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REVISITING JURISDICTION’S SOCIAL COST: A BRIEF REJOINDER TO PROFESSOR KLERMAN

Dustin E. Buehler*

My recent article Solving Jurisdiction’s Social Cost examines issues implicated by nonwaivable federal court subject-matter jurisdiction.1 I argue that courts and commentators are prone to monistic theories of jurisdictional value, failing to consider the full range of interests implicated by jurisdictional rules.2 I then catalogue the various interests arising from jurisdictional rules.3 Lastly, I advance several solutions, including early jurisdictional certification orders, a cut-off point for jurisdictional challenges, interlocutory appeals of jurisdictional rulings, and sanctions to deter private-party abuse.4

Daniel Klerman’s response to my article is articulate, well-reasoned, and persuasive.5 Among other contentions, he suggests that mandatory jurisdictional certification by district courts may incur greater costs than those associated with nonwaivable jurisdictional rules.6 Professor Klerman challenges the notion that the efficiency and structural interests underlying jurisdictional rules are incommensurable.7 And he outlines a novel alternative approach in which federal courts could call for the views of state attorneys general when appropriate to identify and protect federalism concerns and state prerogatives.8

I commend Professor Klerman for his significant contribution to the economic literature on federal court subject-matter jurisdiction. This

* Associate Professor of Law, University of Arkansas, dbuehler@uark.edu.

2. Id. at 658–72.
3. Id. at 672–88.
4. Id. at 689–706.
6. Id. at 3–6.
7. Id. at 6–10; see also Cass R. Sunstein, Incommensurability and Valuation in Law, 92 MICH. L. REV. 779, 796 (1994) (“Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgment about how these goods are best characterized.”).
8. Klerman, supra note 5, at 10–12.
rejoinder briefly responds to a few of his key arguments, with the goals of advancing the discussion even further and encouraging others to join the debate.

Although the costs of jurisdictional certification identified by Professor Klerman deserve serious consideration, many are not as insurmountable as they first appear. The parties’ attorneys and federal courts will easily confirm the existence of jurisdiction in the vast majority of cases, with virtually no effort. For example, confirming the existence of jurisdiction in most federal question cases arising under 28 U.S.C. § 1331 requires no effort at all—the complaint cites a federal law cause of action that the attorney presumably already found while researching the plaintiff’s claims for relief. In cases with thorny jurisdictional issues, district courts perhaps could adjudicate other potentially dispositive procedural matters (i.e., any relatively straightforward venue or personal jurisdiction defects) before turning to subject-matter jurisdiction—a sequencing of issues that would be consistent with my proposals. Moreover, early jurisdictional certification provides valuable information for settlement discussions, allowing parties to negotiate with confidence that the court has jurisdiction over the dispute (and, more importantly, jurisdiction to issue any orders necessary to effectuate a settlement).

Courts and parties also can find ways to mitigate the burdens associated with jurisdictional certification. Done in an efficient manner, jurisdictional certification would be worthwhile because it would eliminate costs associated with jurisdictional uncertainty, while allowing federal courts to assess important structural values as a matter of course. For instance, district court clerks’ offices could promulgate a standard form for certification orders, with auto-populated fields that draw relevant case information from the electronic case filing system. This would allow judges to quickly certify jurisdiction by filling in a terse sentence or two, reciting key facts. If Professor Klerman is correct

12. Auto-populated forms have been used effectively in other governmental contexts to reduce the time and expense of routine functions. See, e.g., Art Heinz, One Million State Police Traffic Citations Issued Electronically, ALLEGHENY CNTY. BAR ASS’N LAWYERS J., May 4, 2012, at 10. A vast amount of relevant information on pending civil cases is easily accessible due to electronic case filing in federal courts nationwide. See Public Access to Court Electronic Records, https://www.pacer.gov (last visited Nov. 20, 2014).
that most judges’ chambers already routinely check subject-matter jurisdiction in all cases, then the additional time necessary to complete an auto-populated form would be minimal, even in the aggregate, and especially when compared to other routine functions performed by federal courts.

In any event, the benefits of my proposals likely outweigh the costs of certification. Notably, the efficiency gains from early jurisdictional rulings would not be limited to cases with latent jurisdictional defects. Instead, mandatory jurisdictional certification in every case—paired with the availability of discretionary appellate review on an interlocutory basis—would significantly increase the number of precedential opinions on these matters, providing future litigants with valuable information and predictability regarding the boundaries of federal court subject-matter jurisdiction.

Furthermore, even if the aggregate costs of jurisdictional certification were to exceed costs associated with nonwaivable jurisdictional rules, the crux of my argument is that we should not view these costs to efficiency values in isolation. Jurisdictional rules must accommodate significant structural interests, and at least some of those interests probably cannot be easily reduced to a metric that is also common to efficiency values. Although Professor Klerman likely is correct that many federalism sub-values can be expressed in a way that is commensurable with litigation costs, I doubt that is true for all relevant structural interests. Suppose, for example, that in a particular lawsuit there would be no difference between state court and federal court litigation costs and accuracy, the case presents no novel legal questions, and the case would not meaningfully impact the workload of either court system. From the vantage point of accuracy and litigation costs, there is no reason why we would care whether the parties litigate in state or federal court. But if the lawsuit does not have a basis for federal court

14. See, e.g., FED. R. CIV. P. 16 (requiring federal district courts to issue case scheduling and pretrial conference orders in all civil cases).
15. See Buehler, supra note 1, at 679–80 (“Published jurisdictional decisions have precedential value for similarly situated litigants, and deter other parties from transcending jurisdictional boundaries.”).
16. See Klerman, supra note 5, at 3–6 (arguing the costs of jurisdictional certification may exceed costs associated with jurisdictional nonwaivability); Buehler, supra note 1, at 696–97 (acknowledging this possibility).
17. Professor Klerman and I agree on this point. See Buehler, supra note 1, at 668–72; Klerman, supra note 5, at 2.
subject-matter jurisdiction, the federal courts cannot hear the case—suggesting that some of the structural sub-values underlying jurisdictional boundaries cannot easily be reduced to metrics commensurable with efficiency and accuracy concerns.  

Finally, I am intrigued by Professor Klerman’s alternative proposal to allow federal courts to call for the views of state attorneys general in order to identify and protect various state interests implicated by jurisdictional rules.  

A state-attorney-general approach has the benefit of being relatively easy to implement within the current federal court system; federal courts already ask for the views of state attorneys general in some situations. For example, federal appellate courts sometimes request amicus briefing from state attorneys general in appeals of prisoner civil rights cases dismissed at the screening stage (before state defendants are served), especially when a case involves matters of first impression or other potentially important legal questions.  

A state-attorney-general approach is not without potential drawbacks and limitations, of course. As commentators have noted in other contexts, some attorney general offices can be “understaffed and underfunded” and “highly political” at times. It is not unusual for those offices to be primarily “concerned with more politically remunerative areas of law enforcement.” That said, involvement of state attorneys general to help protect state prerogatives in the jurisdictional context is an idea worth considering. It may even be possible to implement a modified version of Professor Klerman’s state-attorney-general approach

19. Indeed, my skepticism regarding our ability to quantify and weigh all relevant values using a common metric extends beyond the jurisdictional context. Professor Klerman cites environmental policy as an example of an area in which policymakers work around incommensurable values by surveying and measuring people’s willingness to pay for environmental quality. Klerman, supra note 5, at 7. And yet, commentators have noted that such methods can encounter difficulties in accurately measuring certain types of values. See, e.g., Note, “Ask a Silly Question . . .”: Contingent Valuation of Natural Resource Damages, 105 Harv. L. Rev. 1981, 1982 (1992) (arguing that contingent valuation surveys do not accurately measure nonuse values associated with environmental damage).


21. See, e.g., Order, Nordstrom v. Ryan, No. 12-15738 (9th Cir. Mar. 29, 2013), ECF No. 13 (requesting the Arizona Attorney General to enter an appearance or file an amicus curiae brief); Order, Belanus v. Clark, No. 12-35952 (9th Cir. June 19, 2014), ECF No. 18 (requesting the same from the Montana Attorney General).

22. Geoffrey A. Manne, Agency Costs and the Oversight of Charitable Organizations, 1999 Wis. L. Rev. 227, 251 (1999); see also Mary Grace Blasko et al., Standing to Sue in the Charitable Sector, 28 U.S.F. L. Rev. 37, 48 (1993) (“Attorneys general’s offices are traditionally understaffed, underfunded, and have many pressing concerns[.]”).

23. Manne, supra note 22, at 251.
consistent with many of the proposals I advance in my article. For instance, when a federal court suspects that issues underlying jurisdictional certification would implicate state prerogatives, it could give the state attorney general an opportunity to file an amicus curiae brief. Similarly, appellate courts hearing interlocutory appeals of jurisdictional rulings could invite participation by state attorneys general at that phase of the litigation. This would allow states to assert their prerogatives during the jurisdictional certification process.

In sum, there is much merit in Professor Klerman’s well-written response, which makes an important contribution to existing literature. His state-attorney-general approach deserves consideration. Nevertheless, I contest the notion that the costs of my proposals would outweigh their benefits. Jurisdictional certification can be accomplished efficiently in the vast majority of cases, and a conclusive determination of jurisdictional issues at the onset of litigation will offer much-needed certainty and predictability to all litigants.

THE ROLE OF AGENCY: COMPENSATED SURROGACY AND THE INSTITUTIONALIZATION OF ASSISTED REPRODUCTION PRACTICES

June Carbone* and Jody Lyneé Madeira**

Abstract: The surrogacy debate often conflates what should be seen as three distinct issues: the permissibility of the practice under any circumstances, the role of for-profit intermediaries in arranging surrogacy, and the role of compensation in influencing decision-making.

For those who see surrogacy as intrinsically objectionable, nothing short of a total ban will suffice. For those who object to the commodification of reproduction or to the role of for-profit agencies in recruiting surrogates, however, the solutions lie in regulation rather than prohibition. Commercial agencies, unlike infertile couples who enter into arrangements with their friends and relatives, are repeat players. They are in a better position to institutionalize appropriate practices and instantiate acceptable norms than are parties driven by the desire to produce a child.

We conclude that much of the objection to commercial surrogacy involves the practice’s growing pains. In the end, commercial agencies, particularly if they are subject to regulations that require transparency and provide oversight, may promote human dignity as well as, or better than, individually negotiated altruistic arrangements.

INTRODUCTION

The surrogacy debate often conflates what should be seen as three distinct issues: the permissibility of the practice under any circumstances, the role of for-profit intermediaries in arranging surrogacy, and the role of compensation in influencing decision-making. While some find surrogacy intrinsically objectionable, most are troubled instead by reproductive commodification and the role of for-profit

* Robina Chair in Law, Science and Technology, University of Minnesota Law School.
** Professor of Law, Indiana University Maurer School of Law.

1. Surrogacy refers to the practice whereby a woman gives birth to a child with the intention that the child will be raised by someone else. Modern assisted reproduction technology (ART) makes two different types of surrogacy possible. With “traditional surrogacy,” artificial insemination is used to fertilize the egg inside the woman’s body with the intended father’s sperm. In these cases, the surrogate mother is the genetic and the gestational mother to the resulting child. With gestational surrogacy, doctors fertilize an egg either from the intended mother or from a donor with a man’s sperm and implant the fertilized egg in the womb of a woman who gives birth to the child. In these cases, the gestational surrogate has a “biological” relationship to the child through gestation, but no genetic tie to the child. See Pamela Laufer-Ukeles, Mothering for Money: Regulating Commercial Intimacy, 88 IND. L.J. 1223, 1260 (2013).
agencies in arranging the practice. We contend that much of the objection to commercial surrogacy is a response to the practice’s growing pains. Any new technology, particularly one as controversial as surrogacy, involves the creation of new procedures and appropriate norms. Commercial agencies, unlike infertile couples who arrange for the use of sisters or friends to give birth to their children, are repeat players. Thus, they are more likely to routinize the practice; provide screening; shape the parties’ understandings; and, for all intents and purposes, fix prices. In the end, commercial agencies may promote human dignity as well as, or better than, individually negotiated altruistic arrangements. Accordingly, we maintain that prohibitions on payment obstruct, rather than enhance, the development of socially acceptable surrogacy arrangements.

In this Essay, we examine the relationship between the development of surrogacy and the commercialization of assisted reproduction. First, we review the intrinsic objections to surrogacy and show that they are strongest in the context of “traditional surrogacy,” where the surrogate mother gives birth to her genetic child for transfer to another. Second, we discuss the objections to “gestational surrogacy,” where the woman who gives birth is bearing a child to whom she is not genetically related, and demonstrate that the most forceful of these objections do not involve intrinsic objections to surrogacy itself. Rather, these objections implicate the process of commodification. Third, we maintain that the criticisms of commodification that involve fears of exploitation apply to altruistic as well as commercial surrogacy. Finally, we conclude that for-profit agencies, if administered with transparency and accountability, contribute to the development of an appropriate ethical infrastructure for surrogacy decision-making to a greater degree than exclusive reliance on altruistic transactions.

I. THE ACCEPTABILITY OF TRADITIONAL AND GESTATIONAL SURROGACY

Surrogacy—the practice of having a woman give birth to be raised by another—has existed since antiquity. In the book of Genesis, Abraham’s infertile wife, Sarah, persuaded her handmaid, Hagar, to give birth to Abraham’s child, whom Abraham and Sarah raised as their own.2

2. Christine L. Kerian, Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?, 12 WIS. WOMEN’S L.J. 113, 116–117 (1997) (noting that Sarah persuaded Abraham to sleep with Hagar to produce the child. In addition, Rachel, Jacob’s infertile wife, similarly arranged for her maid Bilhah to have a child that Jacob and Rachel raised).
Today, we would call that process “traditional surrogacy,” except that the woman giving birth would become pregnant through artificial insemination rather than intercourse. Since the advent of in vitro fertilization (IVF) in the 1970’s, however, a man’s sperm can fertilize a woman’s egg outside the body and then be implanted into a second woman who will ultimately give birth to the child. This process, called “gestational surrogacy,” allows a woman to give birth to a child to whom she was not genetically related.

The separation of genetics and gestation gives rise to two different types of objections to surrogacy. The first objection focuses on the transfer from the mother to another family, and is criticized as “baby selling.” The second objection involves the use of the surrogate’s gestational services to give birth, and is criticized as “womb rental.” Critics of traditional surrogacy combine both arguments. Those who object to gestational surrogacy focus on the second objection. In this section, we argue that the opposition to traditional surrogacy tends to be a wholesale opposition to the practice in any form, but that the criticisms of gestational surrogacy are more likely to concern specific practices that are not necessarily intrinsic to surrogacy itself.

Surrogacy first captured popular attention in the late 1980’s with the birth of Melissa Stern, the infamous “Baby M.” In this much publicized case, Herbert Stern, the only child of Holocaust survivors, was married to Elizabeth Stern, a doctor who suffered from multiple sclerosis and who feared that pregnancy would worsen her condition. Mr. Stern, determined to have a biologically-related child, entered into a contract with Mary Beth Whitehead to bear a child for him. Whitehead would be the genetic and gestational mother of the child. According to the New

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4. Id. at 1103.
5. Id. at 1102–1103.
10. Id.
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Jersey Supreme Court, she would also be the child’s legal mother.\textsuperscript{11}

\textit{Baby M} touched off a firestorm of publicity and condemnation. Criticisms combined two concerns: the specter of “baby selling” (a mother being paid to create to create a child for another)\textsuperscript{12} and fear of exploitation (a belief that a mother would do this only because money overcame more sensible judgments).\textsuperscript{13} The two concerns were related. During this time, IVF was in its infancy. Surrogates, who were artificially inseminated with the intended father’s sperm, provided both the egg and the womb.

More than twenty-five years after \textit{Baby M}, surrogacy remains controversial. A minority of commentators objects to surrogacy altogether, some would permit it in limited circumstances (allowing, for example, the use of a gestational carrier to give birth to the genetic child of a woman born without a womb), and still others would leave the matter entirely to individual choice.\textsuperscript{14} For those who find surrogacy or particular surrogacy-related practices intrinsically objectionable, the only solution is a ban on the offensive practices, whether or not the surrogate is paid. Yet, the effect of gestational surrogacy has been to separate the arguments against all surrogacy from those opposed to traditional surrogacy per se.

Conceiving a child and carrying it to term is an act of creation and profound psychological bonding. Many view reproduction as an act of wonder; religions view it as sacred. Moreover, for most women, pregnancy involves an adjustment to the idea of motherhood. Over the course of the pregnancy, hormonal fluctuations produce intense mood swings and most women experience an intensifying identification with their child as they work through the cascade of pregnancy-related emotions. Pregnancy gives prospective mothers a chance to prepare for the birth, and most behold the children they produce with awe and joy. Accordingly, while all pregnant women experience physical and emotional changes, traditional surrogacy asked a mother to surrender her child immediately after birth, where a new mother is ordinarily expected to feel an extraordinarily intense identification with the child she has

\textsuperscript{11} \textit{Id.}

\textsuperscript{12} \textit{Id.; see also} Margaret Jane Radin, \textit{What, If Anything, Is Wrong with Baby Selling?}, 26 PAC. L.J. 135, 144–45 (1995).

\textsuperscript{13} \textit{See} Iver Peterson, \textit{Baby M, Ethics and the Law}, N.Y. TIMES, Jan. 18, 1987, http://www.nytimes.com/1987/01/18/nyregion/baby-m-ethics-and-the-law.html (“To some who have studied the issue one of the most disturbing elements of surrogate motherhood is the overtone of class exploitation.”).

\textsuperscript{14} \textit{See infra} notes 15–23.
Some religious and secular philosophers maintain that surrogacy is intrinsically impermissible whether compensated or not. The Catholic Church’s modern theology of the body, for example, associates the divine—and human dignity—with the conception of a child within a woman’s body as a result of intercourse, celebrating the unity of sex, marriage, and procreation as part of God’s plan. Accordingly, the Church objects not only to surrogacy, compensated or unpaid, but to IVF altogether. Secular philosophers, such as Immanuel Kant, maintain that human beings should always be seen as ends in themselves, not means to an end. Religious and secular traditions disfavor the creation of a child for a reason other than the desire for the child itself. Surrogacy involves conception not for the child’s sake or as the natural outcome of sexual intercourse, but for other reasons. Payment compounds the offense, but the same objection would apply if the mother’s motive were to please a third party. The child becomes a means by which the mother achieves ends that may not necessarily involve the child at all. Even if the mother has confidence in the prospective parents’ love and ability to provide for the child, she still has given birth to a human being who would not exist but for payment or for the mother’s sense of obligation to another. In accordance with this line of thinking, traditional surrogacy is necessarily objectionable because the mother creates the child for another.

15. See, e.g., Brief of Organizations Committed to Women’s Equality as Amici Curiae in Support of Respondents at 9, Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (No. 04-1144) (“While the lasting impact of bearing a child could be mitigated by surrendering the child to others to raise, in reality, fewer than one percent of children born to never-married women are placed for adoption. . . . This likely reflects the psychological toll of giving up a child at birth.”).

16. See, e.g., United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services 24 (5th ed. 2009), available at http://www.ncbcenter.org/document.doc?id=147 (“Reproductive technologies that substitute for the marriage act are not consistent with human dignity. Just as the marriage act is joined naturally to procreation, so procreation is joined naturally to the marriage act.”).


18. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 186–87 (Mary Gregor ed., 1996); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 73 (2000) (stating that the Kantian notion of dignity requires recognizing “each person [as] a bearer of value” and views exploitation as treating “a person as a mere object for the use of others.”).
By contrast, philosophers disagree about gestational surrogacy, which involves appropriation of the surrogate’s labor without use of her genetic material. Thus, it does not include her involvement in the child’s conception.\textsuperscript{19} Exacerbating the more abstract concerns is the mother’s relinquishment of the child to the prospective parents.\textsuperscript{20} Cultural mores stress that a mother is supposed to experience a profound connection to her newborn, and that giving up that child should be wrenching. Handing over a child is a form of abandonment, even betrayal. Accordingly, surrogacy, to the extent it involves the deliberate creation of a child for another, victimizes both the mother who surrenders a child and that child, who may wonder why her mother intentionally gave her up.\textsuperscript{21} While gestation itself creates a sense of attachment to the child (and some will also object to gestational surrogacy on this ground), the normative conclusion that the traditional surrogate should identify and bond with the child is reinforced by the sense that the child is intrinsically and uniquely “hers.”

Complementing the harm to the mother is the emotional dissonance authorities may feel in enforcing surrogacy agreements when they go awry. Mary Beth Whitehead fled, for example, rather than surrender the child to the Sterns.\textsuperscript{22} When the police eventually confronted her, they forcibly took the baby and returned it to the Sterns.\textsuperscript{23} Enforcing surrogacy contracts, as in \textit{Baby M}, may require literally taking a baby from its mother’s arms. The prospect is disturbing not only because of the potential impact on mother and child, but also because it involves state intervention to sever a maternal connection.

At the time of \textit{Baby M} and afterwards, others have argued that women were fully capable of making surrogacy arrangements.\textsuperscript{24} Women, like men who have one-night stands or donate to a sperm bank, should be able to decide to create a child they will not raise. Responsible women who elect to enter into surrogacy contracts may want assurances that new parents will adequately provide for the child, but they should not be

\textsuperscript{19} For a definition of gestational surrogacy, see \textit{supra} note 5 and accompanying text. For discussion of the ethical distinctions between traditional and gestational surrogacy as they relate to the meaning of motherhood, see \textit{infra} notes 31–39 and accompanying text.

\textsuperscript{20} See, e.g., Ellen Goodman, \textit{Surrogates Could Make Pregnancy a Service Industry}, \textit{L.A. Times}, Sept. 2, 1986, at B5 (“I do not believe that anyone should be able to sign away parental rights before she has even borne the child. A baby is not a piece of goods, and human emotions do not make for neat contracts.”).

\textsuperscript{21} For a summary of these arguments, see Scott, \textit{supra} note 8, at 112.

\textsuperscript{22} \textit{In re Baby M}, 537 A.2d 1227, 1235 (N.J. 1988).

\textsuperscript{23} \textit{Id.} at 1236—37.

subject to motherhood ideals that assume that all women identify with all of their genetic offspring in particular ways. Just as some object to state intervention in taking a newborn away from its mother, so do others object to state intervention that limits reproductive choices. These individuals argue that no option, including reproductive surrogacy, should be taken off the table.

However, these arguments, which address women’s decision-making capacity, do not respond to arguments rooted in the personhood of the child. The latter arguments involve societal judgments about the identity of parenthood, and traditional surrogacy involves production of a child who, in every sense but parental intent, is the child of the traditional surrogate. The appropriate response to objections that surrogacy intrinsically dehumanizes the child is to ban traditional surrogacy altogether or to limit it to narrow circumstances where the birth mother’s genetic tie to the child is important in itself.

II. GESTATIONAL SURROGATES AND THE PROSPECT OF EXPLOITATION

The development of gestational surrogacy fundamentally changed the nature of the surrogacy debate. A substantial basis for the objections to surrogacy in Baby M focused on the ties between the child and a mother who both supplies an egg and gives birth. In contrast, objections to gestational surrogacy depend less on the mother-child tie and more on the potential for abuse of the relationship between the intended parents and the carrier. This section will focus on three types of objections: first, the degree to which use of a woman’s reproductive capacity for another can be reconciled with notions of human dignity; second, the

25. See, e.g., Calvert v. Johnson, 851 P.2d 776, 785 (Cal. 1993) (“The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.”).


28. The most typical cases will involve sisters or other relatives who share a genetic link with the intended mother. There is, however, another set of concerns tied to the woman’s health. Artificial insemination is, after all, a relatively non-intrusive process. Use of in vitro fertilization, on the other hand, is necessary for a woman to give birth to another woman’s child and it involves far more risk to the gestational carrier. See discussion infra, p. 11.

29. See supra notes 20–22 and accompanying text.

gestational carrier’s decision-making capacity in light of the physiological and psychological impact of pregnancy; and third, the acceptability of the health risks to the carrier.

The fundamental difference between traditional and gestational surrogacy is that the woman who gives birth is not the child’s genetic parent. IVF, which creates the ability to fertilize a woman’s eggs outside the body and transfer the developing embryos into another woman, makes it possible to separate the gestational and genetic aspects of parenthood. It also raises a question that women have never had to face before: what makes a person a mother?

Law professor Gary Spitko advances a “labor theory” of parenthood that would treat the gestational mother as the initial legal parent, regardless of the circumstances of conception. His theory recognizes a second legal parent (including a genetic father) only with the gestational mother’s consent. Accordingly, gestational and traditional surrogates would be treated as legal parents absent their post-birth consent to adoption. Some state laws are in accord with this theory, recognizing the woman who gives birth as a legal parent on the basis of her gestational role. Other states, however, even if they would ordinarily regard the gestational mother as a legal parent, permit a pre-conception judicial proceeding (with adoption-like safeguards) to secure the intended parents’ legal parentage at birth.

The majority of states reject the privileging of gestation over the genetic connection. These states stress intent to parent the child as the most important factor, and refuse to accord surrogates a parental status equivalent to the infertile couple. In the first major gestational surrogacy decision, *Johnson v. Calvert*, the California Supreme Court ruled explicitly that intent was the tie breaker between two women who each had a biological tie to the child. In that case, Christina Calvert was

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33. *Id.* at 104.
34. *See, e.g.*, Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 23, 24 (2000) (“It is apparent from the foregoing cases that a ‘gestational mother’ may possess enforceable rights under the law, despite her being a ‘genetic stranger’ to the child.”).
unable to carry a child to term, and Anna Johnson agreed to give birth to a child conceived with Christina’s egg and her husband’s sperm. When Johnson contested parentage after the child’s birth, the court ruled that, under California’s version of the Uniform Parentage Act, both the genetic mother and the gestational carrier could be recognized as parents. Rather than privilege either genetics or gestation, the court held that intent plus either genetics or gestation determined parentage. It accordingly recognized Calvert as the legal mother.

Since Johnson v. Calvert, the majority of gestational surrogacy cases have deferred to the parties’ intent. The principal statutory exceptions have come from states that would either discourage surrogacy or recognize the woman giving birth as the mother. The latter encourage use of judicial process to determine parenthood. Even then, state courts in Utah and Florida have held such statutes unconstitutional to the extent they preclude legal recognition of a genetic parent using a gestational carrier with the intention of retaining her parental status. Whether or not these cases produce ironclad constitutional guarantees, the weight of authority favors consideration of the combination of intent and genetics over gestation alone. Thus, the labor theory, in its pure form, has not been credited in most jurisdictions.

The conclusion that the child belongs to the intended parents frames the objections to and the defenses of gestational surrogacy. The first concern is that the intended parents are using another person, not as an equal partner in their efforts to create a child, but as a means to an end. They are thus appropriating the fruits of the gestational carrier’s labor,
without crediting her investment in the child’s birth.\textsuperscript{44} Payment increases
the concern. A friend or relative might enter into a surrogacy
arrangement as an equal in a relationship of mutual respect. Intended
parents, on the other hand, are more likely to reduce a commercial
surrogate’s contribution to the price of the contract.

In fact, surveys of commercial surrogacy in the United States belie the
claim that gestational carriers feel that surrogacy arrangements are
intrinsically unfair or demeaning. These surveys indicate that gestational
carriers are motivated at least in part by the desire to help others to
conceive.\textsuperscript{45} While carriers might not agree to undertake pregnancy’s
considerable inconvenience and expense absent payment, the desire to
help others is an important consideration.\textsuperscript{46} The gestational carrier and
intended parents are often united in their concern for the child and their
joy in the process of conception.\textsuperscript{47} Moreover, gestational carriers find
that the knowledge that the child they are carrying is that of the intended
couple, rather than their own child, strengthens their willingness to
participate in the process.\textsuperscript{48} While gestational carriers can experience
unfair, insensitive, or dehumanizing treatment, they largely report
satisfaction with the experience in the United States.\textsuperscript{49} Within the
American context at least, those who become gestational carriers often
choose to participate in the surrogacy process because they enjoy the
experience of pregnancy, rather than find it intrusive or demeaning.\textsuperscript{50}

The second objection to gestational surrogacy concerns the question
of whether it is ever appropriate to ask a woman to relinquish the child
to whom she has just given birth because of the attachment that arises
during pregnancy. With traditional surrogacy, the issue involved the

\textsuperscript{44} See, e.g., Elizabeth S. Anderson, Is Women’s Labor a Commodity?, 19 PHIL. & PUB. AFF. 71,
75 (1990) (arguing that when women’s capacity to carry children “is treated as a commodity, the
women who perform it are degraded.”).

\textsuperscript{45} See Laufer-Ukeles, supra note 1, at 1242.

\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} See Scott, supra note 8, at 142; see also ELLY TEMAN, BIRTHING A MOTHER: THE
gestational surrogates found that they strongly regard the fetus as the child of the intended parents);
Hal B. Levine, Gestational Surrogacy: Nature and Culture in Kinship, 42 ETHNOLOGY 179
(Summer 2003).

\textsuperscript{49} Janice C. Ciccarelli & Linda J. Beckman, Navigating Rough Waters: An Overview of
Psychological Aspects of Surrogacy, 61 J. SOC. ISSUES 21, 31–32 (2005) (finding that most
surrogates reported satisfaction with the experience).

\textsuperscript{50} International surrogacy, however, may involve greater potential for abuse. See Katarina
propriety of the mother’s willingness to give up her own child. With gestational surrogacy, the issue is her *capacity* to do so in light of the emotional attachment that typically attends pregnancy and childbirth. The assumption is that if pregnancy naturally or inevitably produces such feelings, a woman giving birth will naturally and inevitably experience anguish or regret at relinquishing the child. Asking her to do so in advance, before she has actually experienced the emotions involved, is therefore a form of exploitation.51 Others feel that women (particularly if they have given birth before) can “control” their emotions, and that they are more likely to do so where they believe they are conferring a gift upon another couple, whom they regard as the child’s true parents.52 In gestational surrogacy, arguments about women’s autonomy and decision-making capacity involve their ability to deal with their own emotions in making an ethically acceptable decision. Empirical studies find, in fact, that gestational carriers do not typically have difficulty relinquishing the child.53

A third concern involves the inherent risks of pregnancy and childbirth. This concern gives rise to contentions that asking a woman to undergo such risks for another is a form of exploitation. Even today, a small number of women die in childbirth, even with the best medical care.54 Others suffer lifelong side effects from a difficult birth, postpartum medical treatment, postpartum depression, or pregnancy-related hormonal changes.55 The mandatory use of IVF in gestational

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52. Indeed, empirical studies show that gestational carriers have stronger feelings of emotional attachment to the prospective parents than the child. See Laufer-Ukeles, supra note 1, at 1230–31.


surrogacy also increases risks as a gestational carrier must take various hormones to prepare her body for the embryo. 56 Ethicists question whether prospective surrogates can fully assess these risks, which are hard to determine in advance, and whether these tradeoffs are ethically permissible. That is, while many would accept intended parents’ willingness to take physical and financial risks to have a genetically related child, more would question the tradeoffs involved in gestational surrogacy. The gestational carrier is risking her own health and well-being to create a child for someone else—typically for payment. The tradeoff between potential health risks and payment is arguably impermissible either because another person (the gestational carrier) is used as a means to an end, 57 or because of doubt that her consent can ever be truly informed and free of the coercion that comes with payment.

The response to these objections concerning decision-making competency and emotional and physical exploitation depends in part on surrogacy’s perceived value. The ability to assist prospective parents to have a genetically related child is itself incalculable. 58 Accordingly, if intended parents can ethically undertake risks of a surrogate pregnancy, why can’t a gestational carrier, motivated at least in part by altruistic concern for the intended parents or child? The question becomes one of informed consent rather than intrinsic objection.

Moreover, payment influences gestational carriers’ decisions in varied ways. A given fee, such as the $10,000 paid to Mary Beth Whitehead (more like $20,000 to $25,000 today), 59 will mean something different to each surrogate depending on the surrogate’s socioeconomic status. 60 Similarly, women vary in their ability to weigh risks and make informed


57. See, e.g., Sonia M. Suter, Giving in to Baby Markets: Regulation Without Prohibition, 16 MICH. J. GENDER & L. 217, 222 (2009) (“We potentially do harm to ourselves and to human flourishing if we treat something integral to ourselves as a commodity, i.e., as separate and fungible.”).

58. Laufer-Ukeles, supra note 1, at 1224–25.

59. Id. at 1264 n.244 (noting that the typical fee today is between $20,000 and $25,000).

60. See I. Glenn Cohen, The Price of Everything, the Value of Nothing: Reframing the Commodification Debate, 117 HARV. L. REV. 689, 689–91 (2003); Laufer-Ukeles, supra note 1, at 1234 (noting that most surrogates are working class; they need the money but are not poor or desperate).
choices depending on the quality and quantity of information they receive and their individual capacity to evaluate that information.61

Taken together, arguments about gestational surrogacy’s permissibility are far more contextual than objections to traditional surrogacy. At the core of these arguments is concern about contract structure and payment’s role in skewing surrogacy decision-making. The next section will address the role of commercial, for-profit agencies in structuring that decision-making.

III. COMMERCIALIZATION VERSUS ALTRUISM, AND THE IMPACT OF SURROGACY AGENCIES

Critics of commodification contrast altruistic and commercial motivations and associate the potential abuse of gestational carriers with the profit motive. Yet, studies of surrogacy in practice find that many of these abuses also occur in altruistic cases. The problems are indicative of surrogacy’s growing pains. Creating norms that regularize a new practice, establish ethical standards, and shape parties’ expectations takes time and experience. In this section, we contrast the role of commercial agencies with private arrangements in shaping such understandings and identify specific agency practices that contribute to forging an ethical infrastructure for surrogacy agreements. Surrogates’ motives and the involvement of a surrogacy agency can profoundly affect the formation and outcome of a surrogacy arrangement.

Consider the case of two gay men, Donald Robinson and Sean Hollingsworth, a married couple who wanted to have a child they would raise together. Donald’s sister, Angelia, a childless unmarried woman in her forties, agreed to serve as a gestational carrier.62 As part of the agreement, she left her Texas home and went to work for her brother’s Manhattan accounting firm. She conceived twins and planned to live permanently near her brother in New Jersey and play a role in the children’s lives.

All did not go well. Over the course of the pregnancy, Angelia began to bond with the twins, and she and her brother eventually had a falling-out.63 The pregnancy was difficult; Angelia experienced periodic depression and nearly died one month before the due date when her

61. See Laufer-Ukeles, supra note 1, at 1249–50.
blood pressure spiked due to pre-eclampsia. Although her brother and his partner took the children home from the hospital, Angelia sued for recognition as their legal mother. As part of the Baby M legacy, New Jersey does not recognize the validity of surrogacy agreements and, absent adoption, treats the woman who gives birth as the legal mother, even without a genetic relationship. 64 The courts concluded that Angelia was the children’s legal mother, and Sean Hollingsworth (as sperm provider) was the legal father. Sean received full legal and physical custody, but Angelia was awarded visitation. Five years after the children’s birth, the parties, who agreed on little, were still disputing care issues. 65

Angelia’s case illustrates why those who find surrogacy intrinsically objectionable think it is sensible to ban it outright. The case also embodies the tradeoffs faced by those who do not uniformly oppose surrogacy but fear commercial surrogacy will lead to exploitative, demeaning, or unfair practices. Critics from both perspectives could allege exploitation irrespective of payment. However, exploitation is not inherent within all surrogacy arrangements. If a state takes Washington’s approach of allowing altruistic surrogacy—permitting surrogacy but banning payment—the state discourages the practice’s growth in-state and encourages its residents to rely on informal or out-of-state surrogacy arrangements, with little ability to shape the practices. If states legalize surrogacy with payment, state regulation and private institutionalization of surrogacy norms may regularize surrogacy relationships and provide participants some protection. For reasons discussed below, no reputable agency today would arrange a surrogacy agreement on the terms Donald and Angelia reached. 66

In Baby M, many observers disapproved of the commercial entities involved as much, if not more, than surrogacy itself. 67 There, conflict appeared inevitable and the agency’s role in setting up the transaction in spite of the warning signs demonstrated the potentially unsavory nature of commercial agencies. William Stern had gone to much trouble to conceive a genetically related child to ensure continuation of a family line threatened with extermination during the Holocaust. The agency’s

66. See discussion infra at pp. 15–18.
pre-conception psychological screening indicated that Mary Beth Whitehead would have difficulty giving up the child, yet the agency still proceeded to use her as a surrogate. Under these circumstances, both Stern and Whitehead could be expected to bond with the child, yet the agency did not provide either with counseling or assistance after the birth. Banning commercial surrogacy served to eliminate the prospect that profit-motivated agencies would rush to arrange questionable transactions. These bans still allowed parties in need of surrogacy services to canvass family and friends for someone presumably more trustworthy than Mary Beth Whitehead. Yet, there is reason to doubt that altruistic transactions are necessarily happier or less conflicted, or that state bans will necessarily restrain the growth of commercial surrogacy exchanges.

Every state has residents unable to reproduce without gestational surrogacy. To produce a genetically related child in Washington today, these residents have three options. First, they can hire a surrogate out-of-state. California, which has legalized surrogacy and recognizes intended parents on the child’s birth certificate without an adoption proceeding, has a flourishing surrogacy industry attracting prospective parents from around the world. In addition, international fertility tourism now offers less expensive options. Shopping for surrogacy-friendly jurisdictions has become a global business. Accordingly, it is unlikely bans on payment will stem its growth. Second, residents can try to enter into their own underground surrogacy agreements, advertising online or responding to others’ ads. These informal relationships, however, leave both parties with fewer protections than they would have through authorized transactions. Third, Washington residents interested in surrogacy can try to persuade a friend or family member to give birth without payment—as in Angelia’s case. Though these cases sometimes lead to happy conclusions and closer family ties, they can also be exploitative in some of the same ways as commercial surrogacy.

Commercial agencies, in contrast, offer protections that may not have been available at the time of Baby M. They have developed policies designed to prevent the conflicts that arose in the Baby M case and between Angelia and Donald. In the first place, no reputable agency

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69. Id. at 96.
70. See, e.g., Sarah Mortazavi, It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy, 100 GEO. L.J. 2249, 2272 (2012) (observing that the cost of surrogacy is significantly less expensive in India than it is in the United States).
would choose a gestational carrier like Angelia, who was childless and in her forties. Agencies prefer women who have already given birth, partly because it indicates that a carrier can deliver a child without complications, and partly because it provides assurance that she “understands the biological and emotional implications of pregnancy and childbirth.” In an interview discussing the case, the New York Times quoted Dr. James Goldfarb of the Cleveland Clinic, who indicated standard clinical practice when he commented that “[i]f a surrogate has not had a baby before, we won’t use her.” In contrast, parties dependent on altruistic surrogacy may know relatively few women willing to be gestational carriers, and may not have the luxury of looking for more suitable candidates.

Moreover, arm’s length practices provide a measure of protection for both intended parents and surrogates. The fertility clinic involved in the Robinson case had offered psychological screening, but the parties refused, if the surrogate were a stranger, the clinic would have been more likely to have insisted on the screening and the intended parents would have been more likely to accept. Angelia felt pressure from her brother to agree, and the lack of options may have heightened the pressure on both parties to proceed. In addition, the brother and sister entered into arrangements that strangers in a contractual relationship are unlikely to do: Angelia sold her Texas home where she had lived all her life, accepted a job with Donald’s firm in New York, used her own assets and some of her brother’s to set up a bed and breakfast, and became dependent on him financially. After the birth—and the rupture in her relationship with her brother—she had no home, no savings, no job, and no access to the children she had planned to help raise. She responded by rediscovering her Baptist faith and denouncing both surrogacy and homosexuality, complicating the relationship with her brother and his spouse.

71. See Saul, supra note 62. They also prefer gestational carriers who, unlike Mary Beth Whitehead, have no genetic tie to the child. See also Laufer-Ukeles, supra note 1, at 1260 (noting that more than ninety-five percent of surrogates carry children to whom they are not genetically related).

72. See Saul, supra note 62.

73. Id.

74. See, e.g., Laufer-Ukeles, supra note 1, at 1262 (noting that psychological screening is matter of common practice even where not mandated by state law).


76. Id.

77. Crandell, supra note 63.
By contrast, agencies often structure the relationship to separate surrogacy’s commercial and altruistic parts. Agencies typically require that the intended parties make payments in advance. The agency then distributes the payments to the surrogate when required conditions have been met. In addition, agencies may insist that the surrogate have separate legal representation to increase chances a contract will be enforced; Angelia instead waived the right to separate counsel. Even if the contract is of questionable enforceability, independent counsel may review matters such as the agreement’s binding force (void in New Jersey), the parties’ plans for an abortion from birth defects or other contingencies, the need for an adoption to transfer legal parentage, the carrier’s ability to change her mind post-birth (an uncertain matter in New Jersey at that time), and any anticipated post-birth contact with the child. Angelia’s lawyer reported that she moved to New Jersey in part to have a continuing relationship with the children, but she signed an agreement that severed her parental status and made access to the children dependent on her brother and his spouse’s goodwill. As brother and sister, Donald and Angelia had expectations that Angelia’s involvement with the twins would continue, but these expectations, at least on Angelia’s part, may well have gone beyond the conventional role of an “aunt.” Thorough exploration of the agreement and the parties’ post-birth expectations might have persuaded them that this sister-as-surrogate arrangement was not a good idea, or could have produced more realistic plans and expectations.

Moreover, processes of socialization may allow parties to surrogacy arrangements to traverse well-trodden paths instead of hacking their own way haphazardly through the experience. Many of the practices surrounding pregnancy, marriage, and childbirth have been “institutionalized” in that social norms define parties’ expected behavior within the institutions of marriage and legal parenthood. Andrew Cherlin, for example, has argued that marriage once served to socialize young people into adulthood through the assumption of predictable, gendered roles. Remarriage, the stepparent role, and same-sex relationships did not have the same “institutionalization” function

78. See, e.g., Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (noting in that case that the surrogate was paid in installments over the course of the pregnancy, with the final installment scheduled for six weeks after birth).
79. Cassidy, supra note 75.
81. Id. at 848–849.
because role expectations were far less detailed or uniform. 82

The relationship between Sean, Donald, and Angelia was not “institutionalized” in any sense. It is not too much of a stretch to say that their collaborative reproduction plan required making it up as they went along. Both surrogate and same-sex reproduction, after all, are relatively new. Over the time period from the twins’ conception to the custody resolution five years post-birth, Sean and Donald went from a relationship that could not receive legal recognition in most states, to marriage in California, to repeal of the right to marry (that nonetheless did not invalidate their particular union), to recognition of their California marriage in New York (where Donald and Angelia worked but not in New Jersey where they lived). The legal status of gestational surrogacy and the parties’ subsequent parental status also shifted during the same time period—neither New York nor New Jersey adopted comprehensive legislation addressing the issue. 83 As a result, the litigation between the parties addressed issues that had not been resolved under New Jersey law at the time the parties entered into their initial agreement. 84

If surrogacy becomes common, particularly for gay couples, its associated roles may become more routinized and, with shared expectations, more institutionalized. This is more likely to happen, however, if commercial agencies play a role in the process. After all, a quarter century after Baby M, the agencies, which were in their infancy at the time of the case, largely responded by moving out of New Jersey. 85 The question for the future is what role payment—and attorneys and commercial agencies—plays in the creation of appropriate ethical understandings for the development of new forms of reproduction.

IV. REPEAT PLAYERS, COMMERCIAL AGENCIES, AND ETHICAL CODES

Ethical codes—and the institutionalization of family norms—come from the formalization of shared experiences. For that to happen,

82. Id. at 848.
83. Scott, supra note 8, at 120.
practices need to be visible and opinion leaders such as legislators, courts, religious figures, and professionals need to shape and fix in place appropriate understandings. Repeat players in surrogacy arrangements can anticipate what can and will go wrong and design procedures accordingly. Some arrangements that may feel appropriate in a conflict-free relationship will appear unfair or even exploitative in the event of a dispute. Donald’s willingness to provide Angelia with a job and help to establish her bed and breakfast seems well-meaning, even generous, in the context of a collaborative brother-sister relationship, but oppressive in encouraging Angelia to become financially dependent and therefore vulnerable. In this section, we argue that commercial agencies, subject to appropriate regulation and oversight, are more likely to protect the parties involved in a surrogacy arrangement than laws that restrict surrogacy to altruistic exchanges.

Commercial surrogacy agencies, through their broker role, may “lock in” practices that help surrogacy operate more smoothly, particularly in jurisdictions without comprehensive regulation. This does not always mean that agencies adopt best practices or that they act against self-interest. Instead, it simply means that the presence of commercial actors in the surrogacy process changes the dynamic in predictable ways. We discuss four of those ways below.

First, agencies alter supply and demand. Donald and Angelia may have each felt pressure to reach an agreement if both believed it was the only way for Donald to have a child with his partner. An agency recruiting many possible gestational carriers would have increased the supply. Given other possible surrogates, Angelia may have felt freer to press Donald about terms of their agreement, and Donald may have thought twice about whether to use his sister. Alternatively, after examining an arm’s length arrangement with another carrier, they may have agreed on different terms or evolved a different understanding of the arrangement.

Second, agencies act on the basis of past experience. Clinic practices reflect institutional memory of past cases, particularly cases that go wrong. Fertility clinics, surrogacy agencies, and lawyers tend to incorporate lessons gleaned from past experiences into new procedures. For example, in recruiting surrogates, agencies often require that prospective gestational carriers be over twenty-one and under forty-one; have no sexually transmitted diseases, cancer, substance abuse, or other disqualifying medical conditions; be financially secure; have a supportive environment; and be capable of handling pregnancy’s
physical and emotional issues. Many clinics also will not work with carriers who have not given birth and require psychological screening; jurisdictions that regulate surrogacy often mandate such evaluations. These requirements explain much of what went wrong in Angelia Robinson’s case. Her age may have increased her susceptibility to pregnancy complications. Selling her house, quitting her job, and moving to New Jersey made her financially vulnerable. Agencies rule out those who are too financially desperate, which also tends to limit claims of exploitation. They also prefer gestational carriers who have “a supportive environment,” which often means a significant other, children, friends, and family on whom they can rely—apart from the intended parents. Carriers who already have children not only know what to expect, but are less likely to regard surrogacy as their only opportunity to have a child, as Angelia did. These practices help select surrogates who are more likely to surrender the child at birth—and limit the potential that the surrogate will be exploited, treated unfairly, or physically or emotionally endangered by the pregnancy.

Third, agencies assist parties in forming contracts and ensure independent representation. Even in a state like New Jersey where surrogacy contracts are unenforceable, working through an agreement may help parties understand what they are likely to face and provide a framework for future decisions. As one lawyer observed, “[t]he act of setting down the intentions, expectations and goals of the parties will diminish the chance of later conflict or disappointment.”

Courts, moreover, may be inclined to hold those who profit from surrogacy arrangements to a duty to look out for the interests of both parties. Two individuals—an attorney and a surrogacy broker—who had arranged a surrogacy arrangement were held liable when the child was born with severe birth defects that might have been prevented had the father been properly screened. The court held: “This . . . affirmative duty of protection, marked by heightened diligence, arises out of a special relationship because the defendants engaged in the surrogacy business

87. See Ciccarelli & Beckman, supra note 49, at 34.
89. See Laufer-Ukeles, supra note 1, at 1264.
and expected to profit thereby.\footnote{Stiver v. Parker, 975 F.2d 261, 268 (6th Cir. 1992).} Attorneys have a duty to design and administer a program that would protect the participants from foreseeable harm.\footnote{Id. at 268.} Federal and state regulation can also address health and other standards\footnote{Lauren Gill, \textit{Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Donation}, 54 WM. & MARY L. REV. 1715, 1731–34 (2013) (reviewing health regulations).} and, if appropriate, limit contractual waivers of liability. The formalization and professionalization of the process means that these professionals are likely to be held responsible for things that go awry, providing incentives for anticipating—and avoiding—potential sources of liability.

Of course, including lawyers and formal contracts also involves opportunities for one-sided bargains.\footnote{See, e.g., Catherine London, \textit{Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts}, 18 CARDOZO J.L. & GENDER 391, 412–13 (2012).} Angelia Robinson did sign a contract, albeit one that misstated her options under New Jersey law, and did so without legal representation. Lawyers often encourage parties to agree to provisions that may not be legally enforceable. Such provisions are inappropriate where they mislead, but they may also create a framework to deal with possible contingencies. For example, while no court will enforce a provision compelling an abortion over the gestational carrier’s objection, such a provision may encourage parties to contemplate what to do if a fetus has birth defects. Some surrogacy contracts, for example, now include provisions that provide for selective reduction of multiples, but they may also limit the provision to higher order multiples such as triplets. The objection to selective reduction of twins may reflect agency preferences, emerging norms in the field, or a desire to routinize a likely wrenching decision. Whatever the motivation, the contract provisions helps shape expectations before the issue arises.

Routinizing the contract process requires attention to three distinct circumstances: (a) where contracts are enforceable, separate representation, particularly for the party with less bargaining power, is critical;\footnote{See, e.g., Jill Elaine Hasday, \textit{Intimacy and Economic Exchange}, 119 HARV. L. REV. 491, 526 (2005) (explaining the relationship between independent counsel and informed consent).} (b) where provisions may not be enforceable, they still lock in agreements about how to handle foreseeable problems, and they should be based on complete and accurate information; and (c) where they insulate commercial actors from liability, they should be subject to scrutiny. Nonetheless, the inclusion of professional, experienced parties who can realistically anticipate, explain, and plan for potential

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92. Id. at 268.
complications is an advantage.

Fourth, agencies restructure surrogacy’s commodification and contractual dimensions. Much of the objection to surrogacy comes from the association between reproduction as an intimate activity and payment, resulting in commodification. Yet, many of those who have expressed concern about commodification do not necessarily wish to ban surrogacy, and recognize that some compensation for pregnancy’s intrusiveness, expense, inconvenience, and discomfort is appropriate. 96 One response is to consider how surrogacy’s business aspects, including payment, can be structured to minimize its dehumanizing aspects. Such measures include:

a) Fixed prices. Many parties find haggling over price unseemly, particularly when the result creates higher prices for more favored groups along lines such as race, nationality, class, and so on. The Association of Reproductive Medicine (ASRM) has, for example, tried to standardize payments to egg donors. 97 The creation of a standardized price may constrain some of surrogacy’s commercialized aspects. As Pamela Laufer-Ukeles observes, “capping the price reflects the desire to ensure that surrogacy is not fully marketized but rather appreciated for its dual function of creating intimate and monetary relationships.” 98

b) Staggered Payments. One of the differences between Baby M and Calvert involved the difference between a lump sum payment upon birth versus staggered payments over the pregnancy term. Whereas a lump sum payment seems closer to baby-selling, staggered payments more closely resemble compensation for services. Moreover, initial payments acknowledge the surrogate’s assumption of a responsibility to the intended parents from the beginning and mutual involvement in the pregnancy.

c) Third party brokers. When third parties are not involved, the intended parents and the carrier handle financial matters directly. Donald

96. See Laufer-Ukeles, supra note 1, at 1247; Mary Anne Case, Pets or Meat, 80 CHI.-KENT L. REV. 1129, 1144–45 (2005); Michele Goodwin, Relational Markets in Intimate Goods, 44 TULSA L. REV. 803, 810 (2009); Kimberly D. Krawiec, A Woman’s Worth, 88 N.C. L. REV. 1739, 1757 (2010); Jennifer L. Watson, Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 544, 545 (2007); Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood, 81 VA. L. REV. 2343, 2349–50 (1995) (observing that she interviewed women who had acted as surrogate mothers expecting to find exploitation of women who had agreed to become surrogates because of the money involved and, instead, concluded that the potential risks are “rashly speculative and bear no relationship to the arrangements as they currently exist.”); Sanger, supra note 68, at 77–78.

97. But see Krawiec, supra note 96, at 1759–69.

98. Laufer-Ukeles, supra note 1, at 1264.
Robinson, for example, hired his sister, commingled the proceeds from her home’s sale with his own funds in purchasing and renovating the bed and breakfast, and paid for the pregnancy’s medical costs. These activities created numerous individual transactions that could lead to bad will. Even the act of writing a check, particularly if the amount is not fixed in advance, reminds the parties of the commercial nature of their relationship, creating opportunities for potential disputes or simply discomfort. In contrast, most agencies arrange for intended parents to submit payments to the agency, which then disperses payments to the surrogate. This allows the surrogate and the intended parents to interact without having to discuss finances.

d) Acknowledgment of the non-pecuniary aspects of the surrogacy relationship. As Laufer-Ukeles indicates, most studies find that altruistic motivations are important to women who choose to be gestational carriers, and their relationship with the intended parents greatly influences their attitudes toward the experience. At the same time, intended parents sometimes resent the carrier’s ability to produce a child they cannot and may want to micromanage the carrier’s pregnancy, dictating diet, exercise, and medications, or prohibiting alcohol, caffeine, heavy lifting, sex, and travel. Third party professionals can be useful in structuring these relationships. They can inform the parties about the current medical opinion on such matters as use of caffeine (now thought to be less harmful than a few years ago), routine exam frequency, or the risk of travel close to the due date. Third party professionals help to create reasonable expectations by drafting contracts that shape and clearly articulate understandings about factors such as diet, health care, alcohol, sex, travel, participation in prenatal exams, delivery, and post-birth contact. In addition, they counsel intended parents about the nature of the relationships and appropriate etiquette. Finally, third party professionals provide opportunities for the gestational carrier and the intended parents to interact outside of formal or stressful events such as

99. Id. at 1233.
100. See, e.g., London, supra note 94, at 413.
102. London, supra note 94, at 413.
contract preparation or delivery of the child.

In short, the inclusion of agencies, as repeat players with a stake in the smooth execution of surrogacy arrangements, helps to normalize them. The agencies should screen out the most vulnerable participants, shape the understandings of the parties in ways that minimize future conflicts, provide professional legal and psychological assistance in dealing with unexpected events, and structure the parties’ interactions in ways that increase the likelihood of success and satisfaction. These profit-driven agencies are, of course, more likely to take greater care if their actions are visible and they may be called to account. Despite their potential drawbacks, they still offer greater hope for the standardization of appropriate norms than individually arranged transactions, whether altruistic ones taking place with friends and family or foreign sojourns in search of available services.

CONCLUSION

The surrogacy process, like the creation of any new family, involves bringing people together who may have different assumptions, experiences, and values. Institutions instantiate shared expectations and norms about events, whether they are routine or more exotic undertakings. Legal mandates and private contracts can encourage surrogacy participants to develop shared expectations about the experience, but are unlikely to occur without visibility, transparency, and the involvement of third party professionals.

It should be noted that including these professionals can be expensive. Indeed, the expense of assisted reproduction generally and surrogacy, in particular, is fueling international medical tourism, which will make it that much harder either to enforce surrogacy bans or to develop appropriate, equitable, and non-exploitative practices. 104 In this context, allowing commercial surrogacy in the United States, with appropriate safeguards, may contribute to the development of established practices that govern surrogacy globally. When surrogacy arrangements include agencies and professionals with a stake in making these relationships work, these arrangements safeguard the respect and dignity of both surrogates and intended parents.

104. See Laufer-Ukeles, supra note 1, at 1267–75.
THE TWO-SIDED SPEEDY TRIAL PROBLEM

Brooks Holland∗

INTRODUCTION

In The Not So Speedy Trial Act,1 Shon Hopwood invokes the famous maxim, “justice delayed is justice denied,”2 to critique how the Speedy Trial Act of 1974 (“Act”) has been applied in federal courts.3 The Act, as Hopwood observes, was adopted to minimize long and largely unregulated delays in bringing criminal defendants to trial.4 Hopwood argues that, by demanding that trials take place within seventy days of a defendant’s indictment or initial appearance, the Act aims to protect the procedural justice interests of both defendants and the public.5

In light of the “enormous public interest involved in speedy trials,” Hopwood surmises “that federal trial and appellate courts would follow the strict strictures of the Act.”6 But in reality, Hopwood posits, the Act does not accomplish the goal of uniformly speedy federal trials because defense lawyers, prosecutors, trial judges, and appellate courts collude to dodge the Act’s requirements by utilizing various doctrinal side steps.7 This collusion, Hopwood continues, results from the convergence of institutional interests to de-prioritize uniformly speedy trials,8 and the fact that “there is no real incentive for anyone to follow the Act.”9 To minimize the doctrinal discordance between the Act and real-world practice, Hopwood prescribes how lawyers, academics, and federal

∗ Associate Professor of Law, Gonzaga University School of Law. The author currently serves as Chair of the Washington State Bar Association Council on Public Defense, and is a member of the Society of American Law Teachers Board of Governors.

2. Id. at 710.
4. See Hopwood, supra note 1, at 712–16.
5. See id.
6. Id. at 710.
7. See id. at 738–39 (summarizing non-compliance with the Act by prosecutors, defense lawyers, and courts).
8. See id. at 739.
9. Id. at 738–39.
courts can better fulfill the Act’s requirements.\textsuperscript{10} Hopwood has written a valuable paper, and I cannot question his thorough research into the Act’s history and design, his diagnosis of how lawyers and judges may avoid the Act’s requirements, and his prescription for ensuring fuller doctrinal compliance with the Act. Instead, I wish to enlarge the criminal justice inquiry that I believe Hopwood’s paper invites. The interest in speedy trials highlighted by Hopwood is not restricted to federal courts.\textsuperscript{11} On the contrary, the vast majority of criminal cases are heard in state courts,\textsuperscript{12} which are controlled by state speedy trial statutes.\textsuperscript{13} I do not assume that Hopwood means to speak solely to federal courts operating under the Act when he emphasizes that justice delayed is justice denied. Rather, the premise underlying Hopwood’s call for stricter doctrinal compliance with the Act appears to be that more uniformly speedy trials will ensure greater justice for everyone—that efficient justice is a stand-alone priority for our criminal justice system in whatever court those delays may occur.

If we apply Hopwood’s underlying premise about speedy trials to the criminal justice system beyond federal court, what picture will we see? I believe we will see that Hopwood’s concern over trial delays remains quite valid regardless of venue. The states also suffer from chronic institutional delays—some delays even more startling than the federal court examples that Hopwood chronicles.\textsuperscript{14} But this fuller picture may

\textsuperscript{10} See id. at 740–45.
\textsuperscript{11} See, e.g., Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967) (incorporating Sixth Amendment speedy trial right against the states as a fundamental right under the Fourteenth Amendment Due Process Clause).
\textsuperscript{12} The dominance of the state courts in adjudicating criminal matters can be seen in some relative data. For example, in 2006, federal district courts had 66,860 total criminal filings of any kind. See Sourcebook of Criminal Justice Statistics Online, SUNY ALBANY, available at http://www.albany.edu/sourcebook/pdf/5112006.pdf (last visited Mar. 26, 2015). By contrast, in that same year, state courts recorded 1,132,290 felony convictions alone. See id., available at http://www.albany.edu/sourcebook/pdf/5442006.pdf (last visited Mar. 26, 2015). This state-federal criminal caseload disparity also can be seen in correctional data. See U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Correctional Populations in the United States, at 11–12 (2013), available at http://www.bjs.gov/content/pub/pdf/cpus13.pdf (last visited Mar. 26, 2015) (reporting that of a total correctional population in the United States in 2013 of 6,906,200 persons, 6,559,200 persons were incarcerated under state jurisdiction, and 347,000 persons were incarcerated under federal jurisdiction; and of 2,217,000 persons in physical custody, 2,002,000 persons were in state prisons or local jails, and 215,000 were in federal custody).
\textsuperscript{14} See infra notes 19–28.
reveal that the problem with delayed trials is only one side of a larger and pressing criminal justice dynamic. Some cases are tried too slowly, as Hopwood persuasively demonstrates. Many other cases, however, are tried too speedily, in ways that equally undermine any sound conception of criminal justice.

This two-sided speedy trial dynamic results from the reality of modern criminal justice. Theoretically, our criminal courts offer a trial-based system of justice. But in reality, the criminal justice system trudges toward adversarial trials far less often than it hurtles to barely adversarial plea-bargained dispositions. Consequently, in thousands of misdemeanor and even felony matters each year, the speedy trial problem includes the mirror image of justice delayed: a system of rushed, unconsidered justice with very few trials, or even specters of trials.

In this response, I will suggest that the principal phenomenon driving Hopwood’s premise may not be a lack of doctrinal compliance with the Act or any other speedy trial law, but instead the lack of adequate criminal justice resources. More robust resources should minimize many of the incentives identified by Hopwood for lawyers and judges to drag their feet in proceeding to trial. At the same time, more resources should slow the process for some of the thousands of cases that swiftly and routinely are plea-bargained, and maybe even place a few more of those cases on track for an actual trial. Thus, if we improve criminal justice resources to adequate levels, we will realize more fully the benefits of the valuable doctrinal reforms advocated by Hopwood.

I. A TWO-SIDED SPEEDY TRIAL PROBLEM

Hopwood documents numerous instances of lengthy pre-trial delay that appear unrelated to the administration of justice. Trial courts countenance these delays under the Act, Hopwood maintains, by improperly accepting speedy trial waivers or by granting ends-of-justice continuances without an adequate basis. Further, trial courts are not incentivized to act differently because appellate courts rarely reverse these decisions and do not hold defense counsel accountable for failing to press for a speedy trial.

These institutionalized trial delays are a criminal justice problem that extends well beyond federal courts. The New York Times, for instance,
profiled the County of Bronx, New York, as offering perhaps some of the worst examples of institutionalized trial delay. As the Times’ series of articles reported, “a plague of delays in the Bronx criminal courts is undermining one of the central ideals of the justice system, the promise of a speedy trial.” This report noted that in 2011, New York City had 141 defendants who had waited more than three years in jail for a trial, with eighty-five of these cases in the Bronx. These excessive delays extended to misdemeanor cases, and responsibility was laid at the feet of the court, prosecutors, and defense lawyers. These delays have proliferated notwithstanding New York’s own speedy trial statute, and for reasons that may track Hopwood’s diagnosis of the Act’s own failings.

Delays of this magnitude are inexcusable, and they inflict more than theoretical harms. A recent article in The New Yorker powerfully illustrated these harms in the case of Kalief Browder. Browder was charged with robbery at the age of sixteen, and was held in jail at Riker’s Island pending trial. Browder refused to plead guilty and demanded a trial. But that trial never happened. And by the time the prosecution moved to dismiss the case, Browder, who had entered jail at sixteen, “had missed his junior year of high school, his senior year, graduation, the prom. He was no longer a teen-ager; four days earlier, he had turned twenty.” The tragic circumstances of these delays make Hopwood’s proposals to invigorate the Act, or any other speedy trial law, easy to embrace.

Yet, for every Kalief Browder, numerous individuals receive too
speedy of a trial, because our criminal justice system is no longer principally a trial system. Rather, as the U.S. Supreme Court recently acknowledged, “ours ‘is for the most part a system of pleas, not a system of trials.’”29 This plea system prioritizes and rewards early guilty pleas, which relieve an overburdened system of the resources and uncertainty that extended pre-trial litigation and trial would require.30 And nowhere is the speedy guilty plea more prevalent than with misdemeanor cases, because “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”31

As a result, “[i]n many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. . . . This process is known as meet-and-plead or plea at arraignment/first appearance.”32 Indeed, “it is common for defense counsel in our large urban courts to offer a guilty plea on behalf of their clients within minutes of having first met the defendant.”33 Misdemeanor convictions nevertheless can impact individuals’ lives tremendously, not only due to the loss of liberty that can result, but also from the myriad “collateral consequences” that can follow convictions for even seemingly minor criminal offenses.34


32. NACDL, supra note 30, at 31.


The recent federal court decision in *Wilbur v. City of Mount Vernon* illustrates this premium on speedy dispositions, free of the inefficiencies of robust adversarial tests like a trial. In *Wilbur*, two Washington State cities (“Cities”) contracted with a law office to provide public defense in misdemeanor matters. Plaintiffs sued the Cities, claiming that through these contracts, the Cities systemically supplied constitutionally inadequate public defense services. After holding a trial, the District Court found:

The period of time during which [counsel] provided public defense services for the Cities was marked by an almost complete absence of opportunities for the accused to confer with appointed counsel in a confidential setting. Most interactions occurred in the courtroom: discussions regarding possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals, and potential dispositions were, if they occurred at all, perfunctory and/or public. There is almost no evidence that [counsel] conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the elements of the crime charged or possible defenses or that they discussed such issues with their clients. Substantive hearings and trials during that era were rare. In general, counsel presumed that the police officers had done their job correctly and negotiated a plea bargain based on that assumption. . . . Adversarial testing of the government’s case was so infrequent that it was virtually a non-factor in the functioning of the Cities’ criminal justice system. . . . [I]n light of the sheer number of cases [counsel] handled, the services they offered to their indigent clients amounted to little more than a “meet and plead” system.

I cannot imagine that the practices challenged in *Wilbur* would seem terribly anomalous to most experienced public defenders and prosecutors. Anecdotally, I have seen lawyers plead dozens of clients guilty during a single first appearance court session. These lawyers were typically doing the best they could under the circumstances to help their

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36. *Id.* at 1124.
37. *Id.* at 1123.
38. *Id.* at 1124.
clients by seizing on a quick disposition opportunity to avoid a more damaging possible case outcome, or by avoiding pre-trial incarceration because the client could not afford bail. But no one seriously would argue that criminal convictions obtained by guilty plea on the first or second court appearance are generally the product of meaningful adversarial testing of the prosecution’s accusation. Even more, no one would suggest that these cases suffer from justice delayed.

This speedy-disposition emphasis can occur in more serious cases too, and even in federal court. For example, under “Operation Streamline,” federal defendants in unlawful reentry immigration cases commonly plead guilty after meeting with a lawyer for only thirty minutes about the case and any possible defenses. These defendants may go from charge to conviction in one day, pleading guilty as part of a group hearing, where the judge takes a plea from multiple defendants at once. Unlawful reentry cases, however, are serious matters authorizing up to two years of imprisonment. Unlawful reentry cases with aggravated circumstances can authorize up to twenty years. Even in return for foregoing numerous protections that the Constitution guarantees, many

39. See Robert Lewis, No Bail Money Keeps Poor People Behind Bars, WNYC NEWS (Sept. 19, 2013), http://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/ (noting study showing that for every 100 defendants who have $500 bail imposed, only nineteen defendants will post bail at arraignment, and forty defendants will remain in jail until their case is decided); Julie Turkewitz, Experimental Program Helps Defendants Make Bail in Backlogged Bronx, N.Y. TIMES, Jan. 23, 2014, at A22 (recounting choice of defendant charged with misdemeanor crimes and facing $1,000 bail: “[p]lead guilty and go home, or sit in jail and wait for a trial”). One recent study found that 76.5 percent of federal defendants were detained by the court prior to trial or other case disposition. See U.S. DEP’T OF JUSTICE, Federal Justice Statistics, 2009, at 10 (Dec. 2011), available at http://www.bjs.gov/content/pub/pdf/fjs09.pdf (last visited Mar. 26, 2015).

40. See Zeidman, supra note 30, at 222 (observing that “the criminal court in practice is hardly adversarial”); Steven Zeidman, Policing the Police: The Role of the Courts and the Prosecution, 32 FORDHAM URB. L.J. 315, 339 (2005) (opining that “[a]lthough the Criminal Court has been fraught with problems, an overabundance of adversarialism is not one of them”); Gerald E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2118 (1998) (commenting on how criminal justice in most instances has become more administrative in nature than adversarial).


43. See Partlow, supra note 42, at A11.

44. See 8 U.S.C. § 1326(a) (authorizing two years in prison for unlawful reentry offense).

45. See 8 U.S.C. § 1326(b) (authorizing up to twenty years in prison for unlawful reentry offense with certain aggravating factors).
fast-track defendants still receive jail terms of thirty to 180 days.46 These fast-track guilty plea proceedings are wondrously efficient, and no one would worry that these cases are defying the Act. Yet, some commentators have argued that the efficiency of these fast-track programs is “endangering our very justice system.”47

My point is not to argue that we do not have the speedy trial problem elucidated by Hopwood. We certainly do. But in my view, this problem is not an independent, free-standing phenomenon. Rather, this problem is one side of a two-sided speedy trial dynamic, with both too much and too little efficiency bookending a more optimal efficiency and efficacy range of criminal justice.

II. MANAGING THE TWO-SIDED SPEEDY TRIAL PROBLEM

How did we get to this two-sided speedy trial dynamic, with too much efficiency on one side and too little efficiency on the other side? The dynamic did not arise from the will of any one institutional actor. As Hopwood asserts, judges, prosecutors, and defense lawyers collude from mutual, institutional interests to delay criminal trials48—a phenomenon not restricted to federal court.49 And, a similar “we’re in this together” mentality can operate at the other end of the speedy trial dynamic, where the system pushes defendants to plead guilty, and to plead guilty quickly.50

To de-calcify this institutional congruence at the delay end of the speedy trial spectrum, Hopwood proposes several doctrinal solutions to improve implementation of the Act.51 These thoughtful solutions would help if taken seriously. Similarly, the system would benefit from further doctrinal clarity at the other end of the speedy trial spectrum regarding how lawyers and courts should process guilty pleas at high volumes.52

46. See Partlow, supra note 42, at A11.
47. Id. (quoting criminal defense lawyer and immigration activist who opposes fast-track plea proceedings).
49. See Glaberson, supra note 19, at A1 (reporting that “[f]ailures by nearly every component of the criminal justice system have contributed to what is known inside the building as a ‘culture of delay,’” practiced by prosecutors, defense lawyers, and judges).
50. See Zeidman, supra note 30, at 217; cf. also Partlow, supra note 42, at A11 (noting defense lawyer who participates in fast-track plea proceedings who nevertheless self-assessed the quality of this representation positively).
51. See Hopwood, supra note 1, at 740–42.
52. See, e.g., Padilla v. Kentucky, __U.S.__, 130 S. Ct. 1473 (2011) (addressing how lawyers can ensure effective assistance under the Sixth Amendment during the plea bargaining process when the plan implicates immigration consequences for the client); Lafler v. Cooper, __U.S.__, 132 S. Ct.
The conclusion is difficult to resist, however, that disobedience of doctrine is more of a symptom, and not the source of, the problem. Lawyers and judges do not typically delay trials because they are lazy or do not care about the administration of justice. More often, in my experience, defense lawyers delay trials because of high caseloads that require more time to investigate, consult with clients, obtain and review complex discovery, and complete other work necessary for competent and diligent trial preparation. Judges, in turn, delay trials because they have packed dockets and do not have the staff or courtrooms to resolve pre-trial issues efficiently across all these cases and also conduct jury trials. Prosecutors also are not ready for trial due to their own resource constraints. The same phenomenon controls at the other end of the spectrum where defense lawyers, judges, and prosecutors take too many guilty pleas with too little adversarial testing of criminal charges: the demands of an over-burdened criminal justice system force this hand on everyone.

Doctrinal solutions targeting these institutional actors and their individual decisions thus, at least to some degree, ask these actors to fix a structural problem by doing more work with the same—or even fewer—resources. Criminal justice actors must be more efficient in trial matters with the same caseloads, the same staff, the same resources,
the same remuneration. Yet, to make the room necessary for this efficiency, these solutions expect these actors to dispose of hundreds or thousands of cases carefully and competently, still with the same caseloads, the same staff, the same resources, the same remuneration. Thus, as one scholar observed, “while lawyer [or court] ignorance, indifference, and malevolence are part of the problem, a focus on individual lawyering practices [or court decisions] obfuscates the larger, structural issue—indigent defense systems with otherwise competent attorneys [and courts] who are under-resourced, overwhelmed, and overburdened with cases.”

The two-sided speedy trial dynamic accordingly should be treated as a structural, systemic problem, and not solely as the product of poor individual legal judgments. Indeed, a contrary message of do-more-with-less can breed deep institutional skepticism, which I have witnessed, in whether society truly cares about the values that the doctrine is telling lawyers and judges to prioritize in individual decision-making—like a speedy trial. If society really wants speedier trials, the law meaningfully would address some of structural barriers to speedy trials for lawyers and judges who take their roles seriously. If society wants well- advised guilty pleas that follow meaningful adversarial testing of the government’s case, society should address some of the structural barriers to eliminating meet-and-plead systems of justice.

Some jurisdictions are taking these barriers to both efficient and effective criminal justice more seriously. For example, the Washington State Supreme Court has adopted indigent defense standards, including detailed caseload standards, to help to ensure that lawyers have the competence, resources, and time to work deliberately on all criminal matters, but also to work efficiently in cases heading to trial.

60.  Cf. Wilbur, 989 F. Supp. 2d at 1124 (finding that “municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation”); see generally Roberts, supra note 30, at 329–70 (exploring misdemeanor ineffectiveness as an institutional and structural dynamic).
Wilbur decision holding local municipalities constitutionally accountable for passing the burden of competency and efficiency to lawyers and judges also should incentivize important structural changes. Perhaps following Wilbur’s lead, New York State settled an important lawsuit challenging its public defense systems, agreeing to significant resource and training reforms.

These kinds of structural changes should help to bring the two sides of the speedy trial coin closer together and into equilibrium. Well-trained and -resourced lawyers and courts will move cases more efficiently to trial. And, better-trained and -resourced lawyers and courts less likely will steamroll defendants into overly efficient dispositions. Rather, when the two sides of the speedy trial coin converge, more of the cases typically plea-bargained too speedily instead may enjoy a speedy trial, as Hopwood envisions.

CONCLUSION

Hopwood’s paper champions the maxim, “justice delayed is justice denied.” Looking at the fuller picture of criminal justice, I might prefer the version of this maxim I recall from Martin Luther King, Jr.’s Letter from Birmingham Jail: “justice too long delayed is justice denied.” Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice. We must calibrate our criminal justice...
system to provide both speedy and deliberate trials across the full run of cases.

This kind of calibration in our complex and vast modern criminal justice system will necessitate deep structural changes. These structural changes, combined with important doctrinal reforms of the sort proposed by Hopwood, should present the best antidote to both sides of the speedy trial dynamic ably uncovered by Hopwood in *The Not So Speedy Trial Act*. The result, I hope, will be a criminal justice system that is not too fast, and not too slow, but just right.  

SURROGACY AND WINDSOR’S PENUMBRAS

Susan Frelich Appleton*

INTRODUCTION

This symposium, Compensated Surrogacy in the Age of Windsor, explores what the Supreme Court’s invalidation of Section 3 of the federal “Defense of Marriage Act” (DOMA) in United States v. Windsor means for the legal treatment of commercial surrogacy arrangements. As a scholar with a longstanding interest in family law generally and parentage and assisted reproduction in particular, I found much to appreciate in the symposium contributions—especially those insights that come from examining the issues through the always revealing lenses of feminism, critical race theory, heteronormativity, and outsider narrative.

* Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University in St. Louis. I thank my colleagues Deborah Dinner, Rebecca Hollander-Blumoff, and Laura Rosenbury for valuable comments and conversation.

2.  133 S. Ct. 2675, 2696 (2013).
3.  Like contributors to the symposium, I use “compensated” and “commercial” interchangeably and would contrast this type of surrogacy with arrangements described as “altruistic,” in which the surrogate donates her services and receives no pay. See, e.g., Kellye Y. Testy, Foreword: Compensated Surrogacy in the Age of Windsor, 89 WASH. L. REV. 1069, 1070 & n.9 (2014). Of course, one could consider further distinctions. For example, to what extent does mere reimbursement for medical expenses constitute “compensation” even if we would not label the arrangement “commercial”? For purposes of my analysis, I assume that a commercial or compensated surrogate receives a fee for her services, in addition to reimbursement for her expenses.
Despite the value of the analyses presented, however, the “prompt”—Windsor’s implications for commercial surrogacy—originally struck me as both superficial and contrived. Perhaps I was thinking too much like a lawyer, reacting to the fact that nothing in the Windsor opinions directly compels a shift for surrogacy. Put differently, it is not immediately obvious that Windsor’s rejection of DOMA’s Section 3 has any bearing on state surrogacy laws. Accordingly, for me, Professor Field got it exactly right when she wrote:

Windsor has little relevance to surrogacy, which will continue to be governed by state rather than federal law. States do, and will, follow a wide spectrum of policies on surrogacy, ranging from banning it and making it illegal to promoting it by enforcing surrogacy contracts as ordinary commercial transactions. The legalization of gay marriage need not affect states’ surrogacy laws.8

Nonetheless, stepping back and situating Windsor and surrogacy in broader conversations about gender, marriage, and family law can open additional ways to understand the question posed by this symposium. From this wider perspective, Justice Kennedy’s analysis in Windsor (like various constitutional guarantees) might be said to have “penumbras” and “emanations” that reach beyond the case’s direct impact or precedential role.9 Below, I briefly consider two such penumbral matters pertaining to surrogacy, Windsor’s politics and its repronormativity, before turning to a more extended look at a third, Windsor’s federalism.

Even with this expanded frame, the path from Windsor to significant surrogacy reform largely remains uncertain and obscure. Windsor’s reasoning about marriage and dignity10 promises only inclusion in the system of family law as it is, not fundamental transformation of that system itself.11


8. See Field, supra note 4, at 1155.

9. Most readers will recognize that I am borrowing terms made famous by Griswold v. Connecticut, 381 U.S. 479 (1965). Unable to identify a constitutional provision securing a right to privacy, including the protection of married couples’ use of contraception, the majority cited the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution and invoked their “penumbras, formed by emanations from those guarantees that help give them life and substance.” Id. at 484.

10. 133 S. Ct. at 2692–96.

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I. WINDSOR’S POLITICS

Although Windsor stems from the judicial branch, the case has political ramifications. First, Windsor now looms large in the social movement for LGBTQ rights, spurring marriage-equality advocacy, legislation, and court rulings within the states. In the United States today, same-sex couples have access to marriage in more than 37 jurisdictions.12 Just as Justice Scalia’s Windsor dissent predicted,13 the portions of the majority opinion that explain how DOMA demeans same-sex couples and their families have proved influential in challenges to state marriage exclusions, with several courts invoking Windsor to invalidate such laws.14 Now that one federal court of appeals has refused to embrace this expansive reading of Windsor, the Supreme Court has agreed to review the constitutionality of state bans on same-sex marriage and marriage recognition.15

Second, beyond its implications for the rapidly developing law and politics of marriage equality, Windsor’s emanations might reach even farther, as suggested by the argument animating this symposium. This argument seems to proceed as follows: To the extent Windsor “legitimizes” same-sex couples, it creates increased demand for reproductive arrangements that allow such couples to become parents. In turn, this demand generates political pressure for reforms that would facilitate and regularize such family formation. For example, New York, which became a marriage-equality state by legislation before Windsor,16 now faces pressure to reconsider its prohibition on compensated surrogacy, enacted back in 1992.17 A chief proponent of a more permissive approach to surrogacy is a New York state senator who, with his husband, had a child with the help of a gestational surrogate in California.18 Windsor might well fuel such efforts to relax the legal

13. 133 S. Ct. at 2709–10 (Scalia, J., dissenting).
18. See Anemona Hartocollis, And Surrogacy Makes 3: In New York, a Push for Compensated
treatment of surrogacy, although the revision that Windsor works in federal law would seem to be a much less influential force here than state-level developments that open marriage to same-sex couples. Of course, we might think of Windsor as catalyst in the expansion of marriage at the state level19 and hence as potential catalyst for surrogacy reforms as well.

Will such Windsor-inspired pressure produce surrogacy reforms? Possibly. We might consider, for example, how the demand for less onerous divorce rules and the frequent evasion of restrictive laws through the practice of migratory divorce sparked the move for divorce reform and ultimately brought no-fault divorce statutes to the states.20 If “[f]amily law follows family life,”21 as Joanna Grossman and Lawrence Friedman contend in their history of modern family law, then a growing practice of compensated surrogacy (including resort to out-of-state arrangements) should produce a more supportive legal environment. Further, LGBTQ advocates have become politically influential and could make surrogacy reform their next priority after marriage equality.22

Still, I see significant stumbling blocks. With the fault system of divorce, a consensus had emerged that the existing regime caused significant harm and provided at most illusory benefits.23 Likewise, the shift represented by Windsor came in response to inferences of DOMA’s great harm and the absence of evidence that change would pose a problem.24 Surrogacy restrictions like New York’s, however, differ from both of these precursors.

First, surrogacy restrictions were enacted amidst worries about the exploitation of women and the commodification of children.25 Whatever the increased demand for compensated surrogacy, we have not reached a consensus that such restrictions reflect misguided concerns or cause


19. See supra notes 12–15 and accompanying text.
21. Id. at 2.
24. See, e.g., Windsor, 133 S. Ct. at 2694.
more harm than good. Second, in contrast to the law felled by Windsor, basic anti-surrogacy laws do not seek to demean and disadvantage gays. They reflect not anti-LGBTQ animus, which inflicts dignitary harms, but instead protective policies that were seen at the time of enactment to trump the competing interests of even different-sex married (but infertile) couples and enterprising would-be “surrogates” themselves. In other words, when states like New York enacted surrogacy restrictions, they did so for the purpose of protecting women and children; moreover, they found the need for such protection to outweigh the interests of likely surrogacy consumers (then envisioned to be married different-sex couples with a fertile husband and an infertile wife) as well as the interests of women who might feel eager to serve as gestational carriers for others.

True, some surrogacy laws might need fine-tuning today, given Windsor’s condemnation of DOMA’s discriminatory purpose. For example, some states limit surrogacy to married couples—a category that at one time excluded all same-sex couples—and others assume that intended parents will be a man and a woman. Yet, even before Windsor, courts in several states insisted that paternity and parentage laws be read in a gender-neutral way, when possible. This approach to statutory construction has extended legal recognition as parents to same-

26. See, e.g., Field, supra note 4; Shapiro, supra note 4. See also Hiring a Woman for Her Womb, Room for Debate, N.Y. TIMES, Sept. 22, 2014, http://www.nytimes.com/roomforedebate/2014/09/22/hiring-a-woman-for-her-womb (presenting different positions, as articulated by two lawyers, an ethicist, a law professor, and a professor of obstetrics and psychiatrist).

27. The Windsor majority finds telling evidence of DOMA’s discriminatory purpose in the name itself: the Defense of Marriage Act. 133 S. Ct. at 2693.

28. See id.

29. See generally Field, supra note 4.

30. This stereotype derives from the highly publicized Baby M case that prompted legislation in several states. See In re Baby M, 537 A.2d 1227 (N.J. 1988) (holding compensated traditional surrogacy contract void and enforceable).


32. For example, an early model law, the Uniform Status of Children of Assisted Conception Act, promulgated by the National Conference of Commissions of Uniform State Laws (now called the Uniform Law Commission or ULC) in 1988, included the following provision for those states opting to permit surrogacy:

“Intended parents” means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.

UNIF, STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3) (1988). The language makes clear that same-sex couples would be ineligible as “intended parents.” The ULC’s more recent model also contemplates a cross-sex couple as intended parents without requiring their marriage.

UNIF, PARENTAGE ACT § 801(b) (2002).
sex couples and facilitated the intended results of assisted-reproduction arrangements for such families.\footnote{33}{See, e.g., Elisa B. v. Superior Ct., 117 P.3d 660, 665 (Cal. 2005) (recognizing mother’s former partner under gender-neutral reading of paternity statute); Chatterjee v. King, 280 P.3d 283, 285 (N. Mex. 2012) (applying presumption of paternity to recognize as second parent mother’s former partner who held out adopted child as her own); In re Roberto d. B., 923 A.2d 115, 125 (Md. 2007) (using gender-neutral reading of state law to allow intended father’s name alone to appear on birth certificate of child born to gestational surrogate and conceived with donated egg); see also D.M.T. v. T.M.H., 129 So. 3d 320, 328 (Fla. 2013) (post-Windsor case using gender-neutral reading of paternity law).} To the extent that such developments eliminate discriminatory barriers to surrogacy, they address any Windsor-related problems. Accordingly, states that still follow gendered rules of paternity and parentage might well need to move to a gender-neutral approach. By contrast, Windsor does not compel revision of those restrictions that apply to all surrogacy consumers and reflect more general protective policies aimed at commodification and exploitation. The possibly increased demand for surrogacy in Windsor’s wake does not alter this conclusion.

To see why we should not expect to see protective policies evaporate in the face of Windsor, consider this analogous question: Because many same-sex couples add children to their families by adoption, should we expect to see post-Windsor relaxation of various protective adoption laws—such as requirements for waiting periods\footnote{34}{See, e.g., 750 ILL. COMP. STAT. ANN. 50/9 (Westlaw, through 2015 legislation) (requiring valid surrender of child for adoption to take place no sooner than seventy-two hours after birth).} and home studies,\footnote{35}{See, e.g., IOWA CODE § 600.8 (Westlaw, through 2015 legislation) (specifying the requirements of “preplacement investigation” and report).} which apply regardless of the sexual orientation or gender of the adopters? Of course not. Similarly, the rise of gay married couples and their possible demand for surrogacy do not diminish concerns about commodification and exploitation—concerns that prompted restrictions back when different-sex couples were surrogacy’s principal consumers.

To conclude otherwise would suggest that the extra quantum of male privilege possessed by gay couples would produce political success where it has eluded different-sex couples with fertility-challenged wives. Such speculation seems far-fetched. Hence, once surrogacy restrictions are purged of any elements that target sexual minorities,\footnote{36}{Here, my argument suggests the familiar distinction between discriminatory intent and disparate impact. See, e.g., Richard Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 494–95 (2003) (identifying three types of questions about “[t]he relationship between equal protection and facially neutral practices with discriminatory effects”). In any event, Windsor makes clear that anti-gay animus played a pivotal role in its analysis. See Windsor, 133 S. Ct. at 2693.} I see no reason to expect additional reforms stemming from Windsor.
II. WINDSOR’S REPRONORMATIVITY

Second, Windsor shares at least attenuated connections with surrogacy because of the repronormativity reflected in the majority opinion. I use this term, which derives from Katherine Franke’s scholarship, to underscore the centrality of children and parenthood in Windsor’s vision of marriage and also the centrality of marriage in Windsor’s understanding of parenthood and children.  

While rejecting a model of marriage that depends exclusively on procreation, the majority opinion nonetheless gave the children of gay and lesbian couples a prominent place in its analysis. According to the majority, one of DOMA’s fatal flaws lay in its effect on children:

[Section 3 of DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

In these sentences, the Court writes as if all, or at least most, of the married couples marginalized by DOMA have children—despite the childless marriage of Edith Windsor, who brought the case. In this way, the majority’s effort to celebrate diversity in marriage reinforces a vision of marriage tied to children and childrearing.

Whatever its direct legal effect, then, Windsor stands out as a high-profile cultural and social artifact that sends strong signals about marriage norms. Windsor could have invalidated DOMA without mentioning children, citing their numbers, or expressing empathy for their feelings. The stakes for childless same-sex couples could have amply justified the outcome, as Windsor’s own tax burden demonstrates. The Court made a choice, citing a marriage-equality argument designed to tug at the heartstrings of those who might find

37. Although Katherine Franke famously uses “repronormativity” to critique the centrality of motherhood in feminist agendas, I use the term more broadly here, to call attention to the Windsor Court’s assumptions about marriage. Windsor not only emphasizes the place of children in marriage; it also suggests that, without marriage, children suffer emotional harm. Put differently, while Franke challenges the centrality of motherhood in legal feminism, I point out centrality of parenthood in Windsor’s rationale. See Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 COLUM. L. REV. 181, 183 (2001).

38. Justice Alito’s dissent criticizes the majority on this ground. See Windsor, 133 S. Ct. at 2718–19 (Alito, J., dissenting) (describing two understandings of marriage, one based on procreation and the other based on consent, and asserting that Congress and the states may choose which to endorse through their enactments).

39. Id. at 2694.

40. See id. at 2683–85.
“second-tier marriage” a not especially compelling problem (or even well-deserved marginalization) when it disadvantages only adults.

In so doing, the Windsor majority entrenched a limited view of family, realizing a hazard that some observers have identified in contemporary gay rights advocacy. This symposium’s premise—linking Windsor to surrogacy—not only illuminates this feature of Windsor, but also strengthens it. This paradigm excludes many family forms, for example, unmarried couples and individuals who might use surrogacy, unmarried and married couples who want no children, and a host of other affiliations and domestic situations, from friendships to polyamory. A robust commitment to pluralism among families would decenter married couples and families with children—understanding these as just a few of many possible familial arrangements.

Whatever its merits or problems—as a matter of substance or judicial strategy—Windsor’s repronormativity only returns us to the issue of Windsor’s politics. Even if Windsor’s repronormativity could be said indirectly to increase demand for surrogacy, translating such demand into concrete pro-surrogacy reforms remains unlikely, especially where demand by different-sex couples has failed to achieve that end. In the meantime, the argument itself has troubling implications for family pluralism.

III. WINDSOR’S FEDERALISM

The Windsor majority’s compassion for families headed by same-sex married couples, its antisubordination theme, and its professed concern for humiliated children have all largely eclipsed its encomium to

41. Id. at 2684.
45. See supra notes 10, 13–14, and accompanying text.
46. See supra note 39 and accompanying text.
federalism. This part of the opinion emphasizes the traditional control of families and family relationships by the states, in turn prompting a skeptical look at Congress’s intervention through DOMA.48 Most federal district courts and courts of appeals, in relying on Windsor to invalidate state bans both on same-sex marriage and on recognition of such marriages performed elsewhere, have glossed over the Court’s reaffirmation of federalism in family law. Instead, these courts have stressed Windsor’s condemnation of unequal treatment.

The current regulation of surrogacy epitomizes the federalist or localist approach to family law that Windsor embraces. In fact, taken seriously, this strand of the Windsor opinion poses difficulties for those who now ask the Supreme Court to require all states to license and recognize marriages of same-sex couples. A majority of the U.S. Court of Appeals for the Sixth Circuit pointed out this problem in the case currently under consideration by the Supreme Court.50 Assuming that marriage-equality advocates will nonetheless prevail when the Supreme Court decides this case, gendered entry requirements for marriage will join many other aspects of family law in which state rules have had to yield to federal constitutional protections. For example, states no longer exercise unfettered control over limitations on contraception and abortion, the parental status of unmarried fathers, the treatment of nonmarital children, and visitation by grandparents and other third parties. Add to constitutional constraints the often-used power of Congress to shape state family laws by attaching conditions to federal funding or in enacting family-affecting statutes on taxation, welfare, and employment benefits, and it becomes tempting to agree completely

47. 133 S. Ct. at 2689–93.
48. See id.
49. See supra note 14 (citing illustrative cases) and accompanying text. The principal outlier is the opinion from the U.S. Court of Appeals for the Sixth Circuit, to which the Supreme Court has granted review. See supra note 15 and accompanying text.
57. See JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 45–59 (2014) (examining various
with those who see federalism in family law as a myth. 58

Against this background of extensive federal authority and influence, however, the “legal patchwork”69 or “maze of laws, state by state”59 applicable to surrogacy today provides a telling counterexample. Surrogacy helps sustain the traditional story that family law belongs to the states.

The state-by-state variation in laws governing surrogacy61 results in several predictable consequences. First, supporters of surrogacy have pursued several different paths toward eliminating bans and decreasing restrictions. Some have focused their reformist efforts on state legislatures.62 Others have called for a national statute allowing surrogacy63 or the elimination of most limitations through judicial recognition of a constitutional right to procreate by means of surrogacy.64 Yet, law reform projects do not always yield hoped-for outcomes and, in any event, take time.65

Thus, a second, more practical and immediately available response for those in restrictive states entails arrangements that take advantage of the laws of more surrogacy-friendly jurisdictions. For example, Professor Nicolas, who lives in Washington (which bans surrogacy), describes how such considerations figured in his and his husband’s plans to have a child.66 First, he considered attempting to locate a surrogate in California because of its especially hospitable laws.67 Ultimately, for reasons of proximity and costs, he chose to work with a woman in nearby Oregon, where he found compensated surrogacy flourishing “in

58. Id. at 17–66 (challenging canonical narrative of family law as local, not federal, law); Courtney G. Joslin, Federalism and Family Status, 90 Ind. L.J. 787 (2015) (critiquing the “myth” of “family law localism”).

59. Nicolas, supra note 7, at 1239.


61. For a survey of the various state approaches and their categorization into six identifiable groupings, see Nicolas, supra note 7, at 1240–45.

62. See, e.g., Hartocollis, supra note 18, at E1; Price, supra note 7.


65. See Price, supra note 7.


67. Id. at 1245.
the shadows,” that is, despite the absence of explicitly relevant law.68

The phenomenon of traveling to a state with more attractive laws occurs frequently in family law. Other examples, past and present, include migratory divorce before the advent of no-fault statutes69 and today’s efforts to avoid local abortion regulations.70

The likelihood that state surrogacy restrictions would prompt evasion in this familiar fashion surfaced for consideration as soon as New Jersey began to contemplate legislative responses invited by the provocative Baby M case in 1988.71 As part of that process, the New Jersey Bioethics Commission consulted me about the conflict of laws implications of a ban on surrogacy that the state was contemplating. My analysis, later revised for publication as a law review article,72 concluded that New Jersey would have considerable difficulty limiting surrogacy so long as those eager to participate in such arrangements could find more permissive jurisdictions. Accordingly, I wrote:

[A]ssuming residents of a restrictive state truly want to participate in surrogacy, the existence of more hospitable jurisdictions will significantly limit local control. Absent federal legislation or a single uniform act (without alternatives) adopted by all the states, restrictive states can hope to achieve their goals only through resort to untested extensions of criminal law or creative solutions making the family formed through surrogacy vulnerable to continuing risks.73

Subsequent case law confirmed my suspicions. Consider Hodas v. Morin,74 in which a couple from Connecticut commissioned a New York
woman to serve as a gestational carrier and bear for them a child conceived with their genes, with the embryo transfer taking place in Connecticut. Connecticut had no controlling authority on the subject, but New York “expressly prohibit[ed] gestational carrier agreements in order to protect women against exploitation as gestational carriers and to protect the gestational carrier’s potential parental rights,” thus expressing “a ‘fundamental policy’ on a matter in which it [had] a great interest.” By contrast, Massachusetts, based on precedent, allowed the name of intended, genetic parents to be entered on the birth certificate even when another woman bears the child, facilitating the objectives of those entering a gestational surrogacy arrangement. Among these disparate laws, the parties wanted Massachusetts law to govern parentage and the birth certificate, and they included a choice of law provision to that effect in their agreement.

Using the Restatement (Second) of Conflict of Laws, the Supreme Judicial Court of Massachusetts followed the parties’ contractual choice of law. The court deemed purely manufactured connections—the agreement that the birth would take place at a Massachusetts hospital, if possible, and the administration of some prenatal care in that state—sufficient to justify this choice of law. Accordingly, the parties to the contract completely evaded New York’s restriction even though the court conceded that the gestational surrogate, who lived in that state, came within the scope of its protective policy.

As Hodas illustrates, what makes a regime appealing to participants in a surrogacy arrangement is not merely the absence of a prohibition or criminal sanctions. Rather, state parentage rules play a vital role as well. For this reason, California’s doctrine of intent-based parentage has attracted many surrogacy participants. Windsor’s assertions about federalism in family law fit quite

75. Id. at 325.
76. Id.
78. Hodas, 814 N.E.2d at 322.
79. Id.
80. Id.
81. See id. at 325.
82. E.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); see Lewin, supra note 60 (“California has the most permissive law [in the U.S.], allowing anyone to hire a woman to carry a baby and the birth certificate to carry the names of the intended parents. As a result, California has a booming surrogacy industry, attracting clients from around the world.”). Another aspect of the regulatory regime, fees and costs, explains why American reproductive tourists often go abroad—although this practice takes us away from the question of federalism.
comfortably with significant variation in surrogacy and parentage laws across this country, along with the experimentation and travel that such variation invites. Thus, this penumbral link between *Windsor* and surrogacy supports, rather than challenges, the present patchwork, with its mix of restrictive and permissive laws.83

CONCLUSION

The conversation about the appropriate legal treatment of surrogacy began in earnest over twenty-five years ago with the *Baby M* litigation and its aftermath. Although the conversation has continued, inconsistency and discord persist. Some states have opted for a restrictive regime, others have taken a permissive approach, and still others have remained silent. Scholars, commentators, and the public remain divided as well.84

*Windsor’s* invalidation of Section 3 of DOMA does nothing to settle these longstanding contests. Indeed, precisely because *Windsor’s* significance lies in its move toward full inclusion of gay and lesbian couples in mainstream family law, this landmark case spells no major break with the past for surrogacy. If we look beyond *Windsor’s* direct legal impact, we find that its penumbras—its political, social, and cultural signals; its promotion of a repronormative understanding of marriage and family; and its approval of family law federalism—might refresh our conversations about surrogacy, adding timely talking points, but without significantly disrupting surrogacy’s status quo.

83. See supra notes 60–61 and accompanying text.
84. See, e.g., *Hiring a Woman for Her Womb*, supra note 26.
AN ANALYSIS OF FEDERAL PREEMPTION AND A CLEAN FUEL STANDARD IN WASHINGTON STATE

Kirsten Nelsen

Abstract: Transportation fuel is the greatest contributor to greenhouse gas emissions in Washington State. To curb emissions, Governor Jay Inslee has charged the Washington State Department of Ecology with developing a Clean Fuel Standard (“CFS”) proposal, which may be proposed in future legislative sessions. The goal of a CFS is to reduce the overall carbon intensity of transportation fuel. California enacted a similar program in 2010—the low carbon fuel standard—which was challenged in federal court. One issue that remains open is whether a state low carbon fuel standard would be preempted by the federal Clean Air Act. This Essay considers whether the Clean Air Act would preempt a CFS in Washington. It concludes that a Washington CFS is unlikely to conflict with the purpose of any portion of the Clean Air Act and is therefore unlikely to be preempted.

INTRODUCTION

The Washington State Legislature enacted a bill in 2008 that pledges to reduce state greenhouse gas (“GHG”) emissions to 1990 levels by 2020.1 The bill requires further reductions in GHG emissions in 2035 and 2050.2 Although it does not target specific industries, the bill will likely impact the transportation sector, the greatest contributor to GHG emissions in the state.3 For this reason, Governor Jay Inslee has announced that he will propose several strategies to decrease carbon pollution from transportation.4 One of the governor’s potential policies is a Clean Fuel Standard (“CFS”),5 a regulatory scheme that would

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5. Id.
reduce the carbon intensity of transportation fuels.\(^6\)

Opponents to a CFS in Washington will likely challenge it on the basis of federal preemption under the Clean Air Act. California enacted a similar low carbon regulatory scheme,\(^7\) which was the topic of over five years of litigation challenging the authority of the state to enact the standard.\(^8\) In part, the plaintiffs claimed the California regulations were preempted by the federal Clean Air Act.\(^9\) Under the Clean Air Act, states cannot adopt fuel regulations that conflict with federal standards.\(^10\) However, California is explicitly exempt from the fuel preemption provision of the statute.\(^11\) The Court of Appeals for the Ninth Circuit briefly considered California’s exemption from federal preemption under the Clean Air Act in *Rocky Mountain Farmers Union v. Corey*,\(^12\) but it did not analyze whether a low carbon fuel standard would have been preempted if enacted by a state that did not have the same exemption as California.\(^13\) Further, the court declined to answer whether the California regulations were preempted by another subsection of the Clean Air Act, namely Section 211(o) codifying the Energy Independence and Security Act (“EISA”).\(^14\) These are two issues that would likely affect implementation of a CFS in Washington State.

This Essay considers whether a Washington CFS, if enacted, would be in danger of federal preemption under the Clean Air Act. Part I explains what a CFS in Washington would look like and how it compares to the California standard, which is likely to form the basis for the Washington CFS. Part II details the applicable federal preemption

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\(^7\) California adopted the Low Carbon Fuel Standard (“LCFS”), a set of regulations very similar to a CFS in Washington.


\(^9\) Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1078.


\(^12\) See *Corey*, 730 F.3d at 1106 (finding that although California is exempt from the express fuel preemption provision, it was not excused from compliance with the dormant commerce clause, which was the deciding issue in the case).

\(^13\) Id.

\(^14\) Id.
doctrine and the history of preemption provisions in the Clean Air Act. Part III discusses the litigation arising out of the California standard, which clarifies the challenges and potential resolutions to these challenges in Washington. Finally, Part IV analyzes the open federal preemption issues, considering likely challenges to a CFS in Washington. This Essay concludes that it is unlikely that a court would find that the federal Clean Air Act would preempt a Washington CFS regulatory scheme. This Essay aims to inform those in Washington, as well as those in other states attempting to enact similar fuel standards.

I. A CLEAN FUEL STANDARD IN WASHINGTON

Governor Inslee has taken steps toward proposing a CFS in Washington as a strategy to reduce carbon emissions. In February 2015, the Governor directed the Washington State Department of Ecology (“DOE”) to engage in public outreach and discussion surrounding the potential passage of a CFS. 15 He did this before official legislation was proposed and prior to any rulemaking by DOE. 16 Governor Inslee also commissioned an updated report analyzing the impacts of a CFS in Washington 17 and listed it as a potential proposal to decrease carbon emissions in the state. 18 These actions indicate that the Governor is seriously considering a CFS in Washington. Although there has been no official proposal for a CFS in Washington, this section will briefly outline the potential policy based on reports commissioned by the Governor and information released by the DOE, which suggest the standard will be similar to the low carbon fuel standard in California.

California is the only state that has adopted a regulatory scheme that is substantially similar to one that may be proposed in Washington. 19

16. Id.
17. PONT & UNNASCH, supra note 6, at 1.
California’s standard aims to reduce GHG emissions by lowering the carbon intensity of transportation fuels. The “carbon intensity” of a transportation fuel is “the amount of lifecycle [GHG] emissions per unit of energy of fuel.” The lifecycle GHG emissions analysis takes into account the direct emissions—emissions from producing and burning the fuel—as well as any indirect emissions, which include land use changes. Emissions related to the full fuel lifecycle are part of the calculation, including “all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.” By employing a lifecycle analysis, the California standard attempts to consider all carbon emissions that are released from the production and use of transportation fuels.

It is likely that Washington’s CFS would mimic many of the features of California’s standard because two reports commissioned by the Washington State Department of Ecology to analyze the impacts of a CFS draw on California’s low carbon fuel standard for several assumptions. Like California’s standard, the CFS would require regulated fuel providers to reduce the average carbon intensity of fuels by a certain amount over a given period of time. A regulated fuel provider will receive credits for fuel sold with a carbon intensity measurement below the standard, and debits for fuel with a carbon intensity value above the standard. Surplus credits may be sold or traded to other regulated parties for use in compliance.

A calculation of the carbon intensity of each type of fuel requires an analysis of direct and indirect emissions from the entire lifecycle of the fuel, not just vehicle emissions. As an illustration, direct emissions can be broken into two parts: “well-to-tank” and “tank-to-wheel” emissions. “Well-to-tank” emissions are produced during fuel

21. Id. § 95481(16).
22. See id. § 95481(a)(28) (defining of “lifecycle greenhouse gas emissions”).
23. Id.
24. Pont & Unnasch, supra note 6, at 9; Pont & Rosenfeld, supra note 19, at 48.
25. Pont & Unnasch, supra note 6, at 39.
26. Id.
27. Id.
28. Id. at 20.
29. Id.
production and transportation.\textsuperscript{30} For example, corn ethanol production requires tractor fuel, fertilizer production, transport to the ethanol plant, fuel production emissions, and transport to refueling stations.\textsuperscript{31} “Tank to wheel” emissions, on the other hand, are simply vehicle tailpipe emissions from individual vehicles.\textsuperscript{32}

II. THE FEDERAL CLEAN AIR ACT AND PREEMPTION

A CFS in Washington will likely be challenged under two preemption doctrines: express and implied preemption.\textsuperscript{33} First, opponents would likely argue that the Clean Air Act express fuel preemption provision, codified at Section 211(c)(4), expressly preempts the ability of Washington State to enact a CFS. Further, a CFS would likely be challenged under implied preemption using the federal renewable fuel standard, codified at Section 211(o) of the Clean Air Act. This section provides necessary background information regarding: (a) federal preemption doctrine, and (b) the two provisions in the Clean Air Act that could trigger federal preemption.

A. Federal Preemption Doctrine

Federal preemption is based on the Supremacy Clause in Article IV of the United States Constitution.\textsuperscript{34} Federal law may preempt state and local law either by express terms in statutory language, or by implication based on a statute’s purpose and structure.\textsuperscript{35} State law may be preempted by explicit language in a statute that makes it clear that Congress intended federal law to foreclose state action.\textsuperscript{36} “Express” preemption language often requires additional analysis of Congress’ intent.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Opponents to California’s low carbon fuel standard challenged it on implied preemption, but the issue remains open. See Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1042, 1048–49 (E.D. Cal. 2011). Opponents to a CFS in Washington are likely to also argue express preemption, however, because unlike California, Washington does not have a waiver from the express fuel preemption provision in the Clean Air Act. See Clean Air Act of 1970 § 211(c)(B), 42 U.S.C. § 7545(c)(4)(B) (2012).
\item \textsuperscript{34} U.S. CONST. art. VI (“This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land. . . .”).
\item \textsuperscript{36} Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).
\item \textsuperscript{37} See id. at 517 (considering the broader language of the federal act before concluding that the
Like express preemption, implied preemption requires examination of more than the text of the statute. There are two types of implied preemption: field preemption and conflict preemption. Field preemption occurs when a federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Immigrant law, for example, is an area exclusively controlled by the federal government. Conflict preemption, on the other hand, occurs on a smaller scale. Instead of federal preemption over an entire area of law, as in field preemption, conflict preemption occurs when a particular state law conflicts with a particular federal law. A conflict may occur in two ways. First, state and federal law can create a situation in which it is literally impossible to comply with both laws. Impossibility preemption is not at issue here because a CFS would not be in direct conflict with any federal regulation. Second, even if it is possible to comply with both state and federal law, a state law may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." "Obstacle" preemption requires a court to make two distinct determinations: (1) what the original Congressional purpose was in enacting the federal law, and (2) whether that purpose is impeded by the state law. Making those determinations often requires a look at the text

express preemption provision did preempt state tort claims); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (considering the history of federal regulation in addition to the express preemption language in finding that the state law was preempted).

38. Gade, 505 U.S. at 98 ("Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict preemption. . . .").

39. Id.


42. Id. at 684–85.

43. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (noting that "federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility").


45. See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98–104 (1992) (concluding that the federal worker safety regulations preempted state regulations because Congress sought to promote occupational safety "while at the same time avoiding duplicative, and possibly counterproductive, regulation"); Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 222–23 (1986) (finding that a California law regulating nuclear power development was not preempted because although the primary federal objective was promotion of
of the statute itself, the legislative history, and the legislative intent.\footnote{Dickinson, supra note 41, at 704.}

In \textit{Geier v. American Honda Motor Co.},\footnote{529 U.S. 861 (2000).} the U.S. Supreme Court considered the preemptive authority of federal standards that required auto manufacturers to install passive restraints on some, but not all, 1987 vehicles.\footnote{Id. at 864–65.} The issue was whether a lawsuit based on an injury from a car that was not required to have such restraints was preempted by the federal standards.\footnote{Id. at 886.} The Court found that the federal objective was to give the manufacturer a range of choices for passive restraint systems that would be gradually introduced.\footnote{Id. at 877–81.} The Court considered the federal regulations in light of the agency rulemaking history and the agency’s explanation in the \textit{Federal Register}.\footnote{Id. at 886.} Ultimately, the Court held that the plaintiff’s lawsuit, which imposed a duty on the manufacturers to install specific passive restraint systems, such as airbags, “would stand as an ‘obstacle’ to the accomplishment” of the federal objectives.\footnote{Id. at 886.}

Courts are generally reluctant to find a conflict between state and federal law. A finding of preemption requires a “high threshold” to be met “if a state law is to be pre-empted for conflicting with the purposes of a federal Act.”\footnote{Chamber of Commerce of U.S. v. Whiting, __ U.S. __, 131 S. Ct. 1968, 1985 (2011) (citing Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 48, 110 (1992) (Kennedy, J., concurring)).} “[H]ypothetical or potential conflict[s]” do not meet this threshold,\footnote{Roce v. Norman Williams Co., 458 U.S. 654, 659 (1982).} and courts are heavily discouraged from “seeking out conflicts between state and federal regulation where none clearly exists.”\footnote{English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990) (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960)).} Therefore, although it can be difficult to determine how a court will rule in an obstacle preemption case, there is a tendency to find against federal preemption.\footnote{Dickinson, supra note 41, at 682–83.}

Congress enacted the Clean Air Act in 1963 after Congress in 1955 declared that air pollution was an issue that should be addressed by state and local governments. The first iteration of the act charged the Department of Health, Education and Welfare ("HEW") with developing a national research and development program to reduce air pollution from motor vehicles. HEW was required to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution. . . ." Because of this emphasis on cooperation between a federal agency and state government, the Clean Air Act has long been known as one of several comprehensive and cooperative federal environmental statutory schemes.

Subsequent amendments continued to encourage the "cooperative federalism" relationship between states and the federal government. The first amendment to the Clean Air Act occurred in 1967 and directed each state to adopt state-specific ambient air standards to reduce various federally recognized pollutants and to create a plan to achieve those standards. The standards became known as State Implementation Plans ("SIPs"). Congress again amended the Clean Air Act in 1970 to "provide for a more effective program to improve the quality of the Nation’s air." To speed progress, it developed the National Ambient Air Quality Standards, which placed limits on the allowed levels of certain pollutants per cubic meter of air. States were required to

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59. § 3, 77 Stat. at 394.
60. Id. In 1970, President Nixon created the U.S. Environmental Protection Agency (EPA) by executive order and gave the new Administrator control over Clean Air Act implementation. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 2087 (1970).
65. Id.; see also Greco, supra note 63, at 870.
66. § 107, 84 Stat. at 1678; see also Greco, supra note 63, at 873 (explaining the development of federal air quality standards).
implement plans to meet these new national air quality standards, which were generally stricter than the original state standards.

Although the Clean Air Act imposes specific requirements for state implementation of air quality standards, states are free to adopt air quality standards more stringent than those provided by federal law. This freedom stems from the section of the Act calling for “Retention of State Authority.” That section provides that “nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any applicable implementation plan [not less stringent than the federal standard].” The Clean Air Act was intended to join the “States and the Federal Government [as] partners against air pollution.” However, the cooperative nature of the Clean Air Act is undermined by the express preemption provisions on fuel regulations and motor vehicle emissions. Federal preemption may also be implied when a federal law conflicts with or stands as an obstacle to the goals of Congress in enacting such a law. The following discussion details sections of the Clean Air Act that may result in express or implied preemption of a CFS in Washington.

1. **Express Preemption in the Clean Air Act**

   Despite the substantial history of cooperative federalism at the heart of the original Clean Air Act, Congress included language in the 1970 amendments that expressly preempted states from regulating in certain areas. Specifically, the Clean Air Act preempts state regulation of motor vehicle emissions and state regulation of fuel in certain

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67. See Connecticut v. EPA, 656 F.2d 902, 909 (2d Cir. 1981) (holding that states are “free to adopt air quality standards more stringent than required by the [National Ambient Air Quality Standards],” but that a state is not required to comply with neighboring states’ more stringent standards); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 345 (6th Cir. 1989) (“The federal statutory scheme clearly contemplates that Michigan can make its air pollution rules as stringent as it likes, and may enforce those rules”).


73. Id. at § 7545(c)(4).
circumstances. Both preemption provisions have a special exception for California.\(^{74}\)

The preemption provision for motor vehicle emissions standards was born out of Congress’ desire to lighten the compliance burden on the automobile manufacturing industry.\(^{75}\) There were two major problems with states regulating automobile emissions independently from the federal government.\(^{76}\) First, states with automobile factories faced political pressure from the automobile industry to keep regulations lax.\(^{77}\) These states generally enacted less burdensome standards for fear that industry would move to other states.\(^{78}\) Second, some states, such as California, wanted to enact more stringent automobile emissions standards.\(^{79}\) California’s desire for stricter standards came from its problems with smog and air pollution.\(^{80}\) The regulatory inconsistency was a problem for the automobile industry and also had the potential to cause enforcement problems for states and the federal government.\(^{81}\)

As a result of inconsistent state standards, the automobile industry lobbied for the creation of federal emissions standards.\(^{82}\) Pressure from the automobile industry resulted in passage of an express preemption provision barring state regulation of motor vehicle emissions in the Clean Air Act.\(^{83}\) The provision did, however, include a waiver for California, which traditionally set more stringent standards than the federal government.\(^{84}\) The waiver allowed California to continue to set its own emissions standards as long as they were more stringent than the federal standards.\(^{85}\) Later, Congress again amended the Clean Air Act to allow other states to adopt standards identical to California.\(^{86}\) Today,

\(^{74}\) Id. at § 7543(b), 7545(c)(4)(B).
\(^{76}\) Id. at 673.
\(^{77}\) Id. at 674.
\(^{78}\) Id.
\(^{79}\) Id.
\(^{80}\) Id.
\(^{81}\) See id. (explaining that varying state standards caused two major problems for automobile manufacturers: the challenge of complying with various regulatory inconsistencies along with the legal burden and expense).
\(^{82}\) Id.
\(^{83}\) Id.; see also Clean Air Act of 1970 § 209(a), 42 U.S.C. § 7543(a) (2012).
\(^{84}\) Leatherwood, supra note 75, at 675.
\(^{85}\) 42 U.S.C. § 7543(b) (2012).
there are only two vehicle emissions standards that individual states can adopt: the federal standards or the more stringent California standards.\(^87\)

Similar to federal preemption of motor vehicle emissions regulations, the 1970 Clean Air Act amendments expressly preempted state regulation of fuel in certain circumstances.\(^88\) State regulation of fuel or fuel additives was preempted when the Environmental Protection Agency (“EPA”) prescribed standards regarding the same fuel or fuel additive.\(^89\) Like the preemption provision for motor vehicle emissions, California was again granted a waiver to enact standards more stringent than those prescribed by the federal government.\(^90\)

Notably, when the Clean Air Act was amended in 1990, the new amendments significantly changed the fuel preemption provision. Instead of directly regulating a “fuel or fuel additive,” the new amendments preempted state law that controlled the same “characteristic or component of a fuel or fuel additive.”\(^91\) This new provision actually broadened state authority to enact regulations\(^92\) because the pre-1990 provision prevented states from enacting any regulation “respecting use of a fuel or fuel additive in a motor vehicle” that was regulated by the EPA.\(^93\) The Ninth Circuit Court of Appeals repeatedly held that the legislative history of the 1990 Clean Air Act amendments indicated that Congress was attempting to give more control over fuel regulation to the states.\(^94\) Furthermore, the EPA regulations were amended to make it clear that state regulations were only preempted if there was a federal rule regarding that specific characteristic or component of fuel.\(^95\) The change provided states with more latitude to enact regulations on fuel.\(^96\)

\(^87\) The two standard approach (federal and California) alleviated some of the problems with the motor vehicle industry. Instead of needing to comply with different standards for each state, there are just two standards requiring compliance.


\(^89\) Reitze, supra note 10, at 486.


\(^91\) Id.

\(^92\) Id. at 487.


\(^94\) See Oxygenated Fuels Ass’n, Inc. v. Davis, 331 F.3d 665, 670–71 (9th Cir. 2003) (“The Clean Air Act generally seeks to preserve state authority.”); Exxon Mobil Corp. v. United States Envtl. Prot. Agency, 217 F.3d 1246, 1253 (9th Cir. 2000) (“A number of Senators explained that the 1990 amendments preserved the authority of the states to regulate air pollution.”).


\(^96\) See, e.g., Davis, 331 F.3d at 669–70 (holding that California’s ban on methyl tertiary-butyl ether (“MTBE”) in gasoline was not preempted by the Clean Air Act because it was enacted for the
Today, Section 211 of the Clean Air Act expressly preempts states from enacting fuel legislation in certain circumstances.\textsuperscript{97} State legislation is preempted if it encompasses “any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine” “for purposes of motor vehicle emission control.”\textsuperscript{98} Controls and prohibitions are only preempted if the EPA Administrator has prescribed “a control or prohibition applicable to such characteristic or component of a fuel or fuel additive” and the state prohibition is not identical to the EPA regulation.\textsuperscript{99} Thus, there must be some federal law that conflicts with the state regulation for the fuel preemption provision to take effect.

2. The Renewable Fuel Standard and Potential Implied Preemption in the Clean Air Act

The renewable fuel standard, which is a separate provision of the Clean Air Act, may impliedly preempt a CFS in Washington. The Energy Policy Act of 2005 authorized the EPA to adopt regulations to ensure that “gasoline sold or introduced into commerce in the United States . . . contains that applicable volume of renewable fuel . . . .”\textsuperscript{100} With authority from this mandate, the EPA developed the renewable fuel standard program, which was designed to increase the quantity of renewable fuel used in the United States.\textsuperscript{101} The original standard required an increasing percentage of renewable fuel to be blended with gasoline, with four million gallons of renewable fuel to be incorporated into the nation’s gasoline supply in 2006 and mandating an increase to seven and a half billion gallons by 2012.\textsuperscript{102} This led to a significant

\textsuperscript{97} 42 U.S.C. § 7545(c)(4)(A)(ii).
\textsuperscript{98} Id. § 7545(c)(4)(A).
\textsuperscript{99} Id. § 7545(c)(4)(A)(ii).
\textsuperscript{102} Id. at 1.
increase in corn ethanol production.\textsuperscript{103}

Two years later, the Energy Independence and Security Act of 2007 was enacted to increase energy efficiency and availability of renewable energy, while requiring more renewable fuels to be mixed with gasoline.\textsuperscript{104} The stated purpose of the Act was to move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options and to improve the energy performance of the Federal Government and for other purposes.\textsuperscript{105}

The new renewable fuel standard increased the volume of renewable fuel required to be blended, expanded application to other transportation fuels, and required EPA to develop a lifecycle greenhouse gas performance threshold to ensure that renewable fuels emit fewer greenhouse gases than the petroleum fuels they replace.\textsuperscript{106} It was incorporated into the Clean Air Act at Section 211(o).\textsuperscript{107} The EPA updated and issued its final rule to implement the new renewable fuel standard program on February 3, 2010.\textsuperscript{108}

The federal renewable fuel standard mandates that renewable fuels be derived from one of four specific sources: total renewable fuels (produced from “renewable biomass” including planted crops), advanced biofuels (biofuels other than ethanol derived from corn starch), cellulosic and agricultural waste-based biofuel (fuel from cellulose), and biomass-based biodiesel (diesel from biomass feed stocks).\textsuperscript{109} Under EPA’s regulations, renewable fuels mixed with gasoline must meet certain

\begin{itemize}
  \item \textsuperscript{103} Melissa Powers, \textit{King Corn: Will the Renewable Fuel Standard Eventually End Corn Ethanol’s Reign?}, 11 VT. J. ENVTL. L. 667, 668 (2010).
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} SCHNEPF & YACOBUC, supra note 101, at 4.
  \item \textsuperscript{107} SCHNEPF & YACOBUC, supra note 101, at 4.
  \item \textsuperscript{108} Regulations of Fuel and Fuel Additives: Changes to Renewable Fuel Standard Program, 40 C.F.R. § 80 (2010).
  \item \textsuperscript{109} SCHNEPF & YACOBUC, supra note 101, at 4.
\end{itemize}
lifecycle GHG emissions thresholds for a given category. A lifecycle analysis under the federal renewable fuel standard is a way to measure the environmental impact of fuel, which considers direct and significant indirect emissions from production and transportation. “Total renewable fuel,” for example, is generally ethanol from corn or sorghum. The statute mandates that the GHG emissions for total renewable fuel from new facilities (constructed after the bill was enacted), as calculated by a lifecycle analysis, must be twenty percent below that of conventional fuels to qualify. However, the federal standard exempts existing corn facilities from the GHG lifecycle requirements. “Advanced biofuels” are derived from non-corn feed stocks and are required to reduce lifecycle GHG emissions by fifty percent to qualify.

The EPA regulations require a specific proportion of renewable fuels from each of the four categories. For example, the EPA required 0.004 percent of total renewable fuel volume to be cellulosic biofuel in 2013. Total renewable fuel, generally from corn ethanol, was required to comprise 9.74 percent of renewable fuel. The requisite proportion of renewable fuel increases each year, capping at thirty-six billion gallons by 2022. Fuel refiners, importers, and blenders must meet the federal standards either by purchasing and blending renewable fuel into gasoline or by buying credits from other parties.

The tension between state and federal power to regulate fuel and automobile emissions is a constant struggle for courts attempting to interpret preemption under the Clean Air Act. For example, the Act itself requires state enforcement of federal air quality standards through State Implementation Plans. State autonomy is also highlighted in the section

112. SCHNEPF & YACOBUCCI, supra note 101, at 4.
113. Id. at 8.
115. SCHNEPF & YACOBUCCI, supra note 101, at 4.
116. Id.
118. Id.
120. Id. at 3–4.
titled “Retention of State Authority.” 121 This section entitles states to adopt air quality standards more stringent than those provided by federal law in many circumstances. 122 The seemingly strong history of state regulation is undermined by explicit federal preemption over regulation of fuel and motor vehicle emissions. These preemption provisions have impeded state efforts to combat climate change and air pollution on several occasions. 123 Further, because California is often exempt from preemption, much of the case law allowing state regulation may not apply to states other than California. It is against this background of federalism issues that this Essay addresses whether a CFS in Washington will face preemption under the Clean Air Act.

III. CHALLENGES TO CALIFORNIA’S STANDARD: ROCKY MOUNTAIN FARMERS UNION V. COREY

A recent line of cases in the Eastern District of California and the Ninth Circuit that challenged California’s low carbon fuel standard provides insight into whether a CFS in Washington would be preempted by the Clean Air Act. The California low carbon fuel standard was authorized by the California Global Warming Solutions Act of 2006, 124 followed by an Executive Order issued by California’s Governor in January 2007. 125 The act charged the California Air Resources Board (“CARB”) with developing regulations that would achieve the goal of reducing GHG emissions from California to 1990 levels by the year 2020. 126 The Executive Order then directed CARB to initiate a regulatory proceeding to establish and implement the [low carbon fuel

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122. See Connecticut v. Envtl. Prot. Agency, 656 F.2d 902, 909 (2d Cir. 1981) (holding that states are “free to adopt air quality standards more stringent than required by the [National Ambient Air Quality Standards],” but that a state is not required to comply with neighboring states’ more stringent standards); Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 345 (6th Cir. 1989) (“The federal statutory scheme clearly contemplates that Michigan can make its air pollution rules as stringent as it likes, and may enforce those rules.”).

123. See, e.g., Exxon Corp. v. City of New York, 548 F.2d 1088, 1089, 1095 (2d Cir. 1977) (holding that a city regulation setting lead content and volatility standards for gasoline was preempted); Am. Petroleum Inst. v. Jorling, 710 F. Supp. 421, 429 (N.D.N.Y. 1989) (holding that a state regulation limiting volatility of gasoline was preempted).


standard].” CARB obliged, resulting in final adoption of the low carbon fuel standard in April of 2010. The stated purpose of the new regulation was to “reduce [GHG] emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel pool used in California, pursuant to the California Global Warming Solutions Act of 2006.”

To fulfill this stated purpose, the California regulations require fuel providers to reduce the average carbon intensity of fuels by a certain amount each year. The carbon intensity of fuel is calculated using a lifecycle analysis, which considers the direct and indirect emissions from fuel production. Regulated parties receive credits for fuel that has a carbon intensity below the standard, and debits for fuel with a carbon intensity above the standard. Unlike the federal renewable fuel standard, which exempts existing corn facilities from the GHG lifecycle requirements, the California standard imposes the same lifecycle GHG requirements on all renewable fuels.

In *Rocky Mountain Farmers Union v. Goldstene*, the plaintiffs were Midwest-based farm associations with an interest in increased regulation of the corn and soybean ethanol industry. Plaintiffs challenged California’s low carbon fuel standard on the basis of federal preemption. Plaintiffs argued that the standard conflicted with the goals of Congress in enacting the renewable fuel standard, as authorized by the Energy Independence and Security Act of 2007. The Court found that although California was exempt from the express fuel preemption provision under Section 211(c)(4) of the Clean Air Act, this did not insulate it from a possible implied preemption challenge under some other section of the Clean Air Act, specifically the renewable fuel standard at Section 211(o). However, the Court declined to decide

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129. Id. § 95480.
130. Id. § 95482(b).
131. Id. § 95481(a)(28) (defining “lifecycle greenhouse gas emissions”).
132. Id. § 95485.
134. CAL. CODE REGS. tit. 17 § 95484(b) (2012).
136. See Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1078, 1096 (discussing plaintiffs’ interest in protecting the corn ethanol industry).
137. Id. at 1101.
whether California’s low carbon fuel standard was actually preempted by the renewable fuel standard because it found that the parties failed to argue the correct standard of review. Thus, the implied federal preemption question remains open and will likely be instrumental in any challenge to a CFS in Washington.

The Court’s analysis and discussion of the federal preemption claim in Rocky Mountain Farmers Union provides insight into how a court may analyze a federal preemption challenge to a CFS in Washington. This section gives a brief explanation of the Court’s reasoning and conclusions at the District Court level and in the appeal to the Ninth Circuit.

A. District Court Proceedings

Plaintiffs at the District Court level in Rocky Mountain Farmers Union argued that the California low carbon fuel standard was preempted by the Energy Independence and Security Act of 2005 and the subsequent 2007 amendments, codified at Section 211(o) of the Clean Air Act. The plaintiffs argued that California’s law was invalid under obstacle preemption. The Act authorized the EPA to set a national renewable fuel standard, which requires renewable fuels to be blended with gasoline. The standard excludes corn ethanol made from plants constructed before December 19, 2007 from the carbon intensity requirements imposed on other types of renewable fuels. Plaintiffs argued that the California standard frustrated the purpose of the amended federal renewable fuel standard. Unlike the national standard, plaintiffs argued, the California standard did not provide an exception for “first generation” corn ethanol producers. Instead, the California standard assessed carbon intensity in the same way for all fuels. Plaintiffs argued that the purpose of the amended federal standard was to preserve the United States corn ethanol industry, and that the California standard “interfered with the methods by which the federal statute was designed to reach [its] goal.”

Defendant CARB denied the contention that the California standard

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139. Id.
140. Id. at 1052.
141. See supra Part II.B.2 and notes 100–20.
144. Id.
145. Id. (citing Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 103 (1992)).
was preempted by the renewable fuel standard.\textsuperscript{146} CARB pointed to California’s preemption waiver in the Clean Air Act,\textsuperscript{147} which, CARB argued, insulated California from all preemption challenges under the Clean Air Act.\textsuperscript{148} CARB maintained that because it was exempt from the express fuel preemption provision under Section 211(c)(4), it was also exempt from implied preemption under other parts of the Clean Air Act, specifically the renewable fuel standard, codified at Section 211(o). The court addressed this argument in two parts. First, it asked whether the express fuel preemption provision applied to the California standard. Second, it asked whether California was exempt from all types of preemption.\textsuperscript{149}

The court first analyzed whether the Clean Air Act preemption waiver for California applied to California’s low carbon fuel standard.\textsuperscript{150} The court split this analysis into three parts based on the text of the fuel preemption provision: (1) whether the California standard was a control or regulation “for the purpose of motor vehicle emissions”\textsuperscript{151}; (2) whether the standard was a control or prohibition respecting any “characteristic or component of a fuel or fuel additive”\textsuperscript{152}; and (3) whether the standard was a “control respecting any fuel or fuel additive.”\textsuperscript{153} The court answered “yes” to all three questions and found that the preemption exemption authorized the California standard with respect to the federal fuels regulations set forth in Section 211(c) of the Clean Air Act.\textsuperscript{154} Concluding that California’s standard fit within the express fuel preemption waiver under Section 211(c)(4), the court considered whether California’s standard was exempt from preemption by other portions of the Clean Air Act, namely the renewable fuel standard, codified at Section 211(o), where there was no express preemption provision.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{146} Id. at 1054.
\item \textsuperscript{147} 42 U.S.C. § 7545(c)(4)(A) (“[N]o State . . . may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine . . . (ii) if the Administrator has prescribed . . . a control or prohibition applicable to such characteristic or component of a fuel or fuel additive.”).
\item \textsuperscript{148} Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1054.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. at 1055.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id. at 1057.
\item \textsuperscript{153} Id. at 1061.
\item \textsuperscript{154} Id. at 1061–62.
\item \textsuperscript{155} Id. at 1062.
\end{itemize}
The court did not, however, find that California’s preemption waiver exempted the California standard from preemption analysis under other federal laws, including other provisions of the Clean Air Act. Instead, it found that “[f]ederal preemption, and California’s preemption exceptions, differ under each Section 211 subsection.” The court cited to *Davis v. Environmental Protection Agency*, which found that California’s preemption waiver did not exempt California from preemption analysis under a different subsection of the Clean Air Act, namely Section 211(k). Therefore, the court found, California’s exemption from the fuel preemption provision did “not grant California the authority to enact a regulation that conflicts with the [renewable fuel standard], as set forth in section 211(o).”

Although the court found that California’s exemption from the express fuel preemption provision under Section 211(c)(4) did not preclude preemption by the renewable fuel standard in Section 211(o), the court declined consideration of the implied preemption claim on the merits because neither party addressed the appropriate standard of review. Because the court did not decide whether the federal renewable fuel standard preempted the California low carbon fuel standard, the parties did not appeal the decision to the Ninth Circuit. This obstacle preemption issue remains open.

**B. The Ninth Circuit Briefly Addressed Preemption**

*Rocky Mountain Farmers Union* was appealed to the Court of Appeals for the Ninth Circuit. However, because the District Court did not address whether the renewable fuel standard preempted California’s low carbon fuel standard, the issue was not brought

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156. *Id.* at 1062 (“Section 211(c)(4)(B) does not authorize California to enact and enforce fuel standards that conflict with federal laws, including other provisions of the Clean Air Act such as [the Energy Independence and Security Act], Section 211(o).”).

157. *Id.*

158. 348 F.3d 772 (9th Cir. 2003).

159. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1057 (citing *Davis*, 348 F.3d at 786).

160. *Id.* at 1063.

161. *Id.* at 1071.

162. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).


164. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1071 (refusing to address whether California’s low carbon fuel standard was preempted by the Energy Independence and Security Act because neither party argued the correct standard of review).
before the Ninth Circuit. The court did note California’s fuel preemption waiver in the Clean Air Act briefly in its opinion. CARB argued that Section 211(c)(4)(B)—California’s exemption from the Clean Air Act preemption provision—authorized the low carbon fuel standard under the Commerce Clause. In rejecting this argument, the court noted that the California standard fell within the fuel preemption exemption because it was “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.” The Court did not address whether there was any federal regulation that would actually preempt the California standard.

IV. THE CLEAN AIR ACT IS UNLIKELY TO PREEMPT A CLEAN FUEL STANDARD IN WASHINGTON

The Clean Air Act’s express declaration of federal preemption for state regulation of fuel additives, combined with the Clean Air Act’s renewable fuel standard may be used to challenge a CFS in Washington. State regulation of fuel additives is only preempted if it conflicts with a federal regulation. The federal renewable fuel standard has the potential to preempt a CFS in Washington. First, this section will analyze whether a CFS in Washington would be preempted by the Clean Air Act express fuel preemption provision, Section 211(c)(4). Second, this section analyzes whether the national renewable fuel standard—codified at Section 211(o) in the Clean Air Act—would preempt a CFS in Washington. It concludes that federal preemption of a CFS in Washington—under both express and implied preemption—is unlikely.

165. Corey, 730 F.3d at 1107 (“We express no opinion on Plaintiffs’ claim that the Fuel Standard is preempted by the [renewable fuel standard].”).
166. Id. at 1106.
167. Id.
168. Id. (citing Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1061).
171. See Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1065–68. Plaintiffs challenged California’s low carbon fuel standard based on implied preemption under the federal renewable fuel standard. Id. The issue was not decided and remains open. Id. Therefore, opponents to a CFS in Washington will likely attempt preemption based on the renewable fuel standard.
173. See Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1065 (plaintiffs argued that the California low carbon fuel standard stood as an obstacle to Congress’ intent when it enacted section 211(o) of the Clean Air Act—the renewable fuel standard).
A. Clean Air Act Express Preemption: Section 211(c)(4)

The Clean Air Act would not expressly preempt a CFS in Washington because the EPA has not regulated the carbon intensity of fuel. Section 211(c)(4) is the express fuel preemption provision in the Clean Air Act, but it is merely procedural and not substantive. Under Section 211(c)(4), the EPA must have regulated the same “characteristic or component” of fuel as the state regulation for express preemption to apply. Therefore, the test for express preemption under the statute is twofold. First, the state law must regulate a “characteristic or component” of fuel. Here, a court would likely determine that a Washington CFS would regulate a “characteristic or component” of fuel. Second, the state law must regulate the same “characteristic or component” of fuel as federal law. This analysis requires consideration of a separate, substantive federal regulation to arrive at express preemption. Opponents of a CFS in Washington will likely point to the federal renewable fuel standard, codified at Section 211(o). The pertinent question for this analysis is whether the federal renewable fuel standard regulates the same “characteristic or component” of fuel as would be regulated by a CFS in Washington.

Express preemption analysis under Section 211(c)(4) requires more than a simple look at the plain language of the statute. Courts often consider the legislative history, purpose, and the broader context of the statute when interpreting the scope of express preemption language. Here, the analysis requires comparison between the scope of the federal renewable fuel standard and a CFS in Washington. This section will compare the two standards by considering the content, along with the congressional purpose in enacting the two standards. It finds that the federal standard regulates the source of fuel, focusing on renewables, and a Washington CFS would regulate the carbon intensity of fuel. It

175. Id. at § 7545(c)(4)(A)(ii).
176. See Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1057 (finding that California’s low carbon fuel standard regulated a “characteristic or component” of fuel for purposes of the Clean Air Act.) Because a CFS in Washington would likely mimic California’s standard, a court would also likely find that a CFS regulates a “characteristic or component” of fuel.
177. Id.
178. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 548 (2001) (considering the history of federal regulation in addition to the express preemption language in finding that the state law was preempted); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) (considering the broader language of the federal act before concluding that the express preemption provision did preempt state tort claims).
concludes that the state standard does not regulate the same “characteristic or component” of fuel as the federal standard and should not be preempted.

As discussed above, the Ninth Circuit noted that the California low carbon fuel standard fell within the Clean Air Act fuel preemption provision. It explained that the California standard was “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.”\(^{179}\) However, California’s preemption waiver exempted the California standard from analysis under the Clean Air Act’s express fuel preemption provision.\(^{180}\) The Court simply decided that California would be exempt from express preemption and therefore avoided engaging in a full analysis under the preemption provision. Specifically, the Court did not consider whether the EPA had prescribed a “control or prohibition respecting any characteristic or component of a fuel or fuel additive,” as required by the preemption provision.\(^{181}\) Unlike California, however, Washington is not exempt from the fuel preemption provision expressly written in the Clean Air Act.\(^{182}\) Therefore, an attempt to enact a CFS in Washington will likely result in a challenge based on express preemption.

As explained in Part II.B.1,\(^{183}\) express federal preemption of state regulation of fuel only occurs when the EPA has “prescribed . . . a control or prohibition applicable to such characteristic or component of a fuel or fuel additive.”\(^{184}\) Such a federal regulation is required for the fuel preemption provision to come into play.\(^{185}\) If there is no federal regulation on point, there is no preemption.\(^{186}\) Therefore, states may enact regulations that would fall under the express preemption provision as long as there is no federal regulation that concerns the same

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179. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1077, 1106 (9th Cir. 2013) (internal quotation omitted) (citing Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1061).
180. Corey, 730 F.3d at 1106 (citing Davis v. United States Envtl. Prot. Agency, 348 F.3d 772, 786 (9th Cir. 2003)).
181. Id.
182. See 42 U.S.C. §§ 7543(b); 7545(c)(4)(B) (California is the only state exempt from preemption).
183. See supra notes 72–99.
185. Id.; see also Exxon Mobil Corp. v. Envtl. Prot. Agency, 217 F.3d 1246, 1256 (9th Cir. 2000) (holding that a county requirement in Nevada that gasoline sold during the winter contain at least 3.5 percent oxygen content by weight did not conflict with, and was not preempted by, any provision of the Clean Air Act, including provision restricting state power to regulate and prohibit fuel additives) (citing Clean Air Act § 211(c)(4)(A), 42 U.S.C. § 7545(c)(4)(A) (2012)).
186. Id. at 1253–56.
“characteristic or component” of that particular fuel or fuel additive. 187 This is particularly important to the present analysis. Application of the express preemption provision to a CFS in Washington requires consideration of other federal laws regulating carbon intensity of fuel.

The most obvious federal law that may result in express preemption is the renewable fuel standard. 188 As explained in Part II.B.2, 189 the renewable fuel standard requires that a certain amount of renewable fuel be blended into transportation fuels each year. 190 The renewable fuel standard focuses on the source of renewables, requiring fuel vendors to blend certain volumes of each of the four recognized categories of renewable fuel into gasoline. 191 The EPA sets volumes for each category of renewable based on percentage of total renewable fuels. 192

By setting volume requirements for each category of renewable fuel, the renewable fuel standard targets the source of fuel. In large part, the renewable fuel standard focuses on whether the sources of transportation fuels are adequately diversified. Congress’ purpose in passing the Energy Independence and Security Act of 2007 was to “move the United States toward greater energy independence and security.” 193 When considered in light of the purpose of the Act, source diversification is a logical approach to achieve the stated goals. It requires a specific percentage of fuel from planted crops, a certain percentage from biofuels derived from cornstarch, a percentage from cellulose, and a percentage of diesel from biomass feed stocks. 194 Thus, the EPA is meeting the stated purpose of the act by requiring specified volumes of diverse renewable fuels. 195

In contrast, emphasis on the specific source of renewable fuels is completely absent from proposals for a Washington CFS. 196 Unlike the federal standard, Washington would not require certain percentages of

188. Id. § 7545(o).
189. See supra notes 100–20.
191. See supra Part II.B.2.
192. See id.
194. SCHNEPF & YACOBucci, supra note 101, at 4.
195. See Powers, supra note 103, at 668–69 (explaining that EISA has been “wildly successful” at reducing United States dependence on foreign oil, but not successful at reducing carbon emissions).
196. See supra Part I.
fuel from cellulosic biofuels or planted crops. Instead, a Washington CFS would focus entirely on the carbon intensity of fuel. As explained in Part I, the “carbon intensity” of a transportation fuel is the amount of lifecycle GHG emissions per unit of energy of fuel. Regulated fuel providers will receive credits for fuel with a carbon intensity value below the standard, and debits if the carbon intensity value is above the standard. In other words, the source of renewables is irrelevant to a CFS. The crux of the policy is its focus on the carbon intensity of fuel.

Thus, the “characteristic or component” that would be regulated by Washington’s CFS is not the same “characteristic or component” as regulated by the renewable fuel standard.

The focus on regulating carbon intensity under a CFS is a logical means to fulfill Washington’s legislatively mandated reductions in state GHG emissions. Governor Inslee highlighted a CFS as a method to achieve these reductions. Requiring a reduction in the carbon intensity of fuel would likely result in statewide GHG emissions reductions. Therefore, the policy would be designed to achieve statewide goals.

On the other hand, Congress’ stated goal in enacting the renewable fuel standard was to “move the United States toward greater energy independence and security.” One major critique of the federal standard is that it has not effectively reduced GHG emissions from transportation fuels. For example, the federal standard requires high volumes of traditional renewable fuels, mainly corn ethanol, to be blended into fuel. However, corn ethanol may actually emit more GHG emissions than traditional petroleum-based fuels.

Like a CFS, the federal renewable fuel standard does require some renewable fuels to meet specific GHG emissions thresholds, which are
calculated using a lifecycle analysis. However, certain fuels—many corn-based ethanols, for example—are exempt from the emissions thresholds. The exemption for corn-based ethanol from the GHG emission requirements further demonstrates that Congress’ goal was to reduce dependency on foreign oil by strengthening domestic renewable fuel sources, rather than to limit GHG emissions. Furthermore, the GHG emissions threshold is a preliminary step in the regulation. Renewable fuels in each category are first assessed according to the GHG emissions threshold. Fuels that meet the required thresholds are then blended with gasoline based on required volumes of each renewable fuel. Therefore, the focus of the federal standard is centered on increasing the use of fuel from non-petroleum-based sources and not on GHG emissions thresholds.

The fuel preemption provision in the Clean Air Act only applies if the EPA has regulated the same “characteristic or component of a fuel or fuel additive” as is targeted by the state regulation. The federal renewable fuel standard does not regulate the same characteristic of fuel as would be regulated by a Washington CFS. The federal standard regulates the source of renewable fuels, requiring certain volumes to be derived from each of four different categories. In contrast, a Washington CFS would regulate the carbon intensity of renewable fuels. It would not require percentages from specific sources. This conclusion is further validated by a look at legislative purpose: Washington’s purpose was to reduce GHG emissions, while the federal purpose was to move the United States toward greater energy independence. Therefore, a CFS in Washington would not be preempted by the federal renewable fuel standard because they do not regulate the same “characteristic or component” of fuel, as required by the Clean Air Act.

B. Clean Air Act Implied Preemption

A CFS in Washington does not “stand as an obstacle to Congress’ objectives” under the federal renewable fuel standard, authorized by the Energy Independence and Security Act of 2007, and should not be preempted. Whether a CFS in Washington would be preempted by the federal renewable fuel standard is an open question following the Ninth

206. Id.
207. Powers, supra note 103, at 668.
Circuit’s decision in Rocky Mountain Farmers Union.209 Opponents to a CFS in Washington will likely use the renewable fuel standard, Section 211(o) of the Clean Air Act, to argue implied obstacle preemption. This section analyzes the merits of such an argument and concludes that the CFS would not be preempted.

Plaintiffs in Rocky Mountain Farmers Union argued that California’s low carbon fuel standard interfered with “the methods by which the federal statute was designed to reach [its] goal.”210 This argument is one of implied preemption under the federal renewable fuel standard211 and is an argument that is likely to be included in a challenge to a CFS in Washington. Specifically, the question is whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.”212 Obstacle preemption was never analyzed in Rocky Mountain Farmers Union because the court found that neither party addressed the appropriate standard of review.213

A challenge to a CFS in Washington will likely hinge on obstacle preemption by the federal renewable fuel standard, authorized by the Energy Independence and Security Act of 2007.214 In analyzing whether a Washington CFS would be preempted by the federal renewable fuel standard, the question is whether it would “stand[] as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.”215 As noted earlier, Congress’ stated objective in enacting the renewable fuel standard was to “move the United States toward greater energy independence and security.”216 The question in an obstacle preemption analysis is whether a CFS in Washington conflicts with Congress’ purpose in enacting the federal law.217

A significant difference between California’s standard and the federal renewable fuel standard in Rocky Mountain Farmers Union was in the treatment of corn ethanol. This would likely be the most controversial

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209. 730 F.3d 1070, 1107 (9th Cir. 2013).
211. Id.
213. Rocky Mountain Farmers Union, 843 F. Supp. 2d at 1071.
214. See supra Part II.B.2.
part of the Washington CFS, as well. While the federal standard favors all renewable fuels, the Washington CFS would only favor renewables with a low carbon impact. The production of corn ethanol, although renewable, can actually produce more carbon dioxide than it absorbs in the atmosphere. Although this may theoretically work to fulfill the federal purpose by decreasing the United States’ dependence on foreign oil, it hardly advances Washington’s goal to reduce carbon emissions from transportation fuel.

The issue is one of Congressional purpose. In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, for example, the Court found that a California law that put a moratorium on nuclear power development was not preempted by a federal law. Although it found that the primary purpose of the federal law was promotion of nuclear power, it found that a secondary objective was safety. The Court found that the California objective was economic in nature. It therefore concluded that the state law’s purpose did not obstruct the federal purpose to enhance safety.

Here, the analysis seems even clearer. The purpose of the Energy Independence and Security Act of 2007, which authorized the renewable fuel standard, was plainly stated as moving the United States toward greater energy independence. As explained in Part IV.A, EPA requires that fuel providers blend escalating volumes of certain categories of renewable fuels to achieve this goal. A CFS in Washington would require an increase in the amount of renewable transportation fuels used in Washington. A CFS would not require that renewables be derived from a specific source; it would instead preference renewables

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218. See Leah Stiegler, Comment, Avoiding the Catch-22: Reforming the Renewable Fuel Standard to Protect Freshwater Resources and Promote Energy Independence, 48 U. RICH. L. REV. 1063, 1091 (2014) (arguing that the federal renewable fuel standard favors corn ethanol and that this has significant environmental impacts); Morgan Brubaker, Comment, Dream of Californication: Constitutional Questions Put the Brakes on the Nation’s First Low Carbon Fuel Standard, 22 VILL. ENVTL. L.J. 57, 65 (2011) (discussing the impact of land conversion from forest or grassland to corn fields, which generally increases the amount of carbon dioxide in the atmosphere).

219. See U.S. ENVTL. PROT. AGENCY, RENEWABLE FUEL STANDARD PROGRAM (RFS2) REGULATORY IMPACT ANALYSIS 483 (Feb. 2010), available at http://www.epa.gov/oms/renewablefuels/420r10006.pdf (analyzing corn ethanol production and noting that “unless we analyze the lifecycle GHG emissions of corn ethanol over more than 14 years, corn ethanol from this pathway will not achieve a reduction compared to gasoline.”).


221. Id. at 220–23.


223. See supra notes 174–208.
with a lower carbon intensity. Rather than stand as an obstacle to the purpose of the federal standard, a CFS in Washington would serve as a complement. Increased renewable fuels would likely result in greater energy independence nationwide. At the very least, it does nothing to impede the federal objectives.

Plaintiffs in Rocky Mountain Farmers Union argued that Congress intended to ensure a continued nationwide market for corn ethanol by exempting existing corn ethanol producers from the GHG emissions threshold requirement. However, this alleged intent appears nowhere in the legislation, and plaintiffs did not cite to anywhere that it appeared in the legislative history. For a court to speculate that Congress intended to bolster nationwide sales of corn ethanol by enacting the renewable fuel standard is likely a stretch. It also requires that a court ignore the stated purpose of the Act: to move the United States toward energy independence.

Far from conflicting with the stated objectives of the federal renewable fuel standard, a CFS would likely further federal goals. Based on Supreme Court precedent and consideration of the doctrine’s reluctance to find preemption of state law, it is unlikely that a court would find a CFS in Washington preempted.

CONCLUSION

A CFS enacted in Washington State will likely meet resistance from parties with a financial stake in the current fuel economy. Based on challenges to the California standard, federal preemption under the Clean Air Act is likely to be raised to challenge a Washington CFS. Although the federal renewable fuel standard may appear similar to a CFS on its face, a court is unlikely to find a Washington CFS preempted. Under the express preemption standard, a court is unlikely to find that a Washington CFS would regulate the same characteristic of fuel as the federal renewable fuel standard, as required by the Clean Air Act fuel preemption provision, Section 211(c). Unlike the federal standard’s focus on the source of renewables, a CFS in Washington would regulate the carbon intensity of fuel. A CFS in Washington would likely also survive an obstacle preemption analysis under the renewable fuel


standard, Section 211(o) because it does not obstruct Congress’ purpose. The stated purpose of the federal standard is to move the United States toward greater energy independence; the stated purpose of the Washington CFS would be to reduce GHG emissions from transportation fuels. Far from inhibiting the federal standard, the Washington CFS actually serves as a complement. Therefore, it is unlikely that a CFS in Washington would be preempted by the Clean Air Act.
ON THE ARGUMENT THAT EXECUTION PROTOCOL REFORM IS BIOMEDICAL RESEARCH

Paul Litton*

INTRODUCTION

The United States Supreme Court just decided *Glossip v. Gross*, rejecting the claim that Oklahoma’s lethal injection protocol violates the Eighth Amendment. Like Kentucky’s protocol approved in *Baze v. Rees*, Oklahoma’s procedure involves the administration of three drugs, the second and third of which paralyze an inmate and then stop his heart, respectively. The third drug in both protocols, potassium chloride, would cause excruciating burning pain if an inmate were not properly anesthetized, as it flows through his veins. The difference between the Kentucky protocol permitted in *Baze* and the Oklahoma procedure permitted in *Glossip* is the first drug. Kentucky employed sodium thiopental, “a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection.”

Oklahoma’s first drug is midazolam, which is a benzodiazepine, like Valium; it is not a barbiturate. Midazolam is used primarily to relieve anxiety and to sedate, not to “induce the type of deep, general anesthesia needed to withstand painful stimuli,” such as the burning pain caused by potassium chloride. The pain from the

* R.B. Price Professor of Law, University of Missouri School of Law. Many thanks to Seema Shah for the opportunity to comment on her excellent article. I am also grateful to the editors of *Washington Law Review* for very helpful comments on prior drafts.

3. Id. at 44.
potassium chloride can “break through the midazolam-induced sedation,” causing the inmate to regain consciousness.\textsuperscript{5} Midazolam was used in at least three executions that have gone terribly wrong over the last year.\textsuperscript{6}

Condemned inmates in \textit{Glossip} argued that Oklahoma’s use of Midazolam as the first drug violates the Eighth Amendment because it creates a “substantial risk of serious harm.”\textsuperscript{7} According to the plurality in \textit{Baze v. Rees}, an execution method is unconstitutional if it presents a “substantial risk of serious harm,” which is defined as an “‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”\textsuperscript{8} In addition to arguing that the Oklahoma protocol presents a “substantial risk of serious harm,” petitioners in \textit{Glossip} bolstered their claim that the Oklahoma Department of Corrections is subjectively blameworthy because of the way in which it chose midazolam.\textsuperscript{9} At the preliminary injunction hearing before the federal district court, former general counsel for the Oklahoma Department of Corrections (ODOC) testified that he, along with the Attorney General’s office, chose midazolam because “we knew [it] had the same properties as pentobarbital as far as sedation goes.”\textsuperscript{10} The truth is that they did not know. Pentobarbital, like sodium thiopental, is a barbiturate; midazolam’s properties, in terms of the kind of unconsciousness it causes, are different.\textsuperscript{11} Accordingly, petitioners in \textit{Glossip} argued that the ODOC chose midazolam based on inadequate investigation, lacking the knowledge required to make a responsible and legally permissible decision about the execution protocol.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{5} \textit{Id.}
\item \textsuperscript{8} \textit{Baze}, 553 U.S. at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 846 n.9 (1994)).
\item \textsuperscript{9} \textit{See} Brief of Petitioner, supra note 7, at 11.
\item \textsuperscript{11} Brief of Petitioner, supra note 7, at 2–3 (citing \textit{Baze}, 553 U.S. at 50).
\item \textsuperscript{12} \textit{Id.} at 10–11.
\end{itemize}
Regardless of whether the Supreme Court rightly decided *Glossip*, Oklahoma officials had inadequate reason to choose midazolam as the first drug. Its decision to try midazolam is one example illustrating Seema Shah’s point that death penalty states, in using new drugs and drug combinations, are engaged in “poorly designed experimentation that is not based on evidence.” Shah argues that “an important factor” causing the high rate of botched executions is that the lethal injection reform in which states are engaged is a type of human subjects research that is going unregulated.

Shah’s arguments in *Experimental Execution* are creative and thought-provoking. Their importance resides in the fact that all possible legal avenues should be identified and explored for prohibiting reckless choices by departments of corrections in their design of execution protocols. Shah’s work, appealing to ethical and legal principles governing human subjects research, is one such worthy exploration. Her claim that recent reforms constitute research has strong intuitive appeal. As she writes:

All states conducting executions . . . borrow and learn from one another’s experiences and tend to change their protocols by adopting the same new drugs around the same time. This suggests that states are making modifications and experimenting with the goal of producing knowledge from each individual execution to improve future executions.

As evidence of the value of her exploration into the application of research ethics and law, we see attorneys for death row inmates urging courts to consider recent lethal injection reforms as unnecessarily risky human subjects research. The plaintiffs in *Glossip*, for example, argued that the “State’s hasty, ill-founded, non-medical approach to the selection of midazolam as an execution drug, does not accord with basic expectations of research.”

Part I of this essay grants Shah’s conclusion that death penalty states are engaged in human subjects research. However, it argues that if protocol reform amounts to research, then it is unethical for lacking social value, regardless of the morality of capital punishment. Shah argues that research ethical requirements, such as informed consent and Institutional Review Board (IRB) review, are necessary to render the

14. Id.
15. Id. at 182.
research ethically permissible. I argue that we need not get that far if it is research: Because it lacks social value, it is unethical.

Parts II and III provide reasons to doubt the empirical claims and normative conclusions of Experimental Execution. Shah’s normative conclusion is that the law and ethics of human subjects research should govern lethal injection reform. Empirical claims underlie that normative view. Shah argues that the capital inmate’s relationship to the corrections department is sufficiently similar to the relationship between a research participant and investigator. She also claims that the application of the law and ethics of human subjects research will help ensure less suffering during executions. Part II argues against Shah’s normative conclusion by providing reasons to reject its underlying empirical assumptions. Finally, Part III argues that describing lethal injection reforms as human subjects research fails to add moral or legal reasons to condemn the way in which states have conducted recent executions.

I. IF IT IS RESEARCH, DOES IT HAVE SOCIAL VALUE?

If Shah is correct that states are engaging in medical research, then this research is unethical. Of course, one might argue that the research is unethical because the death penalty is immoral. However, I contend that even if the death penalty is a morally permissible punishment in at least some cases, this alleged research would be unethical for the state to conduct because it fails the research ethics requirement of providing new and valuable knowledge. In other words, I argue that even if the death penalty is morally permissible, the “research” nonetheless lacks social value. Even if states adopted Shah’s recommendations of requiring informed consent and IRB review, the research would still be unethical. To start, a research protocol is ethical only if that research has social value. When research seeks to find “what is already well known” it lacks social value. It is ethically impermissible to expose persons to medical risks—especially persons who are particularly vulnerable to coercion—if the research lacks social value.

Regardless of whether the death penalty is morally justifiable, the

18. Id.
“experimenting” in which states are engaged lacks social value. Shah asserts that the aim of the experimentation is to “improve [execution] protocols to use on other inmates on death row.”20 In what way are states trying to “improve” their protocols? I do not want to attribute an answer to Shah, but one intuitive answer is the following: States are trying to find a lethal injection procedure that will terminate a life while minimizing the risk of pain and suffering. The problem, though, is that this cannot be the actual aim of the experimentation: We already know how to kill someone without causing suffering. Physicians perform neurosurgery, and patients feel nothing. Some states use a single overdose of a barbiturate, the same kind of drug that has been prescribed in Oregon under its Death with Dignity Act.21 And even if states cannot obtain a barbiturate for single-dose executions, other means of killing quickly, minimizing the risk of prolonged suffering, exist. Surely people know that the state can render an inmate unconscious with some drug—whether it is a drug used by medical professionals or not—and then kill him by means that governments have used in the past. The state could intoxicate and anesthetize an inmate and then riddle his head with bullets, blowing up his brain and causing death in an instant. The state could render an inmate unconscious before employing the guillotine. I am sure others can think of many more such execution protocols that would kill an inmate quickly right after rendering him unconsciousness. Consider the following: The reason midazolam’s use in executions is so problematic is because potassium chloride does not kill instantaneously. The searing pain it causes is “sufficiently noxious to break through the midazolam-induced sedation.”22 If the burning pain causes the inmate to regain consciousness, there is time for him to suffer intensely. Death might take up to two minutes.23 Midazolam would not be a problem in terms of permitting pain if, after it causes unconsciousness, the inmate were killed instantly.

So what is the supposed aim or value of this “experimentation” if it is not to find a way to kill someone while minimizing the risk of pain?

20. Shah, supra note 13, at 152.
Perhaps other options for killing painlessly that I mentioned (besides a barbiturate overdose) are more gruesome, and inmates themselves have an interest against such executions even if painless. I am skeptical, though, that pro-death-penalty states are motivated by a concern to protect dignity interests of condemned inmates for the sake of the inmates.

Rather, I suggest the following: Death penalty states want to terminate an inmate’s life using only drugs because doing so makes the death penalty more palatable to others, including the public. As others have observed, “[l]ethal injection looks more like therapy than punishment.” The purpose of killing with drugs is to “mask the brutality of execution by making them look serene and peaceful—like something any one of us might experience in our final moments.”

Some commentators surmise that the level of public support for the death penalty rests in part on the “medicalization” of executions. By medicalizing executions, the state can maintain and influence public support for the death penalty.

If the state conducts human subjects research to find a means of killing that permits the state to maintain and influence public support for the death penalty, then that research is immoral. The state disrespects the public by attempting to influence public opinion by a means that has nothing to do with the reasons to support the death penalty. Medicalizing executions may cause people to feel more comfortable with killing; it avoids causing feelings of disgust and horror that might be caused by more graphic newspaper accounts of executions by other means. However, the fact that executions are medicalized and sanitized neither constitutes nor reveals any reasons that morally speak in favor of capital punishment. It is illegitimate for the state to try to influence public opinion in a way that bypasses reasoning.

The state may attempt to maintain or influence public opinion on an important social matter such as the death penalty. The government may “defend its own policies.” However, in a democracy, the state may not


25. Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc).


27. Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 229 (2000) (“The government, as a general rule, may support valid programs and policies by taxes or other exactions

try to influence public opinion on an important matter in a way that bypasses “reasoned discussion and deliberation.”28 Whether legislators and citizens support or oppose the death penalty should be based on questions about its retributive value (if any), its deterrent value (if any), and other moral, policy, and financial considerations. It is morally illegitimate for the state to manipulate public opinion by means that have nothing to do with reasons that speak for or against capital punishment. Therefore, if Shah is correct in deeming lethal injection reform to be human subjects research, then the research fails the requirements for ethical research regardless of any consent process or expert review.

II. ARE RESEARCH ETHICS REQUIREMENTS APPLICABLE?

Shah is certainly right that the “mere fact that an inmate is sentenced to death should not suspend the standard protections to which all of us are entitled.”29 The question, though, is whether good reason exists to apply the law and ethics of research to the lethal injection context. If good reason is lacking, then we are not suspending research protections to which an inmate is entitled. In this section I argue that good reason does not exist to apply research ethics requirements to lethal injection reform. The relationship between condemned inmates and corrections departments (including the execution team) is not similar for ethical purposes to the relationship between research participants and investigators. Second, the justifications for particular research ethics requirements—such as informed consent—are inapplicable in the lethal injection context.

The essence of Shah’s normative argument that the law and ethics of research should bind execution reform is the following: There are features of research that call for strong ethical and legal requirements, and those same features also exist in the execution context. First, research may involve risks of bodily harm to research subjects. Similarly, experimentation with lethal injection protocols involves risks of suffering to condemned inmates. Second, research necessarily

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29. Shah, supra note 13, at 155.
involves parties—researchers and patient-subjects—who have diverging interests. Researchers want to produce generalizable knowledge that may lead to the improvement of human welfare. They may also seek personal benefit from their work and publications, including "prestige, status, career advancement, satisfaction of curiosity, and money."\(^{30}\) Patient-subjects, though, are the ones who face the risks required for researchers to achieve their goals. Likewise, Shah argues, the interest of a corrections department and an inmate are not perfectly aligned.\(^{31}\) Both have an interest in a painless execution, but the corrections department, lacking certainty about drug effects, has an interest in producing knowledge for future executions. Perhaps, though, an even more worrisome concern is that corrections departments deal with political and time pressure to change an execution method because of drug shortages or other reasons.

Shah is right that these diverging interests are cause for concern. The recent Oklahoma experience demonstrates how time and political pressure on a corrections department can lead to a terrible choice of drug.\(^{32}\) However, the fact that condemned inmates may suffer harm and have interests in tension with corrections officials does not imply that the same ethical and legal requirements should bind the execution context.

For example, consider the informed consent requirement for medical research. Shah argues that extending the ethical requirement of informed consent to condemned inmates can or will help reduce the risks of unnecessary suffering that they face. In human subjects research, the ethical requirement of informed consent has two purposes: "to ensure that individuals control whether or not they enroll in clinical research and participate only when the research is consistent with their values, interests, and preferences."\(^{33}\) Shah argues that "just as some inmates might be given a choice to participate in research . . . testing a new medication for treating HIV, so too should inmates be asked for their consent to participate in research about how they should be killed."\(^{34}\) Moreover, Shah argues that requiring informed consent before enrolling an inmate in execution research will actually help the inmate protect his interests.\(^{35}\) For example, Shah argues, an inmate with a particular

\(^{30}\) Id. at 164.

\(^{31}\) Id.

\(^{32}\) Brief of Appellant, supra note 16, at 22–27.

\(^{33}\) Emanuel, supra note 19, at 2706.

\(^{34}\) Shah, supra note 13, at 199 (emphasis in original).

\(^{35}\) See id. at 198–202.
medical condition that increases the risk of a painful lethal injection might be able to bring his condition to bear in a decision about whether to participate in the state’s protocol reform efforts.\(^\text{36}\)

Shah’s empirical assumption is that asking death row inmates to consent to execution research will help them protect their interests. However, if that empirical assumption is false, then the normative conclusion—that the informed consent requirement should be applied—loses its justification. In the following, I explain why I am skeptical of the empirical assumption.

First, I must admit finding something morally grotesque about the state asking an inmate, who the state is about to kill, for permission to expose the inmate to risk so that it may find the best way to kill others in the future. It is hard to imagine why an inmate would or should be disposed to helping the state in this manner. Let us first contrast an execution with the normal medical context in which a physician or researcher asks a patient to enroll in research. It is reasonable for a physician to ask a patient if she is willing to participate in research and bear risk for the good of others because perfectly intelligible reasons exist to justify a patient’s agreement. For one, some patients consent to research for altruistic reasons; they want to contribute to improving human welfare. Patients can derive meaning from their illness by participating in research that will hopefully help prevent or alleviate the suffering of people in the future.\(^\text{37}\) A patient might also reasonably believe that she has benefitted greatly from the advancement of medicine and therefore has a responsibility to participate in the ongoing production of medical knowledge. In addition, patients often feel good will towards their doctors, grateful for the way in which their doctors have cared for them. The context makes it quite understandable why a patient would see good reason to accept an invitation to enroll in research and take on risk for the good of others. Accordingly, some commentators have described the ideal researcher-subject relationship as a joint venture, in which they share in the goal of improving human welfare.\(^\text{38}\)

These facts do not apply to the execution context. Execution “research” cannot be a joint venture. A condemned inmate does not have reason to be altruistic towards the state, which is killing him against his

\(^{36}\) Id. at 200.

\(^{37}\) Paul Litton & Franklin G. Miller, A Normative Justification for Distinguishing the Ethics of Clinical Research from the Ethics of Medical Care, 33 J.L. MED. & ETHICS 566, 569 (2005).

\(^{38}\) See, e.g., Charles Fried, Medical Experimentation: Personal Integrity and Social Policy 172 (1974).
will, to help the state find a way to execute that sits well with the public. Again, as argued before, the state knows how to kill people quickly with little risk of pain. The purpose of this alleged research is to find ways to kill that maintain support for the death penalty. We should hope that guilty inmates attempt to repent, reform, and benefit others in ways they can. However, we should not expect that their rehabilitation include volunteering for the state’s endeavor to find a more peaceful way to kill more inmates. A patient might see an obligation to help advance medicine because of the medical benefits she has received throughout her life. Inmates have no analogous obligation to the state to help it maintain the death penalty; they have not received benefits from the existence of the death penalty. Finally, unlike the normal good will within the doctor-patient relationship, the execution differs in that inmates most often lack good will towards the state. It is just unseemly of the state, before killing a person, to ask him to take on risk so that it can kill others.

Shah also supports her conclusion—that ethical and legal requirements of research should apply to execution reform—by claiming that the application of those requirements, such as informed consent, will help inmates protect their own interests and reduce their risk of suffering. However, it is difficult to see how an informed consent requirement will help an inmate protect his interests. The context is plainly coercive. Corrections officials, asking the inmate to consent, are in control of whether he is going to suffer extreme pain during the execution. They are going to kill him one way or another. The inmate wants to make sure that the risk of pain is as low as possible. He is not sufficiently free to decline when he knows that agents acting on behalf of corrections are in control of whether he suffers or not. Executioners can deliberately cause pain, and whether or not they would, an inmate may certainly and legitimately fear such intentional infliction of pain. Consent may be informed, but, for ethical purposes, it would not be freely given.

Another obstacle to meaningful informed consent is the fact that both options—the “standard” or “unmodified” protocol, and the “experimental” or “modified” protocol—might be terrible. To use Shah’s words, both can be “poorly designed and not based on evidence.” A non-lethal injection option might even be barbaric. Shah writes: “States seeking to modify their lethal injection protocols would

40. Id. at 155.
have to ask inmates whether they prefer the modified or unmodified version of the protocol or could offer inmates a choice of a different method of execution altogether.\textsuperscript{41} That choice, according to Shah, might involve “older methods of execution to offer alternatives.”\textsuperscript{42} Imagine the choice is between lethal gas—an older method of execution\textsuperscript{43}—and some experimental lethal injection protocol that, say, uses midazolam as the first drug. The inmate choosing the latter is not freely giving informed consent to participate in research for the good of others. That inmate could very well choose the experimental method because of the known horrors of dying via lethal gas.\textsuperscript{44} In medical research, usually one option for a patient is the standard of care, the best treatment we have, given current knowledge. Given the way states have concocted their execution protocols, there is no reason to trust that the “unmodified,” non-experimental option for execution is actually acceptable and constitutional.

The objections I have raised so far cast doubt on whether an informed consent requirement would allow inmates to actually protect their own interests and reduce the risk of a botched, painful execution. There is another obstacle, not to the inmate protecting himself, but to implementing such a requirement. Who would actually administer the informed consent process and how would it be done? The process should not be administered by a department of corrections employee who is not a medical professional. Informed consent is not merely about obtaining a research participant’s agreement; it is supposed to be a process of communication in which the potential participant learns about the nature and purpose of the research, the risks and benefits of enrolling, and the risks and benefits of alternatives to participation.\textsuperscript{45} The potential participant should also have the opportunity to ask questions so that her decision may be fully informed. The federal regulations, for example, require the informed consent process to include “[a]n explanation of whom to contact for answer to pertinent questions about the research.”\textsuperscript{46} Non-medical professionals cannot be the only willing administrators of

\begin{itemize}
\item[41.] Id. at 199.
\item[42.] Id. at 200.
\item[43.] Mo. Rev. Stat. § 546.720 (2014). (“The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.”).
\item[45.] Emanuel, supra note 19, at 2706.
\item[46.] 45 C.F.R. § 46.116(a)(7) (2014).
\end{itemize}
this process. At least one medical professional must be on hand to answer questions about this alleged research.

But would—and should—any physician actually participate in this manner in an execution? Professional medical societies, such as the American Medical Association (AMA), American Society of Anesthesiologists, and the American Nurses Association, condemn the participation of medical professionals in executions. The AMA Code of Ethics specifically condemns even consulting the execution team, which a physician who administers an informed consent process would have to do. This consensus among professional organizations is why some states, such as California, have been unable to secure participation of physicians in their executions. Granted, some other jurisdictions have been able to employ physicians for executions. However, would it be ethical for a physician to steward a condemned inmate through the informed consent process for purposes of enrolling him in execution research? Some commentators have defended physicians who participate in executions. Are their arguments applicable to the current issue at hand?

Though commentators have presented reasonable arguments defending the participation of physicians in some execution procedures, their arguments would not support physician administration of an informed consent process. These commentators have challenged the ethics position of the AMA and other professional organizations by arguing that physicians can actually reduce the risk of unnecessary suffering during an execution. A traditional function of medicine is to reduce the risk of suffering. Insofar as a physician can ensure proper delivery of a barbiturate, which would prevent excruciating pain that would otherwise be caused, a physician acts in accordance with principles of medical ethics. These arguments in favor of physician participation, though, cannot justify a physician’s administration of the informed consent process through which a death row inmate is asked to participate in “execution research.” If my concerns above are correct, an informed consent requirement will not effectively permit inmates to protect their own interests. As stated, the context is necessarily coercive. A physician might be able to protect an inmate’s interest by ensuring

47. Denno, supra note 44, at 49.
50. Id.
proper delivery of the barbiturate, to make sure the inmate does not experience any suffering. However, if the execution is truly research to produce generalizable knowledge for future state-sanctioned killings, it is difficult to see how a physician’s administration of an alleged informed consent process could really protect an inmate’s interests.

III. DOES CALLING IT “RESEARCH” MATTER?

Shah rightfully asserts that the lethal injection reforms implemented by states are “poorly designed and not based in evidence.” Their poor design and lack of evidentiary support are, according to Shah, causing the disturbing rate of botched executions. Shah aims to address the root of the problem: “Viewing lethal injection executions through [the lens of research ethics] can help ensure that states have a solid scientific basis and are neither excessively risky nor disrespectful of inmates on death row.”

Is the ethical problem that the protocols are “poorly designed and not based in evidence,” or that they are “poorly designed research” adequately supported by evidence? By calling these reforms “research,” would we add either to the moral or legal reasons the state has to avoid execution methods that are “poorly designed and not based on evidence”? In this section I argue that we would not.

To begin, the state already has an extremely strong moral obligation to respect condemned prisoners as persons, regardless of their crimes; it is immoral to choose methods of punishment that are poorly designed. Even worse, it is, at the least, grossly negligent to choose a method of execution that supposedly involves administering an effective anesthetic agent when there is good scientific reason to doubt that the chosen means of anesthesia does not actually have the desired medical properties.

The state’s moral obligation is based on the fact that it is inflicting punishment. Given the extreme harm the state inflicts on a prisoner, the state is morally justified only if “the end to be achieved is of undeniable importance to society, and no less severe [punishment] will suffice.”

51. Shah, supra note 13, at 152.
52. Id. at 153.
53. Id. at 152.
54. Id. at 191 (emphasis added).
The fact that punishment is morally justified only if it is necessary to achieve a compelling state interest—only if a less severe punishment is not adequate—is why the Supreme Court, in its death penalty proportionality cases, asks whether the challenged punishment serves a legitimate state purpose such as retributive justice or deterrence.\(^{56}\) If a punishment is not needed to serve a state interest, it is unjustified. The infliction of severe suffering without justification is, indeed, cruel. Correspondingly, the state has a moral obligation to inflict punishment only when necessary. If state officials, by poorly designing a protocol without a scientific basis, culpably inflict torturous suffering upon an inmate that exceeds what is necessary to inflict his sentence, then such officials have grossly violated a serious moral obligation owed to affected inmates.

Categorizing the lethal injection reform as “research” just does not add to our moral reasons to condemn the state for using execution methods so hastily and unjustifiably chosen. Shah’s position reminds me of Joseph Raz’s question of whether a moral obligation to obey law adds to an individual’s moral reasons to refrain from committing murder or other violent crime.\(^{57}\) The fact that the law punishes such crimes provides self-interested reasons to refrain; but does the law add to our moral obligation to refrain? Given the weight of our moral obligation to refrain from committing murder, any alleged moral obligation to obey the law adds no weight to our moral obligation to refrain from violence.\(^{58}\) Analogous to the present context, the question is whether calling the changes to lethal injection protocols “research” adds anything to the state’s moral obligations to avoid “poorly designed” execution procedures that are not based on science. Given the weight of the state’s obligation to avoid the infliction of unnecessary suffering through poorly designed punishment, an alleged duty to avoid poorly designed research adds very little to the state’s moral obligations in this context.

Shah contends, though, that the law governing research is also applicable, in addition to research ethics.\(^{59}\) The law of research, like research ethics, requires risk minimization.\(^{60}\) Shah argues that the


\(^{57}\) See Joseph Raz, The Obligation To Obey: Revision and Tradition, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139 (1984).

\(^{58}\) Id. at 140–41.

\(^{59}\) Shah, supra note 13 at 157.

\(^{60}\) See, e.g., 45 C.F.R. § 46.111(a) (2014) (“In order to approve research covered by this policy the IRB shall determine that . . . (1) [r]isks to subjects are minimized . . . .”).
Court’s Eighth Amendment jurisprudence is not as protective as regulations that govern research. Chief Justice Roberts’s plurality opinion in Baze does not require risk minimization. An execution protocol can fail to minimize risks yet, simultaneously, pass Baze’s standard by presenting less than a “substantial risk of serious harm.” Shah argues, “Justice Ginsburg’s dissent requiring that there be no ‘untoward risk’ was the only standard that was consistent with the obligation to minimize risks in research or quality control activities.”

Is there a practical difference among a prohibition on “substantial risk[s] of serious harm,” a prohibition on “untoward risk[s],” and a requirement that risks be minimized? On their face, I agree with Shah that they differ. On the other hand, we have reason to wonder whether, or how often, a decisionmaker disposed to seeing an “untoward” risk of harm would deny the existence of a “substantial risk of serious harm,” particularly in the execution context. In attempts to apply these standards, how often would the same decisionmaker conclude that an execution protocol fails to minimize risks yet simultaneously find no substantial risk of serious harm? The same decisionmaker might be prone to seeing a “substantial risk of serious harm” in the same case she concludes that the state has failed to minimize the risks involved in an execution.

In fact, consider Shah’s own application of the Baze plurality standard in the following passage. It suggests that Shah sees current lethal injection experimentation as not only failing the research requirement to minimize risk, but also as violating the more permissive standard from the Baze plurality:

Importantly, the plurality opinion in Baze indicated that a lethal injection protocol would violate the Eighth Amendment if it involves a “substantial risk of serious harm” or an “objectively intolerable risk of harm,” and there are alternative execution methods that effectively address this risk.” When faced with examples of problematic executions, the Court opined that “an isolated mishap,” or an “accident, with no suggestion of malevolence” would not be enough to sustain a challenge based on the Eighth Amendment. Yet, states are increasingly engaged in experimentation that disregards many potential risks and the considerable uncertainty as to whether procedures will work as planned. Given the growing number of examples of executions gone wrong, it is difficult to believe that these failures are

62. Shah, supra note 13, at 196. (citing Baze, 553 U.S. at 123 (Ginsburg, J., dissenting)).
merely a series of accidents. Rather, the problem is systemic and foreseeable. Poorly regulated and haphazard experimentation on inmates predictably leads to bad outcomes.\textsuperscript{63} “Given the growing number of examples of executions gone wrong,” we should not view the terrible outcomes as “isolated mishaps” or “accidents,” with no suggestion of malevolence.” Perhaps the malevolence is not equated with purposeful infliction of suffering, but recklessness and indifference can be malevolent, particularly in this context.

Finally, if the \textit{Baze} standard is not strong enough to prohibit “poorly designed” protocols that are “not based on evidence,” then there is a problem with the \textit{Baze} standard. There is no justification for the state to execute death row inmates with recklessly chosen procedures. Reckless or grossly negligent infliction of torturous suffering has no justification, and, as such, is cruel. States have a constitutional obligation to avoid cruel and unusual punishments. The Constitution already forbids the reckless and grossly negligent infliction of torturous suffering, whether it is inflicted through means that look like medical research or not. Therefore, labeling recent reforms as “research” seems to add little to the state’s legal reasons to avoid “poorly designed” protocols “not based on evidence.”

CONCLUSION

Shah’s goal is admirable. Finding recent reforms to count as research, she argues that some kind of independent oversight is required to prevent states from employing poorly designed execution methods in their quest to kill the very few offenders who are sentenced to death. As explained, I am not persuaded that her creative suggestion is the solution. The relationship between death row inmates and corrections officials is not analogous, from an ethical perspective, to the research subject-investigator relationship. Moreover, the legal and ethics requirement of informed consent for research will not help inmates protect their interests. These two facts are reasons why the law and ethics of human subjects research is not applicable to lethal injection reform. Nonetheless, states have weighty ethical and legal obligations to cease employing poor means of execution. Terribly designed protocols have no justification.

Shah and I join the call for rationality in the search for a humane

\textsuperscript{63} Id. at 153 (emphasis added) (citations omitted).
method of killing. I do, however, readily admit that such a call is, perhaps, hopeless and odd. Death penalty states seem unwilling even to assess whether having capital punishment is rational. In my own state of Missouri, a senate committee annually refuses to bring to the floor a bill that would simply require the state auditor to calculate the financial cost of the death penalty to the state.⁶⁴ Politicians do not want to know whether there are any reasons to abolish the death penalty. Hopefully recent botched executions will cause states not only to reexamine their protocols, but to have the courage to assess whether this punishment, which constitutes such a small part of the criminal justice system, is actually worth its trouble and cost.

THE CASE FOR REVISITING CONTINGENT LIABILITIES UNDER ARTICLE VIII

Joshua Hansen-King

Abstract: Prior to 2012, Washington municipalities frequently relied on contingent-liability agreements (“CLA” or “CLAs”) to reduce borrowing costs because such liabilities did not constitute debt under article VIII of the Washington State Constitution. But the viability of CLAs was called into question by the Washington State Supreme Court’s 2012 plurality decision in In re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District (“Wenatchee Events Center”), which applied a new method for determining what constitutes debt—the risk-of-loss principle—to conclude that the entire value of a CLA constitutes debt. This Essay urges the Court to revisit the opinion because the decision fails to offer clear guidance and relies on an unpersuasive distinction between debt and indebtedness to explain the holding. Additionally, this Essay argues that the risk-of-loss principle is not the correct standard for municipal debt because the framework is not supported by Washington precedent and the principle is a novel approach that disregards the origins of Washington’s debt provisions. If the Court decides to continue treating CLAs as debt, this Essay suggests the Court should not follow Wenatchee Events Center’s conclusion that the entire value of the CLA is debt and instead adopt the approach of the Generally Accepted Accounting Principles for governments: The amount of debt equals only that portion that is likely to become owed.

INTRODUCTION

Before 2012, Washington municipalities commonly used contingent-liability agreements (“CLA” or “CLAs”)1 to help other municipalities reduce borrowing costs by making it easier to secure affordable bond rates.2 Under these agreements, a municipality typically agreed to pay the borrower’s debt or provide a loan only if the borrower—often another municipality—was unable to pay bondholders.3 After executing

1. Contingent liabilities are “liabilities or obligations which become the financial responsibility of another at a given date when certain conditions are not met.” ROY J. KOEGEN, WASHINGTON MUNICIPAL FINANCING DESKBOOK 522 (1993). CLAs are one method of creating contingent liabilities.

2. See Brief of Amicus Curiae Washington State Treasurer in Support of Direct Review at 2, 10–11, In re Bond Issuance of Greater Wenatchee Reg’l Events Center Pub. Facilities Dist., 175 Wash. 2d 788, 287 P.3d 567 (2012) (No. 86552-3) [hereinafter Brief of Amicus Curiae in Support of Direct Review]. The amount secured by CLAs is significant; these agreements back more than $271 million in bonds. Id. at 10 (calculating the value of CLAs secured by public facilities district but not including other municipal corporations).

a CLA, the borrower’s debt secured by the agreement was not counted towards the non-borrowing municipality’s constitutional debt limit because their obligation to pay or lend money was contingent on the borrower not paying. This practice was approved by Comfort v. City of Tacoma, a 1927 Washington State Supreme Court decision that established the contingent-liability doctrine. This doctrine, however, was called into question by the Court’s 2012 plurality decision in In re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District (“Wenatchee Events Center”).

In Wenatchee Events Center, the Court evaluated a proposed CLA between the City of Wenatchee (the “City”) and the Greater Wenatchee Regional Event Center Public Facilities District (the “District”). Under the proposed agreement, the City would be obligated to make a loan to the District if the District lacked sufficient funds to meet its bond-payment obligations. The lead opinion concluded that the potential obligation under the proposed agreement was debt under the Washington State Constitution article VIII. The plurality reached this conclusion by: (1) distinguishing between “debt” and “indebtedness”—the key terms used to restrict state and municipal debt respectively—and (2) deducing the existence of the risk-of-loss principle. After recognizing the principle, the Court applied it to determine whether a contingent liability is a debt of a municipality. In doing so, the lead

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86552-3) [hereinafter Brief of Amicus Curiae].


5. Id. at 255, 252 P. at 931.


7. 175 Wash. 2d 788, 287 P.3d 567 (2012) (plurality opinion). While five justices signed the opinion, one of the signatories concurred in the result only. Id. at 810, 287 P.3d at 578 (noting that Justice Wiggins’s lead opinion was signed by Justices C. Johnson, J. Johnson, Gonzalez, and Stephens, but that Justice Stephens concurred only in the result). Washington State courts treat such a decision as a plurality. See, e.g., Kailin v. Clallam Cnty. 152 Wash. App 974, 985, 220 P.3d 222, 226–27 (2009) (stating there was no majority opinion when four justices signed onto the reasoning and a fifth concurred in the result only).

8. Wenatchee Events Center, 175 Wash. 2d at 791, 287 P.3d at 569.

9. Id. at 793, 287 P.3d at 570.

10. Id. at 791–92, 287 P.3d at 569.

11. Id. at 806–07, 287 P.3d at 577.

12. See id. at 798 n.9, 287 P.3d at 572 n.9. The principle means there is debt when taxpayers could be responsible for a payment, id. at 798–99, 287 P.3d at 573, and is discussed further infra Part I.C.2.a.

13. Wenatchee Events Center, 175 Wash. 2d at 801–02, 287 P.3d at 574.
opinion rejected *Comfort*’s contingent-liability doctrine\textsuperscript{14} but also noted that the opinion was not overruling *Comfort*—instead, the plurality distinguished the contingent liability in *Wenatchee Events Center* from the similar agreement in *Comfort*.\textsuperscript{15} Specifically, *Wenatchee Events Center* focused on how the City’s CLA secured the District’s entire repayment obligation while *Comfort*’s contingent agreement secured only a portion of the primary debtor’s obligation.\textsuperscript{16} For the lead opinion, this meant *Wenatchee Events Center* presented debt because the agreement was properly construed as a guaranty while *Comfort* did not create debt because the underlying agreement could properly be called a contingent obligation.\textsuperscript{17}

The decision in *Wenatchee Events Center* creates two significant problems. First, the lead opinion fails to offer clear guidance on CLAs to lower courts or municipalities because: (1) as a plurality opinion, the decision has limited precedential value,\textsuperscript{18} and (2) the opinion appeared to both approve and reject the contingent-liability doctrine.\textsuperscript{19} This uncertainty about the treatment of CLAs will disrupt municipal borrowing by increasing borrowing costs, impeding cooperation between municipalities, and making it difficult to ascertain the value added by these agreements.\textsuperscript{20} Second, the opinion’s treatment of contingent liabilities could disrupt municipal planning or existing projects by forcing municipalities to suddenly recognize new debt from pre-existing CLAs, which could push municipalities beyond their constitutional limits and prevent them from incurring new debt.\textsuperscript{21}

In response to these practical concerns about the effects of *Wenatchee Events Center* and issues with the opinion’s analysis (discussed infra),

\begin{footnotesize}
\begin{enumerate}
\item Id. at 800–01, 287 P.3d at 574.
\item Id. at 802, 287 P.3d at 574 (noting that “*Comfort* may well have been correctly decided on its facts” and explaining how *Comfort* is distinguishable from *Wenatchee Events Center*).
\item Id.
\item Id.
\item \textit{In re Isadore}, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) (noting that “[a] plurality opinion has limited precedential value and is not binding on the courts”).
\item \textit{Infra} Part I.C.2.b.
\item Brief of Amicus Curiae, \textit{supra} note 3, at 7.
\end{enumerate}
\end{footnotesize}
this Essay: (1) asserts that the Court should revisit, correct, and clarify the treatment of contingent liabilities; and (2) proposes an alternative standard for when these liabilities should be recognized as debt. Part I explains the applicable parts of Washington’s constitutional debt limits and the lead opinion in Wenatchee Events Center. Part II argues that Wenatchee Events Center’s analysis and conclusion are problematic, and proposes a different standard based on the Generally Accepted Accounting Principles.

I. CONSTITUTIONAL DEBT LIMITS BEFORE AND AFTER WENATCHEE EVENTS CENTER

An examination of Wenatchee Events Center requires an understanding of Washington’s constitutional debt limits. Accordingly, this Essay begins with an examination of the Washington State Constitution article VIII, sections 1 and 6—specifically, those sections’ origins, text, and interpretation—before concluding with a summary of Wenatchee Events Center’s lead opinion.

A. Constitutional Restrictions on Debt in Washington

Before turning to Washington’s debt limits, this Essay highlights the impetus for these limits and the background against which they were enacted.

1. National Trends Influenced Washington’s Debt Limits

Washington’s constitution, drafted in 1889, came at the end of a century that saw two waves of constitutional reform aimed at limiting public debt. The first wave targeted state debt as a response to the Financial Panic of 1837 when states that had borrowed aggressively were unable to meet their obligations. These changes left municipal debt unchecked. The second wave, starting in the 1870s, targeted municipal debt as a response to rapid, unchecked increases in spending that left many municipalities near bankruptcy with little to show for their efforts.

23. Id.
24. Id. at 525.
25. See C. Dickerman Williams & Peter R. Nehemkis, Jr., Municipal Improvement as Affected by Constitutional Debt Limitations, 37 COLUM. L. REV. 177, 177–78, 180 (1937).
While the first wave favored absolute limits on state debt, the second wave eschewed specific amounts in favor of linking municipal-debt limits to a floating value. These municipal provisions generally use similar language and structure: restricting debt to a set percentage of the assessed value of taxable property in the municipality. These constitutional sections were designed to prevent municipalities from indulging in extravagant or improvident purchases that they could not afford by shifting the cost to future generations.

Towards the end of the debt-limit movement’s second wave, Washington held its constitutional convention. The delegates were aware of the recent additions of debt-limit provisions to various state constitutions and were guided by similar concerns: the dangers of unlimited debt and detrimental effect of unrestrained indebtedness on future prosperity. Specifically, the delegates wanted limits that would protect people from the type of bad decisions that led to government bankruptcies in the 1800s, guard taxpayer credit, and prevent the oppression that develops from potentially ruinous taxation. In pursuit of these goals, the delegates chose constitutional debt limitations because those at the convention believed: (1) political checks were

26. See Bisk, supra note 22, at 525.
27. C. Robert Morris, Jr., Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 YALE L.J. 234, 241 (1958) (noting that nearly every state constitution limits municipal debt to a percentage of the value of taxable property); infra note 40 (comparing debt-limit language between states).
28. Williams & Nehemkis, supra note 25, at 180. Although the restrictions were designed as rigid barriers, the limits have been construed more liberally to avoid crippling municipalities’ ability to function effectively. Dennis J. Heil, Another Day Older and Deeper in Debt: Debt Limitation, the Broad Special Fund Doctrine, and WPPSS 4 and 5, 7 U. PUGET SOUND L. REV. 81, 86 (1983) (noting there has been a nation-wide trend of courts approving devices for evading local-debt limits in response to rigid debt-limit provisions).
30. See JOURNAL, supra note 29, at 44–45 (reprinting a letter presented to the delegates that highlighted other states’ constitutional provisions restricting debt).
32. Dep’t of Ecology, 116 Wash. 2d at 257–58, 804 P.2d at 1246.
34. Id. (quoting 56 AM. JUR. 2d Municipal Corporations § 599, at 651 (1971)).
insufficient\textsuperscript{35} and (2) a constitution without such limits would render municipal bonds worthless\textsuperscript{36}—a belief likely driven by the history of municipal bankruptcies, caused by unchecked spending, that impaired bond repayment.\textsuperscript{37}

With goals that were similar to the other states that had already enacted limits, the convention delegates discussed proposals that mirrored versions passed in other states.\textsuperscript{38} Ultimately, the delegates enacted stringent constitutional restrictions on the ability of the state and municipalities to incur debt\textsuperscript{39} in line with provisions enacted earlier in other states.\textsuperscript{40} Like other jurisdictions, the delegates created provisions imposing an “impassable barrier”\textsuperscript{41} designed “for the protection of minorities, for the protection of posterity, and to protect majorities against their own improvidence.”\textsuperscript{42}

\textsuperscript{35} See Wenatchee Events Center, 175 Wash. 2d 788, 796, 287 P.3d 567, 571 (2012) (plurality opinion).

\textsuperscript{36} ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION 160 (2d ed. 2013).

\textsuperscript{37} See Bisk, supra note 22, at 525 (explaining that constitutional debt limits developed in response to local government bankruptcies caused by fiscal imprudence).

\textsuperscript{38} See ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE § 4.2, 171 (1992) (discussing how states often enacted absolute limits on state debt while linking municipal-debt limits to a percentage of assessed property value); JOURNAL, supra note 29, at 668–71, 675–79 (documenting that the delegates considered absolute limits on state debt and dynamic limits on municipal debt linked to a percentage of property values).

\textsuperscript{39} WASH. CONST. art. VIII, § 1 (amended 1972); WASH. CONST. art. VIII, § 6 (amended 1952).

\textsuperscript{40} See State ex rel. Troy v. Yelle, 36 Wash. 2d 192, 204, 217 P.2d 337, 343 (1950) (“Many states have constitutional provisions generally similar to [article VIII] of our constitution.”); Arthur S. Beardsley, Sources of the Washington Constitution, in 2011–2012 LEGISLATIVE MANUAL 385, 411 (noting that section 6 is similar to a provision in Illinois’ Constitution). Compare WASH. CONST. art. VIII, § 6 (stating that no municipality “shall for any purpose become indebted in any manner or for any purpose to an amount, in the aggregate, exceeding” a certain percentage), and WIS. CONST. art XI, § 3(2) (stating that no municipality “may become indebted in an amount that exceeds” a certain percentage). The similarities are not surprising because the delegates were aware of the practices in other states. JOURNAL, supra note 29, at 44–45.

\textsuperscript{41} State ex rel. Jones v. McGraw, 12 Wash. 541, 543, 41 P. 893, 894 (1895). It is questionable, however, how strict and impassable the barrier is when the Court has determined multiple funding mechanisms are not debt and permitted municipalities to exceed their debt limit for public emergencies. See Wenatchee Events Center, 175 Wash. 2d 788, 796–97, 287 P.3d 567, 571–72 (2012) (plurality opinion) (noting the various principles and interpretations the Court has used to exclude obligations from implicating the debt limits); cf. Heil, supra note 28, at 86 (recognizing a national trend of courts approving methods for evading rigid limits).

\textsuperscript{42} State ex rel. Potter v. King Cnty., 45 Wash. 519, 528, 88 P. 935, 938 (1907).
2. Washington’s Constitutional Limits on State and Municipal Debt

Motivated by concerns expressed throughout the two debt movements of the 1800s, the delegates at Washington’s Constitutional Convention settled on two separate limits: one for municipalities and another for the state.

Article VIII, section 6 permits municipalities to become indebted for a public purpose but limits the amount of debt they can incur. Under section 6:

No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation without the assent of three-fifths of the voters . . . .

This provision has remained substantively unchanged since the Constitution was ratified.

Relatively, article VIII, section 1 limits state debt. The original provision restricted the state to $400,000 of debt. In 1972, section 1 was amended to make the limit a floating number based upon a percentage of general revenues over a specific number of years. Despite the significant change, the Court has concluded that the underlying purpose of section 1 remains the same. The state debt limitation was further amended in 1999 and in 2012; however, the function and structure remain generally the same as the 1972 version.

43. WASH. CONST. art. VIII, § 6.
44. Id. (emphasis added). Municipalities may also seek voter approval to incur debt up to five percent of the assessed value of property and can become indebted up to an additional five percent without voter approval for certain municipal-controlled utilities. Id.
45. See Washington State Constitution, WASHINGTON STATE LEGISLATURE, http://www.leg.wa.gov/lawsandagencyrules/Pages/constitution.aspx (last visited April 11, 2015) (indicating there has only been one amendment to article VIII, section 6). The only changes to section 6 occurred on November 4, 1952, when voters approved slight grammatical changes and the addition of a clause noting that school districts, with voter assent, can become indebted above the debt limit. Compare WASH. CONST. art. VIII, § 6 (repealed 1952), with WASH. CONST. art. VIII, § 6. See also EARL COE, SEC’Y OF STATE, A PAMPHLET 20 (1952) (voter pamphlet for the general election to be held on Tuesday, November 4, 1952).
46. WASH. CONST. art. VIII, § 1 (amended 1972).
47. A. LUDLOW KRAMER, SEC’Y OF STATE, OFFICIAL VOTERS PAMPHLET 50–51 (1972) (voter pamphlet for the general election to be held on Tuesday, November 7, 1972).
49. The 1999 amendment allowed the state to guaranty voter-approved, general-obligation debt of the school district without having the guaranty count as state debt. SEC’Y OF STATE, STATE OF
The current version provides:

The aggregate debt contracted by the state, as calculated by the treasurer at the time debt is contracted, shall not exceed that amount for which payments of principal and interest in any fiscal year would require the state to expend more than the applicable percentage limit of the arithmetic mean of its general state revenues for the six immediately preceding fiscal years . . . . 50

There are three main differences between the state and municipal debt limitations. First, the provisions calculate the limit differently. The state limit is a percentage of general revenues over multiple years while the municipal limit is a percentage of the recently assessed value of taxable property. 51 Second, each section has a different method for determining whether the limit has been reached. The amount of debt the state can incur is based on how much debt service must be paid annually (regardless of the state’s total obligations); in contrast, the municipality restriction focuses on the total amount of debt (without regard to annual payment obligations). 52 Third, the state-debt provision precisely defines “debt,” while the municipal provision does not. 53

B. Triggering Article VIII Limits

Because Wenatchee Events Center purported to change the article VIII analysis, a critical examination of the opinion requires an understanding of how the Court previously interpreted the debt limits—in particular, what triggered the limits and how contingent liabilities and guaranties 54 were treated.
1. Before Wenatchee Events Center, Section 1 and Section 6 Were Triggered by the Same Types of Obligations

Before Wenatchee Events Center, the Court did not recognize a difference between the types of obligations that would trigger the limits established in section 1 and section 6. Both sections were interpreted synonymously despite different operative phrases—section 1 uses “[t]he aggregate debt contracted by the state” and section 6 employs “indebted in any manner.” The Court indicated that “debt” and “indebtedness” were interchangeable by (1) using municipal cases to define “debt”; (2) applying the same principles to both sections while interchangeably citing cases relating to each section; and (3) relying on municipal debt cases to explain how the state-debt limit is calculated. Based on this shared understanding of the two provisions, the Court used the term “debt” to refer to an obligation that implicates the article VIII limit of a state or a municipality.

The Court also defined what constituted debt: borrowed money that the state or municipality was required to pay with proceeds of general tax levies. In State ex rel. Washington State Finance Committee v. While the lead opinion in Wenatchee Events Center does not treat these two provisions identically, this Essay argues in Part II.B, infra, that treating the provisions differently is an error.

55. See State ex rel. Winston v. Rogers, 21 Wash. 206, 208, 57 P. 801, 802 (1899) (“Section 6 of the same article (8) of the constitution limits municipal indebtedness, and should receive the same construction as section 1 relative to state indebtedness.”); UTTER & SPITZER, supra note 36, at 161 (explaining section 6’s limitation by stating “[a]s with state obligations, debt is defined as borrowed money payable from taxes”).

56. WASH. CONST. art. VIII, §§ 1(b), 6 (emphasis added).

57. E.g., State ex rel. Wittler v. Yelle, 65 Wash. 2d 660, 669, 399 P.2d 319, 324–25 (1965) (explaining the meaning of state debt by citing two municipal cases: Winston v. City of Spokane, 12 Wash. 524, 41 P. 888 (1895), and Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929 (1927)).

58. See, e.g., State ex rel. Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 661, 384 P.2d 833, 841–42 (1963) (recognizing the applicability of the special-fund doctrine in the state-debt context); City of Spokane, 12 Wash. at 526, 41 P. at 889 (applying the special-fund doctrine in the municipal-debt context).

59. See, e.g., State ex rel. Attorney Gen. v. McGraw, 13 Wash. 311, 318–19, 43 P. 176, 178 (1895) (applying the special-fund doctrine to state debt and citing City of Spokane—a municipal-debt case). While the Court sometimes declines to apply a case from another section, the Court has justified those decisions by distinguishing between the financial agreements rather than the sections addressed in the cases. See, e.g., Martin, 62 Wash. 2d at 659–60, 384 P.2d at 841–42 (addressing section 1 and distinguishing Comfort and City of Spokane without relying on the fact that those cases addressed section 6).

60. Rogers, 21 Wash. at 208–09, 57 P. at 802.

61. UTTER & SPITZER, supra note 36, at 154, 161. For example, the government incurs debt when bonds are issued that will be repaid from a tax on cigarettes because the government is (1) borrowing funds from the bond purchasers and (2) repaying those bonds from a generally
the Court wrote that “a debt of the State of Washington” is “[a]ny obligation which must in law be paid from any taxes levied generally.” This opinion was supplemented two years later in State ex rel. Wittler v. Yelle when the Court stated that it “has many times said what Article 8 means by the word ‘debt.’...[I]t means borrowed money.” While section 1 was later amended to reflect this understanding, the definition continues to resonate for section 6 as well; Justice Utter—the late Washington State Supreme Court Justice—and Professor Hugh Spitzer—a Washington State Constitution scholar and public-finance lawyer—embrace this definition in their treatise on the Washington State Constitution.

2. Before Wenatchee Events Center, Guaranties Constituted Debt While Contingent Obligations Were Not Treated as Debt

With this definition of debt providing a framework for article VIII analysis, the Court addressed guaranties and CLAs. A guaranty is a promise to answer for the debt of another if the debtor fails to make a payment. Such an agreement is a narrower form of a CLA, which is the promise to answer for another’s obligation upon the occurrence (or non-occurrence) of a specific event. Although guaranties and CLAs are closely related, the Court developed conflicting case law about these types of agreements under article VIII. The Court concluded in State Capitol Commission v. State Board of Finance that a guaranty created debt even though the State was not primarily liable. Conversely, the applicable tax—an excise tax on cigarette sales. Martin, 62 Wash. 2d at 662, 384 P.2d at 843–44.

64. Id. at 661, 384 P.2d at 843.
65. 65 Wash. 2d 660, 399 P.2d 319 (1965).
66. Id. at 668, 399 P.2d at 324. Wittler also reviewed previous cases and found that borrowed money was involved in every case where article VIII applied. Id. at 669–70, 399 P.2d at 324–25.
67. Compare WASH. CONST. art. VIII, § 1(d) (defining debt as “borrowed money”), with WASH. CONST. art. VIII, § 1 (amended 1972) (omitting definition).
70. See UTTER & SPITZER, supra note 36, at 161.
72. See KOEKEN, supra note 1, at 522.
73. 74 Wash. 15, 132 P. 861 (1913).
74. Id. at 26–27, 132 P. at 865.
Court held in *Comfort and Kelly v. City of Sunnyside*\(^75\) that a contingent obligation to pay was not debt because the government was not primarily liable and the likelihood of any liability was speculative.\(^76\) The conflict between these lines of cases was the central issue in *Wenatchee Events Center*.

In *State Capitol Commission*, the Court established that a guaranty of bonds is debt because the state’s general credit had been pledged for repayment.\(^77\) The Court developed this doctrine while evaluating the state’s guaranty of bonds that were secured by the capitol-building fund.\(^78\) The Court concluded that these bonds, because of the guaranty, were general obligations of the state and were article VIII debt in accord with “the spirit and the letter” of the Constitution.\(^79\) The Court reached this conclusion even after acknowledging that taxpayers likely would not be obligated to make any payments because the value of the land securing the bonds exceeded the amount of the bonds.\(^80\) The mere possibility that the state would have to use general revenues to pay for these bonds, however unlikely, was sufficient to establish that the guaranty of the obligation was article VIII debt.\(^81\)

In *Comfort*, the Court recognized the contingent-liability doctrine without discussing the apparent conflict with *State Capitol Commission*’s treatment of guaranties.\(^82\) The contingent-liability doctrine provides that no article VIII debt is incurred when the government is not primarily liable but is obligated to pay if some event occurs that is outside the control of the party securing the debt.\(^83\) Thus, an agreement pledging the government fisc to repayment of another’s debt is not
article VIII debt when the obligation to make payments is not realized until the borrowing entity defaults.\(^{84}\)

In *Comfort*, the city of Tacoma had established a fund—replenished in certain circumstances by a special-tax levy—that would ensure local-improvement bonds were paid.\(^{85}\) If the city paid a bond using the fund, the City would be subrogated to the rights of the bondholder.\(^{86}\) However, there were significant limitations on the fund and its use. First, the fund’s value could not exceed five percent of the outstanding improvement bonds secured by the fund.\(^{87}\) Second, the City was obligated to pay into the fund and purchase bonds only if the regular assessments were insufficient.\(^{88}\) Third, bondholders had no recourse against Tacoma’s general revenue—the bondholders could only sue for repayment from the local-improvement-bond assessment or the fund created by Tacoma.\(^{89}\)

In evaluating whether the agreement constituted debt, the Court focused on the last two limitations and concluded that Tacoma’s obligation was not article VIII debt because it was “only a contingent liability as far as the city is concerned, and in no sense a debt proper.”\(^{90}\) It was not a debt because the bondholders had no unconditional right to receive money from Tacoma.\(^{91}\) The city incurred an obligation only if the regular assessments were insufficient and the bondholders sought repayment from the guaranty fund created by the city.\(^{92}\) The Court explained:

> If A. is indebted to B., and C. promises that, if A. does not pay B., then he (C.) will, no one would contend that C. had an outstanding debt. He has but a contingent liability that may or may not ripen into a debt. If A. fails to pay, then, in that event, the contingent liability has ripened, and the debt is absolute as to C. But until that time arrives C. owes B. nothing. So in the present case, the city will have nothing to pay if the property holders meet their obligations and pay their assessments. If they fail to do so, then the city will pay into the fund to the extent

\(^{84}\) See id. at 255–56, 252 P. at 931.
\(^{85}\) Id. at 254, 252 P. at 929–30.
\(^{86}\) Id.
\(^{87}\) Id. at 254–55, 252 P. at 930–31.
\(^{88}\) Id. at 255, 252 P. at 931.
\(^{89}\) Id. at 254–55, 252 P. at 930–31.
\(^{90}\) Id. at 255, 252 P. at 931.
\(^{91}\) See id.
\(^{92}\) See id.
Accordingly, the Court held that a contingent liability is not debt because the obligation has not actually become a liability but merely gives rise to the potential that a liability may be incurred.

In 1932, *Kelly* reaffirmed *Comfort* but again the Court did not address the conflict with *State Capitol Commission*. In *Kelly*, the Court clarified the contingent-liability doctrine by responding to the appellant’s argument that *Austin v. City of Seattle* controlled. The Court explained that *Austin* was distinguishable because the city was primarily liable in that case rather than contingently liable. Like *Comfort*, *Kelly* focused on whether the treasury was directly and immediately at risk rather than whether there might ultimately be such a risk. The decision in *Kelly* helped further delineate the doctrine by emphasizing that contingent liability is the opposite of primary liability. In sum, the Court used *Comfort* and *Kelly* to establish that a contingent liability—an obligation that may be incurred—is not article VIII debt.

Before *Wenatchee Events Center*, the Court had two lines of cases dealing with the calculation of debt in situations where the government is not primarily liable: *Comfort/Kelly* and *State Capitol Commission*. In the first line—*Comfort* and *Kelly*—the Court held such obligations are not debt because they are merely contingent liabilities. The Court determined that the agreements were not debt by focusing on the fact that the municipality may not be required to make a payment. In the second line—*State Capitol Commission*—the Court concluded potential obligations are debt because they are a guaranty. The Court honed in on the fact that the treasury ultimately would be responsible for payment if the primary debtor was unable to pay. In sum, the Court had two lines of cases dealing with potential obligations—a conflict that posed the
central issue in *Wenatchee Events Center*.

C. *Wenatchee Events Center* Calls into Question the Continued Viability of the Contingent-Liability Doctrine by Recasting the Analysis Used to Determine Debt

In *Wenatchee Events Center*, the lead opinion attempted to resolve the conflict between *State Capitol Commission* and *Comfort* to answer whether the proposed CLA between the City and the District constituted article VIII debt for the City. The plurality addressed the conflict by re-characterizing prior cases as establishing the risk-of-loss principle and then using that principle to establish *State Capitol Commission* as the correct statement of the law. But at the same time, the opinion also appeared to reaffirm *Comfort* and decide that the CLA was debt because it was a guaranty rather than a contingent obligation like the agreement in *Comfort*.

1. The Superior Court Treated the CLA as Debt

At the superior court, the issue in *Wenatchee Events Center* was whether the proposed CLA between the City and the District constituted article VIII debt. The City and the District negotiated the CLA to help the District secure affordable financing for bonds. Those bonds would pay off the short-term bond anticipation notes that financed the construction of the Regional Events Center. The CLA would have obligated the City to loan the District money only if the District lacked

103. *Id.* at 797–98, 287 P.3d at 572–73.
104. *Id.* at 801–02, 287 P.3d at 574.
105. *See id.*
106. *See id.* at 803–04, 287 P.3d at 575.
107. Although the final agreement was called an interlocal agreement, Wenatchee City Council Res. No. 2011-52, at exhibit A (July 14, 2011) (enacted) [hereinafter CLA Terms], available at http://www.wenatcheewa.gov/Modules/ShowDocument.aspx?documentid=5657, this is just a broad term for a contract between two or more public entities. WASH. REV. CODE § 39.34.080 (2014). The resolution approving the agreement, drafts of the agreement, and the Court were more specific—each identified the type of contract at issue: a contingent-loan agreement—a form of a CLA. CLA Terms, *supra*, at 1; WENATCHEE CITY COUNCIL, COUNCIL PACKET (June 30, 2011), available at http://www.wenatcheewa.gov/Modules/ShowDocument.aspx?documentid=5547; *Wenatchee Events Center*, 175 Wash. 2d at 791, 287 P.3d at 569.
108. *Wenatchee Events Center*, 175 Wash. 2d at 791, 287 P.3d at 569.
109. *See CLA Terms, supra* note 107, at 1–2.
110. *See id.*
sufficient funds to pay the principal and interest on the new bonds.\textsuperscript{111} This obligation was not limited to the City’s debt limit: The City had an unconditional obligation to lend the District as much money as was required to service the bonds.\textsuperscript{112} But the District did not have to apply the loans to servicing the bonds; the City could direct that its loan be used only for operation costs of the Regional Events Center.\textsuperscript{113} Furthermore, the City could fund these loans however it saw fit; the loans did not have to be funded by levying taxes or borrowing money.\textsuperscript{114}

The CLA also limited the City’s potential liability from bondholder suits as well as insulating the City against the risk that the District would be unable to repay the loans because it was insolvent. The CLA provided that “[a]ll liabilities incurred by the District, including but not limited to the [b]onds, are obligations solely of the District and shall not be liabilities or obligations of the City.”\textsuperscript{115} Furthermore, bondholders would have no recourse against the City.\textsuperscript{116} The CLA included numerous provisions to ensure the City was repaid. First, the District’s obligation to repay the loans was absolute and unconditional—the District pledged its full faith, credit, and resources towards repayment.\textsuperscript{117} Second, if the District lacked sufficient debt capacity, then any loan constituted an equity payment for an interest in the Regional Events Center.\textsuperscript{118} Third, the City could force the District to call bonds for redemption, levy a tax, or put a proposition on the ballot to increase taxes.\textsuperscript{119}

On June 30, 2011, the Wenatchee City Council passed a resolution approving the CLA on the condition that the City obtain a judicial declaration that the City had authority to enter the agreement without voter assent.\textsuperscript{120} The City filed a complaint in Superior Court seeking a declaratory judgment on whether the CLA would cause the City to exceed its debt limit—effectively, the City asked whether the CLA constituted article VIII debt and, if so, to what extent.\textsuperscript{121} The Superior

\begin{itemize}
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See id. at 2–3.
\item \textsuperscript{113} Id. at 3.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 5.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 6–7.
\item \textsuperscript{120} Id. (resolution attached to terms).
\item \textsuperscript{121} See Wenatchee Events Center, 175 Wash. 2d 788, 794, 287 P.3d 567, 570 (2012) (plurality opinion).
\end{itemize}
Court concluded that the entire amount secured by the CLA would constitute debt under article VIII. Following an appeal, the Court took the case on direct review.

2. The Court Concluded the CLA Was Debt After Adopting a New Framework that Rejected the Contingent-Liability Doctrine

The lead opinion affirmed the trial court’s decision after re-characterizing prior cases to establish that the risk-of-loss principle guides the analysis under article VIII and makes contingent liabilities debt under section 6. But after concluding that contingent liabilities are debt, the lead opinion stated that the obligation at the center of the case was debt based on the fact that the agreement was actually a guaranty.

a. The Lead Opinion Re-Characterized Prior Cases to Establish that the Risk-of-Loss Principle Determines When Debt Is Created

The lead opinion used the risk-of-loss principle to guide the analysis of what constitutes debt. According to this principle, courts determine whether there is debt by focusing on who—the taxpayers or the creditors—would lose money if the primary debtor is unable to pay without considering the likelihood of such an occurrence or the amount at risk. Specifically, there is article VIII debt when taxpayers could be required to make a payment on a debt obligation because the risk of loss is deemed to fall on taxpayers rather than creditors. The plurality justified applying this principle by concluding that the principle underlies many of the various analyses the Court has used when evaluating article VIII. In support of this conclusion, the lead opinion noted that Robert Amdursky and Clayton Gillette previously had

122. *Id.* at 794, 287 P.3d at 570.
123. *Id.*
124. *Id.* at 792, 287 P.3d at 569.
125. *See id.* at 801, 287 P.3d at 574.
126. *See id.* at 803, 287 P.3d at 575.
127. *See id.* at 797, 287 P.3d at 572.
128. *Id.* at 798, 287 P.3d at 573.
129. *See id.* at 797, 287 P.3d at 572.
130. *Id.* The lead opinion, however, only addressed the principles explanatory power for three of the Court’s doctrines: guaranties, special funds, and lease-purchase agreements. *Id.* at 797–98, 287 P.3d at 572–73.
131. This Essay will refer to “Amdursky and Gillette” as “Gillette” when discussing their work because Gillette was the author responsible for the portions of their book that are referenced in this
characterized Washington cases in this manner in their book on municipal debt. The plurality rationalized its use of the risk-of-loss principle by re-characterizing earlier cases and concluding that the principle explained the cases’ results. Because the Court had not explicitly or formally adopted this analysis in earlier cases, the plurality was “forced to craft this test through inference.” The lead opinion developed this rule by focusing on the facts and conclusions of each case but without discussing the analysis in them. For example, the opinion highlighted how the facts and opposite conclusions in State ex rel. Winston v. City of Spokane and Martin—relatively similar cases involving construction bonds that reached different results on whether the obligations constituted debt—illustrate the point that the risk-of-loss principle explains earlier cases. The plurality also contended the Court had begun explicitly relying on this principle.

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121. Essay. E-mail from Clayton P. Gillette, Professor of Law, New York University School of Law, to Hugh Spitzer, Professor of Law, University of Washington School of Law (May 19, 2013, 14:31 EST) (on file with author). Clayton Gillette is a Professor of Law at New York University School of Law who focuses on, among other things, local-government law. Clayton Gillette, N.Y.U., https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=19945.

132. Wenatchee Events Center, 175 Wash. 2d at 798, 287 P.3d at 572 (discussing AMDURSKY & GILLETTE, supra note 38, § 4.1.2, at 164–70). Gillette’s work is discussed further in Part II.C.1.c.

133. See Wenatchee Events Center, 175 Wash. 2d at 797–98, 287 P.3d at 572–73.

134. See id. at 819, 287 P.3d at 582 (Fairhurst, J., dissenting); AMDURSKY & GILLETTE, supra note 38, § 4.1.2, at 169 (stating that “the mechanisms devised to avoid debt limits have not readily been analyzed by reference to the standard of ultimate exposure of the public treasury”).

135. Wenatchee Events Center, 175 Wash. 2d at 819, 287 P.3d at 582 (Fairhurst, J., dissenting). Even the plurality appears to concede the principle has not been definitively established as the law. See id. at 798 n.9, 287 P.3d at 572 n.9 (plurality opinion) (asserting it is important to state the principle directly because there is a pattern of courts relying on the principle).

136. See id. at 797–98, 287 P.3d at 572–73.

137. 12 Wash. 524, 41 P. 888 (1895).

138. Wenatchee Events Center, 175 Wash. 2d at 797–98, 287 P.3d at 572. The lead opinion asserted there was article VIII debt in Martin because if the state was unable to repay the bonds then the state would raise the excise tax, therefore, putting the risk of a shortfall on the taxpayers. Id. at 797, 287 P.3d at 572. In contrast, Wenatchee Events Center highlighted that the bonds in City of Spokane were not debt because the bonds were payable only from the project’s revenue—thus, the taxpayers bore no risk. Id. at 797–98, 287 P.3d at 572. But this reframing of cases is problematic; Martin, in particular, did not address who bore the risk of loss and instead relied on reaffirming the earlier principle that debt is an obligation payable from taxes. See generally State ex rel. Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963).

139. Wenatchee Events Center, 175 Wash. 2d at 798, 287 P.3d at 572. The lead opinion omitted that Department of Ecology was a plurality—a majority agreed in the result but only three justices signed the opinion that Wenatchee Events Center quotes for the risk-of-loss principle. See generally Dep’t of Ecology v. State Fin. Comm., 116 Wash. 2d 246, 804 P.2d 1241 (1991) (plurality opinion).
because “[t]he ultimate risk of loss is not on the State’s future taxpayers. Instead, the risk of loss is on the [investors], who will have entered into the transaction with full knowledge that they alone bear that risk.”

Having re-characterized the Court’s previous cases to establish the risk-of-loss principle, the plurality in *Wenatchee Events Center* turned to the contingency and guaranty cases.

**b. The Lead Opinion Applied the Risk-of-Loss Principle to Resolve the Conflict Between the Guaranty and Contingent Liability Cases**

*Wenatchee Events Center*’s lead opinion addressed the conflict between the contingent-liability cases and the guaranty case—ultimately concluding that *State Capitol Commission*’s treatment of guaranties as debt is the correct statement of law. The plurality discussed three types of contingent liabilities: (1) pay-as-you-go agreement—the obligation to pay depends on receiving goods; (2) limited-contingent liability—the potential obligation is less than the entire debt; and (3) unlimited-contingent liability—the potential obligation is equal to the entire debt. The lead opinion concluded that a pay-as-you-go arrangement is not debt and then turned to the remaining types of contingent liabilities.

The lead opinion drew a distinction between limited- and unlimited-contingent liabilities by suggesting that *Comfort* correctly stated the law but that the case’s dicta was too broad. Specifically, the opinion stated that *Comfort* may have correctly held that limited-contingent obligations are not debt but reached too far by stating that unlimited-contingent obligations—which *Wenatchee Events Center*’s plurality deems absolute guaranties—are not debt. This latter conclusion in *Comfort* the plurality deemed dicta and directly contradicted by *State Capitol Commission*’s treatment of guaranties.

141. See id. at 799, 801–02, 287 P.3d at 573–74.
142. See id. at 799–801, 287 P.3d at 573–74.
143. Id. at 799–800, 287 P.3d at 573.
144. See id. at 801–02, 287 P.3d at 574.
145. See id. at 802, 287 P.3d at 574.
146. Id. at 800–01, 287 P.3d at 573–74. It is debatable whether this portion of *Comfort* is dicta because the language appears directly related and necessary to resolving the case’s central issue. Id. at 816, 287 P.3d at 581 (Fairhurst, J. dissenting). Furthermore, the plurality’s assertion that *Comfort* discussed two types of contingent liabilities—one in holding and one in dicta—is questionable because *Comfort* focused on whether the obligation was currently owed or whether it was conditioned on some future event—there was no indication that the limited size of the obligation
The plurality resolved this conflict by applying the risk-of-loss principle. The lead opinion explained that State Capitol Commission was correct and Comfort’s dicta was incorrect because the risk of loss for a contingent liability falls on the municipality: “Even if the municipality’s liability is contingent upon the failure of payment by an intervening agency such as the District, such a contingent liability is subject to the debt limit if the ultimate risk of loss falls upon the municipality.” Although the lead opinion asserted its holding was limited to Comfort’s purported dicta, the analysis speaks broadly of contingent liabilities and the holding’s justification—whether the taxpayer bears risk—is equally applicable to both limited- and unlimited-contingent liabilities. Thus, the lead opinion nominally treats only unlimited-contingent liabilities as debt but appears in practice to be overruling all of Comfort’s contingent-liability doctrine and treating all contingent obligations as debt.

c. The Lead Opinion Held that the Entire Value of the CLA Was Debt Because the Agreement was a Guaranty of the District’s Bonds

Despite focusing on contingent liabilities for much of the opinion, the lead opinion pivoted to conclude that the CLA was article VIII debt because the CLA was a guaranty. The plurality explained the substance of the agreement had the City acting as a traditional guarantor by pledging to provide credit security to make the bonds more marketable. Accordingly, the lead opinion treated the CLA as debt because the CLA mirrored the situation in State Capitol Commission: a public entity obligating itself to pay if the primarily liable party was unable to make payments.

In sum, Washington’s constitutional-debt limits were at the center of

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147. See Wenatchee Events Center, 175 Wash. 2d at 801, 287 P.3d at 574.
148. Id.
149. See id. at 801–02, 287 P.3d at 574. Reading the lead opinion as applying to all of Comfort is further justified based on the lead opinion’s unpersuasive dissection of Comfort into holding (limited-contingent liabilities) and dicta (unlimited-contingent liabilities). See supra note 146.
150. Wenatchee Events Center, 175 Wash. 2d at 803, 287 P.3d at 575.
151. Id. at 803, 287 P.3d at 575.
152. See id.
Wenatchee Events Center. The Court was asked to reconcile existing case law on guaranties and contingent liabilities. The lead opinion resolved this conflict by developing an overarching framework for debt cases—the risk-of-loss principle—and applying that standard to reject only part of the contingent-liability doctrine. But the opinion’s precise holding is unclear because the analysis seems to strike down the entire contingent-liability doctrine while also discarding any conclusions about the doctrine in favor of treating the agreement as a guaranty. Thus, Wenatchee Events Center leaves significant questions about the fate and scope of the contingent-liability doctrine.

II. THE COURT SHOULD REVISIT WENATCHEE EVENTS CENTER

This Essay argues the Court should act promptly to address the unsettled state of the law following Wenatchee Events Center because the lead opinion fails to offer clear guidance, has a broader than intended scope, and presents an incorrect framework—the risk-of-loss principle—for evaluating debt. Because Washington law does not support this principle, this Essay proposes the Court not follow Wenatchee Events Center’s approach that treats all contingent liabilities as debt and suggests treating as debt only those portions of contingent liabilities that appear likely to require payment.

A. Wenatchee Events Center Does Not Offer Clear Guidance to Municipalities or Future Courts

The lead opinion’s failure to garner a majority and its unclear treatment of contingent liabilities will make it difficult for municipalities to assess their debt and for future courts to evaluate debt cases. As an initial matter, the absence of a majority opinion minimizes the lead opinion’s usefulness. Because Wenatchee Events Center is a plurality, the opinion “has limited precedential value and is not binding on the courts”,153 thus, it is unclear whether the risk-of-loss principle will be applied in future cases and how courts will view the lead opinion’s treatment of contingent liabilities.

Moreover, the lead opinion’s inconsistent treatment of contingent liabilities also leaves courts and municipalities without clear guidance. While Wenatchee Events Center appeared to reject the contingent-liability doctrine, the lead opinion obfuscated this message in two ways.

First, the opinion suggested *Comfort* was correctly decided\textsuperscript{154} even though the risk-of-loss principle would seem to require overruling the case.\textsuperscript{155} Specifically, the lead opinion indicated that *Comfort* correctly held that limited-contingent obligations are not debt but did not reconcile that conclusion with the fact that a municipality entering such an agreement still bears some risk.\textsuperscript{156} Second, the opinion resolved the case by holding the CLA was debt because it was a guaranty rather than a contingent liability.\textsuperscript{157}

In sum, there is no binding precedent and the existing precedent is far from clear on how article VIII should be (or will be) treated in the future.

**B. The Lead Opinion Unpersuasively Attempted to Limit Wenatchee Events Center’s Scope by Distinguishing Between Debt and Indebtedness**

The plurality’s attempt to confine the effect of the opinion to only municipal government debt by distinguishing between debt and indebtedness is unpersuasive.\textsuperscript{158} The basis for this position is not only at odds with the Court’s precedent but also lacks support in both the Constitution’s text and principles of constitutional interpretation. As a result, *Wenatchee Events Center*’s lead opinion has a more expansive scope than intended; the opinion puts both municipal and state financing schemes at risk—or at least significantly affects the market and costs for their bonds while uncertainty lingers about the plurality opinion.\textsuperscript{159}

The lead opinion justified its holding in part by explaining that section 6’s language limiting the ability of a municipality to become indebted in any manner is broader than section 1’s limitation on state debt.\textsuperscript{160} But no authority was cited for this proposition nor was the conclusion justified with analysis.\textsuperscript{161} Basing such an important distinction on an unsupported assertion means that future courts and

\begin{itemize}
\item \textsuperscript{154} *Wenatchee Events Center*, 175 Wash. 2d at 802, 287 P.3d at 574.
\item \textsuperscript{155} See id. at 801, 287 P.3d at 574 (explaining that a contingent liability is debt whenever taxpayers could ultimately be required to make a payment).
\item \textsuperscript{156} See id. at 801–802, 287 P.3d at 574. The lead opinion does not explain why or how *Comfort*’s limited-contingent liability renders that agreement not debt or how courts in the future should determine what percentage is acceptable in a CLA before it becomes debt.
\item \textsuperscript{157} Id. at 803, 287 P.3d at 575.
\item \textsuperscript{158} See id. at 807, 287 P.3d at 577 (stating that section 6 is broader than section 1).
\item \textsuperscript{159} See Brief of Amicus Curiae, *supra* note 3, at 7.
\item \textsuperscript{160} *Wenatchee Events Center*, 175 Wash. 2d at 807, 287 P.3d at 577.
\item \textsuperscript{161} See id.
\end{itemize}
policy makers will have to hypothesize as to the reasoning. Accordingly, this Essay presents, discusses, and ultimately rejects two potential justifications—based on the text of each provision—that might support the distinction. The Essay then turns to traditional principles of constitutional interpretation to bolster the conclusion that there is no difference between “debt” and “indebtedness”—which is the position the Court embraced prior to Wenatchee Events Center. Accordingly, the holding in Wenatchee Events Center is applicable to both state and municipal financing despite the lead opinion’s attempt at minimizing the opinion’s scope.

1. “Debt” is Not a Term of Art that Is Narrower than “Indebtedness”

The plurality could be asserting that “debt” is a term of art while “indebted in any manner” is not. This has some facial appeal because article VIII, section 1(d) has a relatively detailed definition of “debt.” If “debt” is a term of art, then the corresponding failure to define “indebtedness” could indicate that the provisions are addressing different types of obligations. To understand the meaning of section 1’s definition of “debt,” it is helpful to look at the origins of the definition. The drafters of the 1972 amendment defining debt merely enshrined the definition established in previous cases. These cases and the Court’s other opinions addressing debt limitations did not distinguish between debt and indebtedness; the Court often mixed and matched cases dealing with either section while applying the same analytical frameworks. Up until Wenatchee Events Center, no distinction was

163. See Wenatchee Events Center, 175 Wash. 2d at 807, 287 P.3d at 577 (distinguishing section 1 from section 6 on the basis that the language in section 6 is broader).
164. See Wash. Const. art. VIII, § 1(d).
168. Supra notes 58–61 and accompanying text.
drawn between the meaning of “debt” and “indebtedness.” Accordingly, the argument that “debt” in section 1 is a term of art does not justify a broader treatment of “indebtedness” in section 6.

2. **Section 6 Is Not More Inclusive than Section 1**

   Alternatively, the plurality could be arguing that section 6’s inclusion of “in any manner” means the section is broader than section 1 (which just refers to “debt”). This is problematic because section 6 alternates between “indebtedness” and “indebted in any manner” when defining the applicable limitations. Therefore, reaching the plurality’s conclusion that section 6 is broader than section 1(d) on the basis of “in any manner” would also require recognizing two types of debt within section 6—one for “indebtedness” and one for “indebted in any manner.” Such an interpretation cannot be supported because (1) this distinction has not been recognized in previous cases, (2) *Wenatchee Events Center* made no reference to such a fundamental shift, and (3) this interpretation is not supported by the discussions at the Constitutional Convention that evince the purpose behind article VIII.

3. **Principles of Constitutional Construction Support an Identical Interpretation of “Debt” and “Indebtedness”**

   Having presented and rejected two possible justifications for the lead opinion’s unsupported distinction between debt and indebtedness, the plurality’s conclusion is also not supported by Washington State principles of constitutional construction. Under these principles, the Court looks to the common, ordinary meaning of the words but may also consider historical context. If the words are unambiguous and the ordinary meaning leads to a reasonable conclusion, the terms are read

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169. See supra Part I.B.2.

170. See WASH. CONST. art. VIII, § 6 (prohibiting a municipality from being “indebted in any manner” beyond one and a half percent without assent but then limiting “indebtedness” with voter assent to five percent).

171. See *Wenatchee Events Center*, 175 Wash. 2d 788, 807, 287 P.3d 567, 577 (2012) (plurality opinion).

172. See JOURNAL, supra note 29, at 675–79 (presenting a record of the delegates’ debates about the debt limits without any indication that the delegates considered, let alone implemented, different methods of calculating municipal limits depending on whether the debt was incurred with or without voter assent).


according to this meaning rather than resorting to a forced construction to limit or extend the function.175

Turning first to the ordinary meanings of “debt” and “indebtedness,” there is no basis for distinguishing between the terms. Black’s Law Dictionary treats them as synonyms by defining “indebtedness” as “[s]omething owed; a debt.”176 Bryan Garner further explained that the terms are functional equivalents: “[Indebtedness] is frequently used where the simpler word debt would be preferable” and “indebtedness is a NEEDLESS VARIANT of debt.”177 Interpreting “debt” and “indebtedness” as distinct terms would require a forced construction to create a difference where none exists.

Second, the historical context offers no support for distinct interpretations of “debt” and “indebtedness.” The reasons for restricting state and municipal debt were identical.178 There is no indication in the convention record that the delegates intended section 1 and section 6 to restrict different types of obligations.179

In sum, Wenatchee Events Center could have a broader than intended effect because the lead opinion’s treatment of “debt” and “indebtedness” as distinct concepts is an unsupported conclusion that fails to narrow the holding. Thus, the lead opinion could have a significant effect on both municipalities and the state by altering their current debt levels, changing available financing mechanisms, and increasing costs.180 Accordingly, the Court should revisit and clarify Wenatchee Events Center’s discussion of debt.

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176. BLACK’S LAW DICTIONARY 836 (9th ed. 2009) (emphasis added). This definition is synonymous with the definition of debt: “liability on a claim; a specific sum of money due by agreement or otherwise.” Id. at 462. Even the lead opinion used the terms interchangeably earlier in the opinion. See Wenatchee Events Center, 175 Wash. 2d at 791–92, 287 P.3d at 569 (“Total municipal debt incurred without a public vote is limited” and “[o]ur state constitution limits municipal indebtedness” (emphasis added)).
178. See supra Part I.A.1.
179. See JOURNAL, supra note 29, at 667–84.
180. See supra notes 20–21.

The Court should not embrace the risk-of-loss principle in subsequent opinions. First, the framework is not supported in Washington case law. Second, the framework is not used by other jurisdictions, which is an important consideration because the Court has recognized that article VIII is situated firmly within a nationwide tradition and has drawn from other jurisdictions to resolve public-debt questions.


The risk-of-loss principle is not supported by Washington’s case law on debt limits. This Essay highlights the lack of support by examining three problems with the lead opinion’s attempt to justify the principle. First, the plurality re-characterized prior precedent without regard for the analysis applied in those cases. Second, the plurality ignored inconsistent cases. Third, the plurality relied on an academic piece that recognized that the risk-of-loss principle is not a talisman for all of Washington’s debt cases and supported the principle’s limited explanatory powers with problematic analysis.

a. The Lead Opinion’s Re-Characterization of Prior Cases Does Not Support the Conclusion that Risk of Loss Applies to Article VIII

The lead opinion’s establishment of the risk-of-loss principle by re-characterizing prior cases is problematic because the opinion conflates correlation with causation, ignores the Court’s various approaches to debt limits, and fails to address the principle’s absence in prior case law.

Wenatchee Events Center conflates correlation with causation by ignoring the underlying analysis in the cases that are re-characterized to establish the risk-of-loss principle.181 The plurality establishes the principle by going through prior decisions and concluding that they are consistent with the risk-of-loss principle.182 But the opinion never discusses whether the decisions were actually decided on that principle nor does the plurality address the underlying analysis used in those cases.183 The plurality merely shows a correlation—the result in some of the Court’s earlier decisions may be consistent with the risk-of-loss

181. See Wenatchee Events Center, 175 Wash. 2d at 797–98, 287 P.3d at 572. For a discussion of how the lead opinion re-characterized prior cases see supra Part I.C.2.a.
182. Wenatchee Events Center, 175 Wash. 2d at 797–98, 287 P.3d at 572.
183. Id. at 797–98, 287 P.3d at 572–73.
principle—but never demonstrates that the Court used that principle to reach the result, let alone consistently approached cases using that framework. The plurality does not show causation because they cannot show causation: The Court has not previously analyzed debt cases using the risk-of-loss principle. Accordingly, the plurality does not demonstrate that the risk-of-loss principle is the basis for the results in previous cases, which undermines their reason for using the principle to address the Comfort-State Capitol Commission split and ultimately the CLA in Wenatchee Events Center.

Moreover, the re-characterization of prior cases to establish a single principle is problematic because that approach disregards the Court’s history of employing various frameworks to guide the debt analysis. Like other jurisdictions, the Court resisted developing a general standard for determining whether obligations implicate the debt limits and instead relied on a diverse range of exceptions and principles. The lack of a unifying framework becomes more evident by looking at some of the Court’s debt cases where the Court fluctuated between relying extensively on the analysis conducted in other states and at other times looking only to local opinions. The variety of approaches the Court has embraced undermine the lead opinion’s attempt to re-characterize prior opinions in order to recognize one guiding principle.

Finally, the re-characterization of Washington case law does not support the risk-of-loss principle because the lead opinion’s analysis glosses over the fact that the Court had never expressly embraced the principle in the debt-limit context. Despite over a century of case law

184. See id.
185. Supra note 134.
187. See, e.g., Dep’t of Ecology, 116 Wash. 2d at 256–57, 256 n.9, 804 P.2d at 1246, 1246 n.9 (determining that Oregon’s case law was persuasive and citing other states’ opinions); Troy, 36 Wash. 2d at 204–07, 217 P.2d at 343–45 (looking to Oklahoma’s constitution and case law).
interpreting section 1 and section 6, the term “risk of loss” has never appeared in a majority opinion addressing these issues. Before *Wenatchee Events Center*, the term was only used in the debt-limit context in *Department of Ecology*’s plurality opinion.\(^{190}\) If the risk-of-loss principle guided each of the Court’s debt opinions, one would expect the term to have appeared: (1) before 1991, (2) within more than one opinion, or at least (3) inside a majority opinion. These absences reinforce the notion that the Court has not consistently relied on the risk-of-loss principle when determining how to evaluate article VIII.

Nonetheless, the plurality seizes on the language in *Department of Ecology* as evidence that that Court relied on the principle before *Wenatchee Events Center*. The lead opinion explained that in “recent cases” the Court has “begun explicitly relying on the risk of loss concept as a basis for our decisions” and presents *Department of Ecology* as an example of this trend.\(^{191}\) The plurality is wrong for three reasons. First, there is no trend. *Department of Ecology* is not an example of recent cases relying explicitly on the risk of loss principle in the debt context—it is the only case. Second, the Court did not embrace the principle in *Department of Ecology* despite the opportunity to do so. A majority of the Court declined to sign onto the opinion using the risk of loss language.\(^{192}\) Third, the scope of *Department of Ecology* is a matter of enough debate that the State Finance Committee has recommended a very narrow reading that limits reliance on the case’s holding to closely related facts.\(^{193}\) The State Finance Committee, after reviewing the “vigorous dissent” and the concurrence’s emphasis that long-term leases should not be used as subterfuge, recommended that financing contracts only be used in fact patterns very similar to *Department of Ecology* in order to avoid having the agreements treated as debt.\(^{194}\) This guidance reflects a concern that *Department of Ecology* is not the fundamental shift for which the plurality cites the case.

\(^{190}\) See *Dep’t of Ecology*, 116 Wash. 2d at 254–55, 804 P.2d at 1245 (using the principle without citation to any other cases).

\(^{191}\) *Wenatchee Events Center*, 175 Wash. 2d at 798, 287 P.3d at 572.

\(^{192}\) See *Dep’t of Ecology*, 116 Wash. 2d at 259, 804 P.2d at 1247 (noting that only three justices signed the lead opinion); *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004) (explaining that a plurality is not binding on future courts).


\(^{194}\) See id. at 1–2.
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b.  The Risk-of-Loss Principle Does Not Explain Washington Cases on Debt

The analysis used to justify the risk-of-loss principle does not (and cannot) explain the diverse range of precedent on what is article VIII debt.195 Before Wenatchee Events Center, the Court accepted the contingent-liability doctrine—a framework that is incompatible with the risk-of-loss principle.196 The lead opinion carefully avoids this issue by asserting the risk-of-loss principle through a limited survey of Washington cases; the plurality looks at cases that support their position and ignores cases like Kelly and Comfort that do not fit the framework.197 The plurality addresses these unsupportive cases only after establishing the framework they contend explains Washington law: the risk-of-loss principle.198 It is easier to “find” principles when the search looks for authority that supports the idea and sets aside contradictory materials.

c.  The Lone Academic Piece Embracing the Risk-of-Loss Principle for Washington Cases Offers a Tentative and Incomplete Analysis

Academics have not embraced the idea that the risk-of-loss principle explains Washington’s public debt cases. The idea has been presented in only one place: Gillette’s Municipal Debt Finance Law: Theory and Practice.199 Despite academia not embracing Gillette’s conclusion, the plurality relies in part on Gillette’s analysis as part of the basis for establishing the risk-of-loss principle.200 This reliance is problematic for two reasons: (1) Gillette is unwilling to assert that risk of loss fully explains Washington debt cases, and (2) Gillette’s analysis is incomplete.

195. See AMDURSKY & GILLETTE, supra note 38, ¶ 4.1.1, at 162. Even the plurality agrees that the risk-of-loss framework only explains some of the cases. See Wenatchee Events Center, 175 Wash. 2d at 798, 287 P.3d at 572 (“Nearly every case . . . is consistent with this ‘risk of loss’ principle” (emphasis added)).

196. See Wenatchee Events Center, 175 Wash. 2d at 801, 287 P.3d at 574.

197. See id. at 797–99, 287 P.3d at 572–73 (establishing the risk-of-loss principle by looking to City of Spokane, Martin, and Department of Ecology without discussing Comfort and Kelly).

198. See id. at 799, 800–02, 287 P.3d at 573–74 (establishing principle and discussing Comfort).

199. This book is the only academic source cited by either the lead opinion or the plaintiff’s brief. See generally id., 175 Wash. 2d 788, 287 P.3d 567; Brief of Respondent City of Wenatchee, Wenatchee Events Center, 175 Wash. 2d 788, 287 P.3d 567 (2012) (No. 86552-3). A search of common legal resources reveals no other sources asserting this proposition. Moreover, one can fairly assume that if other sources supported the plurality’s fundamental shift then they would have bolstered their position by position by citing additional sources.

200. See Wenatchee Events Center, 175 Wash. 2d at 798, 287 P.3d at 572.
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and misleading.

i.  Gillette Does Not View the Risk-of-Loss Principle as a Talisman for All of Washington’s Debt Cases

Gillette is only willing to support the idea that the risk-of-loss principle is, at best, a partial answer for when debt has been recognized in Washington. He acknowledges that his argument has limited explanatory powers: The “application of [the risk-of-loss principle] brings a high, though by no means complete, degree of consistency to an otherwise irreconcilable body of cases” and the principle “does bring some order to the [Court’s] decisions.” Contrary to the lead opinion’s assertion, Gillette is not concluding that the risk-of-loss principle determines when an obligation triggers Washington’s debt limits. Rather, his conclusion is more nuanced; he believes the risk-of-loss principle can, at best, explain why the debt limit is triggered in some of the Court’s public debt cases.

ii. Errors in Gillette’s Analysis Undermine His Conclusion that the Risk-of-Loss Principle Is Applicable

Gillette’s limited explanation of Washington’s public debt cases is also problematic because it is based on incomplete and misleading analysis. First, he glosses over or ignores critical cases that are not explained by the proposed framework. He relegates Comfort to a footnote with a “but see” citation and no analysis—he does not try to explain how this case can be explained by the risk-of-loss principle and does not even address Kelly. Gillette does not offer an explanation because he cannot: The cases are not reconcilable with the risk-of-loss principle. Accordingly, his conclusion is clouded by selection bias—

201. Amdurisky & Gillette, supra note 38, § 4.1.1, at 162.
202. Id. § 4.1.2, at 169 (emphasis added).
203. Compare id. (recognizing that the risk-of-loss principle does not fully explain the Court’s opinions on debt), with Wenatchee Events Center, 175 Wash. 2d at 798, 287 P.3d at 572 (summarizing Gillette’s position as “concluding that [Washington’s] debt limits are triggered where the risk of project failure falls on the taxpayers”).
204. See Amdurisky & Gillette, supra note 38, § 4.1.1, at 162. But even this conclusion is problematic because Gillette makes the same mistake as the plurality: conflating correlation with causation. He surveys Washington cases saying how the risk-of-loss principle could explain the results in those cases but never explains how the analysis in those cases supports the principle.
205. See id. § 4.1.2, at 164–70.
206. Id. § 4.1.2, at 167 n.17.
207. See Wenatchee Events Center, 175 Wash. 2d at 801, 287 P.3d at 574.
effectively ignoring cases that challenge his analysis—that allows him to draw inappropriate conclusions about Washington’s debt law.

Second, Gillette misrepresents Department of Ecology to manufacture stronger support for the risk-of-loss principle. He incorrectly asserts that the Court expressly relied on the principle. However, Gillette does not disclose that Department of Ecology’s risk-of-loss discussion had limited-precedential value because it occurred in a plurality opinion. He ventures beyond mere omission because he inaccurately states “the majority opinion explicitly based its decision on the issue of risk.” Without this statement, Gillette’s conclusion about Washington’s use of the risk-of-loss principle would have relied only on inferences—a weaker analytical tool—because the Court never explicitly addressed the principle before Department of Ecology. Thus, Gillette’s misrepresentation of the case’s nature artificially inflates the support for his theory on the risk-of-loss principle. This misdirection underscores the weakness of his analysis for explaining a broad range of cases that Gillette earlier generally referred to as “irreconcilable” and decidedly “ad-hoc.”

2. The Court Should Reject the Risk-of-Loss Principle Because It Disregards the Common Origins of Article VIII

The lead opinion’s adoption of the risk-of-loss principle is problematic because the Court has indicated other jurisdictions’ analyses of debt provisions are persuasive and no other state has embraced the principle. Before Wenatchee Events Center, the Court recognized the state’s debt limits originated as part of a national trend by turning to other jurisdictions’ case law to help interpret article VIII and embracing principles used by other states. The absence of the risk-of-loss principle in these other jurisdictions suggests that the principle is not applicable to Washington’s debt limits.

208. AMDURSKY & GILLETTE, supra note 38, § 4.1.2, at 168.
210. AMDURSKY & GILLETTE, supra note 38, § 4.1.2, at 168 (emphasis added). Moreover, Gillette’s book was published in 1992, which was before the State Finance Committee cast significant doubt on Department of Ecology’s scope of the opinion. See supra text accompanying note 194.
211. AMDURSKY & GILLETTE, supra note 38, § 4.1.1, at 162.
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a. Washington and Other States Have Recognized the Common Origins of Their Debt Limits by Interpreting Them Similarly

Given the common motivation for restricting government debt and the similar structure of the debt-limit provisions, it is unsurprising that courts in different jurisdictions have analyzed their debt limits by developing and applying relatively consistent principles. A fifty-state survey of municipal-debt-provision schemes shows the same principles have been applied by most of the states. For example, most states have created a lease-purchase exception, developed a special-fund doctrine, and recognized that contingent-liabilities are not debt.

Before Wenatchee Events Center, the Court joined these other states in implicitly recognizing a harmony between constitutional-debt limits throughout the United States. Specifically, the Court signaled there was a harmony between Washington’s provisions and those in other states by: (1) looking to other jurisdictions for guidance or support; and (2) using the same principles that were adopted in other states. This practice of interpreting article VIII by looking to other jurisdictions and applying similar principles indicates that the debt-limit provisions have not, and should not, be read without consideration of the practices in other states.

b. The Lack of Risk-of-Loss Cases in Other States Supports the Conclusion that the Framework is Not Applicable to Article VIII

Because the Court has indicated that the practices in other states are

212. Supra Part I.A.1–2.
213. See generally MISS BETTIE MANN & DR. FREDERICK L. BIRD, STATE CONSTITUTIONAL RESTRICTIONS ON LOCAL BORROWING AND PROPERTY TAXING POWERS (1964) (surveying each state and noting if they had recognized specific principles).
214. See generally id. While there is some variance, courts generally agree on the basic principles and doctrines that apply—even if they are applied slightly differently depending on the jurisdiction. See, e.g., Bisk, supra note 22, at 523–25 (explaining that there are a variety of approaches for lease-purchase agreements).
216. Compare id. at 255, 804 P.2d at 1245 (lease-purchase agreements), and Winston v. City of Spokane, 12 Wash. 524, 526–27, 41 P. 888, 888 (1895) (special-fund doctrine), with Charles, W. Goldner, Jr., State and Local Government Fiscal Responsibility: An Integrated Approach, 26 WAKE FOREST L. REV. 925, 935–36 (1991) (acknowledging that lease-purchase agreements, the special-fund doctrine, and other approaches have been embraced by state courts). See also MANN & BIRD, supra note 213 (detailing the debt principles adopted in every state).
instructive, the absence of the risk-of-loss principle in these states indicates that the principle is not applicable to Washington’s debt limits. A survey of other states indicates that no other state has adopted the risk-of-loss principle to resolve constitutional-debt cases—Washington would be the first.\textsuperscript{217} Rather than adopting the principle, many states have adopted a mutually exclusive principle: the contingent-liability doctrine.\textsuperscript{218} Thus, the practice in other states suggests that the risk-of-loss principle is not the correct framework for article VIII. To nonetheless adopt the principle, the Court would have to deny the common origins of article VIII and treat the provisions as novel. Such an approach is not supported by the Court’s precedent or the history of article VIII.

\textbf{D. The Court Should Consider Adopting the Governmental Accounting Standards Board’s Evaluation of Contingent Obligations to Evaluate Article VIII Debt}

If the Court declines to abandon categorizing CLAs as debt, the Court should consider evaluating these agreements by using the Governmental Accounting Standards Board’s (“GASB”)\textsuperscript{219} Generally Accepted Accounting Principles (“GAAP”)\textsuperscript{220} for nonexchange financial guaranties\textsuperscript{221} rather than the risk-of-loss principle. The GAAP provide standardized accounting standards for state and local governments.

\textsuperscript{217} A search of traditional legal sources turned up no results, Wenatchee Events Center’s lead opinion cited no authority that had reached a similar conclusion, and Gillette provides a relatively detailed analysis of the concept without citing or quoting from a case outside of Washington explicitly applying the concept. See generally Wenatchee Events Center, 175 Wash. 2d 788, 287 P.3d 567 (2012) (plurality opinion); AMDURSKY \& GILLETTE, supra note 38, § 4.1, at 160–70.

\textsuperscript{218} See Wenatchee Events Center, 175 Wash. 2d at 801, 287 P.3d at 574 (explaining that the risk-of-loss principle and contingent-liability doctrine are incompatible); McQUILLIN, supra note 82, § 41.22 (recognizing that many states have adopted the contingent-liability doctrine).


\textsuperscript{220} While the GAAP is used outside the United States, this Essay will use “the GAAP” to refer exclusively to the GASB’s version that only addresses practices for jurisdictions within the United States. See GASB FACTS, supra note 219, at 1.

\textsuperscript{221} This type of agreement is identical to the contingent liabilities addressed throughout this Essay: A party agrees to pay a debtor’s obligation under specific conditions without receiving value or approximately equal value in exchange for entering the agreement. See GOVERNMENTAL ACCOUNTING STANDARDS BD., ACCOUNTING AND FINANCIAL REPORTING FOR NONEXCHANGE FINANCIAL GUARANTEES 2 (2013) [hereinafter GAAP GUARANTEES], available at http://gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176162551665&acceptedDisclaimer=true.
within the United States. Although governments are not required to follow the GAAP, the principles are widely used in Washington and nationwide. Since 1984, the GAAP have been established by the GASB—a non-profit private organization that develops the standards through an open process that invites public feedback and expert participation. The GASB produces a product analogous to the Financial Accounting Standards Board’s (FASB) principles governing the preparation of financial reports by nongovernmental entities; however, the GASB’s principles—are not officially recognized as authoritative by the Securities and Exchange Commission.

The GAAP for nonexchange financial guaranties are set forth in GASB Statement 70 (“Statement 70”). The principles established in Statement 70 require a government abiding by the GAAP to recognize a liability for the amount that is likely to become owed on a contingent obligation. Specifically, each government must reassess its agreements each year and recognize a liability when “qualitative factors” and

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222. Mission, Vision, and Core Values, GOVERNMENTAL ACCOUNTING STANDARDS BD., http://www.gasb.org/jsp/GASB/Page/GASBSectionPage&cid=1175804850352 (last visited Mar. 27, 2015); see also OFFICE OF FIN. MGMT., STATE ADMINISTRATIVE AND ACCOUNTING MANUAL Ch. 80.20.10 (2014) (“Adherence to the GAAP provides a reasonable degree of comparability among the financial reports of state and local governmental units.”).

223. See WASH. REV. CODE § 43.88.037 (2014) (adopting the GAAP for the state government); GAAP VERSUS CASH REPORTING, WASH. STATE AUDITOR’S OFFICE (n.d.), available at http://www.sao.wa.gov/resources/Documents/GAAP_Reporting_proscons.pdf (noting that twenty percent of local governments used the GAAP but that they are the largest and most complex governments).

224. See GOVERNMENTAL ACCOUNTING STANDARDS BD., RESEARCH BRIEF: STATE AND LOCAL GOVERNMENT USE OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR GENERAL PURPOSE EXTERNAL FINANCING REPORTING 1–2, 5 tbl.1 (2008), available at http://www.gasb.org/css/ContentServer?site=GASB&c=Document_C&apename=GASB%2FDocument_C%2FGASBDocumentPage&cid=117616726699 (estimating that between 62.27% and 71.52% of state and local government entities follow the GAAP based on a sample that represents 98% of all government revenue).

225. GASB FACTS, supra note 219, at 1–2.

226. Compare id. (explaining that the GASB’s GAAP are not federal laws or regulations), with Facts About FASB, FIN. ACCOUNTING STANDARDS BD., www.fasb.org/facts/ (last visited Mar. 27, 2015) (explaining the FASB’s standards are officially recognized by the SEC).

227. GAAP GUARANTIES, supra note 221 (Statement 70); see GOVERNMENTAL ACCOUNTING STANDARDS BD., THE HIERARCHY OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR STATE AND LOCAL GOVERNMENTS 1–4 (2009), available at http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage?cid=1176159972129&acceptedDisclaimer=true (establishing GASB Statements as the most authoritative source of the GAAP).

228. Examples of qualitative factors include the debtor: (1) entering bankruptcy, (2) breaching the contract creating the underlying debt (e.g. not meeting covenants or defaults in payments), or (3) demonstrating signs of significant financial difficulty (e.g. drawing on reserve funds to make
historical data, if any, ... indicate that it is more likely than not that the government will be required to make a payment."²²⁹ The liability would equal "the discounted present value of the best estimate of the future outflows expected to be incurred."²³⁰

Statement 70 and its principles for nonexchange financial guaranties could be used in the article VIII context by counting the assessed liability as debt. There are three reasons why this approach would be preferable to the risk-of-loss principle embraced by Wenatchee Events Center’s lead opinion. First, in contrast to the lead opinion’s unclear treatment of contingent obligations,²³¹ Statement 70 offers a clear standard that will be easier for the Court and municipalities to apply.²³² This is important for municipalities whose effectiveness depends, at least in part, on being able to understand what constitutes debt so that they can determine what projects can be pursued. Second, Statement 70’s standard protects municipal- and state-financial flexibility by facilitating the use of a common-funding mechanism without triggering the sudden and unexpected recognition of debt that is likely to occur under the risk-of-loss framework.²³³ Preserving this flexibility comports with the Court’s precedent,²³⁴ is consistent with national trends,²³⁵ and is important for the variety of projects that the state and municipalities frequently undertake.²³⁶ Third, Statement 70’s reliance on experts (accountants) creates a more accurate, nuanced perspective of debt—recognizing it is only money that is, or is likely to become, due—rather than the more draconian all-or-nothing rule advanced by Wenatchee Events Center.

debt payments, seeking debt-holder concessions, incurring significant investment loses). GAAP GUARANTEES, supra note 221, at 3.

²²⁹. Id. "[M]ore likely than not" means a likelihood of more than fifty percent. Id. at 4 n.2.

²³⁰. Id. at 4.

²³¹. See supra Part II.A (highlighting the seemingly contradictory nature of the opinion and the lack of guidance for determining what percentage makes an obligation a guaranty rather than a contingent liability).

²³². In fact, the state is already applying this standard and many local governments are as well. See supra note 223.

²³³. If the Court adopted the risk-of-loss principle in a majority opinion—removing any doubt about its applicability—there would likely be a sudden increase in the amount of debt recognized by municipalities. See supra note 2 (explaining the value of debt secured by existing CLAs). In fact, even the uncertainty about the treatment of CLAs has caused some municipalities to recognize more debt because of their existing CLAs. Supra note 21.

²³⁴. See supra note 216 (highlighting the various exceptions recognized in Washington).

²³⁵. Heil, supra note 28, at 86 (recognizing a national trend of courts approving methods for evading rigid limits).

²³⁶. See Brief of Amicus Curiae in Support of Direct Review, supra note 2, at 11.
Statement 70 not only has these three distinct advantages over Wenatchee Events Center’s risk-of-loss approach, but the statement also addresses the plurality’s concern about CLAs: municipalities guarantying debt without regard for their limits and then being forced to resort to taxes when the agreements suddenly came due.237 Under Statement 70, municipalities are unlikely to lightly enter into CLAs because the potential burden is not just an obligation to make a payment in the distant future but is also a present-day concern: part of the value can count against their debt limit each year. The likelihood that municipalities will enter into CLAs without careful deliberation is further minimized by the limited volatility introduced by Statement 70’s standard: Debt from CLAs will be added or subtracted annually based on the likelihood that a payment will have to be made.238 By creating the potential for a more immediate effect on the debt limit, Statement 70 should encourage officials to thoroughly scrutinize a potential CLA rather than merely looking at the short-term gains. Thus, Statement 70’s volatility responds to one of the concerns underlying debt restrictions: limiting the perverse incentive politicians have to enter into guaranties for short-term gain without regard for the potential long-term costs.239

CONCLUSION

Wenatchee Events Center’s lead opinion’s adoption of the risk-of-loss principle and treatment of contingent liabilities as debt are problematic. As soon as practicable and in an appropriate case, the Court should grant a petition for review addressing these topics because Wenatchee Events Center is unclear, has a broader than intended scope, and recognizes an incorrect framework for public debt. The lead opinion’s inconsistent treatment of contingent liabilities and failure to garner a majority means the opinion does not offer clear guidance to policy makers or courts. Beyond a lack of clarity, the opinion has a broader than intended scope because the attempt to compartmentalize the holding by limiting it to municipal debt—based on a distinction between “debt” and “indebtedness”—is not persuasive. Finally, the adoption of the risk-of-loss principle—used to justify the treatment of contingent liabilities as debt—is not supported by case law, academics, or the origins of Washington’s debt-limit provisions.

238. GAAP GUARANTIES, supra note 221, at 4.
239. See Bisk, supra note 22, at 525.
After granting a petition for review, the Court should decline to adopt the risk-of-loss principle and instead provide a clear, easily applicable rule on contingent liabilities. This is important because the frequent use of CLAs as a funding mechanism makes clarity and predictability critical factors. In pursuit of this goal, the Court should look to the GAAP on nonexchange financial guaranties. This standard would require municipalities to annually evaluate their contingent liabilities and recognize debt for any amounts that are likely to become due. This approach is preferable because it balances clarity and flexibility with appropriate safeguards against improvident decision-making.

In sum, the Court should address the problematic analysis adopted by Wenatchee Events Center’s lead opinion while offering a clear and binding rule about the status of contingent liabilities. One avenue to explore would be using the GAAP for nonexchange financial guaranties.