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A Letter from the Editor-In-Chief

Dear Readers,

It gives me great pleasure to present you with the very first print edition of the Claremont Law Journal (CLJ), the new undergraduate legal publication of the Claremont Colleges! We began this project in September 2013 with the dream of fostering a strong community of students dedicated to lively intellectual discussion and debate about the most critical legal issues of our time. This compilation of student-written articles and student-conducted interviews with prominent legal scholars is the fruit of those efforts, designed to showcase some of the exciting legal scholarship and debate happening on campus.

In addition, I am pleased to inform you that the CLJ is recruiting talented new students to produce and edit exciting new content for next year. In addition, we are also seeking dedicated students who can fill open positions on our Executive Board, which meets weekly and which is responsible for facilitating the smooth operation of the CLJ, including running our website, organizing law-related events for the Claremont Colleges community and for CLJ staff, establishing a social media presence, publishing content in print and online, recruiting new contributors and making strategic decisions. If you are a student interested in contributing to the CLJ, please visit claremontlawjournal.com for more information and the link to our online application portal. Similarly, if you are an alumnus of the Claremont Colleges who is interested in assisting the CLJ by providing advice, financial support, assistance in organizing law-related events on campus or any other kind of assistance, please email me at bcohen16@cmc.edu. We would love your participation!

I would like to thank the many people whose help has been critical to the early success of this project. Professors Mark Blitz and George Thomas and the Salvatori Center have been essential in facilitating our ability to publish in print, and we are indebted to them for that. We are also grateful to Professors Kenneth Miller, Joseph Bessette and Giorgi Areshidze for serving as faculty readers for our student-produced content. In addition, we are grateful to Professor Miller for his participation in one of the interviews featured in this issue, and to NYU Law School Professor Jerome Cohen for his participation in two interviews featured in this issue. We are also grateful for the advice and support we received in the early stages of this project from Professor Areshidze, Professor Cohen, Professor Thomas, Attorney Rhett Francisco, and USC Law Review Executive Board member Laura Sucheski. Finally, I personally would like to thank every student who has contributed to the CLJ this year, in ways large and small. Special thanks go to our Senior Editors Kerry Moller, Hannah Dunham, Henry Appel and Michelle Goodwin, our Webmaster and Publisher Jessica Azerad, our Business Directors Bailey Yellen, Nicky Blumm, and Christina Coffin, our Marketing Director Shane Griffee, our Recruiting Officer Martin Sicilian, Business Director Emeritus Camilo Vilaseca, as well as contributors Joseph Hinton, Nikhil Khanade, Harry Arnold, Martin Sicilian, Charlotte Bailey, Adrian Vallens Maddie Davidson and others. Without all of you, none of this would have been possible.

Byron Cohen
Editor-In-Chief

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California's Ballot Initiative Process:
Direct Democracy and the Role of the Courts

An Interview with Dr. Kenneth Miller, Professor of Government at Claremont McKenna College

This interview was co-hosted by Charlotte Bailey (CMC '16) and Adrian Vallens (CMC '14)

Biography: Kenneth P. Miller is a Professor of Government at Claremont McKenna College specializing in California politics, direct democracy, and state constitutional law. Miller is the Associate Director of the Rose Institute of State and Local Government, a research institute known for its expertise in redistricting, elections, demographic research, and public policy analysis. Miller is the author or coauthor of several books and articles regarding California politics and direct democracy. His *Direct Democracy and the Courts* (2009), which examines the initiative process and judicial review within the checks and balances system, has been called "the standard work on the relationship between the judiciary and direct democracy". Miller has a J.D. from Harvard Law School (1988) and a Ph.D in political science from the University of California at Berkeley (2002). Prior to his academic career, Miller was an attorney with the law firm Morrison & Foerster and in 1991 co-founded the firm's Sacramento office.

Bailey: Dr. Miller, thank you for doing this interview. Could you briefly explain the history of the initiative process, specifically in California, and its evolution up to today?

Miller: The initiative process came to the United States and California by way of Switzerland. There were American reformers in the 19th century who believed that the initiative system, which then existed in the Cantons of Switzerland, could provide a remedy to what they thought was the capture of representative government by special interests. The initiative process promised that the people could enact laws directly, going around their representatives and thereby converting public opinion into public policy directly. There was a deep concern about the capture of legislatures by special interests, especially corporate interests in California—the railroads—so the idea started to get traction in the western part of United States where populism and later progressivism were at that point flourishing.

Bailey: In your opinion has the initiative process constrained the California legislature? Or has it left it relatively unchanged?

Miller: If I might, I first should probably say a little bit more about California and how it got the initiative process. California was not the first state to adopt the initiative process; the first was South Dakota in 1898. But the first state to use the initiative process was Oregon, which during first decade of 20th century really developed the process and used it extensively. So the initiative process was originally called the Oregon System. California adopted the initiative process in a special election in 1911 and started adopting initiatives in 1912. So it's about a century old in California. Many states adopted the initiative process during the progressive era, especially western states, and today 24 states out of 50 have this system. Since California adopted the process, California has used it more extensively and more consequentially than any other state.

So with respect to the original question about the effects on the legislature, the important thing to note is that the initiative process in California has been used with an irregular frequency. Early after its adoption, it was used frequently in 1910s and 1920s. Then in the 30s, 40s, 50s and 60s, its usage declined, so that by the 50s and 60s it was moribund, essentially. In the 1970s there was a major revival of the usage of the initiative process in California and the other states. One of the most notable initiatives that really demonstrated its potential impact was Proposition 13 in 1978, which was the Howard Jarvis initiative that rolled back property taxes in California and made it more difficult to raise taxes in the state. It was a landmark piece of constitutional amendment in California. After that, various interest groups recognized that they could use the initiative process to achieve things that they could not otherwise achieve through the legislative process. By going directly to the voters, they could achieve fundamental policy changes in a way that was not necessarily possible through the give and take of normal legislation.

Vallens: Did we start seeing court involvement with initiatives during this revival period after Proposition 13? Or did court review of initiatives begin before then?

Miller: One of the interesting questions is the extent to which the initiative process bypasses the checks and balances of the American constitutional system of government. In a way, it really does bypass legislatures to a large extent, especially in California where the legislature cannot amend initiatives unless the initiative itself allows for its own amendment. The voters can lock-in policies without the legislature having an opportunity to amend or appeal them without first going back to the voters. There really are only very limited legislative checks on the initiative process. The most important and frequently used check is judicial review, where the courts bear a heavy responsibility for exercising a check on what is otherwise pure direct democracy. The courts have used the power of judicial review to constrain the initiative process extensively over state history. Going back to the earliest use of the initiative process, many initiatives have been challenged after the election and many have been overturned either in part or in their entirety by the courts. The phenomenon where opponents of initiatives challenge them in courts has actually accelerated over time and now it's become a pervasive part of the initiative process. At least for some issues, it's more frequent than not that an initiative will be challenged after the election.

Vallens: Can we talk a little more about why certain groups might challenge initiatives and others may not? Some of the literature I have read says that one constraint on groups going to court over initiatives is that the groups that oppose them disband after the elections

and there is no one to bring a lawsuit. So when does that type of situation occur, in contrast to situations where there is strong legal action?

Miller: Well there are a couple of factors that determine whether an initiative will be challenged after an election. One is the subject matter of the initiative. There are certain types of issues that are pursued through the initiative process, such as criminal justice initiatives to increase criminal penalties or restrict the rights of criminal defendants, which routinely are challenged by persons who are being prosecuted in the criminal justice system. And there are a number of constitutional protections in both the state and federal constitutions that provide opportunities to challenge tough-on-crime initiatives. Another type of issue is campaign finance reform initiatives. They're routinely challenged for being in violation or in conflict with the First Amendment of the U.S. Constitution. Typically, initiatives that deal with rights and definitions of rights, or restrictions on rights, are challenged after the election. But there are also other kinds of issues that might come into conflict with the rules of federalism or the technical rules for adopting initiatives. California, like a lot of other states, has a rule called the single subject rule, which states that an initiative can only have one subject. If it is a complicated measure dealing with several different issues, then an opponent will often come along and say that it violates the single subject rule.

Vallens: Was the single subject rule passed via initiative?

Miller: The single subject rule passed through a constitutional amendment put on the ballot by the legislature after an initiative that had many thousands of words and wide-ranging effects over many different issues passed. It was an omnibus proposal. It was called "ham and eggs." It was so complicated and complex that there was a consensus in the state that there should be some sort of restriction on how many subjects an initiative can contain. So now there is a single subject rule. However, it should be said that the California courts have been pretty lenient in their definition of what constitutes a subject. So if something falls within a general topic area, like political reform, the courts will say it's cohesive enough that we can say that it falls within a single subject. Other state supreme courts have been more restrictive and have struck down initiatives under their own single subject rules. This shows the variation in how different courts treat the initiative process in different states. California has been more protective of the initiative process than state supreme courts in states like Florida and Colorado have been.

Vallens: Is that related to the fact that in California judges appear on the ballot?

"The phenomenon where opponents of initiatives challenge them in courts has actually accelerated over time and now it's become a pervasive part of the initiative process. At least for some issues, it's more frequent than not that an initiative will be challenged after the election."

Miller: Well in most states judges face election, so I don't think that's it. It's not completely clear why the California judiciary as a whole has been rhetorically supportive of the initiative process. On the other hand, the California Supreme Court has struck down many initiatives on substantive grounds, not on technical grounds like the violation of the single subject rule. They have been quite willing to strike down initiatives as violating either the state or the federal Constitution. Initiatives get challenged either in state or federal court. Increasingly, opponents of initiatives have turned to the federal courts where they have found many judges receptive to federal constitutional questions regarding California ballot measures.

There's a new wrinkle in this that was created by the US Supreme Court's recent decision in the case of *Hollingsworth v. Perry*, the Prop 8 case. In that case the federal district judge declared that Proposition 8, the 2008 initiative that declared "only marriage between a man and a woman is valid or recognized in California," violated the US Constitution. The Attorney General and Governor of California declined to defend Proposition 8 on appeal and the question was whether the official proponents of

the initiative had standing under Article III of the federal Constitution to defend the initiative in federal court. The Supreme Court and the judges in the Hollingsworth case said that proponents of initatives do not have standing. This creates a situation where if an opponent gets a federal district judge to declare an initiative invalid and the state officials decline to defend it in court, then the state officials in that scenario effectively have veto power over initiatives. We are seeing this in other states like Nevada, where state officials are relying on the *Hollingsworth* decision and are not appealing similar marriage initiatives that are currently being challenged in federal court.

Vallens: Have there been any attempts to remedy that potential problem?

Miller: Election law scholars and practitioners are looking at different scenarios that might satisfy Chief Justice John Roberts's opinion in the *Hollingsworth* case. Roberts says there is an agency problem in that public officials are essentially agents of the public and so they represent the public's interest in defending state laws, whereas initiative proponents are not strictly agents of the people because nobody has elected them and so they cannot be held accountable. Therefore, Roberts held that proponents should not have Article III standing.

Vallens: But in the *US v. Windsor* case, didn't the court allow-

Miller: Well, in the *Windsor* case, the Obama administration declined to defend DOMA, but the House of Representatives used the BLAG (Bipartisan Legal Advisory Group), essentially composed of House Republicans and a few Democrats, to intervene. The US Supreme Court allowed this on the grounds that these were elected government officials. Initiative proponents are usually private citizens, so the *Windsor* case is an exception. There has been some brainstorming among legal scholars as to how the initiative process can work around this. For example, an initiative could by its terms designate initiative proponents as being agents of the state for purposes of defending an initiative if it has been challenged after the election. It isn't clear whether or not that would satisfy what the Supreme Court is requiring, or whether the state could create an office separate from the office of the Attorney General to represent initiatives when the Attorney General refuses to do so. But it hasn't really been worked out. All of this creates a real problem for the initiative process in circumstances where initiatives are opposed by government officials. The original theory of the initiative process was that it was supposed to give people the power and opportunity to countermand government officials if they were not acting consistently with majority opinion, and so what this recent decision of the Supreme Court does, which Kennedy in his dissenting opinion notes, is it undermines the basic premise of the initiative process.

Vallens: I'm surprised that hasn't come up sooner.

Miller: There was one case in Arizona in the 1990's that came about when voters tried to pass an "Official English" initiative that would establish English as the official language of Arizona, so that public officials wouldn't do any business in Spanish. This was challenged in federal court and the Arizona officials declined to defend it. It turned out that the US Supreme Court said the issue was moot because the person challenging the law left state employment and thus no longer had standing. They didn't reach the merits, but in the opinion the Court expressed grave doubt as to whether the initiative proponents would have Article III standing. By a 5-4 decision in the *Hollingsworth* case, the Court said proponents do not have standing in such cases. There was an interesting ideological divide on the court. The majority consisted of Chief Justice Roberts, Justice Scalia, Justice Ginsburg, Justice Breyer and Justice Kagan. The dissenters were Justice Alito, Justice Thomas, Justice Kennedy and Justice Sotomayor. It didn't fall along the normal lines. There might have been a backstory there in which the Court was attempting to dodge the thorny issue of same sex marriage,

so perhaps this was a way to make the Proposition 8 case go away without having to deal with the issue of gay marriage broadly. On the other hand, the Court is going to have to face the issue in the next year or two. There are so many related cases now heading directly for the Supreme Court. Probably not this term, but next term, they're going to have to address the issue.

Vallens: Will they also have to address the standing issue as well, especially as they try different things?

Miller: I think there's going to be enough cases on the same sex marriage issue, both initiatives and constitutional amendments, which will avoid the standing problem. So the Court will have to deal with the substantive issue. I think the Court has now created a problem going forward for the initiative process where if there are other contentious issues where state officials decline to defend a restriction on affirmative action or some restrictive thing on criminal justice issues, this could be an opportunity for state officials to strike down initiatives they don't like without having to go through full judicial adjudication.

Vallens: So this relates back a little bit to the politics of the initiative process. If you have one liberal group that passes an initiative but the government is conservative, you're going to have a clash.

Miller: Right, absolutely. You can see that on an issue like gun regulations or things like that, or even campaign finance reform.

Bailey: So looking to this year's elections, what are the more controversial initiatives coming up on the ballot that you think are likely to pass and/or be challenged?

Miller: There are a couple of criminal justice initiatives that have not yet qualified but have been heavily circulated. One would expedite the process for the capital punishment appeals process in California. That would potentially face legal challenge after the election. Another would reduce the criminal penalties for certain offenses in California. I think these two really demonstrate the asymmetry in judicial review of initiatives; those that tend to be more restrictive with respect to rights face more challenges, whereas those that seek to expand rights are less subject to legal challenge. The check on the latter group is exclusively a political challenge, since the people can decide not to expand rights. But if they choose to restrict rights, the courts can come along and say that it violates the Constitution. On reducing criminal penalties – there is no Constitutional restriction on doing so. Additionally, there may be a marijuana initiative. There is actually a latent legal issue with state legalization of marijuana, which is that it comes into conflict with federal law. Is it permissible for the state to legalize something that the federal government criminalizes? So far, there have been some cases on this but none that have squarely addressed that question. That conflict could be an issue moving forward. Again, it is typically the case where states are more restrictive on rights than the federal government where you get litigation.

Bailey: Last question. It's about Proposition 13, which you touched on little bit earlier. It is over three decades old and still very much part of the California Constitution. Do you think it is too protected by interest groups at this point to be overturned or amended?

Miller: I think Proposition 13 represents a moment and an era in California, which was essentially a conservative moment in the 1970's through the recent period. At least on tax policy, Californians were quite conservative and uniformly proposed tax decreases. There has been slippage on that with things like Proposition 30 two years ago. As the electorate in general becomes more democratic and liberal, I think there is an opening for Proposition 13 to be at least modified, if not completely repealed. There are certainly ways in which you could modify it. You could say it applies only to residential properties, not commercial properties, which would create what is called a split roll. This is a quite plausible amendment. One could also modify the restriction on a 2/3 vote on raising taxes. There are certain parts of Proposition 13 that are vulnerable if strategically attacked by well funded opponents, but Jerry Brown, who was governor when Proposition 13 was adopted the first time, is very wary of taking it on. I don't think he will be the one to do it. I think it will likely be some future governor or another initiative advocate who will make the case that Proposition 13 needs to be modified to reconstruct the fiscal system in the state.

Bailey: Thank you so much, Professor Miller.

Vallens: Yes, thank you.

Miller: It's been a pleasure.

President Obama with former US Secretary of Health and Human Services Kathleen Sebelius

Supreme Court Preview: Analysis of *Hobby Lobby v. Sebelius*

By Martin Sicilian, Pomona College '17

On June 28, 2012, the Supreme Court upheld the individual mandate to purchase health insurance that is at the heart of the Affordable Care Act (ACA), which aims to provide every U.S. citizen with comprehensive healthcare. The part of this provision that requires large businesses to buy plans that offer all forms of contraception at no cost to the employee is called the contraceptive mandate. Among these contraceptives are four drugs that prevent a fertilized egg from implanting in the uterus, known as "abortifacient drugs." Churches and some other non-profit religious corporations are exempt from the mandate on religious grounds. Small businesses are exempt from the mandate, which applies only to businesses with 50 or more employees.

In June 2014, the Supreme Court will decide the case *Hobby Lobby v. Sebelius* together with a companion case, *Conestoga Wood Specialties Corp. v. Sebelius*. For the first time, the Court will address the question of whether or not for-profit corporations have free exercise rights protected under the First Amendment. The Court's decision will weigh religious liberty against women's rights, public health, and equal access to comprehensive healthcare. This case presents a set of complex issues, and the lower courts are divided. Three federal circuit courts of appeal – the Seventh, Tenth, and D.C. Circuits – have ruled that for-profit private employers can claim religious exemptions from the mandate, and two – the Third and the Sixth- have rejected the religious liberty claims.[1]

Hobby Lobby, America's 135th largest private company,[2] has refused to comply with the mandate and has sued for an exemption. While Hobby Lobby is not the only for-profit corporation to file such a lawsuit on grounds of religious freedom, it is the largest to do so.[3] Hobby Lobby is privately owned by the Green family, a family of Evangelical Christians. Hobby Lobby sued the government in September,[4] claiming that the man-

1 Dorothy J. Samuels, "Trouble for the Contraception Mandate," *New York Times,* 11/12/13.
2 "Hobby Lobby Stores," *Forbes,* 12/15/13.
3 Tim Talley, "Hobby Lobby Obamacare Lawsuit: Judge Rules Store Must Cover Morning After Pill," *Huffington Post,* 11/19/12.
4 Talley," Hobby Lobby Obamacare Lawsuit."

date conflicts with the owners' religious convictions. The Greens argue that four of the 20 methods of contraception that the mandate requires coverage for, such as the morning-after and week-after birth control pills, are equivalent to abortion because they can prevent a fertilized egg from implanting in a woman's uterus. The Green family has stated that it has no moral objection to the other 16 contraceptives, and will continue covering them for its employees.[5]

The Supreme Court is expected to consider the relevant questions in the following order. First, the Court will decide if for-profit corporations have free exercise rights. If it finds that they do not, the Court will then have to decide if the owners of corporations have free exercise rights that pass through to the corporation. If either one or both of these are answered in the affirmative, the justices will then decide whether the mandate is neutral and generally applicable, as required by the Court's decision in *Employment Division v. Smith (1990)*. If the Court finds the mandate meets the neutrality and general applicability requirements of *Smith,* the Court will then consider whether Hobby Lobby might find protection in the more strict limitations on the federal government's ability to burden religious exercise that are imposed by the Religious Freedom Restoration Act (RFRA) passed by Congress in 1993. This is contingent upon whether the Court decides Hobby Lobby is a person for the purposes of RFRA, and therefore protected by it. If so, the Court will deliberate on whether or not the contraception mandate is a substantial burden to Hobby Lobby's supposed free exercise rights. If this is found to be true, the Court will then consider whether the contraception mandate serves a compelling government interest and if the mandate is the "least restrictive" means of serving that interest. If both of these two things are found true, then Hobby Lobby will not get an exemption even if everything else goes in their favor. However, if the Court finds that the government lacks a compelling interest or failed to employ the least restrictive means of achieving its interest, Hobby Lobby may be eligible for an exemption from the contraceptive mandate. Although Hobby Lobby could have also mounted an argument for an exemption based on the First Amendment stemming from the Court's ruling in *Citizens United v. FEC* (2010), both Hobby Lobby and the government focused their arguments on the RFRA.[6]

The future of Hobby Lobby's success as a business is dependent on the Supreme Court's decision in this case. The first question the Court will have to address is a fundamental one: is a for-profit corporation, in legal terms, able to exercise religion? If not, are its owners able to exercise their religious preferences through the corporation?[7] Although it may seem intuitive that a for-profit corporation would not have free exercise rights, this is not necessarily the answer that precedent suggests. Supreme Court case *Braunfield v. Brown* (1961) established that individuals do not shed protections for religious views when engaging in trade.[8] This principle was reinforced in *U.S, v. Lee* (1982), *Swaggart Ministries v. Board of Equalization* (1990), and *Hernandez v. Commissioner of Internal Revenue* (1989). In these three cases, for-profit corporations were assumed to have the ability to exercise religion. Evan Bernick, a visiting legal fellow at the Edwin Meese III Center for Legal and Judicial Studies, asserts that "never in its jurisprudence on free exercise of religion has the Supreme Court treated organizational persons differently from individuals."[9] In Hobby Lobby's brief, it mentions that First Amendment religious protections apply to for-profit corporations. Hobby Lobby borrows from *First National Bank of Boston v. Bellotti (1978)* in saying that "the proper question … is not whether corporations 'have' First Amendment rights … Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." In other words, the First Amendment protects an *activity*, even if the source of that activity is a corporation.[10]

However, this issue is far from settled. Judge Ilana Rovner, dissenting from the Seventh Circuit Court of Appeals decision, stated that religion is an "intensely personal experience." Judge Rovner's reasoning does not address the theory that an owner's religious liberties can "pass through" to their corporation. Under such a "pass-through" theory, even if for-profit secular corporations cannot directly exercise religion, the owners'

5 Talley, "Hobby Lobby Obamacare Lawsuit."

6 Paul D. Clement, Michael McGinley, et. al, "Brief For Respondents on *Hobby Lobby v. Sebelius*," *Scotusblog*, 10/2/14, AND Donald B. Verrill, Jr., "Reply Brief For the Petitioners," *Scotusblog,* March 2014

7 This is called the "pass through" theory because the preferences of the corporation's owners are "passing through" to the corporation.

8 Feisal G. Mohamed, professor, University of Illinois, "Does Hobby Lobby Have a First Amendment Case? Yes and No," *Huffington Post*, 12/02/13.

9 Evan Bernick, "Why All Americans Should Support Hobby Lobby's Case Against Obamacare," *The Foundry,* 12/23/13.

10 Paul D. Clement, Michael McGinley, et. al, "Brief For respondents on Hobby Lobby v. Sebelius," Scotusblog, 10/2/14.

religious preferences can be exercised by the corporation. The Tenth Circuit Court ruled that such a "pass-through" theory applies to Hobby Lobby. However, the Third Circuit Court, in its ruling on the very similar case of *Conestoga Wood Specialties Corp. v. Sebelius*, said that it was not persuaded that a company's owners' free exercise rights could pass through to the corporation. In *Citizens United v. FEC* (2010,) the Supreme Court allowed corporations to exercise free speech rights under the first amendment via the pass-through theory. Still, it has been argued in district courts that the logic in *Citizens United* does not necessarily apply to all first amendment rights just because it applies to certain ones. The Green family is publicly touting the "pass-through" theory by arguing on its website that it should be able to run its business in accordance with its evangelical views. The website says that "it is by God's grace and provision that Hobby Lobby has endured," and so it wants to honor God by "operating their company in a manner consistent with Biblical principles." The Greens argue that every American, including business owners, should be free to live and do business according to their beliefs.[11] The Supreme Court has yet to rule on the issue.

If the Supreme Court finds that Hobby Lobby is able to exercise religion, either directly or under the 'pass-through' theory, then Hobby Lobby will clear the first hurdle. However, if the Supreme Court rules both that for-profit secular corporations have no religious autonomy of their own and that people cannot exercise their rights to freedom of religion when acting in their associated capacity as a corporation, Hobby Lobby will almost certainly have to abide by the mandate.

In *Employment Division v. Smith* (1990), the Supreme Court ruled that people must comply with "neutral, generally applicable regulatory law(s)" even if the law incidentally burdens their religion.[12] Therefore, under *Smith*, the standard for establishing whether a law is a free exercise violation is whether the law is neutral, generally applicable, and serving a legitimate state interest (as opposed to a "compelling" state interest). *Smith* was a drastic departure from prior jurisprudence. In response to the *Smith* decision in 1990 and the fear it inspired among religious citizens, Congress passed the Religious Freedom Restoration Act in 1993 in order to impose more strict limitations on the ability of the government to burden free religious exercise. The RFRA states that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except if it demonstrates that the burden "is in furtherance of a compelling government interest" and "is the least restrictive means of furthering" that interest.[13]

In light of the Court's ruling in *Smith*, the Court must decide: Is the contraception mandate "generally applicable"? Hobby Lobby argues that this mandate is not generally applicable because of the numerous exemptions that the Obama administration has allowed. Last June, a federal judge in Tampa, Florida estimated that one third of employed Americans work for an employer that is not required to provide coverage for contraceptives.[14] The government argues that the mandate is generally applicable in that it applies to all for-profit businesses with more than 50 employees. The Supreme Court has not yet discussed whether or not the ACA (and the contraception mandate) is generally applicable in this sense. While we cannot be certain precisely what guidelines the Supreme Court will use to test whether or not this mandate is

11 The Becket Fund for Religious Liberty Case Summary, http://www.becketfund.org/hobbylobby/

12 Evan Bernick, "Why All Americans Should Support Hobby Lobby's Case Against Obamacare," *The Foundry,* 12/23/13.

13 Religious Freedom Restoration Act of 1993, Pub L. No. 2000bb. (1993)

14 This is largely due to the fact that small businesses are not required to provide this coverage.
Adam Liptak, "Court Confronts Religious Rights of Corporations," *New York Times,* 11/24/13.

"generally applicable," we can be certain that a law does not have to be universally applicable in order to be considered "generally applicable." If the Court finds that the contraceptive mandate is not generally applicable, it will strike the mandate down. If instead the Court finds the mandate to be generally applicable, it will then consider the potential challenge to the mandate's constitutionality posed by the Religious Freedom Restoration Act (RFRA).

In this circumstance, the Court would have to decide: are for-profit corporations protected under RFRA? Under RFRA, it is unclear whether there exist relevant legal differences between a religious corporation like a church and a for-profit secular corporation with religious owners. It comes down to whether or not for-profit corporations are considered "persons." As there is no definition of "person" in RFRA itself, the question reverts to the Dictionary Act, which defines a "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[15] While the Dictionary Act does yield to context, Judge Sykes of the Seventh Circuit Court observes that "there is no statutory basis for defining the term to include only those corporations that are religiously affiliated nonprofit corporations", as the government argues.[16]

Should the Supreme Court find that RFRA applies to Hobby Lobby, the following question would be: is the contraception mandate a "substantial burden" on Hobby Lobby's exercise of religion? To answer this we must consider Hobby Lobby's options if it is not found to be exempt from the mandate. Hobby Lobby has four options: 1) comply with the mandate, 2) pay a $1.3 million per day fine ($100 per day for each of its 13,000 employees), 3) drop its health care plan entirely and pay a $26 million per day fine (destroying their business entirely,)[17] or 4) shut down or sell its business. While options three and four are obviously burdensome, Hobby Lobby has to show that the first two options are "substantial burdens" as well. In *Braunfield,* it was established that making a set of religious beliefs more expensive is not the same as making the beliefs illegal, but when the financial burden is large enough, a set of beliefs can become practically impossible to follow. A $1.3 million per day fine would amount to a glaring 14.3% of Hobby Lobby's yearly revenue, and the Supreme Court will have to decide whether this would amount to a "substantial burden".

There is a good chance that the last three options would be found to be substantial burdens. However, Hobby Lobby has to show that all of its options, and not just some or most of them, would result in a substantial burden. The compliance option is where Hobby Lobby's case finds itself upon shakiest ground. The government argues that that just because Hobby Lobby would be providing the contraception coverage does not mean that would be making the decision for those contraceptives to be used. Instead, employees make that decision, and Hobby Lobby's legal obligation is just to provide a *choice* to use contraception. Giving employees a choice, the argument goes, cannot burden the beliefs of the employer when the choice is out of the employer's hands. In the words of D.C. Circuit Judge Edwards, the mandate would not "encourage employees to use contraceptives any more directly than the government does by authorizing the

15 Dictionary Act of 1947, Pub. L. No. 388, 61 Sat. 633 (1947).
16 Judge Sykes, "Judge Sykes Versus Judge Robner on the HHS Mandate," *National Review,* 13/11/13

17 Hobby Lobby makes $3.3 billion in revenue yearly. A $26 million per day fine would be 287% of their yearly revenue. No matter how much they save on the plan they will be significantly in debt. Information as of December 2013, from Forbes: http://www.forbes.com/companies/hobby-lobby-stores/

corporations to pay wages."[18] In its brief, Hobby Lobby argues that the government must recognize that the mandate would make the Greens "complicit" in abortions because the government has provided an exemption to churches. Hobby Lobby asks why an exemption would be allowed to churches if the government did not agree that the mandate makes corporations "complicit" in destroying an embryo.[19]

Under RFRA, even if the mandate is found to be a substantial burden, that burden is legally justified if it furthers a compelling government interest and employs the least restrictive means of doing so.[20] The government asserts three primary compelling interests.[21] First, it claims that the availability of contraception is important to *public health*. Second, it claims that all citizens, including women, should have *equal access* to healthcare services. Third, it claims that everybody should have access to a *comprehensive healthcare* system. While these interests seem to intersect to some degree, they can essentially be boiled down to public health, gender equality and comprehensive healthcare for citizens. Hobby Lobby argues that these must not be compelling interests because the government has allowed religious non-profit corporations and small employers to be exempt from the mandate. What makes this a thorny issue is that government interests can be "compelling" enough to manifest themselves in some cases but not in others. There are many possible scenarios in which an interest could be compelling enough to justify general applicability but not complete applicability. Consider child labor laws: they apply to most businesses, but exceptions exist when reasonable. For example, children are allowed to work for their parents' business.

The Supreme Court will likely weigh the burden to Hobby Lobby's religious freedom against the public's interest in the mandate's fulfillment. As religious freedom is being weighed against not only gender equality but also the practical benefits of public health improvements achieved through comprehensive coverage, it is certainly possible that the Supreme Court will agree that the government does have a (sufficiently) compelling interest. Even if the justices are not convinced that there is a compelling interest, it should be noted that the Court usually defers to the government when it says it has a compelling interest. Not all of the information that is available to Congress and the President is available to the courts, and, more importantly, it is not considered the role of the judiciary to assess the practical merits of legislation.

If the mandate places a "substantial burden" on Hobby Lobby's religious exercise, it must also employ the "least restrictive means" of serving the government's compelling interests. This question is far from straightforward. The Supreme Court will have to consider what other means of achieving these interests could be, and how restrictive those means are. It is also unclear how the Court will go about determining what exactly constitutes the "least restrictive" means.

The public health benefits of contraceptives are well-documented,[22] but the Court may also take into account that the administration considers the mandate to be a very economically efficient way of fulfilling its objectives, since contraception prevents greater medical costs later on. Of course, the absolute "least restrictive" means to achieving the government's interests would be to provide all of the contraceptives itself, but that would likely involve a divisive political battle over whether this is an appropriate use of taxpayer funds. Notably however, the government has not asserted as one of its compelling interests the reduced costs of implementing an insurance mandate as compared to delivering the contraceptives more directly. This may be because saving money is an interest the government can achieve in a number of ways that are far less burdensome on religious freedom.

Given the number of complex and interrelated issues involved in this case and the fact that the Supreme Court's usual ideological lines often break down on First Amendment cases, the Court's decision with respect to *Hobby Lobby v. Sebelius* is impossible to predict with any reasonable degree of certainty. However, given its potentially large ramifications, corporations, academics and legal professionals alike will be waiting eagerly on the result, which is expected to be announced this June.

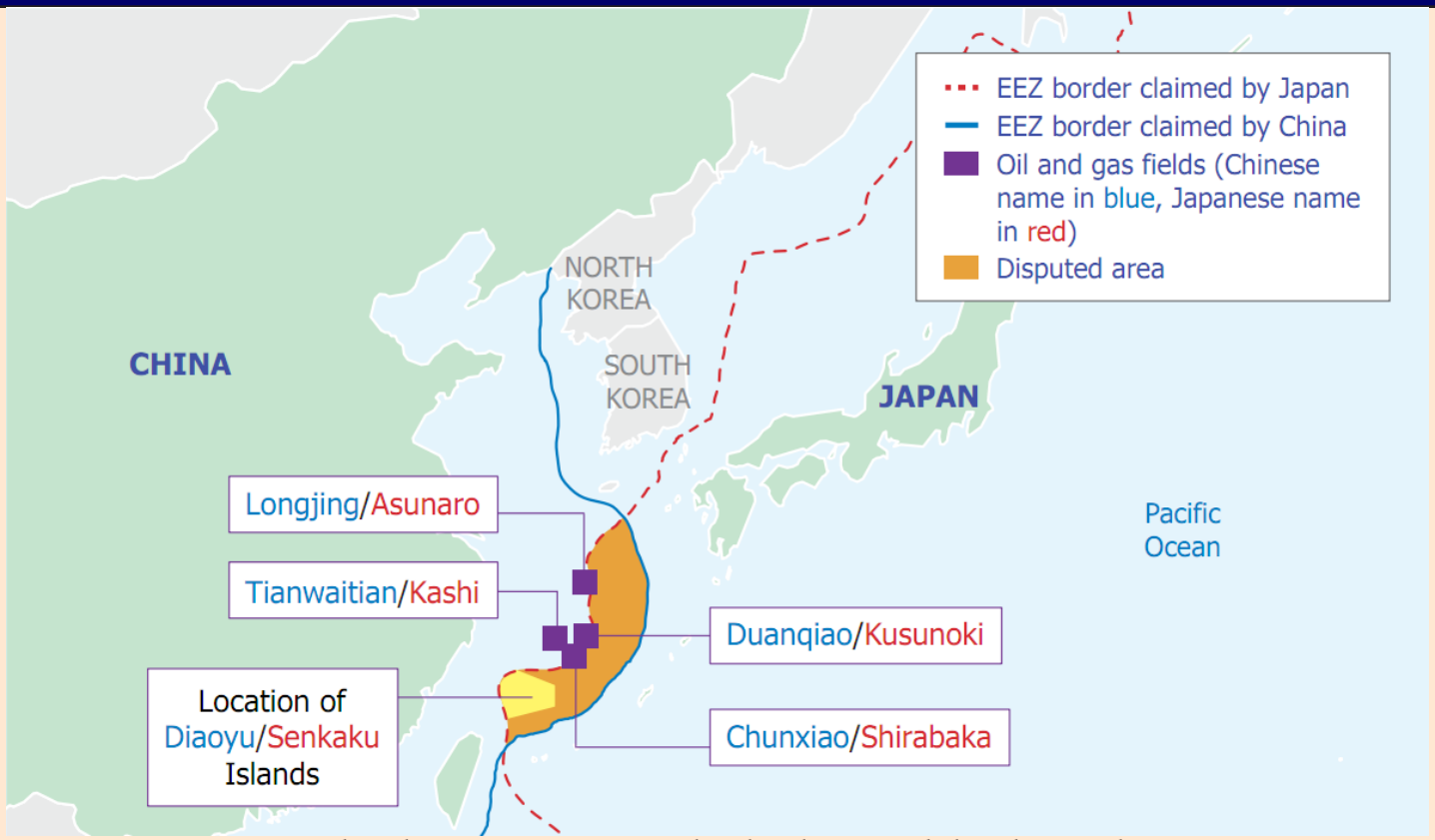
18 Fox News – Politics. Published 11/2/13. http://www.foxnews.com/politics/2013/11/02/appeals-court-deals-blow-to-obamacare-contraceptive-mandate/

19 Paul D. Clement, Michael McGinley, et. al, "Brief For respondents on *Hobby Lobby v. Sebelius*," *Scotusblog*, 10/2/14.

20 Religious Freedom Restoration Act of 1993, Pub L. No. 2000bb. (1993)

21 Andrew Evans, "The Hobby Lobby Case Explained," *Free Beacon*, 12/9/13.

22 Rebecca Wind," Services Provided at Family Planning Centers Yield Myriad Public Health Benefits," *Guttmacher Institute,* 8/7/13.



Disputed Exclusive Economic Zone border claims made by China and Japan

Interview: NYU Law School Professor Jerome Cohen

Why International Law is Critical for Preventing War In East Asia

Michelle Goodwin, CMC '16, interviews NYU Law School Professor Jerome Cohen


Professor Jerome Cohen (right) with President of Taiwan Ma Ying-jeou

Biography: NYU Law School Professor Jerome Cohen is the senior American expert on East Asian law. As Jeremiah Smith Professor, associate dean, and director of East Asian Legal Studies at Harvard Law School from 1964 to 1979, he helped pioneer the introduction of East Asian legal systems and perspectives into American legal curricula. Since 1990, he has been a professor at the New York University School of Law, where he currently teaches courses on Chinese criminal justice and Chinese attitudes toward international law. He co-leads the U.S.-Asia Law Institute and is an adjunct senior fellow for Asia studies at the Council on Foreign Relations.

Note: Minor edits have been made to reflect the delay in the interview's print publication and for readability.

Goodwin: Professor Cohen, thank you again for the interview. Can you please explain the relevant background information on the current tension between China and Japan?

Cohen: Well the tension between China and Japan is only part of a larger tension surrounding what many people call the rise of China and what other people say is the return of China to world prominence, since it has only been 150 years that China has not been a dominant power in the world. Right now, China's expression of its rise is to give some vent to nationalist sentiment, to express their pride and accomplishment at the economic power that China has developed and the growing military power that others respect. The principle manifestation of this is at sea. China, all along its periphery, has been, you might say, pounding its chest, strutting and demanding that Japan respect its views on the Law of the Sea and the territorial questions relating to it. China has also taken similar posture vis-à-vis South Korea, even North Korea its ally, and certainly with respect to the South China sea as well as the East China sea. In the South China Sea you have a very sharp conflict between China and the Philippines, which I will mention shortly, because it is profoundly important in international law terms. You also have a very sharp conflict between the two socialist allies Vietnam and China, and you have Chinese disputes over other aspects of the South China Sea with some of their other neighbors, including Malaysia and even Indonesia, which is further south and will feel some impact from this. So the struggle with Japan over these islands is only part of a bigger picture.

Chinese nationalists protesting Japan's claim on the islands

Now, I should also say that the struggle with Japan over these islands is certainly not just over the islands; this is really a profound historical antipathy between the two major powers of East Asia. We could think about how we take for granted that France and Germany get along now, but you have to understand that in my lifetime France and Germany were hated enemies. They had gone to war repeatedly in the 19th and 20th century, and the great achievement of post-World War II Europe is that they had managed to reconcile. This doesn't mean that they agree on all of the contentious questions that they confront, but they are really singing from the same page. This is an enormous achievement and many of us have been urging Japan and China to do the same.

The Chinese say that they are willing to do it, but how can you reconcile with a country that, unlike Germany, has failed to recognize how awful its conduct was in the 1930's and 40's vis-à-vis China? You have not had a comparable recognition of the past in Japan compared to what Germany has put itself through. Fairly recently, a big dispute flared up again about the visit of the Japanese Prime Minister Abe to the Yasukuni Shrine, where many of the war criminals of Japan, including those condemned to death and executed, have their remains stored. This is full of symbolism. So this isn't a dispute over a few piles of rock, this is a dispute about a very, very serious long-running relationship, and it has poisoned China's reputation with Japan, as well as with East Asia, Northeast Asia, and Southeast Asia.

Now what about these piles of rock? In the 1880's and 1890's, culminating in 1894/95 when Japan was at war with China, the Japanese government was investigating the feasibility of its desire to take those islands. They decided that they couldn't do it publicly because China would object to what obviously the Japanese thought: that China had a claim to these islands. So in January of 1895 the Japanese secretly annexed these islands and adopted a decree that was not made public, claiming that the islands were *terra nullius*, as we say in international law; in other words, a territory not owned by anybody, empty land… and so they therefore could claim these islands, but they didn't do it publicly. It wasn't until 1943, if you can believe it, that Japan made public its claim to these islands. Immediately after World War II, the Chinese government didn't take account of these islands. They were worried about the status of Taiwan, which is very, very important. So neither the Chiang Kai-shek government [in Taiwan] nor the Mao Zedong government [on the mainland] continued to compete [for the islands] after Chairman Mao and the Communist party took over the mainland in 1949. Nobody gave a damn about these islands until 1968. In 1968 there was a UN survey looking for oil and gas resources in that area, and it was shortly after that report, which said that there might be huge deposits of oil and gas underlying these islands, that bells started ringing, people noticed that

these islands existed. At that point the Japanese government said that when Okinawa is returned to Japan on May 15th, 1972, these islands, which were under American administration, would naturally revert to Japan. At that point in 1972, it became obvious that China and Japan had a very, very serious dispute. The problem was how to handle it. I remember giving a talk at the annual meeting of the Harvard Club in Japan in April of 1972, and I talked about this topic, because there were already war-like clashes between ships, boats, etc. of China and Japan.

This is not a new problem, but when Deng Xiaoping took over control of China in late 1978-1979, he and the Japanese government agreed to just put these questions aside. Then for 40 years [the islands] were not an active source of dispute. But, beginning about a year ago, the Japanese government upset the Chinese government very greatly by purchasing several of these islands from their private Japanese owner. And China has taken that as Japan's abandonment of the agreement made with Deng Xiaoping to keep the issue aside and has become very angry, claiming that Japan is nationalizing the islands. Since then, the Chinese have done a lot, in a very assertive way, to make the world aware that these islands belong to them. And the Japanese government, of course, tries to resist. This has led to a series of incidents that make us worry that violence will occur. Some people are recalling how World War I started-and these things do have a life of their own if they get started. So we are facing a very dangerous situation in the East China Sea.

Japanese nationalists protesting China's claim on the islands

Each side says they are willing to discuss the dispute, but each nation also thinks that the islands belong to them. Well something has to be done; the question is what can be done. My view is quite simple. There are international legal mechanisms-institutions, arbitration tribunals, and courts-for resolving these questions. Some Asian countries have gone to the International Court of Justice, and of course the U.S. and Canada have resolved some of their disputes in a peaceful way. So I have recommended that China and Japan take these questions to the International Court of Justice. Since each nation claims they have good legal merits to their case, let them put it to an impartial fair tribunal with the understanding that they will abide by the decision. But neither side is willing to do that. The previous Japanese administration hinted at their willingness to participate in international court by making a statement through their foreign minister that Japan believes in international law and agrees to submit to the compulsory jurisdiction of the International Court of Justice. Neither the U.S. nor China has done that. So essentially, Japan said that if China wants to take us to the ICJ, we will handle the question that way. I would like to see the Abe government do the same thing. I think it would be very smart of them to do that because they know China will never accept, but it would make Japan look like a sincere proponent of international law and it would make China think that we cannot just make these statements without being put to the test.

Eventually China will have to learn more about international law and how to use its institutions, but it takes time. One of my favorite expressions in Chinese is "everything requires a process" (xuyao yige guocheng), i.e., Rome wasn't built in a day. In 1972, I had the chance, like you and I are sitting, to sit with Prime Minister Zhou Enlai; we had dinner and talked for four hours. In the third hour I got my nerve up and thought: I have to make a proposal to them! I said, now that the PRC [People's Republic of China] represents China in the United Nations, (which had happened the previous year), you should name a justice to go on the International Court of Justice. That is one of the perks of being a great power – to be represented on the International Court of Justice. When I said that, Zhou Enlai and the people around the table laughed uproariously, they thought I was a comedian! To them, that was the most ludicrous thought anybody could have. Why would China, a Communist, Asian power that had always felt that the bourgeoisie of the world paid no attention to it, promote their International Court of Justice, why would they want to put a representative on that court? China has always mistrusted international law and international courts. And I said to them, I'm not joking, you are going to want to have someone on that court. Well, it took them over a decade but then they started appointing people.

Now, they take part in the ICJ, but they haven't come around to the point of submitting an important territorial dispute to any third party, because they may lose control over the decision. In negotiation, you maintain control even if you have a mediator, because a mediator has no power to decide and instead merely can make suggestions. But China is afraid that they won't get a fair shake and that maybe they don't have as strong a legal case as they claim to. And of course the Japanese case also has big holes. That is why they kept the annexation of the islands secret for so many years.

As for the South China Sea, the Phillipines and China have had a serious series of disputes over the ownership of certain features in the South China Sea. Having tried for over twenty years to negotiate a solution with China, last January, the Philippines stunned China and the world by taking their dispute to the arbitration of the International Law Tribunal for the International Law of the Sea. This Law of the Sea tribunal decides disputes relating to the Law of the Sea Treaty that China and the Philippines have ratified. Under that convention, if there are disputes regarding its meaning, you are supposed to go to this tribunal. But China has refused to go. This is an obligation under the treaty. When China signed up for the World Trade Organization (WTO) system, it had a similar provision: you must go to the WTO arbitration system for resolving disputes. And China has learned to take part; that's progress. Sometimes they win a case, sometimes they lose, but they learned after a few years to play the game. But with respect to these much more serious, sensitive questions involving who owns territory, China shows no sign of being willing to go to arbitration. So, we are waiting to see now what will happen with the Philippine case. China is not taking part but the process is going forward, and it may well be that the Philippines will win this case. Then China will be faced with an international law question: Will it abide by the decision or will it thumb its nose at it? We don't know.

A Japanese reconaissance plane surveys the islands

I would like to see Japan put China to the test by taking its question of the islands to the International Court of Justice or to agree on a special arbitration tribunal. I have also suggested that since Northeast Asia and Southeast Asia lack the kinds of institutions that Europe developed after World War II, maybe the countries of East Asia should agree to a regional tribunal. If they fear the biases of Westerners for Western tribunals, let them create their own decision-making possibilities. I think we need more adventuresome, imaginative efforts from diplomats and governments; otherwise, we are going to be faced with increasingly serious political-military crises in the East China Sea and the South China Sea.

By the way, the United States is not in a great position to make demands in this respect. The United States hasn't even ratified the UN Convention on the Law of the Sea, so we are in a poor position to criticize anybody. Moreover, in the mid 80s under President Reagan, the United States thumbed its nose at the International Court of Justice concerning Nicaragua. So we look really bad, and I think that it is important for the Senate to finally ratify the UN Convention on the Law of the Sea.

Goodwin: So do you think that the way of the future might be to have all nations push for the international system, push for international law, push for the respect of these tribunals and courts?

Cohen: Of course – we have a rules-based world community, and China, Japan, and the other powers have to respect those rules. These were not rules that were imposed on China against its will or before the Communist government came to power. The Peoples Republic of China, which represents China in the world, took part in the negotiation of the UN convention of the Law of the Seas. They are original participants in that process, going back to when they entered the UN in 1971. So they have influence, and if they thumb their nose at the Convention on the Law of the Sea and the International Court of Justice, it will be a serious blow to international law. But in order to get them to play the game, Japan and the United States also have to take it more seriously. So right now we are facing a great challenge and an opportunity for the further development of international law among the leading powers of the world.

Goodwin: So it looks like we have our orders: We need to adopt more international law. Thank you very much, Professor Cohen.

Cohen: Of course.

Adele Bloch-Bauer I by Gustav Klimt

The Restitution of Nazi-Looted Art: Altmann v. Austria

By Nikhil Khanade, CMC '16

"Doing what is right is different than doing what is legal."[1] This statement, made by James Cuno, the president and CEO of the J. Paul Getty Trust, highlights the dilemma that both individuals and the legal systems of nations grappling with the legacy of wartime art theft face. The aforementioned key players often have conflicting incentives and motivations, which fuel the debate over the restitution of art looted by the Nazis during World War II.

Maria Altmann, a holocaust survivor from Austria who became an American citizen, lost the Gustav Klimt portrait of her aunt *Adele Bloch-Bauer I* during the war to the Austrian government. The painting now hangs in the Neue Gallery in New York. Altmann's effort to reclaim this painting, as well as four other portraits, illustrates some of the legal intricacies surrounding the restitution of Nazi-looted art. The portrait of Adele Bloch-Bauer, or *Adele Bloch-Bauer I,* was one of several Klimt portraits of upper class Jewish women that the Nazis derided as degenerate art. This painting, which had previously received so much criticism by the Nazi regime for its relationship to Jewish society, ultimately became a symbol of "Austria's postwar refusal to make amends for its eager collaboration with Adolf Hitler."[2]

Controversy initially arose over the painting because Altmann's aunt, Adele Bloch-Bauer, left a will in the 1920s stating that she wanted her paintings to be donated to the Austrian National Gallery after her death. However, proponents for Altmann's case argued that there was no way Bloch-Bauer could have foreseen the nature in which Austria would become willing collaborators with the Nazi

1 James Cuno. Who Owns Antiquities. Princeton: Princeton University Press, 2011. Print.

2 Anne-Marie O' Connor. Lady in Gold. New York: Knopf, 2013. Print.

movement and the resulting horrific treatment her family would receive at their hands.[3] Therefore, Bloch-Bauer's late husband, Ferdinand, also created a will stating that all the art should be left to the family's heirs. However, the existence of Adele's will served as a potent legal justification for the Austrian government to retain possession of the painting after the war.

For Maria Altmann and her lawyer, Randall Schoenberg, there was a "score to settle with history" because Austria was not willing to acknowledge its complicity with the Nazi movement and thus continued to impose trauma on Holocaust survivors.[4] The pain Altmann had to endure because the "Austrians had shamelessly stolen her family's life and offered no contrition" is clear. This betrayal created a sense of forgotten identity that Altmann felt compelled to recapture.[5] Klimt's work links Altmann to the many family members that she lost during the Holocaust, making it incredibly valuable in her mind; when Altmann revisited Austria in 1999 and saw the paintings in the Austrian National Gallery, she was "overwhelmed with nostalgia".[6] She sought the restitution of *Adele Bloch-Bauer I*, as well as the other Klimt paintings, in order to attain some closure on that emotional and painful chapter of her life. The Austrian government, which had amassed an excellent Klimt condition during the war, did not feel that it should be "made liable for damages to Jews," a curious argument considering how central their involvement was in the Nazi war machine.[7] This attitude epitomized post-World War II Austria; while the 1946 Annulment Act declared Nazi-era legal transactions "null and void," in reality, it was very difficult for victimized individuals to recover property that was lost during the war.[8]

An American soldier inspects a stash of Nazi-looted art in a German church

Altmann's pursuit of the portraits was made possible, in part, through the actions of Hubertus Czernin, a young Viennan aristocrat turned "crusading journalist" who delved into Austria's collaboration with the Nazi regime and stumbled upon "one of the world's most recognizable paintings, the gold portrait of Adele Bloch-Bauer [that] did not appear to have been donated at all."[9] From here, Czernin learned that in the post-war era heirs to Nazi-looted art were often swindled out of key masterpieces that were still in Austria in return for the export permits of lesser-known pieces. These export permits were required from the 1950s on for family heirlooms and art works to legally leave the country. After Czernin's revelations became public, many Holocaust survivors attempted to reclaim their paintings. This caused the Austrian Parliament to pass a new art restitution law in 1998 that stated, "art that [had] been obtained under duress or in exchange for export permits…was to be returned."[10] It appeared that Altmann now had a glimmer of hope of recovering the paintings; however, the Austrian National Gallery was not going to return them easily.

It was passage of this new restitution law that resulted in the partnership between Maria Altmann and her lawyer Randall Schoenberg. The pair was to find out, however, that there were still a number of hoops for them to jump through before they could recover the paintings. The duo eventually attracted the attention of Ron Lauder, the son of

3 Austria v. Altmann, NO. 28 U.S.C. 1605, 2000
4 Ibid
5 Ibid
6 Ibid
7 Ibid
8 Ibid
9 Ibid
10 Ibid

the eponymous cosmetic company founder Estee Lauder, who spoke in front of the U.S. House of Representatives, as well as the Commission for Art Recovery of the World Jewish Congress in February 2000. In his testimony, Lauder revealed how the Austrian government had "invited Maria Altmann to sue for the return of the Bloch-Bauer Klimts in Vienna courts, but required a bond of half a million dollars just to get started."[11] This requirement illuminated a clear disconnect between the Austrian government's legal and ethical obligations, and implied that the Austrian restitution law was being manipulated to protect the Austrian government from liability. The Austrian government's request for a half a million-dollar bond led Altmann to file a suit in the U.S. Federal Court in Los Angeles in August 2000. Judge Florence-Marie Cooper subsequently ruled that Altmann's case could go forward in U.S. courts because "Maria had made a substantial and non frivolous claim that these works were taken in violation of international law. Austria was an inadequate forum for the claim because of its unduly burdensome court filing fees."[12]

After this ruling, the case started to register on international radars, causing the Austrian ambassador to the USA, Peter Moser, to fly to Los Angeles in order to defend the claims made against his country. Along with Moser came "the Austrian Appeal, which was the size of a phone book,"[13] registering the extent that the Austrians were willing to try and win the case on various technicalities rather than on the moral merits of the case. In Schoenberg's eyes, this was an inadvertent admission of guilt.

After Altmann won in the Ninth Circuit Court of Appeals in May 2001, the Austrians appealed again, this time to the U.S. Supreme Court. The Supreme Court's decision was based on the Foreign Sovereign Immunities Act, enacted by Congress in 1976. Part of the United States Code, this law establishes the circumstances in which a foreign sovereign nation (or its political subdivisions, agencies, or instrumentalities) may be sued in U.S. courts—federal or state. The Austrian government argued that the FSIA couldn't be applied retroactively and that before 1976, the United States accepted a more expansive type of immunity that would have barred the suit. However, in a 6-3 opinion written by Justice John Paul Stevens, the Court held that this was not a justifiable claim because despite the fact that the FSIA was not explicitly written to apply retroactively, it was written with language strongly implying that Congress intended the law to apply retroactively. Stevens pointed to the fact that under the FSIA, [immunity] "claims are 'henceforth' to be decided by the courts. ... [T]his language suggests Congress intended courts to resolve all such claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred."[14] Stevens also took note of the element of coercion involved in this case, writing:

> "In 1946, Austria enacted a law declaring all transactions motivated by Nazi ideology null and void. This did not result in the immediate return of looted artwork to exiled Austrians, however, because a different provision of Austrian law proscribed export of artworks…deemed to be important to the country's cultural heritage and required anyone wishing to export art to obtain the permission of the Austrian Federal Monument Agency. Seeking to profit from this requirement, the Gallery and the Federal Monument agency allegedly adopted a practice of forcing Jews to donate or trade valuable artworks to the [Gallery] in exchange for export permits for other works."[15]

The Court's ruling established that Altmann had earned the right to sue for custody of the paintings, but the ruling did not actually return the paintings to her custody. In light of the Court's decision, the Austrian government recognized that their best chance to hold onto the painting was through binding arbitration, a winner-takes-all situation. The arbitration took place under a panel of three members, one of which was chosen by Schoenberg, one chosen by the Austrian government, and the last a mutually agreed upon panelist. After presenting the various merits of the case to the panel, the three arbitrators investigated "whether Austria had extorted the paintings quid pro quo in exchange for exit permits for other property, a keystone of the 1998 restitution law."[16] Finally, on January 15, 2006, the three arbitrators reached a decision: Altmann and Schoenberg had won.

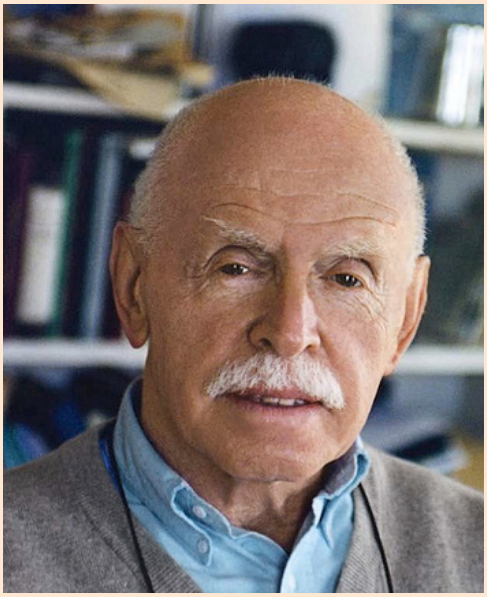
After the arbitrators' ruling, Altmann sold *Adele Bloch-Bauer I* to Ronald Lauder for $135 million dollars, the fifth most expensive price ever paid for a single painting at that time. Its story forces society to consider whether legalized theft of cultural patrimony is an arm of genocide. In addition, the controversy over the painting sparked a new era of art restitution in which Holocaust survivors fought to regain art believed to have been lost during World War II.

11 Ibid
12 Austria v. Altmann, NO. 28 U.S.C. 1605, 2000
13 O' Connor, Anne-Marie. Lady in Gold. New York: Knopf, 2013. Print
14 Austria v. Altmann, NO. 28 U.S.C. 1605, 2000.
15 Ibid
16 Ibid

Interview: NYU Law School Professor Jerome Cohen

Human Rights and the Rule of Law in China

Michelle Goodwin, CMC '16, interviews NYU Law School Professor Jerome Cohen



Biography: NYU Law School Professor Jerome Cohen is the senior American expert on East Asian law. As Jeremiah Smith Professor, associate dean, and director of East Asian Legal Studies at Harvard Law School from 1964 to 1979, he helped pioneer the introduction of East Asian legal systems and perspectives into American legal curricula. Since 1990, he has been a professor at the New York University School of Law, where he currently teaches courses on Chinese criminal justice and Chinese attitudes toward international law. He co-leads the U.S.-Asia Law Institute and is adjunct senior fellow for Asia studies at the Council on Foreign Relations.

Note: Minor edits have been made to reflect the delay in the interview's print publication and for readability.

Goodwin: Professor Cohen, thank you for agreeing to this interview. In a previous exchange on a panel of authorities on China, you talked about how the push for the rule of law in China needs to come from the top down as well as from the bottom up. What could incentivize the Chinese Communist Party leadership to push for reform and which aspects of the rule of law would be affected if they decided to do that?

Cohen: Well, this is a current problem. On January 7 the leading figure in China, the newly all-powerful Xi Jinping - General Secretary of the Communist Party, President of the government of China, Head of the Military Commission - made a speech. It was one of a number he has made in the past year endorsing court reform, urging progress towards the rule of law, and instructing the Communist Party to not directly influence the outcome of cases that are before the courts. Now, he is not doing this out of the love of humanity or for the cause of human rights, he is doing this because the people of China are increasingly demanding justice. There has been a spate of revelations about unfair convictions and wrongful judgments, some of which have condemned people to very, very serious punishment, and that has led many people in China to distrust their courts more than ever, which have a poor reputation for many well-earned reasons. Important segments of the populace are demanding reform, but Mr. Xi, the boss now, in some ways is more repressive in practice than his predecessor Hu Jintao. The party is further tightening up freedom of speech, so that there is almost no freedom of expression now in China. But, that comes at a cost and Xi is trying, as it were, to make it up to people by assuring them that he will attend to the administration of justice and introduce greater fairness, and so will gain popularity for the party and himself and credibility for the courts.

Chinese President Xi Jinping

So, many Chinese are doing what they can to demand justice, and the media, to the extent it is allowed to report, is revealing abuses in the courts. The legislature is improving the relevant laws for both criminal justice and civil justice, but what has to be improved is the administration and application of law in practice. [That is] not just theory, not just having a better piece of paper, but actually making that paper part of the living law that will protect people's rights and make them feel better about the Communist Party and their government.

Goodwin: It's clear Xi Jinping is using the reform of the courts to curry political favor, but is that his only incentive to push for legal reform?

Cohen: Mr. Xi's first incentive for law reform is to be known as a leader who believes in better government and assuring justice, fairness, and the opportunity to be heard by impartial judges. This is a very important ingredient of the "Chinese Dream" that he is promising the people. His major overall goal is to gather political power for himself that was previously dispersed among other party leaders, and he is doing that because he is in a power struggle and he has to win. He needs to take firm control of the police, the justice department, the prosecutor's office, the courts, and the prisons, the levers of power that his predecessor too often left to Zhou Yongkang, a former member of the Standing Committee of the party Politburo, which runs the country. Party leaders later regretted allowing Zhou such power because he did not always act in ways that the other party leaders liked.

Indeed, for many months Zhou Yongkang has been under party and criminal investigation and perhaps will confront prosecution for corruption. The stimulus for this attack was his alleged abuse of his political power as Politburo member and head of the party's national political-legal commission for the five years preceding the advent of the current administration. A fierce power struggle is still under way in the political-legal system, while Mr.

Xi seeks to make the courts more credible and to stop the flood of petitions filed by large numbers of people claiming injustice. Chinese people are determined petitioners, and if justice is closed to them because the courts won't take their cases or because the courts give unfair decisions when they do, they will try to go all the way to the capital in Beijing to protest. Tens of thousands of people have done that, creating political consternation among the many officials accused, and a lot of the protesters get locked up illegally in what are known as "Black Jails." These are not authorized jails, but a highly irregular infringement on freedom. The party is desperate to stop the flood of petitions, and one way to do this legally is to provide better, more accessible justice.

Goodwin: Another area to create change would be around freedom of speech, which you spoke a little bit about earlier.

Cohen: Well, if the party were willing to allow freedom of speech and freedom of assembly, and if it were willing to allow freedom to the media, that would alleviate a lot of grievances, but it would also create what the party fears would be a lot of political instability and criticism that they don't have the confidence they could withstand. In 1957 Chairman Mao Zedong thought that it would be good for the Communist Party to have people speak up and to "let a hundred flowers bloom". And people did speak up, tens of thousands of them, and they inundated the party with criticism that the party didn't expect and couldn't tolerate. That led to the end of the Hundred Flowers Bloom period and to a crackdown where hundreds of thousands of people were arbitrarily detained by the police and sent to labor camps without the benefit of any legal protections. That campaign was known as the "Anti-Rightist Movement," because the detained critics, many of whom criticized party lawlessness, were identified as "Rightists," disloyal bourgeois-type critics of the Communist Party. The reverberations of that campaign remain with us to this day.

Goodwin: Which other freedoms are important to the people, and which are possibly the most dangerous to the party?

Cohen: Well right now, the struggle has come to focus on the Internet and social media. They were not in existence in 1957-58, and they have become a power instrument that the party is desperately trying to control. It does not want people to be able to denounce the party without approval of party officials, and the party is fighting more successfully than many people anticipated to keep the lid on adverse opinions. People have said very often and rather glibly that they are confident that the Internet will defeat any dictatorship – but China is the real test. So far, the dictators are doing pretty well. Adverse material that appears on the Internet may only be there for half an hour, maybe an hour, usually not more than a day. Not only are [the authorities] suppressing opinions they don't like, they are putting out their own opinions, often paying some people to say positive things as an antidote to the negative things other people are saying. This is a bitter, continuing political struggle over control of the Internet and social media.

Goodwin: Social media is influential worldwide, so China's lack of support for Internet freedom must garner international criticism. Has there been backlash internationally?

Cohen: Well, China takes a lot of criticism from human rights organizations in the U.S., Europe, Taiwan, and even in Hong Kong, which is now part of the People's Republic of China but has a largely separate administration. A few U.N. organizations also put heat on the Chinese government. That's another reason why it is trying to demonstrate that the courts can be improved. China wants the world's good opinion – of course, it wants to be known as a military, political and economic power, but it also wants the so-called "Socialist Rule of Law with Chinese Characteristics" to have the respect of the world community. Yet that is easier said than done.

When it comes to a clash between the rule of law and the value of

repressing critics who might shake the stability of the regime, the leadership always chooses its own security even though it would love to have better world opinion. The prime objective of the government is to advance its control of the people, and everything has to be seen, according to the current party line, in terms of its potential for maintaining stability. Stability maintenance is the cry. The courts will continue to keep that in mind even if they improve laws and procedures, because the leadership wants them to.

The leadership wants to make sure that local influences will not adversely influence court decisions. Those local influences are many, including corruption, local protectionism, and Guanxi- the network of human relationships that people use to influence judges and other officials that may be more important than any law in terms of the actual handling of the case. Some judges are also not as competent as they should be. There are many distorting influences on a fair court decision. The leaders want to eliminate those influences but they are not going to give up their ability to control the courts with respect to other matters, and the judges must always keep in mind what public opinion is calling for. In a curious way this is a kind of democracy –the rabble, or the masses if you will, are often shouting for justice, sometimes rightly and sometimes wrongly, and the courts are told they must always listen to the opinions of the masses because otherwise their judgments might lead to political instability. So you have this curious situation where judges are supposed to be mindful of the law, are supposed to be impartial and are supposed to disregard all kinds of adverse influences, but on the other hand they are also told they must always keep party leadership and public opinion in mind. And recently, the leadership resurrected a slogan from the previous administration of Hu Jintao, which told the courts that there are three so-called "Supremes" they must always keep in mind: the first is the will of the party, the second is the wishes of the people, and the third, a poor third, is the law and the Constitution. So, all of that is what judges will have to continue to keep in mind, even under the reforms that are now being debated and implemented.

Goodwin: Where are the most powerful reforms happening? Are they in the appellate courts, in the Constitution, in criminal or civil courts, or elsewhere?

Cohen: Well, the proof is in the pudding, and there are many improvements in the new criminal procedure law that went into effect on January 1st of 2013. Some of those improvements, like making it somewhat easier for a defense lawyer to gain access to a detained client in prison or jail, are actually being implemented. This new law is making some improvements in practice *in this respect*, but in other respects improvement is not happening, because the police don't want it to happen. It is one thing for the police to say, "ok, we will let the defense lawyer go to the detention house and meet for an hour with the detained person," which they have often previously discouraged. It is another thing for the police themselves to be ordered to go to court and be cross-examined in court regarding whether they actually tortured a criminal suspect. Police in any country are not happy about being summoned to court and cross-examined. I used to be a federal prosecutor, so I know how these kinds of things can happen anywhere. But in China, in over 95% of the criminal cases, no witnesses appear in court. The only participant who usually appears in court besides the defendant is a prosecutor and some judges. Witnesses generally do not appear in court. You cannot cross-examine them if they are not there. What the prosecutor does is simply read out in court their pre-trial testimony as that has been taken by the police or other investigators. This is just a piece of paper – you can't cross-examine a piece of paper.

The recent, famous trial of fallen political leader Bo Xilai was distinctive in that he was allowed to cross examine witnesses who were allowed to come to court, since the people of the country were watching. The administration wanted to put on a

better-looking trial to show they were treating him fairly, even if they weren't. Normally, witnesses do not come to court, and police certainly don't come to court, but the new criminal procedure law requires that if the defendant makes a plausible showing that he might well have been tortured into making a confession, police are supposed to come to court to repudiate that and they therefore run the risk of cross-examination. This hasn't happened yet in most cases where defense counsel try to use this technique to exclude illegally-obtained evidence.

So you have a situation in China of great repression of opinion and expression, accompanied by improving legislation but only a so-so picture of implementation of that legislation. What has to happen in order to bring about the kind of justice that the public demands, and that the leadership would like to have the public believes exists, is better implementation. That is going to require very, very serious party efforts. China is a huge country and has a huge population. Traditionally, the Chinese have a saying, "Heaven is high and the Emperor is far away," meaning that if you don't live in the capital, you can get away with a lot that the central government won't like. And that is still the situation, despite the improvements in communication, education, etc. So the real challenge for the central authorities, starting with Xi Jinping, the great leader, who is going to be more powerful in China than any leader since the demise of Deng Xiaping, is how to get cities, counties and provinces that are so far away to do what the new leadership wants… and that is not easy.

Goodwin: It doesn't sound very easy.

Cohen: It is an enormous challenge because, although China is a Communist country built on revolution, it is actually now a very conservative place. It has become so successful, and so many people have become rich that you have many vested interests in all of these localities and they don't want change. They fear change. And yet the masses of people who have not yet benefited from this fabulous national economic development – they want change, they want fairness, they want justice! So China is in turmoil now. The world fears China, but the world doesn't know what the Chinese leaders know: that in the interior of China you have a serious ongoing struggle every day.

Goodwin: I believe you called China "a cat on a hot tin roof" in a recent article you wrote.

Cohen: Well that is right. Often, when you think about what the leaders of China have accomplished in overall economic development and social progress, it seems cruel that they should face the type of threat and dilemma they obviously fear. They fear that they can be easily overthrown. The protests and the ultimate crackdown in Beijing's Tiananmen Square, and elsewhere on June 4th, 1989 proved to them how close it can be. Previous governments in China were overthrown by crowds. That is how the revolution of 1911 overthrew the Manchu/Qing dynasty, and that is not the only time revolution has happened. So you have a leadership that is running scared.

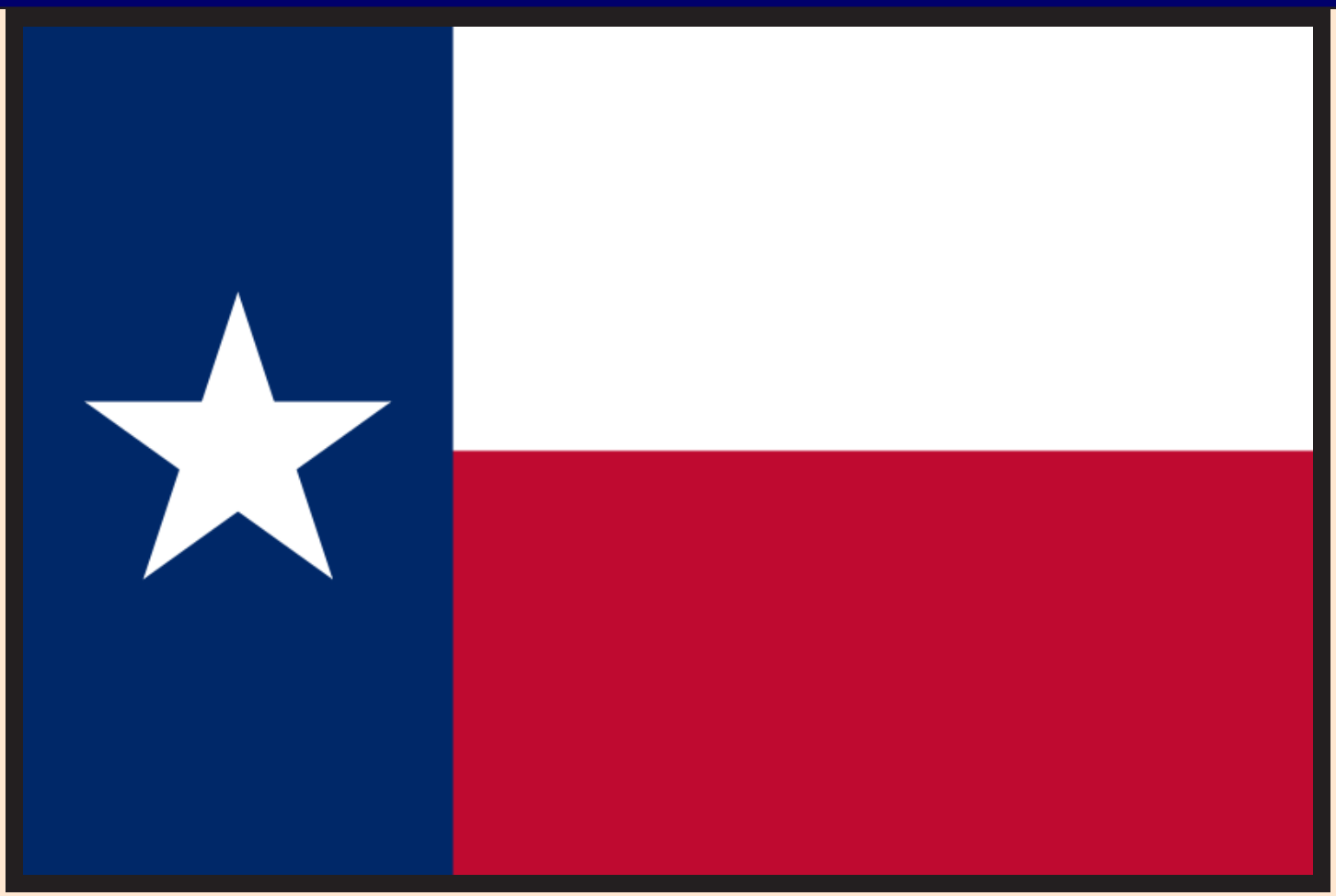
And now, you have a leadership that has been exposed as divided. They have tried for many years to present a façade of unity to the people, but now the fierce internal debates, the rivalries, the factions that inevitably exist, have come into public view and some of their dirty laundry has been really washed in public. Think of the trial of Bo Xilai and the previous trial of his wife on murder charges. Can you imagine famous party figures, a husband and wife, separately sentenced to life in prison? At the root of it is Bo Xilai's ambition. He wanted to be number one in China. He didn't want Xi Jinping to be leader. And now, we are all waiting to see what happens to Bo's closest supporter in the previous Politburo Standing Committee, Zhou Yongkang, a man I mentioned earlier who was in charge of the police, the courts, the prosecution, and internal security. The other leaders were afraid that he could have taken over. Now this is all coming out in public, and it has destroyed the façade of unity that the leadership likes to present. Politics is fierce in China and they play for keeps.

Goodwin: And how long do you think it will be until there is major legal reform or at least some stability in the government?

Cohen: It is very hard to say. There are certain reforms taking place, as I indicated. Stability is another question. There is a whole question about just what is political stability. Dictatorial regimes, not only Communist but also right-wing regimes, such as the one Taiwan had under Chiang Kai-shek, or the one South Korea had under Park Chung-Hee and others-they also claimed they had to oppress people in order to ensure political stability, but that stability was always very short-run and superficial. Real stability comes from creating political institutions that allow people to process their demands and grievances, while tolerating some superficial instability in doing so. Public debate creates disagreement, but processing that disagreement through credible institutions creates long-term stability. That's the challenge now confronting China's leadership: they talk about political reform, but in addition to opening the courts and improving judicial conduct, are they going to provide outlets for people to express themselves, instead of this very rigid repression they have now?

Goodwin: It's a fascinating question. Thank you so much, Professor Cohen.

Cohen: It's been a pleasure.



Opinion: Lone Star Showdown

Obama takes on Texas Republicans Over Voter ID Laws

By: Harry Arnold, CMC '17

Electoral Importance of Texas

While most political gurus would scoff at the idea of Texas becoming a blue state, current demographic trends suggest that this traditional Republican stronghold may be under siege. Democratic strategists often salivate at the prospect of flipping the state of Texas, given that it carries a whopping 38 electoral votes, a number which is second only to California and which will likely grow in the coming decades. Losing such a large number of electoral votes would likely crush any Republican hopes of winning the White House. While such a statement may sound extreme, the political math is undeniably grim for Republicans. Mara Liasson of NPR News explains, "There are now 18 states plus the District of Columbia that voted Democratic in every one of the last six presidential elections. That gives the Democrats a comfortable base of 242 electoral votes out of the 270 needed to win the presidency. On the other hand, only 13 states with 102 electoral votes have gone Republican each of the last six elections."[1] Adding Texas's 38 electoral votes to the Democratic total of 242 would essentially ensure a Republican defeat each

1 Mara Liasson, Will Texas Become a Presidential Battleground?, 2013 NPR All Things Considered, July 01, 2013. <http://www.npr.org/blogs/itsallpolitics/2013/07/01/197692543/will-texas-become-a-presidential-battleground>.

year. This increasingly narrow road for Republican victory was evident in the 2012 election. Even if Obama had lost the traditionally crucial swing states of Florida, Ohio, and Virginia, he could have still hypothetically won.

So how do Democrats translate their electoral fantasies into reality? Given the plethora of factors that routinely affect the political process, the answer is not cut and dry. On one hand, logic holds that Democrats must simply be patient and allow demographic trends to take their course. For example, Hispanics, who historically vote Democratic, have increased as a share of the population at an exponential rate in Texas. Hispanics have constituted roughly 65% of the state's population growth since the year 2000, and now compose 38% of the overall state population.[2] Therefore, Democrats may be able to close the gap over time without significant effort. However, despite these recent statistics, Mitt Romney still won Texas in 2012 by a considerable margin of 16 points.[3] The rise of Republican stars such as Chris Christie and Marco Rubio could widen this margin by potentially expanding the scope of the party's traditional voter base. Given their youthful energy and less orthodox convictions, they possess the ability to not only attract voters from a wider spectrum, which would put more states into play for Republicans, but also safeguard an increasingly Hispanic Texas. Therefore, Democrats may have to take a more proactive approach in order to send Republicans into political oblivion anytime soon.

One school of thought suggests that simply increasing voter turnout among Hispanics could be a feasible solution for Democrats to gain Texas' electoral votes. Battleground Texas, an organization with an abundance of cash and Obama campaign veterans, seeks to turn the Lone Star State blue by 2020.[4] Former Obama field director Jim Messina asserts, "[i]f you look at the 2012 electorate only 38 percent of all eligible Hispanics turned out to vote. Compare that to Florida, where that number is 62 percent. If 62 percent of Hispanic voters who are eligible to vote turn out and vote in Texas, it's a battleground state."[5] However, the problem with this logic is that it assumes Texas Republicans will simply allow this process to unfold without any resistance. Obviously, one major hindrance preventing Republicans from performing better among Hispanics is the party's harsh stance on immigration reform. However, with the rise of conservative stars who hold more moderate positions on immigration, such as Marco Rubio and Jeb Bush, Hispanics may be more inclined to vote Republican in the future.

After all, Hispanics tend to be more socially conservative on issues such as abortion and gay marriage. As a result, Democrats would be prudent to take precautions to avoid political fallout similar to what transpired in the South during the second half of the 20th century. The South had traditionally been a Democratic stronghold for most of the 20th century. However, it was the Democratic Party's embrace of various socially liberal stances in regards to issues such as civil rights and abortion that prompted the South to gravitate towards the Republican Party. If the Republicans were to shift their stance on immigration to a moderate position, then the Democratic Party would be in jeopardy of losing a key voting-bloc. Hispanics, a large number of whom are Catholic, might finally be able to express their disdain towards the socially liberal causes embraced by many Democrats. Without potential repercussions in terms of harsh immigration laws, an opportunity for Republicans to obtain a large number of Hispanic votes would arise.

Obama, the DOJ, and Voter ID Laws

Over the past several years, the Obama administration has pursued a variety of legal maneuvers that directly affect the electoral process in Texas. This year the Department of Justice sued the state of Texas over its voter ID law, which requires everyone to show a form of government identification at the polls.[6] The DOJ asserts that the law violates Section 2 of the Voting Rights Act since it impedes the ability to vote based upon race.[7] While there is evidence that certain groups such as minorities are less likely to have the proper forms of identification, this does not necessarily mean that the voter ID laws themselves are discriminatory. The law in Texas does not indicate that only certain groups must show identification, nor

2 Rick Jervis, Hispanics Guide Huge Growth in Texas, 2011 U.S. Today, Feb. 23, 2011 at (2011), <http://usatoday30.usatoday.com/news/nation/census/2011-02-17-texas-census_N.htm&gt.

3 2012 Presidential Election, 2012 Politico, Nov. 29, 2012 at (2012), <http://www.politico.com/2012-election/map/#/President/2012/>.

4 Liasson, supra.

5 Ibid

6 Kevin Johnson & Richard Wolf, Justice Department Sues Texas Over New Voter ID Law, 2013 U.S. Today, Aug. 22, 2013 at (2013), <http://www.usatoday.com/story/news/politics/2013/08/22/voting-rights-texas-photo-id-justice-department-lawsuit/2685349/&gt.

7 Jordan Fabian, Department of Justice Sues Texas Over Voter ID Law, 2013 Fusion/ABC, Aug. 22, 2013 at (2013), <http://fusion.net/leadership/story/department-justice-sues-texas-voter-id-law-12311&gt

does Texas infringe upon certain individuals' right to obtain this necessary identification. Furthermore, it is hard to make the argument that the 20-30 dollars required to purchase government identification is a significant financial barrier. An increasing number of states are deciding to enact voter ID laws, feeling that such parameters are grounded within the realm of common sense. Additionally, the overwhelmingly majority of Americans support voter ID laws. President Obama has repeatedly entered into legal battle with Republican states, citing racial discrimination as the rationale. To date the Obama administration has been embroiled in legal battles with Alabama, Texas, South Carolina and North Carolina over the states' voter ID laws.

With the Supreme Court's recent decision in *Shelby County v. Holder*, the Democrats have lost their primary weapon for browbeating traditionally Republican states over voter ID laws. The controversial Supreme Court decision struck down Section 4 and effectively neutered Section 5 of the Voting Rights Act, which required states with histories of racial discrimination to receive preclearance regarding changes to any electoral laws.[8] In fact, it is this provision of the Voting Rights Act that the Obama administration initially used to challenge the Texas voter ID law, ultimately preventing the law's implementation during the 2012 presidential campaign.[9] While such a provision may seem unnecessary given the enormous strides in voting equality made in the past 50 years, a reason Chief Justice John Roberts cited in his majority opinion,[10] it was nevertheless legally sound until *Shelby v. Holder*. However, with the recent Supreme Court decision, Obama and the DOJ are now forced to challenge the Texas voter ID law via Section 2 of the Voting Rights Act, claiming that the law discriminates based upon race. As a result, the burden of proof in regard to discrimination within electoral laws has now shifted from the states to the federal government. For instance, Texas was unable to implement its 2011 voter ID law and congressional redistricting maps since it was unable to prove in federal court that the laws were not discriminatory.[11] However, without the requirement to undergo preclearance, states can enact voter ID laws freely. It is the federal government that now has to prove that a particular state's voter ID law is discriminatory.

The Supreme Court & The Voting Rights Act

Over the past 30 years, the Supreme Court has maintained a balancing act regarding Section 2 of the Voting Rights Act.[12] At times the Court has asserted that violations of Section 2 were only valid with proof of intentional discrimination.[13] However, in other cases the Court has declared that elections laws with discriminatory effects, regardless of intention, constitute a violation of Section 2 of the Voting Rights Act.[14] The state of Texas plans to utilize a key 1992 Supreme Court decision to ultimately defeat the Obama administration's attempt to nullify their voter ID law under the Section 2 provisions.[15] In 1992 the Supreme Court upheld a racially gerrymandered North Carolina congressional map with the logic that it was impossible to distinguish an attempt to protect incumbents from an attempt to empower a certain race during the redistricting process.[16] This is due to the fact that certain races/ethnic groups typically vote overwhelmingly a particular way.[17] In short, the court asserted that the while the congressional redistricting map did empower a certain race, in this case African-Americans (who vote Democrat by enormous margins), it could also be interpreted as an attempt to protect incumbents. Ironically, the coalition of liberal justices that generated the majority opinion in the North Carolina case may ultimately help conservatives in Texas prevail in their legal battle with the Department of Justice.

While requiring photo identification is not in itself discriminatory and may be simply a common sense precaution, Texas would be prudent to avoid defending its voter ID law on such claims. The reality is that there

8 Jeffrey Rosen, Eric Holder's Suit Against Texas Gives the Supreme Court a Chance to Gut Even More of the Voting Rights Act, 2013 New Republic, Sept. 01, 2013 at (2013), <http://www.newrepublic.com/article/114524/eric-holder-texas-suit-supreme-court-might-gut-more-voting-rights&gt.

9 Sari Horwitz, Justice Department Bars Texas Voter ID Law, 2012 The Wash. Post, Mar. 12, 2012 at (2012), <http://articles.washingtonpost.com/2012-03-12/politics/35450319_1_voter-id-laws-library-card-or-board-combat-voter-fraud&gt.

10 Ryan Reilly, Mike Sacks & Sabrina Siddiqui, Voting Rights Act Section 4 Struck Down, 2013 The Huffington Post, June 25. <http://www.huffingtonpost.com/2013/06/25/voting-rights-act-supreme-court_n_3429810.html&gt.

11 Enrique Rangel, Federal Court Strikes Down Texas' Redistricting Plans, 2012 Lubbock Avalanche-Journal, Aug. 29, 2012 at (2012), <http://lubbockonline.com/texas/2012-08-28/federal-court-strikes-down-texas-redistricting-plans#.UnC_d_kgd8F&gt.

12 Rosen, supra.

13 Ibid

14 Ibid

15 Ibid

16 Ibid

17 Ibid

is strong statistical evidence demonstrating that minorities are less likely to possess the necessary forms of photo identification required for voting. Therefore, Obama and DOJ could possibly achieve a legal victory by asserting that the effect of the law is discriminatory. The bottom line is Texas should avoid drawing any attention to race, and frame their legal defense within the context of a political issue. Supreme Court precedents, such as those in the aforementioned North Carolina case, declare that defending incumbents is not unconstitutional. This is why it is vital for Democrats and Republicans alike to obtain control of as many state legislatures as possible in today's political climate. Since it is the states that are in charge of redistricting after each census, the majority party is able to draw the new congressional maps in their favor without judicial interference. As a result, Texas, an overwhelmingly Republican state, can easily make the case that their voter ID law was merely an attempt to protect Republican incumbents and subsequently disadvantage Democrats. Obviously, discriminating against Democrats would entail discriminating against minorities since they overwhelmingly vote Democratic. However, with the aforementioned Supreme Court case involving North Carolina, the government would have to prove that the discrimination is of an invidious nature whose purpose was to target racial minorities.

President Obama with US Attorney General Eric Holder

It may seem odd that Texas would want to knowingly draw congressional maps that would suppress the Hispanic vote, a voting bloc of growing importance in the political process. Texas Republicans are pragmatic enough to realize that in the age of Obama, and possibly in the upcoming age of Clinton, now is not the best time to open up Republican congressional districts to Hispanics. Perhaps the best time to try to sway Hispanics into voting Republican would be if a transformative figure such as Jeb Bush or Marco Rubio were to be elected to the White House. However, such a delayed approach runs the risk of further solidifying Hispanics in Texas as a safe Democratic voting base. Regardless, given the current political calculus and monumental importance of Texas's 38 el Rosen, supra. ectoral votes for Republicans, the state party establishment has decided now is not the time to take risks.

DOJ Hedges its Bets

Knowing that their legal argument in regard to the Section 2 violation in Texas is in great jeopardy of being rejected by the courts, the DOJ has invoked yet another section of the Voting Rights Act. A 2013 press release from the Justice Departments reads, "The complaint asks the court to prohibit Texas from enforcing the requirements of its law, and also requests that the court order bail-in relief under Section 3 of the Voting Rights Act. If granted, this would subject Texas to a new preclearance requirement."[18] Section 3 of the Voting Rights Act basically allows courts to add states to the list of states which require preclearance for enacting new election laws, the criteria for which is having recently engaged in discriminatory voting practices.[19] Essentially, the DOJ is asking the courts to deem that the Shelby County v. Holder decision should not apply to the state of Texas. It seems almost illogical for the Obama administration to ask for another preclearance requirement when the Supreme Court just recently stripped such provisions from the Voting Rights Act. However, upon more subtle analysis, there is actually quite a bit of legal acumen present within this maneuver.

While the Shelby County v. Holder decision effectively rendered Sections 4 & 5 of the Voting Rights Act irrelevant, the Supreme Court technically only struck down Section 4.[20] Section 4 was the formula used in order to determine which states require federal preclearance.[21] It was

18 Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law, 2013 Department of Justice Office of Public Affairs, Aug. 22, 2013. <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html&gt.
19 Rosen, supra.
20 Riley, Sacks, Siddiqui, supra.
21 Ibid

declared unconstitutional primarily due to its antiquity and disregard for the social progress of the past 50 years. Chief Justice Roberts elaborated in his opinion, "Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare [Section 4] unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."[22] As a result, no states currently require preclearance since there is no formula existent to determine which states should require such a mandate. One remedy would be to simply pass a law to update the formula; however, given the Republican control of the House of Representatives, at least for the time being, such a measure is practically impossible.[23] Since Section 5, which establishes the preclearance mandate[24], is still constitutional, the DOJ could theoretically subject Texas to preclearance once again via the Section 3 route. However, there are several barriers that will likely render this effort futile.

Potential Supreme Court Showdown?

For all intents and purposes, one should assume that this lawsuit will be heard by the Supreme Court, a likely possibility considering the national implications involved. Historically, the Supreme Court has been very apprehensive about legislating directly from the bench. If the Court were to add Texas to the list of states that require preclearance via the Section 3 provision, it would be effectively establishing new criteria for the formula previously struck down in the *Shelby County v. Holder* case. Given the current makeup of the Court, which is currently composed of a 5-4 conservative majority, such a decision is unlikely. However, the Court, wishing to intervene as little as possible, could reach a decision that might nullify the Texas voter ID law while still stopping short of placing Texas on the preclearance list.[25] Even this outcome is unlikely however, since courts have historically required substantial proof showing intentional discrimination before placing a state on the preclearance list. As a result of its ability to claim it is redistricting solely for political party-related ends, Texas will likely be able to deflect any arguments involving discrimination against minorities. This is why the Section 3 provision has only been successfully used against two states, Arkansas and New Mexico.[26] Moreover, the Section 3 prevision currently applies to only three counties in the entire country.[27]

Perhaps Obama and the DOJ's best chance for legal victory is similar to what happened with the 2012 Supreme Court Obamacare decision upholding the individual mandate. Perhaps Chief Justice John Roberts, seeing the backlash over the *Shelby County v. Holder* decision, would change his position and vote with the liberal wing. Various Court insiders have asserted that this is what transpired during the monumental 2012 healthcare decision.[28] After all, Roberts did essentially redefine the individual mandate as a tax rather than a penalty, a terminology Obama and the Democrats shied away from throughout the entire legislative process. Such an inconsistency would be indicative of Roberts changing his position midway through the opinion writing process as a result of potential backlash or fear of a tarnished legacy (the Roberts Court would have been infamous for nullifying Obama's signature piece of legislation). However, the difference with this case is that the Court's decision would not have as far-reaching impacts. With the healthcare decision, striking down the individual mandate would have effectively struck at the heart of the entire law. The Texas voter ID law case is different,

22 Ibid
23 Ibid
24 Ibid
25 Rosen, supra.
26 Ibid
27 Ibid
28 Jane Crawford, Roberts Switched View to Uphold Healthcare Law, 2012 CBS – Face the Nation, July 01, 2012, <http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/&gt.

because the Court's decision would more than likely be unique only to Texas and not to the entire country. Therefore, the state of Texas can likely take solace in the old adage that lightning doesn't strike twice in the same place.

Obama and the DOJ Doubles Down

Another legal maneuver Obama and the DOJ have pursued is joining a current lawsuit against Texas over its 2011 congressional redistricting maps, claiming that Hispanics are not adequately represented.[29] In 2012 these new congressional districts were prevented from going into effect as a result of a preclearance hearing that found that Texas did not prove the maps were not discriminatory. As a result, a federal court in San Antonio was responsible for drawing the maps for the 2012 election.[30] Like the DOJ's lawsuit against Texas over its voter ID law, this lawsuit is seeking to "bail in" Texas as a state that requires preclearance hearings. Furthermore, like Obama and the DOJ, the plaintiffs are forced to utilize Sections 2 & 3 of the Voting Rights Act as the premise for their lawsuit. They assert that Texas has recently exhibited discriminatory practices as evident in the result of the aforementioned 2012 preclearance hearing, and thus can be "bailed in" via Section 3.[31] On the other hand, Texas points to how in 2013 the Supreme Court vacated the 2012 preclearance hearing due to its ruling in the Shelby County v. Holder decision[32]; Texas asserts that the preclearance hearing therefore cannot be used as evidence of intentional discrimination.[33] As a result, the redistricting case has been sent back to the lower courts for adjudication.[34] While it is possible that a lower court could find that Texas is in violation of Section 2 and/or should be subject to preclearance under Section 3, such rulings could very well be undone in the Supreme Court. However, one slight advantage for the plaintiffs is their ability to utilize a section of the Voting Rights Act that was not struck down, a provision governing majority-minority districts.[35] At the same time, the legal logic involving discrimination against a political party rather than race could play in Texas's favor.

Remember the Alamo

The Obama administration's legal efforts against Texas' voter ID law and congressional redistricting maps unequivocally possess the potential to supplement the ongoing effort to turn the state into a Democratic stronghold. Whether or not a desire to support such grassroots efforts is a driving force of the DOJ's lawsuits is a question for political pundits. However, by seeking to nullify the state's voter ID law and enact congressional maps more favorable to Democrats, Obama is clearly seeking to empower Hispanic voters in Texas. While certainly a noteworthy effort, the Republican Party in Texas is probably too strong and too influential to let a couple of lawsuits dismantle their control of the state. The bottom line is that Texas still votes Republican in presidential elections by margins so considerable that even the adoption of minority-friendly congressional districts or the repeal of voter ID laws would have little practical effect. Hence, even if Texas were once again subject to preclearance hearings via Section 3 it probably wouldn't have an impact anytime soon. Furthermore, Texas can utilize various legal precedents such as the *Shelby County v. Holder* decision in their defense.

With Republicans controlling a majority of state legislatures, it is very likely that more and more states will enact some form of a voter ID law. These efforts could very well extend to blue states, sending the Obama administration scrambling to put out fires across the country. In fact, Pennsylvania, which has voted Democratic the past several presidential elections, is even pursuing a voter ID law. While Obama and the DOJ may think that their slew of lawsuits and legal maneuvers over electoral practices are enfranchising minorities and are pursuant to the ideals of the Constitution, they could very well be having an adverse effect on the realization of their ideals. With each lawsuit, the administration provides the Supreme Court with another opportunity to strike down key parts of the Voting Rights Act (a lesson learned the hard way in *Shelby County v. Holder*), with Section 3 being a potential candidate. Perhaps President Obama has spent a little too much time in Washington to realize that it can be perilous to mess with Texas.

29 Fabian, supra.
30 Rangel, supra.
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