy approaches each case more or less individually, deciding the case on its merits in regards to “a moral concept that judges independently enforce” (Holmes 2010, 19-20). His opinions are based largely on international human rights standards and a consensus of “Western civilization” (*Lawrence v. Texas* (2003)). Indeed, in his decision in *Lawrence v. Texas*, Kennedy cited the European Convention on Human Rights, noting that “in all countries that are members of the Council of Europe” the statute in question would be considered invalid (2003). Concerning homosexual marriage, however, there is less of an international standard to follow; currently only ten countries recognize it as legal. Yet, given that the number of countries – not to mention states within the United States – which sanction homosexual marriage has steadily increased, and, given Kennedy’s claim in *Casey v. Planned Parenthood* “that there is a realm of personal liberty which the government may not enter” (1992) it is likely Kennedy will remain faithful to his federalism jurisprudence and vote to overturn DoMA. This seems to be the option that aligns most closely with both his past positions on similar controversies and the Western trend of sanctioning homosexual marriage. And, it has the added benefit of comporting to his federalism jurisprudence.

This leaves the four “liberal” justices, all of whom – like the “conservative” bloc – will likely have to set aside their typical jurisprudence in or-
der to cast a vote that aligns with their personal ideological preference. When it comes to questions of federalism, Justices Ginsburg and Breyer often find themselves on the federal government’s side of the argument. In all three recent landmark federalism cases – *United States v. Lopez* (1995), *Printz v. United States* (1997), and *United States v. Morrison* (2000) – Ginsburg and Breyer voted to support the federal government’s efforts to exert control over the states. Breyer fleshed out his support for cooperative federalism in greater detail in his book *Active Liberty* (2005). He claims that allowing federal regulation often paradoxically allows for greater “decision-making authority for local governments” by employing “less restrictive, more incentive-based, methods” (Breyer 2005, 58-59). Thus, when the Court rules against the federal government’s regulation in an area, the unanticipated consequence is a shift of “regulatory activity from the state and local level to the federal level” (Breyer 2005, 59). The long list of rulings and opinions by these two Justices provide ample evidence to reveal their support for federal oversight.

Due to their short tenure on the bench thus far, Justices Sotomayor and Kagan have shorter records from which to evaluate their likely positions in *Commonwealth*. Sotomayor was less than forthcoming about her position on federalism during her confirmation hearings. However, she did remark that the Court seemed to be moving away from the restrictions placed on federal power in *United States v. Lopez* (1995) with their opinion in *Gonzales v. Raich* (2005). She then went on to state that the principles established in *Gonzales v. Raich* (2005) would be the precedent from which the Court moved forward, suggesting support for the federal side of federalism (Committee on the Judiciary 2009, 49). This position was a bit more clearly revealed when Sotomayor (along with Ginsburg and Breyer) dissented from the majority opinion in *McDonald v. Chicago* (2010).

One might assume that since Justice Kagan is essentially a product of the federal government (having served as Obama’s Solicitor General and as a member of the Clinton administration) that she would support the federal government in federalism conflicts. Even so, her position as Solicitor General required her to argue for the position of the United States government. Supreme Court scholar Tom Goldstein noted that “it seems entirely possible that Elena Kagan does not really have a fixed and uniform view of how to judge and to interpret the Constitution” having never been a judge (Goldstein 2010). Thus it is extremely difficult to say with any certainty how she might decide the federalism argument in this case.

It is substantially less difficult to determine how Kagan, and the other three “liberal” justices, will ultimately vote in this case. As the Dean of Harvard Law School, Kagan banned military recruiters from campus because she disagreed with the “don’t ask, don’t tell” policies of the armed forces (Lee
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Some argue, however, that her position on homosexual rights is unclear as she, in her official capacity as Solicitor General, stated that she would defend DoMA “if there is any reasonable basis to do so” (Lee 2010). Yet, President Obama announced that his administration no longer considers DoMA to be constitutionally sound, and if one again considers Nemacheck’s assertion that presidents nominate justices whose preferences align with their own, it is at least arguable that Kagan would not see a “reasonable basis” to defend DoMA. Altogether, I contend that Kagan’s personal ideological preference will lead her to strike down DoMA, either in alignment with, or despite, her position on federalism.

This same strategic selection calculus applies to Justice Sotomayor who, when prompted about her views on same-sex marriage in her confirmation hearing noted that “society changes” (Committee on the Judiciary 2009, 128). She also forcefully defended the right to privacy on which both Romer v. Evans (1996) and Lawrence v. Texas (2003) relied (Committee on the Judiciary 2009, 128). Thus, I argue that Sotomayor, a life-long Democrat from the Bronx, will vote (with Justice Kagan) to strike down DoMA.

Ginsburg and Breyer will likely follow suit. Both joined Kennedy’s majority opinions in Romer v. Evans (1996) and Lawrence v. Texas (2003) and both have a history of supporting civil rights. Justice Ginsburg, especially, has been a champion of gender equality. As a young attorney she wrote a brief for Reed v. Reed (1971) arguing that men cannot be categorically preferred over women for inheritance – the case that initiated the Court’s doctrine on gender discrimination (Harvard Magazine 2009). Ever since, she has struck down gender inequality whenever it has come before the Court, including in her perhaps most well known opinion, United States v. Virginia in which she forced Virginia’s state Military Institute to become co-educational because the state failed to provide “exceedingly persuasive justification” as to why such discrimination should be allowed (1996). As such, I contend that Ginsburg would apply the tests to which she so vigorously holds gender discrimination, to discrimination based on sexual orientation even if it means abandoning her traditional interpretation of federalism.

Breyer, the son of a lawyer and an educator from San Francisco, who has joined Ginsburg in every of the aforementioned cases, will likely vote to strike down DoMA as well, despite his traditional position on federalism. Although his philosophy in Active Liberty (2005) suggests the Court should pay great deference to the “politicians... trying to achieve results that will benefit the people who elected them” (Toobin, Breyer 2005) and thus exercise judicial restraint. He noted that many of the great social ills in our history – slavery, discrimination, voting restrictions – were brought about by the Court’s activism, not by democratic government (Pakaluk 2006). As with Ginsburg, it does
not seem too much of a stretch for Breyer to consider discrimination based on sexual orientation among these great social ills.

As we saw in *Bush v. Gore* (2000) and in *Gonzales v. Raich* (2005), in socially contentious and politically divisive cases like *The Commonwealth of Massachusetts v. U.S. Department of Health and Human Services* (2010), justices may very well allow the social ramifications of their ruling to outweigh their desire to remain faithful to their typical institutional jurisprudence. I argue that eight of the nine justices will do just that. Should *Commonwealth* come before the Court, I predict that the each of the four traditionally “conservative” justices – Chief Justice Roberts and Justices Scalia, Alito, and Thomas, all of whom are staunch supporters of states’s rights – will adopt a position that favors the federal government and support their ideological preference to preserve DoMA and to continue to define marriage as between one man and one woman. The four traditionally “liberal” justices – Ginsburg, Breyer, Sotomayor, and Kagan, who have supported or can be assumed to support the federal government’s supremacy over the states – will adopt a position that favors the states in order that they may strike down DoMA and clear the way of legal barriers to same-sex marriage.

Justice Kennedy, the “swing vote,” will indeed make the difference. In *Commonwealth*, his typical view on federalism aligns perfectly with his political preference regarding same-sex marriage. As such, it is not clear whether his vote in *Commonwealth* would be dictated by his views on states’ rights or to further the cause of homosexuals, but in either case, the outcome would be the same. I expect that Justice Kennedy’s vote would create a majority for the Commonwealth of Massachusetts and find that the federal Defense of Marriage Act (1996) violates the Tenth Amendment and as such, is unconstitutional and unenforceable, thereby removing federal restriction preventing persons of the same sex to marry.

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The Constitutionality of the Indiana Voter ID Law: The Indiana Law, Crawford v. Marion County Elections Board and the Standard of Scrutiny

Brandon W. Rickey, Indiana University South Bend

I argue that the Indiana voter identification (ID) law does not withstand the constitutional standard of strict scrutiny because the state of Indiana does not have a compelling interest to enact the law. In addition, the law is not narrowly tailored to further the state’s interest in preventing voter fraud because it does not address the problem of absentee voter fraud. Furthermore, I contend that the Supreme Court of the United States erred in not applying strict scrutiny to the 2008 case of Crawford v. Marion County Elections Board because the Voter ID Law imposes burdens that prevent many protected classes of citizens and those with photo identification card errors from voting.

Introduction

In a democratic government, the right to vote is arguably the most important fundamental right. One’s vote in a democracy represents one’s voice and is the method one uses to give or withhold consent of government action. The right is so important it is protected by the 14th, 15th, 19th, 24th, and 26th amendments to the United States Constitution. Throughout the history of the United States, a number of restrictions have been used to deter different groups of people from voting. Traditionally, the United States Supreme Court has determined the constitutionality of these restrictions by using the most stringent of constitutional standards, known as strict scrutiny. Using this standard, the Court has struck down a number of voting restrictions including poll taxes, literacy tests, and burdensome residency requirements.

In 2005, the Indiana state legislature enacted a law that required those voting in person to present a government issued photo identification (ID) in order to cast his or her ballot. In 2008, the United States Supreme Court ruled that the Voter ID Law was not subject to a standard of strict scrutiny (Crawford v. Marion County Elections Board, 553 U.S. 181 (2008)). In Part I of this paper, I will discuss strict scrutiny and its elements, as well as the legal precedent for using it to determine the legality of restrictions on the right to vote. In Part II, I will examine whether the Indiana Voter ID Law meets any of these requirements. Finally, in Part III, I will rebut the argument put forth by the majority in Crawford, illustrating how the law could prevent many people from voting. I conclude that the law does not withstand strict scrutiny and that the Supreme Court should have applied strict scrutiny as the standard in Crawford.
Part I

Lower Court Opinions in Crawford

In 2005, the Indiana State Senate passed Senate Enrolled Act 483, also known as the Voter Identification (ID) Law. Governor Mitch Daniels signed the measure into law on April 7, 2005. The law required everyone casting an in-person ballot to present a government issued photo ID. The law mandated that all Bureau of Motor Vehicle (BMV) branches must provide free, state-issued photo IDs to anyone who lacked a driver’s license, as long as they could provide proof of identification by presenting a birth certificate, social security card, or another valid form of ID such as a Medicare card. The law contained a provision that allowed anyone unable to obtain a photo ID to vote using a provisional ballot, which would be counted ten days after the day of the election if the voter presents proof of identification to the county board of elections. The law did not apply to those who vote absentee, and it also contained an exception allowing those who did not posses ID or who objected to being photographed due to religious reasons to cast a provisional ballot (Crawford v. Marion County Elections Board, 553 U.S. 181 2008).

Shortly after the passage of the voter ID requirement, the Indiana Democratic Party filed suit in Federal District Court. A second suit challenging the Voter ID Law was also brought by two Indiana elected officials and several nonprofit groups representing elderly, disabled, poor and minority voters. These two cases were eventually consolidated and brought before the Federal District Court for the Southern District of Indiana. In this case, the plaintiffs argued that the law burdened the right to vote as protected by the First and Fourteenth Amendments and that it was neither a necessary nor effective method of preventing voter fraud. The District Court granted the defendants’ motion for summary judgment, upholding the law. District Judge Sarah Barker based her opinion on the plaintiff’s failure to show a single instance of someone being denied the right to vote because of the law. Judge Barker rejected expert testimony stating that around 989,000 registered voters in the state did not possess the appropriate forms of ID required to vote under the law (Crawford v. Marion County Elections Board, 553 U.S. 181 2008). Instead, Judge Barker estimated that around 43,000 residents lacked valid ID.

The case was appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the judgment of the lower court. The court rejected the appellant’s argument that the law should be judged according to the strict scrutiny standard, as several previous decisions regarding the right to vote had been decided. The dissenting judge in that case, Judge Evans, argued in favor of a higher standard of scrutiny because the law imposes a restric-
tion on a fundamental right. Judge Evans viewed the law as “A not too thinly veiled attempt to discourage Election Day turnout by folks believed to skew Democratic” (Crawford v. Marion County Elections Board, 472 F.3d 949, Evans, dissenting). The case was again appealed, and the U.S. Supreme Court granted a writ of certiorari to the petitioners. Traditionally, as Judge Evans suggested, the Court has heavily scrutinized any state restriction burdening the right to vote. The next section will discuss the strict scrutiny standard and the legal precedent for using it to determine the legality of restrictions on the right to vote.

What is Strict Scrutiny?

According to the United States Supreme Court, the right to vote is a fundamental right (Lang 2010). It is a fundamental right because it ensures all of one’s other rights (Valparaiso Law Review 2007). Typically, when Congress or a state legislature passes laws that encroach on fundamental rights, such as the right to vote, the law must meet the burden of strict scrutiny in order to be upheld. Strict scrutiny is the most stringent standard the Supreme Court and all inferior appellate courts use to determine the constitutionality of a legislative or the executive action. This applies at the federal, state and local levels. The standard is applied in two different cases: (1) when the government enacts legislation that negatively affects protected classifications, such as race, known as equal protection and (2) when the government enacts legislation that burdens a fundamental right, also known as substantive due process. For a law to withstand strict scrutiny the government must (1) have a compelling interest for implementing the restrictions and (2) the restrictions must be must be narrowly tailored to further the government’s interest. In other words, the restrictions must be the least restrictive means for achieving the end the government seeks (Black’s Law Dictionary 1996).

Historical Precedent of Applying Strict Scrutiny to Restrictions on Voting

Strict scrutiny has often been used to determine the constitutionality of restrictions on fundamental rights, including the right to vote. The Supreme Court has historically struck down restrictions on the right to vote because they did not withstand strict scrutiny (Lane v. Wilson, 307 U.S. 268 (1939); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Dunn v. Blumstein, 405 U.S. 330 (1972); Norman v. Reed, 502 U.S. 279 (1992); and Louisiana v. United States, 380 U.S. 145 (1965)). The court has dealt with a number of different restrictions that had the effect of deterring or preventing people from voting. These include literacy or interpretation tests, burdensome residency
requirements, and poll taxes. Although these restrictions were not all similar, they had the same effect of unnecessarily preventing many people from voting, thus justifying the application of strict scrutiny.

In *Lane v. Wilson* (1939), the Court struck down an Oklahoma law mandating that each person pass a literacy test before being allowed to vote. The Court dismissed the state’s assertion that the law was a legitimate restriction to ensure accurate election results by preventing unqualified persons from voting. In *Lane*, Justice Frankfurter called for a higher standard of scrutiny to determine the constitutionality of restrictions that conflict with the Fifteenth Amendment saying, “The fifteenth amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race” (Lang 2010, 4). The Oklahoma provision could not withstand the test of strict scrutiny because it was overtly discriminatory, and the restriction did not serve the government’s interest of maintaining legitimate elections because it did not prevent unqualified persons from voting. Indeed, it had the opposite effect—it deterred otherwise qualified voters from exercising their rights.

In 1966, the Court ruled in *Harper v. Virginia State Board of Elections* that a poll tax implemented by the state on all voters attempting to cast their ballot violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that, although the law on its face was neutral because it applied to all persons attempting to cast their ballot, it was discriminatory because it deterred low income citizens—especially African Americans—from voting. The Court found the law unconstitutional, despite the lack of evidence of intentional discrimination. The law made wealth a pre-requisite for voting, constituting discrimination based on economic status. The Court also noted that the intention to discriminate is irrelevant because the restriction prevented otherwise qualified citizens from exercising a fundamental right. The court noted the need for strict scrutiny in *Harper*, proclaiming that the right to vote is a fundamental right “and any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized” (Lang 2010, 5).

Similarly, in *Dunn v. Blumstein* (1972), the Court struck down a Tennessee law that restricted the right to vote to residents who not had lived in the state for a minimum of one year. The court struck down the law, holding that it did not meet the state’s compelling interest, as there were other less restrictive ways for the state to prevent voter fraud as well as ensure only well informed voters were able to participate in the state’s elections. Writing for the majority, Justice Thurgood Marshall noted that, in restricting the right to vote, such laws:
“Deprive them of a fundamental right...preservative of all rights...
As a general matter, before that right can be restricted, the purpose
of the restriction and the asserted overriding interest served by it
must meet close constitutional scrutiny...In pursuing that impor-
tant interest, the state cannot choose means that unnecessarily re-
strict or burden constitutionally protected activity... and if there are
other reasonable ways to achieve those goals with a lesser burden
on constitutionally protected activity, a state cannot choose the way
of greater interference. If it acts at all, it must choose ‘less drastic
means’” (Dunn v. Blumstein, 405 U.S. 330 (1972)).

As Justice Marshall noted in his majority opinion in Dunn, restrictions on
fundamental rights, including the right to vote, must be judged by a standard
of strict scrutiny. The state must have a compelling interest, and in pursuing
that interest, the state must choose the least burdensome means for achieving it
and alleviating the harm it seeks to prevent. In addition, a state cannot choose
the most restrictive means for achieving that interest if lesser restrictions are
just as available.

The Court also applied strict scrutiny in the 1992 case Norman v. Reed,
striking down an Illinois law that prevented citizens of the state from starting
a new political party. After initially applying a balancing test to weigh the
state’s interest against the rights of the citizens to start a new political party,
the court determined the law imposed a “severe restriction” on the new party’s
constitutional right and thus applied strict scrutiny. The Court ruled that any
severe restriction on forming a new party must be “narrowly drawn to advance
a state interest of compelling importance” (Lang 2010, 6).

After years of applying strict scrutiny to restrictions on the electoral pro-
cess, the Court began to moved away from this standard in 1983 with its ruling
in Anderson v. Celebrezze, 460 U.S. 780 (1983). The Court also refused to ap-
ply strict scrutiny to determine the 1992 case of Burdick v. Takushi (504 U.S.
428 (1992)) and instead relied on the rational basis test. The Court in Crawford
cited its decision in Burdick as precedent for its reasoning. In Burdick, the
state of Hawaii placed a ban on write-in voting in all elections. The Court in Burdick
used a the rational basis test to determine the state’s interest in pre-
venting “unrestrained factionalism” at the general election and “party raiding”
in the primaries versus the interest of people to vote for a candidate not on the
ballot. Doing so, it determined that the restriction imposed only a light and
reasonable burden on the petitioner’s First and Fourteenth Amendment rights.
However, the difference between Burdick and cases like Harper and Crawford
is that the ban on write-in voting does not place any additional conditions or
pre-requisites on voters, such as poll taxes or ID requirements that require time
and money to obtain. A ban on write-in voting merely prevents voters from not being able to vote for candidates that are not on the ballot. The law does not mandate that voters have any additional qualifications in order to be able to vote, thus it does not constitute a severe burden. The cases of *Harper* and *Crawford*, on the other hand, impose such pre-requisites and therefore justify the need for strict scrutiny.

Crawford’s Similarities to Harper

The State of Virginia poll tax in *Harper* shares many similarities with the Indiana Voter ID Law. Both involved evenhanded restrictions. Both also imposed what would seem to be relatively small burdens on the right to vote. In *Harper*, the state of Virginia imposed a poll tax of $1.50 (that, adjusted for inflation, would be equal to $10 today) on any person who voted, and in *Crawford*, Indiana required all voters to obtain voter IDs (Lang 2010). If one does not already have a photo ID, it costs $12 to obtain a birth certificate in order to receive one from the local BMV. Finally, both restrictions were justified by the states as necessary to protect the integrity and reliability of the ballot box. Poll taxes were justified in order to ensure that only those who were qualified to vote did so, and the Voter ID Law was justified in order to ensure that only those who were registered to vote could do so (Lang 2010). Although the Indiana Voter ID Law may not constitute a poll tax, it nevertheless imposes many similar burdens.

While proponents of the Indiana statute note that one can obtain a photo ID for free at their local BMV, they do not take into account the preliminary documents that must be obtained in order to receive a photo ID. As mentioned above, in order to obtain a photo ID, one must first show a birth certificate or social security card as proof of identification. If a person does not have one, they must purchase one from their local county government office. In Indiana, the cost of these documents is close to $12. Essentially, this has the effect of creating a wealth requirement on voters. If a person does not have a photo ID and does not have the money to purchase the necessary documents, they are potentially prevented from voting. A $12 dollar fee might seem negligible to some, but in *Harper*, the court struck down $1.50 fee applied to all voters in order to cast their ballot. Justice Douglas, writing for the majority, concluded:

“A state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax… Wealth, like race, creed, or color, is not germane to one’s ability
to participate intellectually in the electoral process. Lines drawn on the basis on the basis of wealth or property...are traditionally disfa-
vored” (*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1965)).

The Court, however, in *Crawford v. Marion County Elections Board* went against the precedent of applying strict scrutiny set forth in *Harper*. Justice Stevens’ opinion in *Crawford* allows for any “evenhanded restriction necessary to protect the integrity and reliability of the electoral process” (*Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008)). If the Court had chosen in *Harper* to adopt the same logic as Justice Stevens’ opinion in *Craw-
ford*, the Virginia poll tax would have most likely been upheld.

**Part II**

*Elements of Strict Scrutiny*

**The State of Indiana Lacks a Compelling Interest**

As Justice Marshall stated in *Dunn v. Blumstein*, restrictions on fundamental rights trigger strict scrutiny. As previously stated, in order for a law to with-
stand strict scrutiny, the government must have compelling interest. There is no doubt that the state of Indiana has an interest in ensuring the integrity of its elections. While an interest may exist, it is not necessarily compelling. As Judge Evans of the Seventh Circuit Court of Appeals noted in his dissent in *Crawford v. Marion County Elections Board*, that the state of Indiana has nev-
er prosecuted anyone for voter fraud (Harvard Law Review 2007). Although there has been at least one known instance of voter fraud, it was committed via absentee voting (not in-person) (*Pabey v. Pastrick*, 816 N.E.2d 1138 (2004)). Similarly, Justice Souter noted in his *Crawford* dissent that the state of Indiana did not provide any evidence of any threat of people committing in-person vot-
er fraud (Kelly 2009). While Souter acknowledged the state’s right to protect against fraudulent elections, he believed that the state’s interest was abstract since they could not point to a single instance of voter fraud in Indiana.

The state attempted to justify the law on the grounds that voter fraud has in fact occurred in other states as well as historically. Justice Stevens, in his majority opinion, cited the instance of Tammany Hall in New York during the nineteenth century where voter fraud was prevalent. Stevens also cited one instance of in-person voter fraud in the 2004 Washington State Gubernatorial election (Kelly 2009). In addition, Stevens cited the Carter-Baker Commiss-
ion on Election Reform (2005), which acknowledged that though voter fraud is rare, it does happen. The commission advocated for implementing a na-
ational voter ID requirement in order to prevent voter fraud from changing the outcome of elections (Kelly 2009). However, the Carter-Baker Report relied mostly on anecdotal evidence to make their case for voter ID requirements.

One of the instances the commission relied on was the allegation of voter fraud in Wisconsin after the 2004 Presidential Election. In that instance Republicans alleged that there was a massive fraud operation that led to John Kerry winning the state by 11,000 votes (Overton 2007). After a yearlong investigation, Republicans claimed to have uncovered nine instances of voter fraud in both Milwaukee and in Illinois. However, of the nine people identified, the Republican-appointed U.S. attorney has prosecuted none. Six of the cases were clerical errors and three of them were instances of two different individuals with the same name but different birthdates voting in Wisconsin and Illinois (Overton 2007).

The Carter-Baker commission also cited evidence claiming that the voter rolls contained 4,500 more people than were listed on the U.S. Census. Still, this was due in part to the fact that the state of Wisconsin allows for same day registration, allowing individuals to show up at the polls, register, and vote the same day. The investigation found that 70,000 voters registered on Election Day, likely leading to the excess of 4,500 more voters listed on the rolls than on the census. Of these 70,000, only one hundred were questionable votes—those where persons may have used fake names or voted twice. There is evidence that these were anything other than clerical errors and out of the one hundred votes suspected of being illegitimate, only four people were ever charged, three of whom were acquitted (Overton 2007).

On a state level, claims of widespread voter fraud are not supported by evidence. Indeed, election law scholar Lorrain Minnite noted that allegations of voter fraud were eventually dismissed in the 1996 California Congressional Election and the 2000 election in St. Louis. (Callahan and Minnite 2003). Voter fraud on a national scale is also very rare. A report in the New York Times stated that there have only been 120 charges, resulting in 86 convictions since 2002 (Cooper and Knotts 2011). Similarly, a report issued in North Carolina reports there were 18 documented cases of double voting in North Carolina in 2008. Several scholars, including Minnite, have concluded that intentional voter fraud is extremely rare, and widespread voter fraud is a myth (Cooper and Knotts 2011). Eighty-six convictions and eighteen instances of double voting may seem like a lot but not when compared to the number of elections across the country, including the many different levels of elections (federal, state, county and local) in all 50 states. The number would likely amount to an average of less than one instance of voter fraud per election.

Minnite argues that the current definition of election fraud needs to be redefined. Minnite wishes to narrow the government’s current definition of elec-
tion fraud, which is “any process that corrupts the electoral process by which ballots are obtained, marked, or tabulated; the process by which election results are canvassed and certified; or processed by which voters are registered” (Schultz 2008, 494). When this definition is narrowed to only include fraud committed by voters—and not by election officials, political parties, candidates, and others involved in the administration of the electoral process—the amount of voter fraud committed is even more scant. Schultz notes that many of the other findings by the Carter-Baker report of voter fraud are miniscule. The state of Washington, for example, turned up six cases of double voting and nineteen instances of persons voting in the name of the dead. Assuming these findings are accurate, the twenty-five instances out of 2,812,675 votes cast, equals a 0.0009% rate of voter fraud. The Carter-Baker report also cited the example of fifty-two convictions by the Justice Department. This means that out of 196,139,871 votes cast in federal elections, fifty-two were fraudulent, a rate of .00003% (Shultz 2008).

While the state may have an interest in responding to fraud and combating it, the state’s interest is rather small and hardly compelling when one considers studies that show that voter fraud is rare. Therefore, were the state forced to satisfy the compelling state interest requirement of the strict scrutiny standard, it would fail to do so.

The Indiana Voter ID Law is Not “Narrowly Tailored” to Further State’s interest in Combating voter Fraud

The second reason that Indiana’s Voter ID Law does not withstand strict scrutiny is that it is not narrowly tailored to further the government’s interest in preventing voter fraud. The law only combats in-person voter fraud, but it does nothing to prevent absentee voter fraud. While the Carter-Baker commission was no doubt correct in stating that voter fraud does occur, most examples of voter fraud occur via absentee voting. Voter ID Laws are merely designed to prevent persons attempting to cast a ballot in-person from committing voter fraud (Lang 2010, Kelly 2009). When a person votes via an absentee ballot, they are not required to show any form of identification (Overton 2007). All that is needed when a person votes absentee is a signature, making it relatively easy to commit fraud simply by forgery. Voter ID Laws do not prevent other kinds of voter fraud, such as voting by felons, voters registered at vacant lots, or double voting.

_Pabey v. Pastrick_, 816 N.E.2d 1138 (2004) demonstrates how individuals can commit voter fraud. The case involved the 2004 Democratic Mayoral Primary in East Chicago, in which incumbent Robert Pastrick was running against challenger George Pabey. Pastrick edged out Pabey by 278 votes in
the election. It was alleged that the Pastrick campaign had fraudulently persuaded some 155 people to vote absentee by bribing first time voters who were uninformed about the registration process and those who did not understand English. The Pastrick campaign also provided compensation for people who voted absentee and helped voters in completing their ballots. Members of the campaign used fake addresses for absentee applications, illegally completed portions of the ballots, and illegally delivered them to the local county board of elections. Finally, the campaign told voters to make false claims of absenteeism on election day to obtain absentee ballots (Pabey v. Pastrick, 816 N.E.2d 1138, (2004)). Voter ID Laws do nothing to curb absentee voter fraud, the kind committed by the Pastrick campaign, because absentee voting is not supervised, unlike in-person voting which is done in the presence of poll workers and election judges.

A number of other forms of voter fraud are not curbed by photo identification cards. Professor Muhammad At-Tauhidi notes that a study conducted by the Missouri Secretary of State found that only 0.01% of voting irregularities are prevented by photo identification cards. Most of the voting irregularities in the state of Missouri were from illegal voting by felons, vacant lot voting, and double voting, none of which are prevented by photo identification cards (At-Tauhidi 2008). With or without a photo ID requirement, a felon could still vote if their name is still listed on the voter rolls. Vacant lot voting is not prevented by photo ID because even with a photo ID, if the name and address on the ID matches the name and address on the registration rolls, one would still be able to cast a ballot. At-Tauhibi notes that the only kinds of voter fraud that photo identification cards prevent are voter impersonation fraud, which is the most rare form of voter fraud (At-Tauhibi 2008).

While voter fraud may exist on a small scale, it exists primarily when people vote absentee, against which Indiana’s Voter ID Law does not protect. The Indiana Voter ID Law only guards against in-person voter fraud, which is a largely non-existent problem. For this reason, Indiana’s Voter ID Law does not withstand the second element of strict scrutiny, requiring that the government’s restrictions be narrowly tailored to meet the government’s interest.

Part III

The Supreme Court’s Decision in Crawford v. Marion County Elections Board

Despite precedent cases such as Lane v. Wilson, Dunn v. Blumstein, Norman v. Reed, and Harper v. Virginia Board of Elections, the Court used rational basis test in Crawford v. Marion County Elections Board. Rational basis (also
referred to by the Supreme Court in its decision as the “Burdick” test from *Burdick v. Takushi*) is the lowest level of scrutiny the Court applies to determine the constitutionality of a government restriction on citizens. Under this test, the Court determines if the government’s action is rationally related to its interest. The Court evaluates the interest of the state against the burdens the restriction imposes.

In *Crawford*, the Court reasoned that the petitioners did not present any evidence of an individual having been denied the right to vote because of Voter ID Laws, despite testimony from elderly, indigent, and poor persons who had not been able to acquire photo identification. And, in spite of no known cases of in-person voter fraud in Indiana, the Court upheld the law. The Court reasoned that although the law did present some burdens, these burdens were offset by the fact that individuals could cast a provisional ballot at the polls. The provisional ballot would be counted as long as the voter could prove his or her identity within ten days after the election. Thus, the Court concluded that the burdens were minimal and did not require the use of strict scrutiny to determine the legality of the law (Kelly 2009).

The Court relied on precedent cases such as *Burdick*. The decision in *Burdick* allowed the Court to uphold evenhanded restrictions that did not impose a severe burden on the right to vote. Using the reasoning from *Burdick* to reach the outcome in *Crawford* is flawed in one critical respect. The restriction imposed in *Burdick*, the state of Hawaii’s ban on all write-in voting, only prevents people from voting for candidates whose names do not appear on the ballot. It does not potentially prevent citizens from being able to vote entirely. As previously mentioned, the law in question in *Burdick* does not impose any additional pre-requisites for voting, as does the Indiana Voter ID Law. This next section will show that the burdens imposed by the Indiana law are of the variety that requires the application of strict scrutiny.

*The Undue Burdens of the Indiana Voter ID Law*

Voter ID Laws are problematic because they create an undue burden on those voters who are in the lower tier of the economic spectrum. Justice Stevens stated in his opinion that the application of strict scrutiny was not necessary because the burdens the law imposed were marginal. Many proponents of the law will also argue that the burdens of the law are alleviated because the law mandates that every local Bureau of Motor Vehicles (BMV) provide free-state issued voter ID cards to those who can supply a birth certificate or social security card. While the state of Indiana may have attempted to alleviate the burdens caused by voter ID requirements, these remedies do not go far enough. Obtaining a voter ID card requires applicants to first present preliminary docu-
ments such as a birth certificate or social security card. If the individual does not already have these documents, they cost $12 to obtain (Daniels 2008). In addition to paying the fees to obtain the required documents, one must make trips to both the local government office to obtain a birth certificate or social security card and then a separate trip to the local BMV in order to obtain a voter ID card.

This can be especially problematic for elderly or disabled persons who do not have a car or do not drive. As political scientists Richard Sobel and Robert Smith point out:

“Poor voters often do not have access to, nor frequently use, government issued photo identification because they lack cars and rarely travel by air. Many, particularly the homeless or those living with relatives, may not have the permanent address needed for government issued photo identification. They are also more likely to have difficulties traveling to government offices to obtain Identification cards” (Sobel and Smith 2009, 107).

Poor, elderly, and disabled voters may have trouble finding transportation to make both trips to a local government office and their local BMV. Poor voters, especially those who work full time, may also find it difficult to take the necessary time off of work to make both trips. Voter ID Laws can be especially problematic for those who are homeless and do not have permanent addresses. They may not be able to conform to the photo ID requirement which mandates that a permanent address be listed on one’s photo ID (Sobel and Smith 2009).

Although Justice Stevens claimed in Crawford that the petitioners failed to present even one instance of someone being disenfranchised by Indiana’s voter ID law, the League of Women voters, in their amici curiae brief, described a number of people who were prevented from voting because of the photo ID requirement. The League cites several examples, including 78-year-old Navy veteran Ray Wardell who was unable to cast his ballot in-person and was forced to vote using a provisional ballot in 2007. Mr. Wardell did not have any form of photo identification. When he went to the BMV to try to obtain a photo ID, Mr. Wardell did not have his birth certificate, so the office refused to issue him an ID. While he did have a Medicare card, the BMV staff failed to make him aware that this was an acceptable document with which to obtain an ID. After Mr. Wardell eventually returned to the BMV and received a photo ID, he was robbed of his wallet the week before the general election. Unable to obtain a new ID because of difficulties at the BMV, Mr. Wardell was forced to vote provisionally on Election Day. In order to actually have his vote counted, he had to appear before the county election board within ten days.
after the election, despite his mobility challenges (Brief of League of Women voters as Amicus Curiae, Crawford v. Marion County Elections Board, 553 U.S. 181 (2008)).

In another example, Kim Tillman was also unable vote because of the Indiana voter ID law. She could not afford the documents necessary to acquire a photo ID. Mrs. Tillman is a stay at home mother of seven, and her husband, who is employed as a janitor, is her only source of income. Ms. Tillman was born in Michigan, and the Michigan Vital Records office charges a $26.00 fee for birth certificates. To expedite the process, the office charges an additional $10.00. Thus, the total cost for Mrs. Tillman to acquire a photo ID would be between $26 and $36 dollars. To Mrs. Tillman this amount of money could have meant the difference between paying a utility bill, buying groceries, or refilling her medical prescription. As a result of these costs, Mrs. Tillman did not vote in 2007 (Brief of League of Women voters as Amicus Curiae, Crawford v. Marion County Elections Board, 553 U.S. 181 (2008)).

The Indiana voter ID law also disproportionately burdens many people in suspect classes, such as people who object to being photographed for religious reasons. The State of Indiana is home to the third largest Amish population in the United States. According to the 2000 census, about 19,000 Old Order Amish adherents live there, most of whom object to being photographed. The State of Indiana is also home to a large population of Mennonites who, along with some Christians, object to being photographed because they believe it is a “graven image” (Brief of League of Women voters as Amicus Curiae, Crawford v. Marion County Elections Board, p. 17-18, 553 U.S. 181 (2008)). Indiana Code 3-11.7-5-2.5 (c)(2)(B) provides that voters who object to being photographed for religious reasons can vote using a provisional ballot. This means that religious individuals who wish to have their vote counted must make the trip to the county elections board within ten days after the election to prove their identification. However, many Old Order Amish adherents do not have motorized vehicles for transportation and must rely on horse and buggy to travel to the county elections board to prove their identity. It was also reported in 2008 that 12 nuns from the University of Saint Mary’s College in South Bend, Indiana were denied the right to vote in-person because they lacked the requisite forms of ID (Erickson and Minnite 2009).

Many Old Order Amish adherents as well as Mennonites are also reluctant to use the judicial system to defend their rights because they believe in the religious principle of Gelassenheit, which means calmness and composure. They are consequently unlikely to legally defend their rights because of their religious beliefs (Brief of League of Women voters as Amicus Curiae, Crawford v. Marion County Elections Board, 553 U.S. 181 (2008)).
Even voters who do possess photo IDs can be burdened due to several ambiguities in the law and the fact that poll workers are allowed to arbitrarily determine when to challenge the validity of a voter’s identification. The first ambiguity in the law states that the ID must conform to the name and address on file, but the law does not define the word “conform.” It does not specify what the poll worker should do if the spelling of a person’s name is off by one letter, if the person has had their name changed, if they have gotten married, or if the person’s appearance has changed slightly (such as the growth of facial hair, etc). Poll workers are allowed to challenge the conformity of a person’s ID at their own discretion. They are provided with little training or guidance on what circumstances justify a challenge to a voter’s identification. The Supreme Court has ruled that it is unconstitutional to allow officials to arbitrarily burden the exercise of a fundamental right (Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 1992).

Under Indiana code § 3-11-8-25.1 (c)(2), the precinct poll worker has the discretion to evaluate whether the photo ID provided by the voter satisfies the requirements mandated by the law (Brief of League of Women voters as Amicus Curiae, Crawford v. Marion County Elections Board, 553 U.S. 181 (2008)). For example, Janice Tingley had to vote provisionally because her name on the voter registration record was spelled “Tengley.” Tracy Heaton De Martinez was also unable to vote in-person because of a misspelling on her driver’s license that listed her name Tracy Heaton “DEMARTINEZ”—no space between the words “De” and “Martinez.” Although it was an error on the part of the BMV, the BMV refused to correct the error once the license was issued. As previously mentioned, the Supreme Court has ruled that such arbitrary burdens on the exercise of a fundamental right are in and of themselves unconstitutional.

**Provisional Ballot is Not an Adequate Remedy for the Burdens Imposed**

The last major flaw in the voter ID law is that it requires voters who do not possess proper identification to cast a provisional ballot. The justices in the Crawford majority ruled that the Indiana law allowing voters to cast a provisional ballot was an adequate remedy for whatever burdens the law imposed. These include voters who were either indigent and did not possess adequate ID, or who objected to being photographed for religious purposes. Under Indiana Code 3-11.7-5-1(b), a voter who casts a provisional ballot shall have his or her vote counted “not later than 3p.m. ten (10) days following the election,” if they return to the county elections board with proof of identification.

According to the code, those who cast provisional ballots are essentially denied the right to a meaningful vote; their votes ultimately do not factor into
the outcome of the election. Because most elections are decided on election night, hours after the polls close (barring the occasional recount), a provisional ballot does not meaningfully affect the outcome. Effectively, the vote is rendered moot. Voters forced to cast a provisional ballot would have no incentive to go before the board of elections because its outcome has already been determined. In *Reynolds v. Sims*, 377 U.S. 533 (1964), Chief Justice Earl Warren cited Justice Oliver Wendell Holmes’ opinion in *United States v. Mosley*, 238 U.S. 383 (1915), proclaiming the right to have one’s vote counted is just as fundamental as the right to vote itself. Warren said, “It is as equally unquestionable that the right to have one’s vote counted is as open to protection… as the right to put a ballot in a box” (*Reynolds v. Sims*, 377 U.S. 533 (1964)). Although a provisional ballot is counted, it is done so only after the election has already been decided. Counting a provisional ballot is more symbolic than it is meaningful. Making a person vote provisionally, effectively denies them their fundamental right to impact the outcome of the election with their vote. Consequently, the voter ID law imposes a “severe burden” on the right to vote, justifying the application of strict scrutiny.

**Conclusion**

Traditionally, the Supreme Court has determined the constitutionality of restrictions on the right to vote by holding them to a standard of strict scrutiny. The Court established this precedent in the cases of *Lane v. Wilson*, *Dunn v. Blumstein*, *Norman v. Reed*, *Louisiana v. United States*, and *Harper v. Virginia Board of Elections*. The Court diverged from this precedent in *Crawford v. Marion County Elections Board* (2008) when it chose not to apply the strict scrutiny standard despite evidence that the law unnecessarily burdened the right to vote. The Court’s ruling in *Crawford* is in particular conflict with that of *Harper*, because of the many similarities between the two cases.

As the previous decisions illustrate, governmental restrictions on fundamental rights, especially the right to vote, must be adjudicated according to a high standard of scrutiny. The Indiana Voter ID Law would not withstand strict scrutiny because the government lacks both a compelling interest and the law is not narrowly tailored. The State of Indiana has not established a compelling interest for the law since it has never prosecuted anyone for voter fraud and widespread voter fraud is rare, particularly in-person voter fraud. Furthermore, the Indiana voter ID law is not narrowly tailored to serve the state government’s interest in preventing voter fraud because it does nothing to address actual documented cases of absentee voter fraud.

In *Crawford*, the Supreme Court did refuse to apply the strict scrutiny standard, reasoning that the voter ID law only imposed minimal burdens that
were offset by the fact that those who could not afford ID could cast a provis-

tional ballot. The Court also compared the restrictions the Indiana voter ID
law imposes with those of prior cases such as Burdick v. Takushi. However,

unlike the restrictions imposed in Burdick, the voter ID law prevents many
individuals from being able to vote altogether. Many classes of voters such
as elderly, poor, minorities, and disabled persons were in fact prevented from
voting in 2006, 2007, and 2008, as well as many people who objected to be-
ing photographed due to religious reasons. Even those who had identification
cards were not without risk of being prevented from voting if their ID did not
conform to the name listed on the voter registration rolls.

Those who cannot vote in-person are forced to vote provisionally and are
effectively denied their right to vote. The law prevented a number of qualified
persons from voting, as documented by the League of Women voters in their
amicus brief in Crawford. Government restrictions that deter qualified citizens
from exercising a fundamental right to vote should be evaluated according to
a constitutional standard of strict scrutiny. For this reason, I conclude that the
U.S. Supreme Court erred in its decision upholding the Indiana Voter ID Law
in Crawford v. Marion County Elections Board.

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Maxwell Meadows, The College of William and Mary

In August of 1996, President Bill Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). This legislation constituted a significant overhaul of the “Welfare State” in the United States. Furthermore, its passage was accomplished despite the policy and political differences of Democrat Bill Clinton’s White House and a Republican Congress, led in part by Speaker of the House Newt Gingrich. An analysis has been undertaken to highlight the factors most pertinent to overcoming these differences in order to pass meaningful legislation. The analysis uses a three-part framework borrowed from John Kingdon’s 1984 Agendas, Alternatives, and Public Policies, focusing on the problem, policy, and political “streams” and their convergence. Such a convergence of streams may generate adequate significance and pressure to breach barriers blocking legislative passage. It is hoped that the relevant factors herein discussed are applicable to the legislative environment in the 112th and future Congresses.

Introduction

August 1996 signaled a major change in American welfare policy that many observers never expected to see. This change was brought about by President Clinton’s signing of the Personal Responsibility and Work Opportunity Reconciliation Act (hereafter PRWORA) of 1996. The PRWORA replaced Aid for Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF). More than just a change in title, the PRWORA constituted substantive changes in how aid was to be provided to America’s poor, and to whom (Mead 2005, 11). Welfare reform was an unlikely accomplishment when considering the nature of previous welfare debates, the divided and highly partisan federal government in 1996, and the perceived gains from strategic disagreement on the issue. Understanding public opinion on the issue of welfare reform is instrumental in understanding this notable and demonstrative occurrence of compromise.

This paper seeks to highlight facets of the political and policy environments that help to explain how policy disagreements, political polarization, and strategy were overcome in passing the PRWORA. Sections of this paper will address how “zones of agreement” over reform changed, the importance of President Clinton’s perception of himself as a populist “New Democrat,” and Speaker Gingrich’s position following the government shutdown of 1995.
as factors in welfare reform. How each of the above affected electoral and policy preferences for successful legislation over maintaining a campaign issue to sustain constituencies is central to the paper. The timing of these changing incentives, particularly public opinion, altered strategies of agreement and disagreement, making passage of the PRWORA possible.

Understanding how substantive reforms to broad social programs were passed in a highly partisan atmosphere is pertinent to the current political climate. The existence of a conservative Republican House of Representatives and Senate juxtaposed with a Democratic White House is similar to today’s situation where Democrats hold only a slim majority in the Senate, and the House in Republican hands. The issues facing our government today are probably more serious than those, like welfare, that were addressed under President Clinton’s tenure. If lessons can be learned from welfare reform that can be adapted to increase the possibility of meaningful, bipartisan legislation in the 112th and future Congresses, then time spent reflecting on 1996 is well spent.

Framework for Analysis

In order to extract meaningful lessons from welfare reform in 1996, this analysis utilizes John Kingdon’s model of agenda setting together with John B. Gilmour’s model of Congress-Executive bargaining behavior (Gilmour 1995, 4; Weaver 2000, 35). Kingdon posits that meaningful policy change can only occur with the confluence of three streams of factors; problem, policy, and politics (Weaver 2000, 103). Within each stream the analysis focuses on strategic decision-making; raising evidence of strategically weighing improvements to the status quo against the electoral benefits of having a salient issue. Problem, policy, and political streams are therefore supplemented with strategic disagreement, by polling data, and then again by an added focus on President Bill Clinton’s particular political identity, and Speaker Gingrich’s position after the 1995 government shutdown.

Kingdon’s “Problem Stream” describes trends and issues occurring within the scope of discussion that increase public awareness, ire, and the “need” for change. The increase in AFDC recipients by three million over five years by 1994 serves as a good example of changes to the “problem stream” (Shalala 2003, 578).

“Policy Stream” refers to an emerging consensus amongst policy experts on what should be done to address the problem. Although there was not universal consensus over welfare reform, the “zone of agreement” had expanded to include far more policy experts and political Finally, the “Political Stream,” signals the emergence of either a majority or a strong coalition in favor of acting on the issue. Encompassed within the political stream are the Republican
Revolution of 1994 and the importance of “New Democrats” like President Clinton and other Democrats who were less wedded to traditional Democratic positions on welfare. The political stream also incorporates as the role of politicians trying to balance their policy prerogatives with their electoral incentives for re-election.

John Gilmour’s framework of bargaining—“Strategic Disagreement” is an important foundation whenever one analyzes a situation like welfare reform, where two parties in conflict overcame partisanship, electing to pass a bill which resulted in a significant policy shift. Gilmour proposes that there are three primary reasons why disagreement may outweigh compromise when elected officials muddle through their political calculus (Gilmour 1995, 4). Explaining a compromise as anything more than “selling-out” can be difficult with engaged, issue-based constituencies (Gilmour 1995, 31). There are also many electoral advantages to maintaining distinct differences between Democrats and Republicans on most issues, as many voters view one party as “better” than the other in only general terms, (Gilmour 1995, 37). Many partisan officials also feel that accepting half of their demands now makes it more difficult to achieve all of their objectives later (Gilmour 1995, 42).

The concept of “Strategic Disagreement” extends to an array of strategic techniques. Most pertinent to a discussion of the PRWORA are pursuit and avoidance, strategic encroachment, and strategic disagreement as a result of bargaining failure, (Gilmour 1995, 8). The first, pursuit and avoidance, occurs when one party seeks to diminish the others dominance on an issue by co-opting their position, which can lead to a bidding war as the approached party seeks to preserve its advantage, (Gilmour 1995, 37). Strategic encroachment follows this closely as a perception of agreement is created, though none exists, (Gilmour 1995, 9). Strategic disagreement can manifest when a zone of agreement on policy options exists, but due to bargaining failure at least one side deliberately avoids a compromise, (Gilmour 1995, 8). Each of these strategies are relevant because short of constitutional or structural hurdles, deciding what needs to be done and agreeing to do it, is the biggest hurdle to legislation. Understanding how these hurdles were overcome in 1996 may apply directly to the current situation.

Background on the Welfare Debate

In explaining why welfare reform in 1996 was unusual and unexpected, it is worth taking a moment to examine the history of reform debate to see what has changed. In brief, welfare is a cash-benefit program created in 1935 during the New Deal as Aid for Dependent Children (ADC). In 1962 the program was subsequently expanded into Aid to Families with Dependent Children.
1962 until 1996, the most serious proposal for welfare reform was initiated by President Nixon in 1969 (Gilmour 1995, 9). Liberals in Congress strategically avoided the proposal, hoping to accomplish reforms more to their liking after the next election cycle. Little was done to overhaul welfare between 1969 and 1996 (regardless of administration) with the exception of the Family Support Act of 1988 (Shalala 2003, 580).

President Clinton’s Administration found that the public’s positive inclinations towards helping the poor, especially impoverished children, no longer extended to AFDC’s colloquial label “welfare,” whose connotation was now strongly negative (Shalala 2003, 585). According to the Pew Research Center, in 1994 “public backing of social welfare programs was at an all-time low” (Pew Research Center 2009, 29). Welfare cost approximately $22 billion annually and was viewed as an ineffective program by seventy-nine percent of the American electorate (Garin, Molyneaux and DiVall 2003, 566; Shalala 2003 578). Although welfare was held in poor regards by most voters, no meaningful consensus existed on how to improve or replace AFDC.

**Problem Stream**

Large-scale policy changes require the American electorate to see a problem as salient, as neither politicians nor bureaucrats have enough sway to singlehandedly alter the system. The role of problem growth, or public perception of problems, is exemplified in the following quote by Gilmour:

“But occasionally events and circumstances beyond the control of either party conspire to give an issue extraordinary salience, and the parties must at least pretend to be interested in reaching a compromise, if only to satisfy journalists and other high-minded observers” (Gilmour 1995, 48).

Such was the status of welfare reform in 1996, with the general public as well as journalists and high-minded observers demanding that the issue be addressed. An analysis of public opinion from the Pew Research Center on support for the social safety net reports the following:

“When asked in December 2005 whether “poor people today have it easy because they can get government benefits without doing anything”, or whether “poor people have hard lives because government benefits don’t go far enough to help them live decently.” 51% of people said the poor have it hard; 35% said they had it easy. That’s almost a complete reversal of opinion from July 1994, when 53% of people said the poor had it easy, and 39% said the poor had hard lives” (Morin and Neidorf 2007).
Polls and focus groups conducted by Stan Greenberg around the time of Clinton’s Inauguration showed that the three most important promises of the campaign for the public were the creation of eight million jobs, health care reform, and welfare reform (Woodward 1994, 100). The economy was rallying in 1996, and health care reform was dead by 1994. This left welfare reform, and Donna Shalala, Secretary of Health and Human Services (HHS) signaled as desire to move on that front, declaring “Welfare as we know it has become a national tragedy” (Shalala 2003, 578).

Public opinion regarding AFDC was lopsidedly critical of both performance and mission. Eighty-five percent of the electorate felt that welfare funds were being spent the wrong way, not that too much was being spent on anti-poverty programs (Garin, Molyneaux and DiVall 2003, 566). Many felt that the primary goal of such programs should be to move people off of welfare and into the workforce by stressing self-help, self-reliance, job training, and education (Garin, Molyneaux and DiVall 2003, 565). The desire to move recipients off welfare may have stemmed from the fact that fewer than twenty percent of voters felt that recipients deserved their cash benefits (Garin, Molyneaux and DiVall 2003, 566). Seventy-nine percent of the electorate viewed welfare as not working well, and more than sixty-five percent of African Americans, liberals, and Democrats shared that perception (Garin, Molyneaux and DiVall 2003, 566).


Data from the Pew Research Center for the People & the Press: 1987-2009 Values Surveys (combined data set) (The Pew Global Attitudes Project bears no responsibility for the analyses or interpretations of the data presented here)
A comparable and much better received anti-poverty program is the Earned Income Tax Credit (EITC), which was added to the tax code in 1975 (Mead 2005, 11). The EITC saw major expansions during the 1990s, a stark contrast to the transition from entitlement program to block grant funding for welfare following the PRWORA (Mead 2005, 11). The EITC is generally perceived as a “pay raise for the working poor,” which helps to “make work pay” for low-income Americans taking the initiative to work (Shalala 2003, 581). Helping those who are helping themselves grew into an underlying mantra in welfare debates in the 1990s. Poverty theories of the time suggesting that a “rising tide lifts all boats,” that jobs were there for those who wanted them, or that welfare bred dependency, may have spurred such attitudes (Albelda and Tilly 2003, 575-576).

Increases in the occurrence of out-of-wedlock births also raised public concern as many prominent commentators suggested a link between welfare and the shift. This is represented by the inclusion of the following passage in the text of the PRWORA:

“(5) (c) The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women. Between 1970 and 1991, the percentage of live births to unmarried women increased nearly threefold, from 10.7 percent to 29.5 percent” (PRWORA 1996, 643).


Family structure concerned the general public as well — conservatives and liberals, Republicans and Democrats (Weaver 2000, 103). Concern over single-parenting, child poverty, and fathers delinquent on child support were common topics (Shalala 2003, 582). Conservatives in particular focused on the family throughout the 1990s (Mead 2005, 15). Democrats did not ignore concerns either, as illustrated by testimony from Donna Shalala before the House Ways and Means Committee:

“All young people must understand the importance of staying in school, living at home, preparing to work, and building a real future. And they must realize that having a child is an immense responsibility – not an easy route to independence” (Shalala 2005, 584).
Other significant trends that heightened the saliency of welfare coming into the 1990s had a lot to do with the demographics of race and sex. As Martin Gilens investigates in Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy (1999), coverage of welfare in the media became decidedly more African American than is statistically the case, starting soon after the Watts riots and continuing well into the 1990s (106). Aside from a disproportionate portrayal of African American poverty in coverage critical of welfare, certain demographics are faced more frequently with the reality of poverty. African Americans were three and a half times more likely to be poor than whites, and Latinos were four and a half times more likely than non-Latinos (Albelda and Tilly 2003, 573).

Women were an overrepresented group as well, constituting two thirds of poor adults (Albelda and Tilly 2003, 573). In 1994 half of single mothers lived below the poverty line, and a female high school graduate was twice as likely to be in poverty as her male peer (Albelda and Tilly 2003, 572-573). Three trends in particular about women in poverty were important during the welfare debates of the 1990s. The first trend harks back to family structure; forty percent of adult women were unmarried, one in six women were single parents, and the dwindling number of new marriages broke apart with greater frequency (Albelda and Tilly 2003, 573). Second, as more women entered the workplace, fewer remained stay-at-home parents, and those who did work earned sixty-seven cents for every dollar earned by a male peer (Albelda and Tilly 2003, 573). The increase in single mothers, combined with the earnings gap, meant that even as single mothers worked, they faced greater odds of poverty. This resulted in the third trend: one half of poor people lived in families headed by a single mother, twice the number in 1955 (Albelda and Tilly 2003, 573).

As evidenced by the chart below illustrating public opinion on three questions of the “Government’s Obligations to the Poor and Needy,” the public’s acceptance of the status quo on welfare-related issues had declined steadily from 1987 to 1994. This change in opinion is a significant catalyst for the engagement of serious debates in both the policy and political streams:

“Overall, the proportion of those agreeing with each statement has increased since 1994, the year Republicans gained control of Congress and, ultimately with support from President Clinton, began overhauling the federal welfare system. A majority of Americans (54%) now [2007] agree the government should do more to help the needy. That’s up from 41% in 1994 but virtually identical to the 53% of the public who offered that view in 1987” (Morin and Neidorf 2007).
Government's Obligations to the Poor and Needy

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(Data from Pew Research Center 2009, 35)

Policy Stream

Social policy formation is an inexact process and there is rarely consensus on what outcomes will result from policy proposals. As Kent Weaver stresses in *Ending Welfare as We Know It* (2000), there was no concrete agreement between party leaders and experts in the field on the path for welfare reform in 1996 (133-134). Some contemporaries went so far as to express that, “many of the current “welfare reform” plans (including the Clinton Administration’s proposed Work and Family Responsibility Act of 1994 and the Republican Contract with America’s proposed Personal Responsibility Act) are based on faulty assumptions concerning the behavior of AFDC recipients” (Spalter-Roth et. al. 2003, 602).
Still, there would have been little hope for passage of the PRWORA if no zone of agreement between parties and policy advisors existed. Compromise was eventually found on the principles of personal responsibility, work, state implementation, protection of children, family incentives, and job training (Archer 2003, 619; Clinton 2003, 659; “Preview” 2003, 590; Shalala 2003, 580). One significant marker of a new overlap between liberal and conservative proposals to reform welfare was Bill Clinton’s 1992 presidential campaign pledge to “end welfare as we know it” (Weaver 2000, 171).

Clinton’s plans for welfare reform were put on hold until 1994, in part because Treasury Secretary Lloyd Bentsen, as well as other advisors, resisted including welfare reform and its savings projections in budget calculations meant to reduce the deficit (Woodward 1994, 125). The GOP’s 1994 Contract with America, released during the midterm elections, featured welfare prominently as a policy topic (“Contract” 2003, 588). Of the GOP’s ten enumerated bills promised for the first one hundred days of Republican leadership in the House, the third was the Personal Responsibility Act, meant to “discourage illegitimacy,” cut welfare spending, and “enact a tough two-years-and-out” rule for beneficiaries (“Contract” 2003, 588). The personal responsibility of welfare recipients, and especially welfare mothers, to help themselves was also stressed by Democratic proposals such as the Work and Responsibility Act of 1994 (Shalala 2003, 582). In its final form, the PRWORA was seen to solve an apparent problem of welfare; that it fomented dependency over work, and destabilized the nuclear family (Pateman 2005, 35). Section 401 of the PRWORA outlines the purposes of TANF to be: providing assistance to needy families with children, ending parental dependence with job training, preventing out-of-wedlock pregnancies, and encouraging two-parent families (PRWORA 1996, 645).

Both parties compromised on time limits for welfare benefits. Republicans lobbied hard for a strict “two-years-and-out” limit, but time limits had been legitimated in liberal discourse by David Ellwood’s 1988 Poor Support (“Contract” 2003, 588; Weaver 2000, 133). In surveys of public attitudes toward time limits, a two-year time limit with a public work program was supported two to one over a strict two-year limit (Garin, Molyneaux and DiVall 2003, 565). Limiting benefits was such a popular proposal that the Secretary Shalala included the claim, “as you know, President Clinton was the first person to propose national time limits on welfare benefits,” in her testimony before Ways and Means in the House (Shalala 2003, 580).

Family values, traditionally a strong domain of the GOP, were stressed by both parties, following “logically from the public’s view that the biggest cause of poverty is the breakdown of families and family values” (Garin, Molyneaux and DiVall 2003, 566). Ninety-five percent of survey respondents
felt that tougher measures to collect child support from absentee fathers were warranted (Garin, Molyneaux and DiVall 2003, 566). Republicans expressed their views in the Contract with America’s number four proposal, the Family Reinforcement Act, to “reinforce the central role of families in American society” (“Contract” 2003, 588). HHS Secretary Shalala’s comment that young Americans “must realize that having a child is an immense responsibility – not an easy route to independence,” was meant to impart the seriousness of the Democratic Party in sustaining families (Shalala 2003, 584).

Republicans were also successful in bringing Democrats to the table on capping growth in the welfare system (“Preview” 2003, 593). TANF, AFDC’s successor, was no longer an entitlement program, but rather a block-grant program after final passage (PRWORA 1996, 645). The GOP had initially proposed strict caps on funds to AFDC, Supplemental Security Income (SSI), public housing, and work programs, as well as the consolidation of ten nutrition programs and their institution as a block grant to states (“Preview” 2003, 593). President Clinton strongly opposed Republican cuts to nutrition programs, as well as cuts to programs for legal immigrants, although a five-year residency requirement was included in the final bill (Clinton 2003, 660; “Preview” 2003, 593).

The most significant consensus on welfare reform centered on the necessity for work requirements, programs to incentivize work, and to train recipients for employment (Haskins and Sawhill 2009, 167). More Americans felt it was necessary to improve welfare’s ability to move people into jobs than to reduce long-term dependence or fraud (Albelda and Tilly 2003, 566). At the signing ceremony for the PRWORA in August of 1996, President Clinton made this clear: “Today we are taking an historic chance to make welfare what it was meant to be: a second chance, not a way of life” (Clinton 2003, 659). Work had been a central theme of Clinton’s Work and Responsibility Act, which proposed an expansion of the JOBS program from the 1988 Family Support Act (FSA), and an effort to make benefits a “paycheck, not a welfare check,” (Shalala 2003, 580). Republicans similarly stressed the importance of work in the 1994 Contract with America’s proposed Job Creation and Wage Enhancement Act (“Contract” 2003, 588).

Compromise did not occur on every aspect of welfare reform, and much legislative movement was required to accomplish what agreements were reached. President Clinton stated at the signing of the PRWORA: “Congress sent me two previous bills that I strongly believe failed to protect our children and did too little to move people from welfare to work. I vetoed both of them. This bill had broad bipartisan support and is much, much better on both counts” (Clinton 2003, 659). Republicans desired more state (and less federal) control over the program, expanded family incentives, more strict time limits
and work requirements, and lower benefits for recipients (Archer 2003, 619; “Preview” 2003, 590). Liberals feared that the PRWORA was too strict in its work requirements, did not provide enough job training and job creation elements, and included harmful cuts to aspects aiding children and immigrants (Spalter-Roth et. al. 2003, 602). Consensus may not have occurred on every proposed element of welfare reform, but there was a significant expansion of the zone of agreement as compared to earlier decades where liberal cash-benefit proposals contrasted sharply with conservative market-based solutions.

**Political Stream**

The political environment of 1996 differed drastically from that of the preceding decades, a difference that significantly altered the nature of welfare debate and created a new opportunity for substantive reform. There are times when the political discourse favors deadlock over incremental progress, and understanding the transition from contention to compromise is important for understanding welfare reform in 1996, and the current political situation. Gilmour, in his book on strategic disagreement and the various reasons why compromise is a legislative rarity states:

“Politicians’ motivations are complex, for they must satisfy not just themselves but also their constituents. Their seemingly perverse unwillingness to compromise is due to perfectly sensible political calculations. They are interested not only in enacting legislation, but also in retaining their offices, and there are occasions when extremism, stridency, and inflexibility are more expedient than compromise” (Gilmour 1995, 16).

Compromising today, in order to receive part of an ideal policy shift, can be seen to hamper future endeavors to pass that ideal in its entirety (Gilmour 1995, 42). If politicians believe that the future holds better prospects of accomplishing their ideal, whether that is because of post-election changes to seats in Congress or increased issue saliency, they are more likely to shun compromise, and use the issue now to push for greater reform later (Gilmour 1995, 42).

Democrats in Congress looked for a better opportunity to implement their ideal reform after their strategic avoidance of Nixon’s proposal in 1969. In the welfare debates during 1987 and 1988 Democrats pushed to expand welfare benefits and coverage without strengthening work requirements, an effort that failed (Archer 2003, 620). After passage of the Family Support Act in 1988, the Democratic Party waited to see what resulted from the law’s implementa-
tion in 1992 (Weaver 2000, 130). Debate during this period consisted primarily of Democrats arguing for expansion of the JOBS program, and Republicans arguing for tougher work requirements (Weaver 2000, 130). Congressman Bill Archer, Republican of Texas and Chairman of the House Ways and Means Committee, expressed his view that: “to the Democrats, welfare reform is not a policy objective, it is a political platform” (Archer 2003, 620).

Many Republicans like Bill Archer and Newt Gingrich also used welfare as a political platform. After initiation of President Johnson’s “War on Poverty” in the 1960s, increased media coverage of welfare controversies became a windfall for conservatives and Republicans willing to criticize anti-poverty programs and their beneficiaries (Mead 2005, 16). Republicans used political messages about dependency, crime, and the decay of traditional families, which carried far better than Democratic messages about economic fairness and equality (Mead 2005, 16). In 1994 the soon-to-be Speaker of the House, Newt Gingrich, “spoke of getting unwed mothers off welfare in 60 days and, if they cannot or will not provide for their children, of putting them into orphanages” (Buchanan, “Republican Revolution” 2003, 596).

The mid-term elections of 1994 were a success for Republicans, with the House of Representatives losing its Democratic majority for the first time in forty years. Republican appeals included a focus on welfare, with the sharp increase in AFDC recipients, rising illegitimacy, and the recession early in the 1990s and its effect on unemployment taking center stage (Mead 2005, 16). A new strategy was rolled out by some GOP strategists:

“Gingrich and some other conservative Republicans in Congress contended that the best way for Republicans to win a majority in Congress was to confront and challenge Democrats at every opportunity in order to distinguish clearly between the parties” (Gilmour 1995, 24).

This strategy was epitomized in the Contract with America, which called for “the end of government that is too big, too intrusive, and too easy with the public’s money. It can be the beginning of a Congress that respects the values and shares the faith of the American family,” and claiming that by “respecting the judgment of our fellow citizens as we seek their mandate for reform, we hereby pledge our names to this Contract with America” (“Contract with America” 2003, 589). As part of this agenda Republicans pushed for welfare reform in order to preserve the values of the American family. Both parties politicized the welfare debate, and utilized it to address their respective constituencies. Politically, having welfare reform as an ongoing issue was mutually beneficial, because maintaining different stances clearly identified each party
in the minds of voters. When political parties compromise on a particularly salient issue, it loses its appeal as a focal point for gathering supporters (Gilmour 1995, 37). Compromise can also be problematic, because as Gilmour states: “A politician who consents to a compromise often comes under attack from rivals within his own party for having sold out the interests of constituents” (Gilmour 1995, 32).

As the 1990s progressed however, the constituency groups of Democrats and Republicans began to become the same one: a middle-class disgruntled with the state of welfare. This bottom-up shift in constituency make-up predicated and permitted any top-down welfare reforms to take shape. When two parties use the same issue to appeal to a singular group, their tactics change from opposition to competition for constituent approval (Gilmour 1995, 48).

It is important to highlight the factors that pushed two parties past historical disagreement on an issue like welfare reform to a compromise solution. If one party has issue advantage, the other may attempt to steal the dominant position by passing a more generous proposal, move strategically to close the gap without truly wanting a compromise, or to begin a game of “pursuit and avoidance” with the other party (Gilmour 1995; 26, 35, 49). Because a final compromise was signed into law as the PRWORA of 1996, it appears more likely that policy agreements were proposed to attract the support of a shared constituency, rather than as position-taking by either party as a means of mitigating the other’s dominance in debates about welfare reform.

A variety of political events, and personalities, can help to explain the important change from confrontation to communication after the foundation of public support was firm. Debate shifted from liberal demands for the expansion of benefits and services versus conservative demands for work requirements and marriage incentives, to whether or not to have a strict two year limit on benefits or a two year program with an associated job program – a dramatic change in tone. President Clinton and Speaker Gingrich were both central to this political reality.

President Clinton’s identification as a “New Democrat,” intent on finding what he viewed as the populist, middle course through any debate, is a strong explanatory factor (Woodward 1994, 13). During Clinton’s campaign he had been advised by David Ellwood, who just a few years earlier had brought some traditionally conservative policy options into the realm of liberal academic debate (Weaver 2000, 127). Clinton also had gubernatorial experience with welfare, as he sat on the National Governor’s Association welfare task force in 1987 and 1988 (Weaver 2000, 127). As President, Clinton recognized the importance of achieving welfare reform to the general public, and to his desires for re-election (Woodward 1994, 100). Stan Greenberg’s post INAUGURAL polls ranked welfare as number three of important campaign promises, and
with health care, taken off of the table as a potential legislative accomplishment, welfare reform became even more important. (Skocpol 1997, 6; Woodward 1994, 100). Campaigning aside, Clinton “was angry with himself for abandoning a cherished reform [welfare] in his haste to meet” deficit reduction goals in his first budget (Woodward 1994, 224).

Speaker Gingrich had also run his party’s midterm election campaign on a platform of reducing the size of government, and reforming the welfare system. In 1995, Gingrich led the Republican Congress into a head-to-head conflict with the Democratic Party that resulted in a shutdown of the federal government. The negative publicity received by Gingrich after the shutdown led him to view welfare reform as an opportunity to redeem himself and his party (Rawls 2009, 63). Congress began to invite many more expert witnesses to testify on welfare in the 104th Congress than it had in the 103rd (Weaver 2000, 142).

Democrats wanted to accomplish one of their key reforms, especially after the fall of health care. Similarly, Gingrich sought to implement aspects of his Contract to prove that the GOP could be constructive in the aftermath of the government shutdown. Both sides sought a success, and welfare sat high on each of their priorities. The desire of both President Clinton and Speaker Gingrich to satisfy the public’s insistence of welfare reform brought the issue, and cooperation, to the fore. Welfare therefore became a highly salient issue for both parties, with neither desiring a stalemate. Lee Rawls describes the situation succinctly:

“The thrust and parry of this two-party competition can be seen in the policy arena in Congress as the parties invade their opponents’ turf with new proposals and defend their own turf against the other side. Over time, in response to Republican incursions, the Democrats passed welfare reform [in 1996]” (Rawls 2009, 96).

Conclusion

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 did not, and could not occur due an individual event, constituency, or politician. Instead, welfare reform resulted from an unlikely but fortuitous alignment of: problems as perceived by the public, expansion of the zones of agreement in policy circles, and the suppression of strategic disagreement within the political sphere.

As President Clinton pronounced at the signing of the PRWORA on August 22, 1996; “Let me also say that there’s something really good about this legislation. After I sign my name to this bill, welfare will no longer be a political issue.
The two parties cannot attack each other over it. The politicians cannot attack poor people over it” (Clinton 2003, 660). Two parties overcame great differences to pass landmark reform that still stands as the foundation for welfare policy today. This could not have happened without the leadership of President Clinton, as well as the realization of Republicans and Democrats alike that there comes a time when presenting a solution is far more important than pontificating over an issue. Solidified public opinion helped to make this a unique moment for welfare reform:

“The belief that poor people are overly reliant on government aid peaked in July 1994. At that time, 85% felt poor people were too dependent – and 46% completely agreed. This year [2007]… roughly three-in-ten (29%) completely agree that the poor are too dependent on government help… Notably, a solid majority of those who say the poor are too dependent (63%) believe the government has a responsibility to take care of people who cannot take care of themselves” (Pew Research Center 2007, 13-14).

Now in 2012, Republicans again control the House of Representatives, and Democrats hold the White House and Senate. Neither side has the ability to unilaterally determine the course of American policy. The question is: are there issue areas where the same sort of merging of problem, policy, and political streams can once again emerge to produce serious policy reform. Speaker of the House John Boehner hopes so:

“The 1996 welfare reform law is probably the most successful domestic policy reform of the past quarter-century. It was enacted by a Republican Congress under a Democratic president, Bill Clinton. It happened because both sides ultimately knew it had to be done – and they locked arms and got it done. The same type of effort now can lead to success on jobs now and on our debt. This is personal for me, and I know it is for Senator McConnell as well. We want these things to happen. I didn’t take this job to preside over some partisan screaming match. I took this job to be Speaker of the whole House so that we could truly listen to the people of our country, those who truly hold the power in this country, listen to their priorities, and get stuff done” (Boehner 2011).

Hopefully politicians of both parties can identify the repetition of patterns in public opinion between the 1990’s and today, acknowledge that both parties could use a series of policy successes given their low poll numbers, and find the zones of agreement that permit action.
References


Money or Trust: Prospects of Democratization of China

Jesse Sun, Calvin College

While modernization theories suggest that economic development and the social changes brought by it are sufficient to produce a successful democratic transition, it has not happened in China despite its recent phenomenal economic growth. Taking the concept of civil society, I attribute the failure to the frailty of civil society in China, and the resulting lack of mutual trust and horizontal cooperation. I explain the deficiency of civic virtues by examining both the general government structure and the historical ideology in China’s imperial history, as well as by drawing on the teachings and implications from Confucianism as the predominant philosophical school in traditional China. These historically embedded values and beliefs have endured and continue to hinder democratic liberalization, despite the presence of a middle class and other fruits of modernization. The insufficiency of civil society has more explanatory power than other development-related variables.

An introduction to PRC and its political status quo

China (PRC) is categorized as “not free” by Freedom House in terms of both political rights and civil liberties (Freedom House 2010). These problematic rankings are a result of the absolute rule of the Chinese Communist Party (CCP) in the political sphere. The actual decision-making authority in the People’s Republic of China resides in the state’s executive organs rather than the nominal National People’s Congress, and since the state leaders are also leaders of the party, the CCP dominates the government with authoritarian structure and ideology. In all important government, economic, and cultural institutions in China, party committees work to see that party and state policies are followed and that non-party members and autonomous organizations cannot challenge party rule. The result is a single centralized locus of power.

This single-party domination and party-state overlap inevitably leads to restrictions and violations of civil liberties and human rights. The reported abuses include arbitrary detention, forced confessions, and severe restrictions

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1 It should be noted that the arguments of Seymour Lipset and Robert Putnam in their original context are not necessarily antithetical. While Lipset’s thesis states that higher development corresponds with higher likelihood for democratic transition, Putnam uses the idea of civil society to explain the difference in political and civil effectiveness in an existing democracy. Treating civil society, economic development and its derivatives as variables, I shall test how much they contribute to the lack of political change in the case of China. Since China has been experiencing increasing economic prosperity in the past thirty years with few promising sign of democratizing, I shall focus in this paper on the point of the ineffectiveness of civil society and the lack of its spirit.
on freedoms of speech, the press, assembly, religion, and worker rights (U.S. Department of State 2008). Religious believers who seek to practice their faith outside of state-controlled religious venues are subject to intimidation, harassment, and detention.2

However, given the remarkable economic boom it has enjoyed for nearly three decades, China’s recalcitrance toward political democratization would be bewildering to some modernization theorists like Seymour Lipset (1959), who suggests a causal relation between the degree of modernization in a country and political openness. In this paper I examine how China’s historically weak fragile civil society helps to explain the country’s lack of democracy despite rapid economic development.

The lack of civic virtues can be traced to the period of state formation in Chinese history when this lack of civil society contributed to the self-enhancing authoritarian nature of Chinese statecraft. I also examine the role of Confucian thought—particularly through its political interpretation—in reinforcing hierarchical social and political relationships. Economic prosperity without democratic liberalization

China’s rapid economic growth distinguishes it from other authoritarian regimes in the Third World. Though it used to be a typical socialist country where the state was responsible for planning and managing the national economy and where private business was not allowed, China reformed and opened its economy after 1979. Since then, the Chinese leadership has adopted a more pragmatic perspective on many socioeconomic problems and has reduced the role of socialist ideology in economic policy.

The market economy reforms have unleashed individual initiatives, reduced poverty, and led to rapid economic growth. Since the reforms, China’s GDP has grown an average of 9.9% per year. In 2007, GDP grew by 13.1%, which was China’s fastest recorded growth since 1994 (Xinhua News Agency 2009), and in 2010 it became the world’s second largest economy after the U.S. (Barboza 2010). China could be come the world’s largest economy, by nominal GDP, as early as 2010 (Adam 2010). Additionally, its per capita income has grown at an average annual rate of more than 8% over the last three decades, with 250 million people being lifted out of poverty (World Bank 2009).

According to Lipset (1959), China should be on the path to democracy; modernization and wealth lead to increasing literacy, urbanization, and the growth of a middle class. In China, literacy rates in 2006 were at 90.7%, while urbanization increased from 17.92% in 1978 to 44.94% in 2007 (UNDP 2008). The impact of this impressive economic development is substantial, which, contrary to Lipset’s prediction, did not usher in any democratic transi-

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2 I have personally witnessed these controls, which are commonly known in other areas of the world as religious persecution.
tion in China but introduced many negative aspects. While both industry and agriculture benefit significantly from the economic reform, technology, labor productivity, and incomes have advanced much more rapidly in urban than in rural areas. The disparities between the two sectors have combined to form a socioeconomic gap between the more developed coastal provinces and the less developed inland regions, or more generally, between the rural and urban. This gap has become a major division in Chinese society.

The China Human Development Report 2007/08, compiled by a group of Chinese researchers for the United Nations Development Program, shows that the widening urban-rural income gap has reached a dangerous level. The report demonstrates that in all major categories of the human development index, from per capita income to life expectancy to literacy rate, regional imbalances are severe and growing. For instance, life expectancy in Guizhou is a decade shorter than in Shanghai, child mortality in Qinghai is seven times as high as in the capital, and illiteracy in Gansu five times more common than in Beijing.

Urban-rural development gaps have continued to widen in recent years. This can be reflected in the urban-rural income ratio, which has changed from 2.79 to 1 in 2000, to 3.33 to 1 in 2007 (UNDP 2008). Also, China’s Gini coefficient, a common measure of income inequality, has increased by more than 50% in the past twenty years; it once stood at 0.16 before the reform but now is reaching 0.47 (UNDP 2008). Migrant workers from the countryside remain outside of almost any system of social protection, and the elderly, female, and vulnerable dominate rural populations because of migration (UNDP 2010). All of these sources reveal the income gaps among different social groups, especially between the large number of migrant rural workers and the permanent urban population (UNDP 2008).

The cause of this difference could be seen as political, especially in light of the famous commitment of Deng Xiaoping to first get a small part of the people rich. The central government chose to first develop China’s east coast, where it was easier to attract foreign investment. When a country is experiencing rapid economic growth, income distribution gaps often widen and, with a few exceptions, only a small portion of the population enjoys the benefits of the country’s modernization drive. This in turn raises a question concerning China’s model of development, consisting of traditional political control and new economic policies, which exclude a large part of the population from China’s growing prosperity.

According to Lipset (1959), economic development will benefit every social class, and the role of the middle class is particularly essential in fostering democratic experiences. However, as demonstrated above, serious income inequality may reduce the power of the middle class to act fulfill its role. While
the widening gap between the rich and the poor may result in a smaller middle class than Lipset foresaw, and in which the have-nots as inferior and resist the egalitarian aspect of democracy (Lipset 1959). More importantly, an unequally developed society does not generally channel resources to the middle class, nor does it exert a positive influence on democratic change. The reason for this can be seen in the cycle in which pursuit of economic prosperity under the current system exacerbates the income gap, and the more skewed the distribution of incomes becomes the more motivated the upper segment of the income distribution would be to block any potential democratic transition, fearing the distributional consequences of democracy (Boix 2001).

A more in-depth examination of the middle class in China will demonstrate whether or not they are able to function as Lipset predicts. Three decades of economic reform have produced a middle class that enjoys a relatively high income by Chinese standards and that owns property such as houses and cars. In this case, does the middle class behave differently from other social groups, such as workers or peasants, in pursuing its interests? What role would the middle class play in the political development of China?

The role of the middle class in political development depends on its relations to the state and other political actors in society (Chen 2002). The middle class may be a force for democratization if it is vigorous and independent from the state (Moore 1993). In countries with a large and politically active working class, however, the middle class may feel threatened and thus favor the authoritarian status quo (Rueschemeyer 1992). Research on the middle class in authoritarian regimes like China and Vietnam seems to confirm this assessment (Gainsboroug 2002). The middle class in Pacific Asia thus cannot be characterized uniformly as either a progressive or a conservative force because its role is inconsistent. Yet, the “dependency culture” of the class in this region determines its nature especially when it faces pressure from the state (Jones 1998, 156).

Members of the middle class, despite higher economic status, demonstrate patterns of responses similar to those of workers and peasants when facing state power. Homeowners act in a manner that will fulfill the will of the state since they are fully aware of the boundaries of state tolerance. Those with property (e.g., homeowner) fear the power of the state to punish without protection from just legal systems, and feel compelled to take action acceptable to the state. Their cautious approach suggests that the middle class may not be more active than other social groups in promoting political development in China. In summary, when considering how they protect their interests facing encroachment from state and other social actors, the members of the Chinese middle class are largely acquiescent because of their intention to maintain the political order and limited ability to stage disruptive action (Cai 2005).
Historical basis for belief in unification and its consequence

Even though more than 80% of Chinese believe that China’s current income distribution is either “not so equitable” or “very inequitable,” according to a 2001 survey cited by the United Nations Development Program (UNDP), around 72% of Chinese in a 2007 Pew Global Attitude survey continue to express satisfaction with national conditions. This seeming contradiction may be partially resolved by Teresa Wright’s finding that nearly 60% of people surveyed in several major Chinese cities agree, “The most important condition for our country’s progress is political stability. Democratization under the current conditions would only lead to chaos” (Wright 2007, 3). Even those who launch extensive and lengthy protests, such as workers in former state-owned enterprises, rural migrants, and peasants, have not called for an end to the CCP’s rule. Instead, most direct their criticism against local state, union, and party officials while appealing to the central government for ultimate support and solutions, rather than blaming the CCP (Wright 2007).

The World Values Survey has conducted more comprehensive surveys on China’s political and social situation in 1990, 1995, 2001 and 2007. Echoing the findings above, these results cover a period of seventeen years after the economic reform. They expose in a clearer fashion the limited impact of economic development on certain important values of the Chinese public. For example, regarding the priority the country should have for the next ten years, “a high level of economic growth” or “strong defense forces” constantly outnumbers the choice that “people have more say about how things are done” by a substantial margin, with only 2.4% of Chinese choosing the latter in 1990 with only a small increase to 6.3% in 2007. When a similar question is put on the individual level, the vast majority considers “maintaining order in the nation” as the most important, while the number of people who prefer “giving people more say” actually decreases from 14% in 1990 to 11.1% in 2007. People who view greater respect for authority as a bad thing also decreased from 34% in 1990 to 8% in 2007, contrary once again to predictions from modernization theorists. While 35.5% of participants deem social injustice as responsible for people who live in need, over 70% of those surveyed have either “a great deal” or “quite a lot” of confidence in the ruling CCP (World Values Survey 2009).

These surveys clearly suggest that Chinese people have different understanding of what leads to security and harmony than just fair economic distribution and free individual expressions. While the very ideas of modern

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3 According to the UNDP survey of Chinese Public Perception of Income Distribution Gaps.
4 According to a global study by the Pew Global Attitude Project in 2007.
5 Statistics based on WVS Five Wave Aggregated File 1981-2005, using the online data analysis available on the WVS website.
democracy have only been discussed in China for roughly a century, an authoritarian rule has been officially sanctioned and accepted by the majority in China throughout the dynastic centuries in which China’s uniqueness assumes universal empire and authoritarian tradition to be the inevitable course of Chinese history and the multistate era represented only a chaotic interregnum, it exerts wide influence on how the state is perceived in state-society relation.

However, the ancient Chinese world did not begin with universal unification. As the feudal Zhou court went into decline in the Spring and Autumn period (656 BC), China entered into a multistate era that spanned roughly four centuries. While the sustained stability in the Spring and Autumn period witnessed attempts at domination, the Warring States system became increasingly unstable after the mid-fourth century BC. States one after another intensified their pursuit of domination, and many smaller states were conquered and annexed by the seven strongest states in this epoch. Eventually, the state of Qin managed to overcome various barriers and difficulties, known as “the impossible” to the Eurocentric logic of balancing (Waltz 1979, 329-330), and became the very first state to achieve universal domination in the ancient Chinese world in 221 BC.

Qin did not overcome formidable problems, such as the balance of power and the rising costs of expansion, simply by the notion of destiny to unification. Qin most notably developed the capacity for extremely institutionalized direct rule and was thus able to utilize its increased relative capability on both the diplomatic and military front. It was the comprehensive self-strengthening reforms, launched by Shang Yang from 356 BC, that elevated Qin from being “relatively backward economically and politically” to being a dominant and unified empire; its legacy left the later ages a model of conquest and governance to be imitated (Yang 1977, 10).

Shang Yang’s reforms were essentially efforts to increase military strength by building larger and stronger armies, to increase economic capabilities by rationalizing and nationalizing taxation, and to develop clever strategies by establishing meritocratic administration. Several hegemonic rivals proved a tight relationship between self-strengthening reforms and the ascendance in relative capabilities, and it was well accepted in this era of intensified wars that not to progress is to regress. Initially, Qin engaged in the reforms by elevating national capacity in the international realm; eventually the state engaged in more institutionalized reforms, making the state dominant in the interaction between state and society.

In order to effect the reforms, which aimed for a stronger army and larger wealth through tough reward-punishment systems, the administrative capacity of the central court needed to be strengthened to maximize extraction. In

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6 The early hegemonic rivals include Chu and Jin and again by the next generation of hegemonic rivals Wu and Yue.
order to implement these reforms, the central court was required to standardize measures to record available tax resources and to facilitate the centralization of accounting, seals and tallies to validate and supervise official as well as military command. Additionally, they centralized procedures to appoint and deploy officials and institutionalized criteria to evaluate performance and reward meritorious service (Hui 2005). Additionally, the reforms aimed to develop the capability of direct rule by allowing the ruling court to penetrate into society to the village level without reliance on intermediate power holders, such as regional magnates and local lords. In other words, the state had to increase its capacity in its state-society relations to increase its relative capability in interstate relations.

In this regard, Shang Yang added two lower administrative layers, xiang (townships) and li (villages), based on the existing administrative system of jun (prefectures) and xian (counties) (Hui 2005). This measure represented the final step toward direct rule, ultimately giving the Qin court the capacity to reach the village level. With this much more direct and penetrating administrative system, it was then possible to systematize universal military conscription by grouping village households into units of five on the model of five-man squads in military organization. Eligible villagers could be mobilized as easily as squads and platoons, allowing for virtually the entire country to go to war (Sawyer 1994). Shang Yang also tightened the policy of household registration, which formed the basis of military service, land tax, and corvée.

In order to maximize extraction of resources, the reform granted the central court the ability to directly tax nuclear families based on the number of eligible males rather than through a clan or a region. To further ensure that the central court was in full control of all human and material resources, Shang Yang required officials at all levels to submit annual reports that would be evaluated by the central state. With this ability to engage in total mobilization of national resources, Qin’s power and wealth reached a new height, which eventually carried it to hegemony and universal domination.

The benefits of self-strengthening reforms and the improved administration were continued by the subsequent rulers and have produced long-lasting influence on the conception of the state and its role in state-society relations. The administrative reforms not only fundamentally changed the pattern of checks and balances in the multi-state era, paving the way to unification, but they also made subsequent conquests against existing empires easier and thus more tempting. When faced with the challenges of consolidating conquered territory and financing further conquests, the administrative capability allowed

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7 It has been said that, besides its harsh legalism in government practice, the reason to Qin’s quick demise is its lack of uniformed ideology (the mandate of heaven) that gives loyalty to the emperor a metaphysical meaning. This loophole was better attended in Han, when Liu Che dedicated exclusive prominence to Confucianism.
Qin to avoid the feudal inefficiency of depending on local chiefs or magnates for contributions. Instead, it was able to exploit the conquered area with officials who were appointed by and responsible only to the central court. China developed the centralized, bureaucratic state with “the ability to appoint officials, dispatch them to remote cities, maintain control over them at a distance, and remove them when necessary” (Lewis 1999, 603). As Richard Walker remarked, “without this background of development,” “the unification of China … could never have taken place” (Walker 1953, 35).

The same logic that favors consolidation in a multi-state period also has a similar effect on conquest. Once the jun and xian became standard administrative units under a centralized administration, these relatively coherent administrative and coercive apparatuses actually facilitated total conquest. As Max Weber pointed out:

“The objective indispensability of the once-existing apparatus, with its peculiar, ‘impersonal’ character, means that the mechanism—in contrast to feudal orders based upon personal piety—is easily made to work for anybody who knows how to gain control over it … he merely needs to change the top officials” (1958, 229).

Niccolo Machiavelli argued that though it may be difficult to conquer a kingdom with centralized authority, “it would be very easy to hold on to it” because there was “no reason to fear opposition.” On the other hand, it would be easy to invade a kingdom ruled by a monarch in conjunction with nobles because there were always “malcontents.” But “it simply is not sufficient to kill the ruler and his close relatives, for the rest of the nobility will survive to provide leadership for new insurrections” (The Prince, in Wootton 1994, 16).

In China, the ruler of the state had less of a need for allies, and he did not have to share the burden of war nor the spoils of victory because the self-strengthened state enjoyed various enhancements in military, economic and administrative capabilities. This contrasts with Europe where kings and feudal lords were commonly required to cooperate during wars with a sharing of the financial burden and goods obtained. This resulted in the establishment of the tradition of cooperation, which generated significant ideological derivatives like the Magna Carta. In China, on the other hand, the administration under the centralized state intensified opportunistic expansion by wholesale takeover. After the short-lived Qin, empires and dynasties rose and fell. The reason for this is twofold: first, the progress achieved in the self-strengthened state lead to “the differential growth of power among states,” which essentially “alters the cost of changing the international system and therefore the incentives for changing the international system” (Gilpin 1981, 95); second, any capable
military leader could overthrow the emperor in order to rule the country made total conquest more tempting.

If the existing emperor is aware that he and his throne are inseparable only if he can prevent an insurrection strong enough to destroy both himself and his household, it is in his best interests not to share substantial power with anyone except the most trusted. Furthermore, the succession of emperors was not determined by bloodline; in theory, the one who founded his own dynasty could be anyone in society. The best examples of this include the founder of the Han (206 BC-AD 220), the first long-lasting dynasty after Qin, and Liu Bang, the founder of Ming (1368-1644), the last great dynasty of native rule and one of the most stable and autocratic.\footnote{Born of a peasant family (whose parents’ names were not even recorded in history and he was named Ji, which simply means “the youngest one”, until he assumed the title of King of Han), Liu Bang began as a mere patrol officer in a county office under Qin dynasty. Outspoken and charismatic, Liu was nonetheless a coarse man from the countryside who once urinated into the formal hat of a court scholar to show his disdain for education.}

The instability of the emperor’s position of power caused him to make sure that no deployment of military forces, promotion and demotion of administrators and generals, and successes and flow of taxes could occur without his command. Once a necessary product of the Warring States period for states’ survival, the penetrating administrative techniques in the self-strengthening reforms became a necessity to guard the dynastic estate of the emperor against any potential threat of insurrection. However, the more power allocated to the emperor for security reasons, the more authoritarian and despotic the emperor tended to be. This was likely to produce malcontented citizens who were tempted to overthrow the existing dynasty with force. The only way to guard against this threat historically, as mentioned before, was to further centralize the power of the state so that the emperor supervises both the bureaucracy and society..\footnote{After the establishment of the Han Dynasty, Liu grew suspicious of his subjects who contributed heavily to the dynasty’s founding, that these regional kings might rebel against him. So he executed most of them on charges of treason and their clans exterminated as well, and confiscated their fiefs.} This way, the institutional aspect of the authoritarian and bureaucratic state, which was once a mark of government efficiency in the ancient Chinese system became self-fulfilling and self-enhancing. This led to a gradual but observable escalation of the strict top-down nature of Chinese politics and reinforced the coercive aspect of the state’s role in state-society relations.\footnote{In 1380, Zhu Yuanzhang abolished all executive posts in the Secretariat, leaving the emperor as the central government’s sole coordinator of any significance. Zhu and the subsequent rulers of the Ming are also known for their use of spy agencies (Jinyi Wei and Dong Chang), who took direct order from the emperor and were authorized to overrule judicial proceedings with full autonomy in arresting, interrogating, detaining without trial and punishing anyone, including nobles and the emperor’s relatives.}
path of centralized bureaucratic state, the wise ones realized that an empire could not be held together with merely authoritarian institutions such as top-down government agencies and harsh laws with severe punishment. In fact, beginning in Han dynasty, the influence of Confucianism increased. However, Confucian scholars were continuing to hold office at the court, serving in the best interest of the ruler. Thus, a set of ideological boundaries on how the state ought to be perceived in the greater realm of society emerged from the Confucian classics with the emperor’s approval. The key of this “politicized Confucianism” was to lure people into believing in an undeniable causal relation between the unified empire with peace and harmony for everyone. When the country is unified under one single central government that is strong enough to exercise definitive authority over local regions, peace and stability can be achieved; only then can prosperity and harmony be attained. This belief in universal unification not only implies that any insurrection will ruin peace and prosperity for the nation, but it also sets the same trap for anyone that dares to challenge the ultimate power either politically or culturally. Society is supposed to be united by looking up to the sole standard manifested in the absolute central government. Thus, working with the one decisive locus of power according to its political and social hierarchy is praised, while any assertion of distinction or divergence from the state’s guidance is seen as separation from the manifest truth and thus a sign of creating chaos (Spence 1991).

If the centralized bureaucratic state necessitates a popular belief in the benefits of universal unification, it also facilitates a set of civic wisdom in the Chinese perspective: Do not challenge the state, for being perceived as insurrection is dreadfully costly (unless one cannot find any other way to live); and participate in the political and social hierarchy to reap the gains by flattering the people above and subduing the ones below. Unlike this civil pattern that has been in the blood of China’s dynastic cycles, civic virtues according to Robert Putnam (1993) are the tolerance for different voices and the willingness to compromise in state-society relation, mutual trust within and among social networks and political apparatuses, active political participation in light of the belief in political equality and appropriate respect of authority. They seem strikingly foreign and even to a point of offensive in the realm of Chinese political and historical traditions. Though there are differences between China and Italy, Putnam’s logic, which states that neither institutional design nor economic development can guarantee high institutional performance and maintenance of democracy, is still applicable to China. Rather, social capital, as the fruit of civic virtues, is key to why some regional governments had better democratic performance in Italy.

However, it would be too extreme to deny the presence of civil society in traditional China as the institutional basis of civic virtues mentioned above.
While the presence of civil society in imperial China has been affirmed in various forms, such as in guilds, religious sects and native place associations, their autonomy is limited because of the state’s bureaucratic resources. One can speak intelligibly of their autonomy from the state only in the sense of the limitation of state’s bureaucratic resources and its consequent inability to dictate every single action in individuals’ daily lives; however, they do not provide legal protection or the capability to exert influence on the state regarding political policies for their interest (Rowe 1993).

In fact, civil society and associations were unwilling to pursue any autonomy from the state or separation between state and society. It was simply not the norm of the day to counter the orthodox sociopolitical hierarchies. For example, while religious sects such as White Lotus were often banned or persecuted by the government, they were less likely to negotiate terms with the state about autonomy and simply avoided any involvement with the state machine; they were rather the target of extermination rather than that of tolerance and compromise (Rowe 1993). Since merchants were traditionally viewed as lacking true civility, they generally were not in a position to exert pressure on the government about public policy and instead left such matters to the imperial court. Furthermore, they did not have to be the designers of public policies nor live at the sufferance of the state to advance their interests. Why would the merchants risk their lives and estate to counter the norm in exercising civic virtues, when they could comfortably comply with the norm and participate in the sociopolitical hierarchies by relying on a powerful patron in the bureaucracy with bribes? Even though the guilds were generally well organized, they operated not as pressure groups struggling for independent identities but as protective associations for the betterment of their benefits despite the means (Pye 1999).

If a well-formed civil society implies an explicit recognition by the state of the right of organizations to act without state inference, and therefore prepares publicly recognized social bases for pluralism free from government persecution, we can only speak of the institutional aspects of an emerging civil society in traditional China. As analyzed before, the self-enhancing nature of the authoritarian and bureaucratic state preconditions the coercive aspect of the state’s role in state-society relation and cannot afford to leave the public or civil society as a non-politicized space. The emerging civil society was either not strong enough or not simply willing to equip existing society with civic virtues so that extermination of political threat would be met with tolerance and compromise. Compliance with political hierarchy would be met with horizontal cooperation and self-government, and mutual trust between political and social realms.

Both the mandarin and the peasant, who ranked above the merchant, agreed that the game of the merchant was to cheat the customer.
With the prevailing norm of compliance with the orthodox sociopolitical hierarchies and the feeble influence of civic virtues generated by the relatively weak civil society in traditional China, one can understand why there have not been sufficient social and ideological forces to break away from the deep-rooted chains of authoritarian regimes; none of the attempts to introduce democratic liberalization to China have succeeded since the First Opium War in the 1840s. For example, industrialization for the “self-strengthening” movement from 1861-1894 failed to consolidate the Qing dynasty’s power by introducing Western technology, as did “The Hundred Days of Reform,” which fought to establish a constitutional monarchy in 1898. Among all the attempts, the fiasco of the Chinese Republic established in 1911 is probably the most miserable, for it caused much disillusionment by revealing the failure to establish a civil society, at the time was able to sustain a functional democracy. Even though civil society is unlikely to be the sole requirement for democratization, it is rather clear that some measure of civil society, such as the social bases for pluralism and state-society separation, is necessary for effective democracy. By understanding the development of the self-enhancing authoritarian nature of the Chinese state and the force of its consequent ideological propaganda in comparison to its weak civil society and civic virtues, it is less surprising that the reign of the CCP has shown few sign of democratic liberalization despite economic progress over the last thirty years. Civil society rooted in a nation’s history, and especially the civic virtues as a deriving ethics and source of social capital, not only matters but has greater endurance than modernization (Putnam 1993).

**Serving the ruler’s ideology: teachings of Confucius in political interpretation**

In order to find a more in-depth explanation for the cultural-philosophical formation and acceptance of the ruler’s ideology, as well as its implications for the potential of democracy in China, we must study Confucius’s teachings. Confucius (Kongzi) (551-479 B.C.) has had an enormous influence in shaping Chinese society for over two millennia. Both the theory and practice of Confucianism have indelibly marked the patterns of government, society, education, and family in China. In the political realm, Confucius’s teachings have been particularly influential. The teachings laid the ideological foundation for the hierarchical and patron-client political structure in China; in this sense, they provide a deep explanation for China’s relative indifference toward civic virtues.

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12 Confucius’ teachings on going beyond rituals to cultivate a heart of kindness are not relevant here to the paper’s argument.
Confucius’s philosophy developed as he grew up in a society divided into warring states. He considered himself a scholar whose obligation was to transmit the moral way of the ancient sage kings, the founders of the Zhou Dynasty (1027-256 B.C.). Their successful and rightful rule was discerned to come from Heaven, and the knowledge of Heaven as absolute morality was vastly embraced well before the time of Confucius (Matthews 2008).

To Confucius, Heaven was a peaceful, harmonious, and life-supporting force, the constant pattern of the universe that provides for people on the earth. He asserted that we should naturally imitate the way of Heaven so that the human society on earth can also enjoy peace and harmony. The way of doing this is to be obedient to the Mandate of Heaven (Tian Ming) by following the set of rituals that mirrored the pattern of Heaven (li) with the help of everyone’s inner moral capacity for virtue (de) bestowed upon humans from Heaven. Therefore li, which is primarily the correct formal way to behave in religious rites or court ceremonies, is the principle of harmony that should rule one’s house, society, and empire.

In terms of the role of government, the ruler, and people’s relationship to them, Confucius affirmed that a country should be governed by li; since only when the ruler “guides the common people with virtue, keeps them in line by means of ritual, will the people have a sense of shame and draw near you.” (2:3) Confucius thought that “simply by being a good son and friendly to his brothers a man can exert an influence upon government. In doing so a man is taking part in government.” (2:21) In other words, he considered the government-people relationship to be based on the father-son relationship, on which he taught, “In serving your parents, you may gently remonstrate with them. However, once it becomes apparent that they have not taken your criticism to heart, you should be respectful and do not oppose them, and follow their lead diligently without resentment.” (4:18) Therefore, according to Confucius’s understanding, the government-people relationship is in fact a relationship between superior and inferior persons, or a ruler-subject relationship. But how could such a relationship actually work to sustain one’s rule and bring harmony to society? Confucius replied, “A young person who is filial and respectful of his elders rarely becomes the kind of person who is inclined to defy his superiors, and there has never been a case of one who is disinclined to defy his superiors stirring up rebellion.” (1:2)

Thus, if governing the country by li means to “Let the lord be lord, the minister minister, the father father, and the son son,” (12:11)—people performing their own roles in society just like the stars following their own courses in

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13 All the following quotes indicated in quotation marks come from Van Voorst, Robert E. 2007. Anthology of World Scriptures. (2:3) means the quote is from chapter 2 verse 3 of Confucius’ Analects
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heaven—then any attempt to overstep the boundaries becomes an attempt to disrupt li and consequently to create chaos over harmony. This should not only be discouraged but also condemned. Therefore, this perception of the relationship between the government and the people is doubtlessly hierarchical. For example, when Confucius saw the official Ji had eight rows of dancers performing in his courtyard, which was rightful only for the emperor, the teacher was enraged and said, “If they can tolerate this, what else could be intolerable?” (3:1) Based on this philosophy people are not expected to challenge the ruler or rebel against him, especially when the ruler is seen to represent the mandate of Heaven, on which Confucius taught that “Once you have incurred the wrath of Heaven, there is no one to whom you can pray for help.” (3:13)

Though the relationship between the government and the people is unequal, each side has a formal responsibility to act toward each other on the basis of li. By asserting, “he who exercises government by means of his virtue may be compared to the north polar star, which keeps its place and all the stars turn towards it,” (2:1) Confucius viewed a virtuous ruler as an imitation of the way of Heaven who thus rules by the mandate of Heaven. As a result, it is the ruler’s responsibility to be the channel of Heaven’s harmonious and life-supporting force, and to take care of the people with food, shelter, and clothes, since he is deemed to be the mediator between Heaven and the people. On the other side, it is then the people’s responsibility to be grateful, respectful and obedient to the ruler. This is likely one ideological origin of the patron-client relationship so deeply embedded in Chinese society.

When a person lives up to all of Confucius’ teachings, he becomes the model human being for others to follow in society—a gentleman or superior man (junzi), who has no other than the way of Heaven in his heart and could thus “follow my heart’s desires without overstepping the bounds of propriety.” (2:4) The junzi always acts from the internalized principle of li and is never at a loss on how to behave in any situation. This means he is best at observing the five relationships between superior and inferior persons, the ruler-subject and father-son relationships being the most prominent, and making sure that each side carries out its responsibility. Consequently, a junzi is expected to solve social conflicts by relying on the hierarchical and patron-client relationship between the ruler and the subject. In this sense, a junzi should not cry for freedom or equality, nor gather people to solve their own problems through cooperation and compromise. He should perform his own role well in his own role in the vertical relationship toward the superiors and the inferiors, since overstepping the authority of the ruler means overstepping the pattern of Heaven. The ultimate goal of a Confucian scholar is to exert influence at the political center by becoming a member of the bureaucracy. He makes sure that the emperor is imitating the way of Heaven, which is the only way for society
to enjoy peace and harmony. He is a part of this hierarchical and patron-client relationship and consequently finds himself helping to sustain it.

As for the negative influence of Confucianism on political culture, other political scientists also offer similar opinions. Liberal democracy excites little appeal in China primarily because of, according to David Jones (1998), “the anxious pursuit of hierarchically coded relationships daily manifested in the personalized factionalism of the ostensibly communitarian politics.” Particularly in the case of Confucianism, power is understood as the capacity to harmonize and balance and attracts subjects to seek the assurance that relationships of dependence provide (Jones 1998). Moreover, because of the emphasis on the key Confucian relationships of father-son and brother-brother, people presume that secure intimacy ought to be based on kinships, and consequently relations with strangers tend to be approached with distrust and suspicion. Thus, Confucianism’s lack of civility for all but face-to-face encounters is hardly a favorable condition for participatory democracy (Pye 1999).

A more interesting analysis comes from Mary Rankin (1990). According to Rankin, the Confucian rules of ethics applied to both the public and private realms only in a way that reinforced the powers of the state, since, in Confucian values, the selfish assertion of private interest in the state or public realm was a gross social evil. Therefore, the local elites usually complemented the state instead of challenging the state with a different agenda of interests and concerns of themselves. This tradition in turn inhibited the development of a true civil society, because it worked to suppress the articulation of special interests and to deny legitimacy to a political process by which the society could balance the powers of the state (Pye 1999).

In summary, Confucianism, as a dominant tradition of moral standards that heavily influenced the individual and community life in China, has discouraged the development of civic virtues as the deriving ethics of civil society in the last two thousand years. While the influence of this tradition was embedded in Chinese people’s mind so deeply over such an extended period of time, it blended with other cultural elements to form a unified Chinese social worldview. It is precisely this worldview that continues to exert considerable influence on Chinese minds this day, either on the surface or subconsciously, and is unlikely to change in the near future.

**Conclusion**

The rapid economic development in China under the current political system has brought not only impressive annual GDP, but also rising inequality in income distribution. In the case of China, the social impact of economic development—the vicious cycle driven by widening income inequality—actually
Money or Trust: Prospects of Democratization in China constitutes a hindrance to democratization, contrary to what modernization theories would predict. The data from various surveys also indicates the lack of power of the economic variables in explaining some important political values of the Chinese public. With the growing middle class and the development of a society that enjoys information diffusion, we see some increase in criticism of the state. However, pro-democratic events such as the Jasmine revolution still do not find much market in China.

The lack of social trust and civic virtues, which disable the Chinese middle class to function pro-democratically, is rooted historically to when and how the first unified China was achieved. The governing system of concentrated power in the centralized state, which made the first unification possible and shaped future empires, and was enhanced with the ruler’s interpretation of Confucius’ teachings. Together these forces have combined to form a formidable political ideology that stood the test of time and continues to dominate China’s sociopolitical environment to this day. In his book, Rob Gifford rightly laments the fact that “China the concept, China the empire, China the construct of two thousand years of imperial thinking” has forbidden and may always forbid “independent thinking” that leads to the questioning of China’s political system (2008, 167).

Money or trust: which one will emancipate the current Chinese nation - their hearts and minds - from their past so that China will achieve the dream of democracy?

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