TEXAS REVIEW of LAW & POLITICS

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Ted Cruz

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Founded by Adam B. Ross & Dennis W. Donley Jr. in MCMXCVI

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Since the most recent issue of the *Review,* some things have not changed: President Obama has continued to take unprecedented executive action. But as we go to print, some things may change: the Fifth Circuit recently heard oral argument on same-sex civil marriage and abortion, and the Supreme Court has granted cert to decide whether the Fourteenth Amendment requires states to recognize same-sex marriages. This issue explores tensions between branches of government and between regulation and liberty—but always with the background of the rule of law. The *Review* is fortunate to have the nation's best conservative and libertarian legal minds calling for consistency and the rule of law while applying intellectual curiosity and fresh thought to today's legal issues.

Immigration is the latest iteration of the unlawful expansion of executive power by the Obama Administration. The *Review*'s 2013 Jurist of the Year, Senator Ted Cruz, surveys this abuse of power in *Lawless: The Obama Administration's Expansion of Executive Power.* He provides a broad overview of the administration's disregard for the rule of law, citing twelve areas of abuse ranging from non-enforcement of drug laws to changing compliance deadlines in Obamacare to outright attacks on taxpayers and journalists. Senator Cruz calls on Americans to stand for liberty and the rule of law, regardless of party affiliation.

Those core values—liberty and the rule of law—run through the center of our national identity. Charles R. Eskridge III traces these principles through the development of the Bill of Rights in *Modern Lessons from Original Steps Towards the American Bill of Rights.* Mr. Eskridge's ten steps to the Bill of Rights begin exactly eight hundred years ago with Magna Carta, and include key developments from the *Mayflower* voyage to the fierce debates at the Constitutional Convention. Throughout, he highlights the importance of both liberty and the rule of law, concluding that our Bill of Rights may not be perfect, but it is very good.

Even when we agree that rights must be protected, philosophy and logic determine which freedoms merit the designation of "rights." In *Natural Law, Natural Rights, and Same-Sex Civil Marriage: Do Same-Sex Couples Have a Natural Right to be Married?,* Professor Shannon Holzer argues that the language of rights necessarily invokes a natural law framework, and implicating this framework means that same-sex marriage must be held to natural law standards as part of the burden of proof born by those seeking legal change. His philosophical framework offers guidance for the coming months of rigorous debate leading to the Supreme Court's anticipated decision on the matter.

Although he does not address the natural law, Clark Neily argues that judges must protect rights that the majority would too willingly disregard. *Against Arbitrary Government and the Amoral Constitution,* a review of Tim Sandefur's *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty,* enthusiastically endorses Sandefur's argument that the judiciary has a moral imperative from the Declaration of Independence to protect liberty, even if it means overturning laws. Neily cautions against moral relativism in constitutional interpretation, advocating that liberty be the ultimate guide for jurisprudence.

When two rights clash, however, should the people or the judges decide the boundaries? Catherine Maggio Schmucker discusses the litigation over Texas's recent abortion regulations in *Everything is Bigger in Texas—Especially the Abortion Debate: Why Texas House Bill 2 Can Survive a Constitutional Challenge and How it Should Change the Abortion Analysis.* She determines Texas House Bill 2 legitimately used the state's police power and did not impose an undue burden, and calls on the Supreme Court to affirm the Fifth Circuit in case of continued appeals.

Finally, the *Review*'s own Nicolas Wenker explains Bitcoin and the ideological tensions it creates for its advocates and naysayers alike. In *Online Currencies, Real-World Chaos: The Struggle to Regulate the Rise of Bitcoin,* he offers an accessible explanation of the Bitcoin technology, its free-market influences, and the regulatory tension it creates. Mr. Wenker explores Bitcoin's verifiable-but-anonymous nature and its implications for ideologues, criminals, investors, customers, and regulators.

This year, in addition to the normal editing process, the staff of the *Review* implemented a small change in our citation format for websites. Each website now contains either the *http://* prefix or the *www.* prefix, and our "perma" citations do not contain either prefix. This saves space while maintaining essential reference information in citations. I would like to thank the entire staff of the *Review* for their enthusiasm, hard work, and dedication in editing the articles and implementing this change.

I hope these articles contribute to the meaningful debates about the tensions between law and liberty, the separation of powers, and how to apply our founding principles in a changing world. I would like to thank Adam Ross, Brantley Starr, and Amy Davis for their guidance and support throughout the year.

Alexandra Harrison
Editor in Chief

Austin, Texas
January 2015

LAWLESS: THE OBAMA ADMINISTRATION'S EXPANSION OF EXECUTIVE POWER

BY U.S. SENATOR TED CRUZ*

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* U.S. Senator (R-TX) and Ranking Member, Subcommittee on The Constitution, Civil Rights and Human Rights, Committee on the Judiciary, United States Senate; Solicitor General, State of Texas, 2003–2008.

This article was adapted from a speech given to the Federalist Society in Washington, D.C. on May 7, 2014 and from *The Legal Limit Report No. 4: The Obama Administration's Abuse of Power.* Senator Ted Cruz, Keynote Address at The Federalist Society Second Annual Executive Branch Review Conference (May 7, 2014); TED CRUZ, THE LEGAL LIMIT REPORT NO. 4: THE OBAMA ADMINISTRATION'S ABUSE OF POWER (2014), *available at* www.cruz.senate.gov/files/documents/The%20Legal%20Limit/The%20Legal%20Limit%20Report%204.pdf [perma.cc/SEP2-9D7P] [hereinafter THE LEGAL LIMIT REPORT NO. 4].

I. INTRODUCTION

"There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[1]

The Obama Administration has had many troubling aspects, but the most alarming has been its consistent willingness to completely disregard the rule of law and instead rule by fiat and decree. Politely referred to as "unilateral action,"[2] President Obama has successfully circumvented or ignored Congress—and even the Supreme Court—in a multitude of contexts. He has repeatedly suspended, delayed, and waived portions of the laws that he is charged to enforce. He has violated the carefully crafted separation of powers put in place by America's Founders—men who read and understood Montesquieu and Aristotle[3] and recognized that a government full of flawed human beings has to be constrained by separating power.[4]

Rather than abide by these separations, the Obama Administration has consistently seized power. Congress and the media, two of our nation's most reliable watchdogs regarding executive power, have failed to keep this Administration in check. Congress, rather than jealously guarding its powers, has rolled over and acquiesced to this grand usurpation. The national media have barely uttered a bark[5]—except when the

1. THE FEDERALIST No. 47, at 337–38 (James Madison) (Benjamin Fletcher Wright ed., 1996) (quoting Montesquieu).

2. *E.g.*, Chris Conover, *The White House's Five Most Egregiously Unilateral Changes to Obamacare*, FORBES, June 2, 2014, www.forbes.com/sites/theapothecary/2014/06/02/potus-to-americans-go-ahead-take-the-law-into-your-own-hands [perma.cc/8L78-6RXL]; Rebecca Kaplan, *Blaming Congress, Obama Readies Unilateral Action on Immigration*, CBS NEWS, June 30, 2014, www.cbsnews.com/news/blaming-congress-obama-readies-unilateral-action-on-immigration [perma.cc/88M6-RS27].

3. *E.g.*, Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1116 (2008).

4. *E.g.*, THE FEDERALIST NO. 47, *supra* note 1, at 337–38.

5. The mainstream media were criticized for not responding adequately to the IRS Scandal. *See, e.g.*, Paul L. Caron, *The Media Ignore IRS Scandal*, USA TODAY, May 16, 2014, www.usatoday.com/story/opinion/2014/05/12/president-obama-irs-scandal-watergate-column/8968317 [perma.cc/CG2Y-34XP]; John Podhoretz, *Why Bridgegate Made Headlines but Obama's IRS Scandal Didn't*, N.Y. POST, Jan. 11, 2014, http://nypost.com/2014/01/11/why-bridgegate-made-headlines-but-obamas-irs-scandal-didnt [perma.cc/3MLL-6B3D] (quoting Scott Whitlock) ("In less than 24 hours, the three networks have devoted 17 times more coverage to a traffic scandal involving Chris Christie than they've allowed in the last six months to Barack Obama's Internal Revenue Service controversy.").

integrity of journalism was visibly under attack.[6] Instead, these two valuable checks on executive authority have left the American people in a world in which the rule of law is ignored to score political points and policy outcomes.

Rule of law means more than a nation having codes and statutes; dictatorships are often characterized by an abundance of laws. Instead, the rule of law means that no one is above the law.[7] Rather than being ruled by the whims of politicians who write themselves into power, we are ruled by laws that govern all equally.[8] The role of the U.S. President is not to issue decrees, but rather to enforce the laws passed by the elected representatives in Congress.[9] The Constitution imposes the express duty on each president to "take Care that the Laws be faithfully executed."[10]

Thus, this is not a partisan problem. This is not a matter of agreeing or disagreeing with the particular policy outcomes that the Obama Administration has pursued. Rather, this is a matter of maintaining the structure of American government, and ensuring that the president cannot unilaterally change the laws or refuse to enforce them.

I have detailed these abuses in a series of reports. The first one was on the rule of law and the abuse of power, and examined nine cases decided by the U.S. Supreme Court since January

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6. The mainstream media did pay attention to various allegations that the Administration was monitoring journalists. *See, e.g.*, Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 13, 2013, www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html [perma.cc/T647-AJZW]. Even after those allegations, however, journalists have been strangely deferential to a secretive and uncooperative White House. *See* Justin Lynch, *Bloggers, Surveillance and Obama's Orwellian State*, TIME, July 11, 2014, http://time.com/2976711/obama-press-surveillance [perma.cc/78QL-LNMG] (quoting journalist Thom Shanker) (although the relationship between government and media is dysfunctional, they should "stay together for the kids"); Erik Wemple, *USA Today's Susan Page: Obama Administration Most 'Dangerous' to Media in History*, WASH. POST, Oct. 27, 2014 www.washingtonpost.com/blogs/erik-wemple/wp/2014/10/27/usa-todays-susan-page-obama-administration-most-dangerous-to-media-in-history [perma.cc/PHF5-P4C7] (noting there was "no firestorm" after the press were not told about a White House event).

7. *E.g.*, Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 351–52 (2014); *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 37–38 (1997) (arguing that the ideal conception of the rule of law would include the notion that the law applies equally to everyone).

8. *E.g.*, U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

9. Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL'Y 377, 422–23 (2014).

10. U.S. CONST. art. II, § 3.

2012.[11] Each time, the Administration had argued for an overbroad view of federal power, and each time the U.S. Supreme Court rejected the Administration's view *unanimously*.[12] Having all nine justices agree indicates these are not difficult, close questions about which reasonable jurists could differ; these are extreme assertions of federal power.

That report was inspired by a speech Justice Alito gave to the Federalist Society. He noted that in one political speech case, the Administration stood before the U.S. Supreme Court and defended the proposition that the federal government could prohibit corporations from publishing books.[13] The Administration argued that the government could prohibit a corporation from using general treasury funds to publish a book if the book contained one instance of "express advocacy."[14] Unsurprisingly, the Supreme Court disagreed.[15]

In another case, law enforcement argued that you could place a GPS sensor on the car of any citizen with no probable cause, no articulable suspicion, and no basis whatsoever.[16] The DOJ's argument was essentially that the Fourth Amendment has nothing to say about whether the Federal Government can electronically monitor the movements of law-abiding citizens.[17] Again, the Supreme Court unanimously disagreed.[18]

Similarly, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[19] the question was whether churches and religious institutions have a First Amendment right to select their

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11. TED CRUZ, THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S ATTEMPTS TO EXPAND FEDERAL POWER (2013), *available at* www.cruz.senate.gov/files/documents/The%20Legal%20Limit/The%20Legal%20Limit%20Report%201.pdf [perma.cc/PJR3-4KGD].

12. *Id.* at 3–8.

13. *See* Transcript of Oral Argument at 29–30, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205) (Mar. 24, 2009) *available at* www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf [perma.cc/J7C6-L5T8].

14. *Id.*

15. *See Citizens United*, 558 U.S. at 372 (ruling against the FEC).

16. *See* United States v. Jones, 132 S. Ct. 945, 950 (2012) (explaining the government's argument that the installation of the GPS device is not a "search" under the Fourth Amendment because there is no "reasonable expectation of privacy" in the underbody of a Jeep).

17. *See* Reply Brief for the United States at 2, United States v. Jones, 132 S. Ct. 945 (2012) (No. 10-1259) ("Under this Court's Fourth Amendment precedent, the GPS monitoring in this case was neither a search nor a seizure.").

18. Although there were concurrences, all nine justices agreed that the conduct at issue constituted a search under the Fourth Amendment. *Jones*, 132 S. Ct. at 949, 954, 964.

19. 132 S. Ct. 694 (2012).

ministers.[20] The EEOC lawyer argued that the Free Exercise Clause and the Establishment Clause do not apply to such situations.[21] After several Justices grilled the EEOC lawyer, Justice Elena Kagan—that famed right-wing advocate—leaned forward to this Administration's lawyer from the Solicitor General's office and said, "I too find [your position] amazing."[22] Keep in mind, that is President Obama's former Solicitor General, saying to a lawyer in her old office, "I too find that amazing, that you think . . . neither the Free Exercise Clause nor the Establishment Clause has anything to say about a church's relationship with its own employees."[23]

The second report we put out dealt with how the Administration has been unilaterally re-writing Obamacare.[24] The degree to which that has happened is breathtaking, and I will discuss it more later. The third report dealt with a total of ten cases involving the Great State of Texas, where Texas has been repeatedly forced to vindicate its rights in court.[25] Happily, Texas has repeatedly prevailed and vindicated its rights against the Administration's abuse of power.[26]

The fourth report takes a broad view; rather than focus on any particular tree, it focuses on the forest. The breadth of the lawlessness in the aggregate is all the more disturbing. It is not one example, or two examples, or three examples. The Declaration of Independence had twenty-seven particular trespasses that King George had committed against the rights of Englishmen,[27] and this particular report lists seventy-six examples of lawlessness and abuses of power.[28] My hope is that

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20. *Id.* at 705–06.

21. *See* Transcript of Oral Argument at 27–28, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) (arguing that "the basic contours of the inquiry are not different" just because the people involved in the case are part of a religious organization).

22. *Id.* at 37.

23. *Id.*

24. TED CRUZ, THE LEGAL LIMIT REPORT NO. 2: THE ADMINISTRATION'S LAWLESS ACTS ON OBAMACARE AND CONTINUED COURT CHALLENGES TO OBAMACARE (2013), *available at* www.cruz.senate.gov/files/documents/The%20Legal%20Limit/The%20Legal%20Limit%20Report%202.pdf [perma.cc/Y5R7-MA35].

25. TED CRUZ, THE LEGAL LIMIT REPORT NO. 3: THE OBAMA ADMINISTRATION'S ASSAULT ON TEXAS (2014), *available at* www.cruz.senate.gov/files/documents/The%20Legal%20Limit/The%20Legal%20Limit%20Report%203.pdf [perma.cc/89WZ-LWNK].

26. *Id.*

27. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

28. THE LEGAL LIMIT REPORT NO. 4, *supra* note *, at 3–12.

rather than have an in-depth discussion about one or two, the breadth of the abuse will catalogue a case that ought to concern anyone who cares about the rule of law.

Certainly everyone says they support the rule of law. There is not currently in the United States Congress an "anti-rule-of-law caucus"—although, give it time, and that may change. But rule of law does not mean the presence of many laws; practically every society on earth has laws. The presence of words on a page in a book of statutes does not define "rule of law." Rather, rule of law is the notion that the law binds all of our leaders, *especially* the president.[29] The principle that no one is above the law distinguishes the United States historically from so many countries across the earth.[30]

I have highlighted some of the "greatest hits" from this fourth report. Even with this small sample, it is clear that over and over again, we have seen an administration that simply announces it will not enforce particular policies with which it disagrees.

II. EXAMPLES OF THE OBAMA ADMINISTRATION'S ABUSE OF EXECUTIVE POWER

A. Welfare Loss

The Administration disagrees with the work requirements that were passed by overwhelming bipartisan majorities and signed into law by Democratic President Bill Clinton.[31] So rather than going to Congress and saying, "Let's amend the work

29. Garrison, *supra* note 7, at 351 ("[C]ontrol of executive power is at the core of the value and meaning of the rule of law . . . .").

30. *See* Fallon, *supra* note 7, at 3 ("Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity.").

31. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE, TANF-ACF-IM-2012-03, GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115 (July 12, 2012), *available at* www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203 [perma.cc/9SUH-LL2D] ("HHS is issuing this information memorandum to notify states of the Secretary's willingness to exercise her waiver authority under section 1115 of the Social Security Act to allow states to test alternative and innovative strategies, policies, and procedures . . . ."); *see also* Robert Rector, *How Obama has Gutted Welfare Reform*, WASH. POST, Sept. 6, 2012, www.washingtonpost.com/opinions/how-obama-has-gutted-welfore-reform/2012/09/06/885b0092-f835-11e1-8b93-c4f4ab1c8d13_story.html [perma.cc/3V7P-WPA9] ("The Obama [A]dministration is waiving the federal requirement that ensures a portion of able-bodied TANF [Temporary Assistance for Need Families] recipients must engage in work activities.").

requirements, we don't like them," it simply granted waivers and said, "Don't worry about the work requirements anymore."[32]

B. Drug Policy

Drug policy is a great example of an area where you can find a lot of reasonable disagreement, even within a single political party. Indeed, I would note that Mike Lee, Rand Paul, and I have co-sponsored sentencing reform to lessen some of the draconian drug sentences and mandatory minimums.[33] So it is an area in which we could find real bipartisan agreement on a lot of issues and have a sensible policy discussion about what should be the right rules, standards, and laws. Indeed, I suspect Congress would be perfectly happy to engage in that discussion. But the President did not do that; instead, Eric Holder simply announced that certain drug crimes would no longer be prosecuted.[34]

This is very different than the laws passed by the legislatures in Colorado and Washington State, which made the extraordinary decision to legalize marijuana.[35] The DOJ has unilaterally decided that entire categories of drug crimes will not be prosecuted.[36] These criminal laws often carry a minimum penalty of ten years of incarceration.[37] It is extraordinary for the Administration to simply announce: "Since we do not agree with it, we will not enforce it."

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32. *See* Rector, *supra* note 31 ("The administration has provided no historical evidence showing that Congress intended to grant the Department of Health and Human Services (HHS) or any part of the executive branch the authority to waive the TANF work requirements.").

33. *E.g.*, Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 2 (2014); *see also* Jacob Sullum, *Senate Judiciary Committee Approves Major Drug Sentencing Reforms*, FORBES, Jan. 30, 2014, www.forbes.com/sites/jacobsullum/2014/01/30/senate-judiciary-committee-approves-major-drug-sentencing-reforms [perma.cc/ADP6-WW8L].

34. Eric Holder, Attorney Gen. of the U.S., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) *available at* www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [perma.cc/3CLJ-XLW5] [hereinafter Holder, Remarks]; *see also* Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html [perma.cc/8PMC-3NRC] (summarizing legal changes made by General Holder).

35. Keith Coffman & Nicole Neroulias, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS, Nov. 7, 2012, www.reuters.com/article/2012/11/07/us-usa-marijuana-legalization-idUSBRE8A602D20121107 [perma.cc/7WU3-8VEH].

36. Holder, Remarks, *supra* note 34.

37. Savage, *supra* note 34.

C. Marriage

The State of Utah has ongoing litigation concerning its marriage law that recognizes marriage as the union of one man and one woman.[38] While the U.S. Supreme Court stayed the district court order that struck down Utah's marriage law pending appeal,[39] the Administration announced that it was going to disregard the Supreme Court's stay and enforce and recognize the marriages that Utah and the U.S. Supreme Court do not allow.[40]

D. Immigration

Reasonable minds can also differ on many immigration issues—all of which deserve thoughtful policy discussions. But when the DREAM Act did not pass Congress right before the last election,[41] the President suddenly announced he was unilaterally granting amnesty to some 800,000 people who are here illegally.[42] People may or may not agree with that as a policy matter—but that is what the democratic process is set up for. It is qualitatively different when the executive says, "never mind," regarding his Article II duty to take care that the laws be faithfully executed, or when he says, "If I disagree with existing law, I hereby decree we will not follow it." Similarly, there is no

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38. The U.S. Supreme Court concluded the litigation by declining to review Utah's appeal five months after Senator Cruz gave this speech. *See* Amy Howe, *Today's Orders: Same-Sex Marriage Petitions Denied (UPDATED)*, SCOTUSBLOG (Oct. 6, 2014, 10:41 AM) www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitins-denied/ [perma.cc/E2U3-K9XD].

39. Lyle Denniston, *Court Stops Utah Gay Marriages (UPDATED)*, SCOTUSBLOG (Jan. 6, 2014, 10:34 AM), www.scotusblog.com/2014/01/court-stops-utah-gay-marriages [perma.cc/manage/vest/7E4V-9GAU].

40. Charlie Savage & Jack Healy, *U.S. to Recognize 1,300 Marriages Disputed by Utah*, N.Y. TIMES, Jan. 10, 2014, www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html [perma.cc/VA8L-Z2Z8]; *see also* Matt Apuzzo, *More Federal Privileges to Extend to Same-Sex Couples*, N.Y. TIMES, Feb. 8, 2014, www.nytimes.com/2014/02/09/us/more-federal-privileges-to-extend-to-same-sex-couples.html [perma.cc/J7WU-U6AR] (extending federal marriage benefits to all married same-sex couples, despite the ongoing disputes in the states and the courts).

41. DREAM Act of 2010, H.R. 5281, 111th Cong. (2010); *see also Senate Vote 278—Fails to Advance Dream Act*, N.Y. TIMES, Dec. 18, 2010, http://politics.nytimes.com/congress/votes/111/senate/2/278 [perma.cc/G9LK-ZATA] (showing details of vote).

42. *See* Mark Krikorian, *Today is A-Day*, NAT'L REV. ONLINE, Aug. 15, 2012, www.nationalreview.com/articles/313996/today-day-mark-krikorian [perma.cc/3Z7B-SRJB] (noting that the estimate of 800,000 people has since gone up to 1.75 million); Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all [perma.cc/R497-BSAQ].

"reverse veto" that allows the President to institute a law that died in Congress.

E. Benghazi

The House of Representatives convened a select committee on Benghazi, which is a very good thing.[43] I have been calling for a joint select committee in both houses of Congress to investigate what happened in Benghazi for nearly a year.[44] We need to answer questions like, "Why didn't we provide security that was repeatedly requested by our diplomats on the ground?"[45] "Why didn't we have assets nearby to prevent the murder of four Americans, including the first U.S. ambassador killed in the line of duty since 1979?"[46] And, "Why in the nineteen months that followed has no one been brought to justice?"[47]

Instead, we have seen an Administration stonewalling Congress. We recently learned about internal emails sent from a senior official at the National Security Council of the White House to the communication staff, directing public spokespeople to go out and carry a political message.[48] That message was that the terrorist attack that was carried out by radical Islamic terrorists was not in fact a terrorist attack, but rather had to do with some silly internet video—a message for which there was no supporting evidence.[49] The email is framed

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43. Michelle Arrouas, *House Votes to Establish Select Committee on Benghazi*, TIME, May 9, 2014, http://time.com/93671/house-select-committee-benghazi [perma.cc/T7AY-QDVA].

44. *See, e.g.*, *Cruz Requests to Adopt Benghazi Resolution/Boxer Objects*, U.S. SENATE DEMOCRATS (Sept. 18, 2013, 3:21 PM), http://democrats.senate.gov/2013/09/18/cruz-requests-to-adopt-benghazi-resolutionboxer-objects [perma.cc/FB5Q-UD5J].

45. Jake Tapper, *Documents Back Up Claims of Requests for Greater Security in Benghazi*, ABC NEWS, Oct. 19, 2012, http://abcnews.go.com/blogs/politics/2012/10/documents-back-up-claims-of-requests-for-greater-security-in-benghazi [perma.cc/D6WU-6CC2].

46. Nick Carbone, *Before Libya: U.S. Ambassadors Who Have Died in the Line of Duty*, TIME, Sept. 12, 2012, http://newsfeed.time.com/2012/09/12/before-libya-u-s-ambassadors-who-have-died-in-the-line-of-duty [perma.cc/FR9C-TKZE].

47. Notably, over a month after Senator Cruz gave these remarks, the first suspect in the Benghazi investigation, Ahmed Abu Khattala, was captured. Karen DeYoung, et al., *U.S. Captures Benghazi Suspect in Secret Raid*, WASH. POST, June 17, 2014, www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52_story.html [perma.cc/JFX2-5MKW].

48. Stephanie Condon, *Emails Illustrate how White House Shaped Benghazi Talking Points*, CBSNEWS, Apr. 30, 2014, www.cbsnews.com/news/emails-illustrate-how-white-house-shaped-benghazi-talking-points [perma.cc/L4BT-8NBM].

49. Bill Flax, *Benghazi: Four Americans Died, Obama Lied, and the Press Complied*, FORBES, Oct. 18, 2012, www.forbes.com/sites/billflax/2012/10/18/benghazi-four-americans-died-obama-lied-and-the-press-complied [perma.cc/KAZ6-VKVE].

in very political terms and the critical objective is to make clear that whatever happened was not the fault of any policies of this Administration.[50]

Why is this so notable? Because despite the White House maintaining for over a year that it had nothing to do with the talking points of the messages, you now have *in writing* that the White House dictated exactly what it wanted the messages to be.[51]

Moreover, it has repeatedly defied Congressional subpoenas, which is what prompted the investigation.[52] We heard testimony that a senior political official for Hillary Clinton reached out to career Foreign Service Officers and told them, "Do not speak to Congress. Do not speak to those coming to investigate what occurred."[53] As any former or current prosecutors know, asking witnesses to criminal activities not to share what they have seen used to be called "obstruction of justice." Sadly, this Administration sees it as politics as usual.

F. Russia

One example of lawlessness that is happening in Russia is the Administration's refusal to enforce the Magnitsky Act—a bipartisan act, sponsored by a Democrat in the Senate to punish human rights violators in Russia.[54] Yet the Administration simply refuses to enforce it.[55] How exactly do we go to Putin and say,

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50. Condon, *supra* note 48.

51. Michael D. Shear, *Email Suggests White House Strategy on Benghazi*, N.Y. TIMES, Apr. 30, 2014, www.nytimes.com/2014/05/01/world/email-suggests-white-house-strategy-on-benghazi.html [perma.cc/7726-Z8XN].

52. Oren Dorell, *House Speaker Calls for Special Probe into Benghazi*, USA TODAY, May 2, 2014, www.usatoday.com/story/news/world/2014/05/02/benghazi-emails-kerry-subpoena/8608615 [perma.cc/JE9T-JK4Y].

53. *Benghazi: Exposing Failure and Recognizing Courage: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 44 (2013) (statement of Gregory Hicks, Foreign Service Officer); *see also* Ben Shapiro, *Whistleblower: Hillary's State Dept. Told Me Not to Talk to Congress*, BREITBART, May 8, 2013, www.breitbart.com/Big-Government/2013/05/08/Whistleblower-state-dept-censor [perma.cc/EU7-UCGP].

54. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496 (introduced in the Senate by Senator Benjamin Cardin (D-MD)); *see also Obama's Magnitsky Walkback*, WALL ST. J., Jan. 5, 2014, http://online.wsj.com/news/articles/SB10001424052702304591604579290880748745144 [perma.cc/RG7P-DG79]. The Administration added twelve names to the original list of eighteen sanctioned individuals on May 20, 2014. *See* William Mauldin, *U.S. Sanctions More Russians Under Law Named for Dead Whistleblower*, WALL ST. J., May 20, 2014, http://online.wsj.com/articles/SB10001424052702304422704579574552454729972 [perma.cc/JN9G-L34A].

55. *Obama's Magnitsky Walkback*, *supra* note 54.

"You need to be bound by the rule of law," when simultaneously our government is saying, "Never mind the laws our Congress passed, we are going to disregard them?"

There was recently a Jimmy Fallon exchange where Fallon did a fake phone conversation between Obama and Putin.[56] This is right after the invasion of Ukraine and he has President Obama say, "You're forcing people to accept something the majority of them don't even want!" Then Fallon, playing Putin, says, "Yes, in Russia we have a word for this: Obamacare!"[57]

G. Obamacare

If you were to embody one example of lawlessness, it would be difficult to come up with a more comprehensive example than Obamacare. Over and over again, the Administration has disregarded the law. It illegally granted a waiver to big business.[58] Not a word in the law says anything about a waiver for big business.[59]

The law says the employer mandate kicks in January 1, 2014,[60] but the Administration announced, "No it doesn't."[61] It announced this in a blog post by an Assistant Treasury Secretary, put up right around the Fourth of July, saying basically, "By the way, big business hereby gets this waiver."[62]

Likewise, the text of the statute says Members of Congress shall be bound by Obamacare and shall be on the Obamacare exchange without employer subsidies just like millions of Americans.[63] That amendment was introduced by my friend,

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56. *The Tonight Show with Jimmy Fallon* (NBC television broadcast Mar. 19, 2014) *available at* www.youtube.com/watch?v=zmIUm1E4OcI [perma.cc/3MN5-JD7S].

57. *Id.*

58. *See* Sarah Kliff, *White House Delays Employer Mandate Requirement Until 2015*, WASH. POST, July 2, 2013, www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015 [perma.cc/ZBP6-W3DV] (describing delayed enforcement of the Obamacare mandate that employers with more than fifty employees provide coverage to their employees).

59. 26 U.S.C. § 4980H (2013); *see also* Kliff, *supra* note 58 ("The Affordable Care Act requires all employers with more than 50 full-time workers provide health insurance or pay steep fines.").

60. § 4980H.

61. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY, July 2, 2013, www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx [perma.cc/C5K6-2RJJ].

62. *Id.*

63. 42 U.S.C. § 18032(d)(3)(D) (2013); *see also* Mike Patton, *Obamacare: Is Congress Playing By The Same Rules?*, FORBES, Nov. 14, 2013,

Senator Chuck Grassley.[64] It was designed to say, "Look, if we are going to do this to the American people, members of Congress should suffer under it too." What ended up happening was a closed-door meeting of Harry Reid, the Senate Democrats, and President Obama, in which they suddenly realized they did not want to be on Obamacare.[65] So the President unilaterally and illegally directed the Office of Personnel Management (OPM) to grant an exemption for Members of Congress.[66] It was directly contrary to the statute, and yet they did so anyway.

Strikingly, we saw at least 4.7 million people have their health insurance canceled because of Obamacare last year,[67] despite the President's repeated promises to the countrary.[68]

If that had happened under any of the forty-three Presidents who preceded President Obama, they would have come to Congress. They would have said, "Listen, this federal law is a disaster. It is hurting millions of people; they have lost their health insurance. We need to get together and fix this. We need to do something to provide relief for the Americans we have hurt."

The President did not do that. Instead he held a press conference, in which he instructed private insurance companies to go and violate the law.[69] He told them—as the President of the United States—to go and reinstate policies that the text of the statute says are illegal, to disregard the text of the statute for a

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www.forbes.com/sites/mikepatton/2013/11/14/obamacare-the-real-story-behind-the-congressional-exemption [perma.cc/G3G8-TD5E].

64. Gregory Korte, *Why Congress Is (or Isn't) Exempt from Obamacare*, USA TODAY, Sept. 27, 2013, www.usatoday.com/story/news/politics/2013/09/27/is-congress-exempt-from-obamacare/2883635 [perma.cc/446U-QUCZ].

65. *See* Patton, *supra* note 63.

66. *See id.* (explaining that although the amendment requires Members of Congress to purchase insurance on an exchange for full price, the OPM issued a rule allowing Members of Congress to continue to receive federal government subsidies).

67. *Policy Notifications and Current Status, by State*, BUSINESSWEEK, Dec. 26, 2013, www.businessweek.com/ap/2013-12-26/policy-notifications-and-current-status-by-state [perma.cc/U3KK-5K8M].

68. Glenn Kessler, *Obama's Pledge that 'No One Will Take Away' Your Health Plan*, WASH. POST, Oct. 30, 2013, www.washingtonpost.com/blogs/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan [perma.cc/F7F6-9UDP].

69. *Full Transcript: President Obama's Nov. 14 News Conference on the Affordable Care Act*, WASH. POST, Nov. 14, 2013, www.washingtonpost.com/politics/transcript-president-obamas-nov-14-statement-on-health-care/2013/11/14/6233e352-4d48-11e3-ac54-aa84301ced81_story.html [perma.cc/XGF8-4WJY].

year, because by presidential grace and whim he decided that was better than following or amending the law.[70]

In the over 200 years of our nation's history, we have never had an instance where the President of the United States instructed private citizens and private companies to go and violate the law. That is an ominous development.

On one of the more recent waivers, the Administration unilaterally announced that employers with between fifty and ninety-nine employees get an extra year delay on the mandate.[71] Under the statute, employers with 100, 101, 102, or 105 employees—as well as those with 95 employees—are supposed to have the burden to provide health insurance.[72] Now, however, those with only 95 employees do not have to follow the law. The Administration has benefitted one competitor at the expense of another, and has done so contrary to the text of the law. This, unlike so many of the examples of lawlessness, has created standing.[73]

H. NLRB

The Administration attempted to force Boeing to fire over 1,000 employees in South Carolina because it was a nonunion state.[74] It took the position that it should padlock the plant—that

70. *Id.* ("[T]he bottom line is insurers can extend current plans that would otherwise be cancelled into 2014.").

71. Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST, Feb. 10, 2014, www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html [perma.cc/5QT6-XF3A].

72. 26 U.S.C. § 4980H (2013); *see also supra* note 59 and accompanying text.

73. *See generally* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013) ("Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restricts the authority of federal courts to resolving 'the legal rights of litigants in actual controversies.'") (citations omitted); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (stating that standing requires three elements: "[T]he plaintiff must have suffered an 'injury in fact,' . . . there must be a causal connection between the injury and the conduct complained of, . . . [and] it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (citations omitted). Here, employers with 100 or more employees have suffered significant competitive disadvantage by the actions of the Administration, which meets the conditions for standing to sue the Administration in court.

74. *See* Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 20, 2011, www.nytimes.com/2011/04/21/business/21boeing.html [perma.cc/3ZKG-NRKC] (discussing the Administration's attempt to force Boeing to move a production line back to unionized facilities after Boeing had hired 1,000 employees at the nonunion site). The case was later dropped at the request of the Washington union. Steven Greenhouse, *Labor Board Drops Case Against Boeing*, N.Y. TIMES,

it would be better to have the plant in China than allow it to be in a state in the Union that does not have mandatory union membership and forced union dues.[75] This is an extraordinary position.

I. Offshore Drilling

Following the disaster of the *Deepwater Horizon* spill, the Administration unilaterally issued a moratorium on offshore drilling.[76] Mind you, it did so by convening a panel of experts, which prepared a report recommending safety improvements for deepwater drilling.[77] After the report was written, political operatives in the Administration wrote the offshore drilling moratorium on top of it.[78]

When the report was released, members of the panel objected that it was different from the report they had written and signed.[79] The moratorium came from the political appointees, not from the experts.[80] Repeatedly, federal courts struck down the moratorium as contrary to law.[81] Repeatedly the Administration reinstated it, defying the courts.[82]

J. "Recess" Appointments

The only small problem with the so-called recess appointments that the President made to the Consumer Finance

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Dec. 9, 2011, www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html [perma.cc/J5T4-RRDE].

75. *See* Editorial, *NLRB V. Boeing—and Jobs*, CHI. TRIB., Sept. 6, 2011, http://articles.chicagotribune.com/2011-09-06/opinion/ct-edit-boeing-20110906_1_lafe-solomon-nlrb-dreamliner [perma.cc/KYZ6-R4G3].

76. Press Release, U.S. Dep't of the Interior, Salazar Calls for New Safety Measures for Offshore Oil and Gas Operations; Orders Six Month Moratorium on Deepwater Drilling (May 27, 2010), www.doi.gov/news/pressreleases/Salazar-Calls-for-New-Safety-Measures-for-Offshore-Oil-and-Gas-Operations-Orders-Six-Month-Moratorium-on-Deepwater-Drilling.cfm [perma.cc/B2KQ-YLWA]; *see also Gov't Hopes New Offshore Drilling Moratorium Can Survive Legal Challenge*, FOXNEWS.COM, July 13, 2010, www.foxnews.com/us/2010/07/13/govt-hopes-new-offshore-drilling-moratorium-survive-legal-challenge [perma.cc/84N2-6D6P] (describing the Administration's multiple attempts to get a court to uphold such a moratorium).

77. David Hammer, *Experts Seek to Clarify Their Views on Drilling Moratorium*, NOLA.COM, June 9, 2010, www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/experts_seek_to_clarify_their.html [perma.cc/J37D-D2B4].

78. *Id.*

79. *Id.*

80. *Id.*

81. Laurel Brubaker Calkins, *U.S. in Contempt Over Gulf Drill Ban, Judge Rules*, BLOOMBERG, Feb. 3, 2011, www.bloomberg.com/news/2011-02-03/u-s-administration-in-contempt-over-gulf-drill-ban-judge-rules.html [perma.cc/9DPX-JAW6].

82. *Id.*

Protection Board (CFPB) and the National Labor Relations Board (NLRB) was that they were made when Congress was not in recess.[83] The President has authority to make appointments when Congress is in recess, but for over 200 years Congress has determined when it is in recess.[84] The President asserted that the Senate was in recess when we were not.[85]

Now, if the President has this power, it altogether guts the confirmation power of the United States Senate. I suppose the President could say at 1:00 AM, "I declare the Senate is in recess and here are all of my appointees." If the President has the ability to deem that Congress is in recess whenever he or she pleases, suddenly advice and consent go away. That renders a critical structural constraint of our Constitution a nullity.

That is not just my view; that is the view of three federal courts of appeals, each of which concluded these appointments were unconstitutional.[86] What happened? The Administration disregarded the views of three federal courts of appeals, and just kept on going. CFPB keeps issuing new regulations, and keeps operating as if nothing has happened.[87] NLRB keeps behaving as if nothing has happened.[88] Now this issue is pending at the U.S. Supreme Court.[89]

I am hopeful and optimistic the Supreme Court is going to agree with the three federal courts of appeals. But think about it—an Administration that just ignores three federal courts of appeals. If an individual did that he would be held in contempt,

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83. Robert Barnes, *Supreme Court Rebukes Obama on Recess Appointments*, WASH. POST, June 26, 2014, www.washingtonpost.com/politics/supreme-court-rebukes-obama-on-recess-appointments/2014/06/26/e5e4fefa-e831-11e3-a86b-362fd5443d19_story.html [perma.cc/74UA-6G8S].

84. *See infra* note 89 and accompanying text.

85. *See infra* note 89 and accompanying text.

86. NLRB v. New Vista Nursing and Rehab., 719 F.3d 203, 244 (3d Cir. 2013); NLRB v. Enter. Leasing Co. Se., 722 F.3d 609, 660 (4th Cir. 2013); Noel Canning v. NLRB, 705 F.3d 490, 514 (D.C. Cir. 2013).

87. *See, e.g.*, Defining Larger Participants of the Student Loan Servicing Market, 12 C.F.R. Pt. 1090 (2013) (published after the appellate court held that the recess appointments were illegal and before the Supreme Court affirmed).

88. *See* Press Release, NLRB, NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed (Aug. 4, 2014), www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court [perma.cc/CCW6-C864].

89. At the time of this speech, the Supreme Court had granted certiorari in the case. NLRB v. Noel Canning, 133 S. Ct. 2861 (2013). The Supreme Court ultimately held that Congress was not in recess at the time in question. NLRB v. Noel Canning, 134 S. Ct. 2550, 2574, 2578 (2014). Though there was a concurrence, the decision that Congress was not in recess was unanimous. *Id.* at 2578, 2595.

because the rest of us cannot disregard courts. Yet somehow, this Administration believes it can.

K. IRS

About twelve months ago, the Treasury Inspector General for Tax Administration concluded that the IRS had wrongfully targeted Tea Party groups, conservative groups, pro-Israel groups, and pro-life groups.[90] The day that news broke, the President said that the IRS's actions were "inexcusable."[91] He was angry and said the American people had a right to be angry.[92] Eric Holder said he was outraged.[93]

The day the news broke, President Obama pledged to work "hand in hand" with Congress to get to the bottom of it.[94] In the twelve months since then, not a single person has been indicted.[95] In the twelve months since then, most of the victims

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90. The report states explicitly that Tea Party groups applying for tax-exempt status were targeted for review. U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5–8 (2013), *available at* www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf [perma.cc/F7LE-9AD6]. Further, the IRS targeted "specific groups" using inappropriate criteria, such as groups' "names or policy positions," including advocating for lower taxes, "mak[ing] America a better place to live," or criticizing the government. *Id.* A former application screener for the IRS admitted that pro-Israel groups' applications "'probably' all are sent to an IRS unit that examines groups for potential terrorist ties." Eliana Johnson, *The IRS vs. Pro-Israel Groups*, NAT'L REV. ONLINE, June 17, 2013, www.nationalreview.com/article/351208/irs-vs-pro-israel-groups-eliana-johnson [perma.cc/N7H4-PLBL]. Pro-life groups were also targeted. Katrina Trinko, *IRS Harasses Pro-Life Groups*, NAT'L REV. ONLINE, Aug. 2, 2013, www.nationalreview.com/article/355021/irs-harasses-pro-life-groups-katrina-trinko [perma.cc/VH4W-CZMB] (explaining unusually long approval process for 501(c)(3) status for two pro-life groups). The IRS asked one group, LIFE Runners, whether they provided "information regarding other alternatives to 'pro life[?']" *Id. See generally*, Greg Sargent, *Conservatives Have Themselves a Real Scandal on Their Hands*, WASH. POST, May 10, 2013, www.washingtonpost.com/blogs/plum-line/wp/2013/05/10/conservatives-have-themselves-a-real-scandal-on-their-hands [perma.cc/8RL7-NNY9] (noting the gravity of the scandals).

91. Chelsea J. Carter, et al., *'Angry' Obama Announces IRS Leader's Ouster After Conservatives Targeted*, CNN, May 16, 2013, www.cnn.com/2013/05/15/politics/irs-conservative-targeting [perma.cc/TUL6-KX46].

92. *Id.*

93. *See* Rachel Weiner, *Holder Has Ordered IRS Investigation*, WASH. POST, May 14, 2013, www.washingtonpost.com/blogs/post-politics/wp/2013/05/14/holder-has-ordered-irs-investigation [perma.cc/L22N-8QUW] (stating the scandal was "outrageous and unacceptable").

94. Carter et al., *supra* note 91.

95. *See* Stephen Dinan, *Holder Won't Rule Out Criminal Charges for Employees in IRS Scandal*, WASH. TIMES, Jan. 29, 2014, www.washingtontimes.com/news/2014/jan/29/holder-criminal-charges-still-possible-irs-scandal [perma.cc/PCS9-KQHF] (explaining that, as of January 2014, no one had been indicted).

of the wrongful targeting have not even been interviewed.[96] In the twelve months since then, the lawyers and investigators working on the investigation have leaked publicly that they do not intend to indict anyone.[97] In the twelve months since then, the head of the office in charge, Lois Lerner, twice went before the House of Representatives and pleaded the Fifth.[98] She effectively raised her hand and said, "If I answer your questions, it may well implicate me in criminal conduct." Most strikingly, in the twelve months since then, we have discovered that the lawyer put in charge of the investigation in the Department of Justice is a major Obama donor, who has given over $6,000 to President Obama and the Democrats.[99]

Earlier this year, Attorney General Holder testified before the Judiciary Committee, and I took the opportunity to very gently question him.[100] I asked General Holder if he was willing to carry on the bipartisan tradition of the Department of Justice.[101] In the past we have seen Attorneys General in both parties prove willing to resist political pressure from the White House, follow the rule of law, and do the right thing.

For example, when credible questions of wrongdoing against Richard Nixon were raised, his Attorney General Elliott

96. *See id.* (noting that as of January 2014, several "key [T]ea [P]arty activists" had still not been interviewed).

97. Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, WALL ST. J., Jan. 13, 2014, http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584 [perma.cc/BFR7-KYSW].

98. The first time Lois Lerner went before the House Committee on Oversight and Government Reform, she asserted her innocence in an opening statement to the committee. H.R. REP. NO. 113-415, pt. 1, at 9–10 (2014). She then asserted her Fifth Amendment privilege. *Id.* at 10. On June 28, 2013, the Committee determined that Ms. Lerner had waived her Fifth Amendment privilege by denying allegations in her voluntary opening statement. *Id.* at 11. She was again called to come before the Committee on March 5, 2014, at which time she continued to refuse to answer questions, despite the Committee's ruling that her Fifth Amendment privilege had been waived. *Id.* at 12–15.

99. Josh Hicks, *Obama Donor Leading Justice Department's IRS Investigation*, WASH. POST, Jan. 9, 2014, www.washingtonpost.com/politics/federal_government/obama-donor-leading-justice-departments-irs-investigation/2014/01/09/980c010a-796a-11e3-8963-b4b654bcc9b2_story.html [perma.cc/3BK3-X6E4].

100. Press Release, Senator Ted Cruz, Attorney General Holder Says IRS Investigation Doesn't Warrant Special Prosecutor (Jan. 29, 2014), www.cruz.senate.gov/?p=press_release&id=856 [perma.cc/VM3C-842L]. President Obama announced Eric Holder's resignation on September 25, 2014, though Holder has said he will remain in his job "until a successor is confirmed." Michael D. Shear, *Eric Holder Resigns, Setting Up Fight Over Successor*, N.Y. TIMES, Sept. 25, 2014, www.nytimes.com/2014/09/26/us/politics/eric-holder-resigning-as-attorney-general.html?_r=0 [perma.cc/MF6V-JLZ8].

101. *Id.*

Richardson, a Republican, appointed Archibald Cox, a Democrat, to investigate.[102] Likewise, when credible allegations of wrongdoing were raised against Bill Clinton, his Attorney General Janet Reno, a Democrat, appointed Robert Fiske, a Republican, as an independent counsel to investigate the matter and get to the bottom of it.[103] I asked Eric Holder in that hearing, whether he would be willing to demonstrate the same independence, the same fidelity to law demonstrated by his predecessors and appoint a special prosecutor, who at minimum was not a major Obama donor.[104] His answer was no.[105] In fact, he said, "I don't think that there is a basis for us to conclude on the information as it presently exists that there is any reason for the appointment of the independent counsel."[106]

That was part of the problem. Indeed, Eric Holder testified for the Senate Judiciary Committee that the ongoing investigation was free of political pressure, free of taint, and that they were going to get to the bottom of it.[107] Four days later, President Obama told Bill O'Reilly before the Super Bowl that there is "not even a smidgeon of corruption" concerning the IRS.[108]

My first thought was of my favorite movie *The Princess Bride*: "You keep using that word. I do not think it means what you think it means."[109]

It is really quite striking. I sent a letter to Attorney General Holder, pointing out that his and the President's initial statements asserting how outraged they were about the IRS's actions were facially inconsistent with the Administration's subsequent actions.[110]

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102. George Lardner, Jr., *Cox Is Chosen as Special Prosecutor*, WASH. POST, May 19, 1973, www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/051973-1.htm [perma.cc/6VDG-D98U].

103. Stephen Labaton, *Reno Is Said to Choose New Yorker as Counsel*, N.Y. TIMES, Jan. 20, 1994, www.nytimes.com/1994/01/20/us/reno-is-said-to-choose-new-yorker-as-counsel.html [perma.cc/7XCC-7BJD].

104. Press Release, Senator Ted Cruz, *supra* note 100.

105. *Id.*

106. *Id.*

107. *Id.*

108. Interview by Bill O'Reilly with President Barack Obama, in Washington, D.C. (Feb. 2, 2014), *available at* www.foxnews.com/politics/2014/02/02/transcript-bill-oreilly-interviews-president-obama [perma.cc/J54U-VTW4].

109. THE PRINCESS BRIDE (ACT III Communications 1987).

110. Letter from Ted Cruz, U.S. Senator, to Eric Holder, U.S. Attorney Gen. (Jan. 22, 2014), *available at* www.scribd.com/doc/201478237/Letter-from-Sen-Ted-Cruz-to-Eric-Holder-on-the-IRS-s-Targeting-of-Conservative-Groups [perma.cc/U3LA-Q8Q5].

Furthermore, if there is in fact a real, meaningful, ongoing investigation of corruption, free of pressure, how can the President state categorically on television four days later there is not a smidgen of corruption? So I ask, "Is President Obama mistaken?"

Was President Obama mistaken when he told the American people that there is no corruption, or alternatively did General Holder testify falsely when he told the Judiciary Committee there was an ongoing investigation free of political taint and free of the outcome being dictated? Those two statements cannot mutually be consistent at the exact same time.

L. Government Monitors in Newsrooms

This Administration is truly astonishing. If I had gone on Fox News and suggested the Obama Administration would send government monitors into newsrooms, I would have been laughed at as a conspiracy-theory kook. They would have asked if I left the tinfoil hat in the car. But the FCC proposed monitoring newsrooms.[111]

III. CONCLUSION

Again, this is only a sample of the lawlessness that threatens the basic underpinnings of our society. In closing, I have two points. First, I hope that smart lawyers think about ways to use the federal courts to challenge this pattern of lawlessness. This is difficult because many of these acts of lawlessness are cleverly designed to make it difficult to find plaintiffs with standing.[112]

This is a difficult issue, because the degree of lawlessness is unprecedented and there would be real value in the courts constraining it. At the same time, the Article III requirements of

111. In May 2013, the FCC proposed the "Multi-Market Study of Critical Information Needs" ("CIN"). Ajit Pai, *The FCC Wades Into the Newsroom*, WALL ST. J., Feb. 10, 2014, http://online.wsj.com/news/articles/SB10001424052702304680904579366903828260732 [perma.cc/SN8-GVHX]. The CIN would involve researching how news broadcasters choose which stories to air in order to gain information about "perceived station bias." *Id.* Though this research would technically be voluntary, broadcasters renew their licenses every eight years with the FCC in order to run their stations, making the requests hard to ignore. *Id.* After public outcry, the FCC amended the proposal, stating that some of the questions initially included were inappropriate, and that the Commission had "no intention of regulating political or other speech." Shannon Gilson, *Setting the Record Straight About the Draft Study*, FED. COMMC'NS COMM'N, Feb. 21, 2014, www.fcc.gov/document/setting-record-straight-about-draft-study [perma.cc/Y3J9-2JT6].

112. For a discussion of standing, see *supra* note 73 and accompanying text.

a case or controversy are meaningful and important. The judgment at the founding of our republic, that the Court not render advisory opinions,[113] was the right judgment to make—even if it means that some issues do not get conclusively resolved for lack of a plaintiff with standing. The best remedy for this is finding plaintiffs with a meaningful, personalized, concrete injury.

Beyond that, the most important constraint against lawlessness should be Congress fighting back. Our checks and balances were designed for the branches of government to wrestle with each other. Part of why the lawlessness has been so egregious is that the current U.S. Congress—in particular the Senate—has utterly acquiesced to this executive overreach. In fact, Professor Jonathan Turley, a well-respected professor on the Left who voted for President Obama in 2008, testified that President Obama has "become the embodiment of the imperial Presidents. Barack Obama has become the President that Richard Nixon always wished he could be."[114] That has particular saliency from an academic on the Left.

This leads to my second point: these concerns should be bipartisan. I recognize there is a poisonous, even toxic atmosphere in Washington where everything gets viewed through a partisan lens, but this should not be a partisan issue. Anyone who cares about the rule of law—anyone who cares about liberty and the Constitution—should be dismayed by an Administration and an executive disregarding the law. This should unify Republicans, Democrats, Independents, Libertarians, and everyone else.

Those on the Left, who may find the tactics a little troubling but who generally like the policy outcomes, must consider how exactly they would feel about a Republican President exercising this power. The scriptures tell us "there arose a new king over

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113. *See* William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 173 (2002).

114. *See* Debra Heine, *Ted Cruz: 'Barack Obama is the President Richard Nixon Always Wished to Be'*, BREITBART, Mar. 7, 2014, www.breitbart.com/InstaBlog/2014/03/07/Ted-Cruz-Barack-Obama-Is-The-President-Richard-Nixon-Always-Wished-To-Be [perma.cc/G8TG-RJ43]; *see also The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the Committee on the Judiciary*, 113th Cong. 14 (2013) (statement of Jonathan Turley, Professor, George Washington Univ.); Interview by Sean Hannity with Jonathan Turley, Law Professor, George Washington Univ. (June 3. 2014), www.realclearpolitics.com/video/2014/06/03/turley_obama_the_president_that_richard_nixon_always_wanted_to_be.html [perma.cc/UW3P-75P9].

Egypt, who knew not Joseph."[115] President Obama is not always going to be President—in time there will come a Republican President. He or she will presumably have different policy priorities than a Democratic President. So rather than easing the work requirements of welfare, or forcing states to accept same-sex marriage, or granting amnesty, you might see a Republican President refusing to enforce certain environmental laws, certain labor laws, or a whole host of laws that our system has worked so hard to pass.

Procedure and the rule of law must cut both ways. For example, I have spent a lot of time saying we should "abolish the IRS and instead move to a simple flat tax where the average American can fill out taxes on [a] postcard."[116] That is a great policy and I'm happy to fight for it in Congress, but I do not think the way to get that done is for the President to decree that outcome. Just imagine if a president said, "Heretofore I am instructing the Department of Treasury not to collect any taxes above a marginal rate of 20%."

Some might wonder whether that is analogous. But the employer mandate is a tax penalty, written in our tax laws,[117] and by waiving the employer mandate for a certain set of people, the Administration is saying that it can decline to enforce the tax laws. Similarly, a President who unilaterally moved to a flat tax without working with Congress would be committing a patently illegal action contrary to the rule of law—even if it were a great policy outcome.

I think this is a symptom of a broader trend. It is a trend that believes that the ends justify the means, and the rule of law is an inconvenience. I will readily concede that abuse of presidential power is not a sin confined to one party—Presidents in both parties have abused their power.

The difference, frankly, is that with this Administration, you have the Congress of the United States actively aiding and abetting in this endeavor, and you have the press all but silent.[118]

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115. *Exodus* 1:8 (American Standard Version).

116. Rachel Weiner, *Ted Cruz: 'Abolish the IRS,'* WASH. POST, June 3, 2013, www.washingtonpost.com/blogs/post-politics/wp/2013/06/03/ted-cruz-abolish-the-irs [perma.cc/ZS4X-ZXZS].

117. 26 U.S.C. § 4980H (2013) (describing the employer mandate provision in Title 26 of the U.S. Code, which is the Internal Revenue Code); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (characterizing the individual mandate as a tax).

118. *See supra* note 6 and accompanying text.

If the same acts would have been committed by Richard Nixon, every day the front pages of the headlines would be banner headlines. But instead of that kind of scrutiny, you have a President who announced on the floor of the House of Representatives, "if Congress won't act soon to protect future generations, I will," after which just about every Democratic member of Congress stood up and cheered.[119] It was surreal. It was like they all said, "Yes, take away our constitutional authority. Usurp Congress!"

The willingness of fellow party members and the media to oppose the President is one of the differences when Republican presidents have abused their power. That happened during my tenure as Solicitor General of Texas, in *Medellín v. Texas*.[120] In *Medellín*, the International Court of Justice (ICJ) had issued an order to the United States to reopen fifty-one convictions.[121] The President, Republican George W. Bush, signed an order instructing the state courts to obey the ICJ.[122] We had a rigorous debate in the State of Texas about what to do. Attorney General Greg Abbott[123] and I discussed that it was unusual for the State of Texas to litigate against the President of the United States—who also happened to be a Republican, a Texan, and a friend.

Yet I was very proud that the State made what I think was the right decision: to go in front of the U.S. Supreme Court and say that the President of the United States lacks the constitutional authority to give up U.S. sovereignty.[124] The Supreme Court ultimately agreed 6-3 and struck down the President's order.[125]

Here, we are not seeing Democrats standing up to the President. Very few in the media are standing up to the President, and relatively few in the academy are standing up to

119. Barack Obama, U.S. President, Remarks by the President in the State of the Union Address (Feb. 12, 2013), www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address [perma.cc/KP5M-F4VY] (noting applause after the statement).

120. 552 U.S. 491 (2008).

121. *Id.* at 497–98.

122. *Id.* at 498.

123. Greg Abbott was elected Governor of Texas on November 4, 2014. Nathan Koppel, *Greg Abbott Defeats Wendy Davis to Win Texas Governor Race*, WALL ST. J., Nov. 4, 2014, http://blogs.wsj.com/washwire/2014/11/04/greg-abbott-defeats-wendy-davis-to-win-texas-governor-race [perma.cc/WFP8-AYKU].

124. *See* Transcript of Oral Argument at 45, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984) ("[I]f the treaty purported to give the authority to make binding ad[j]udications of Federal law to any tribunal other than [the Supreme] Court, [then] it would violate Article III of the Constitution.").

125. *Medellín*, 552 U.S. at 498–99.

the President. I assume it is because of the sense that he is on their team—but letting it slide undermines liberty in the long term.

We can have wild disagreement on a host of issues, but Americans are unified by a belief in the rule of law and liberty. This must be a bipartisan concern—because when you have a president who can pick and choose which laws to follow and which laws to ignore, then you no longer have a president.

MODERN LESSONS FROM ORIGINAL STEPS TOWARDS THE AMERICAN BILL OF RIGHTS

BY CHARLES R. ESKRIDGE III*

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When long ago serving as a law clerk to Justice Byron White, I quickly became aware of a gap in my law school education—a gap common to most lawyers. Law school was no advanced history class. A quote from a Federalist Paper cited in some brief or an extract from Blackstone's *Commentaries* in an earlier opinion would on its face address the legal question at hand, but I had no broad context for its place in the development of an issue. That always nagged at me a bit. And so, with apparently nothing better to do with my evenings, several years ago I organized and edited the material for a course I titled Origins of the Federal Constitution, which I now teach on a somewhat regular basis.[1]

What became evident then—and what I hope my students learn now—is that those letters and tracts and enactments are not some distant echo. The arguments were not hidden or subtle when made, but were instead written plainly and directly, to be understood by the people generally. True, the distance of time remains, but it is that very distance that allows us in hindsight to see the deliberate action and reaction that set the course of the law. These papers, then, continue to provide a frame of reference for issues with which we still wrestle.

I spend the second half of each semester considering in detail original documents that precede and explain the many rights and liberties found in our Constitution. I have selected for consideration ten steps on that path—steps that paint the broad movement towards our Bill of Rights, and from which we can draw modern lessons about how we should interact with our government, and with each other.

It is a conversation the people have been having for at least 800 years now.

I. MAGNA CARTA (1215)

On June 15 of this year, England will celebrate Magna Carta's 800th birthday.[2] That span is itself hard to grasp—800 years. On

1. The primary source of material for my course is original documents from THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987). This remarkable five-volume treatise contains curated and edited public-domain documents with citation to the underlying public source (which I omit from citations for this paper). The University of Chicago provides a valuable, ongoing public service by maintaining a freely available internet version at http://press-pubs.uchicago.edu/founders.

2. *Featured Documents: The Magna Carta*, NAT'L ARCHIVES & RECS. ADMIN., www.archives.gov/exhibits/featured_documents/magna_carta [perma.cc/GH7X-AKAY]

that day in 1215, on the field of Runnymede at the River Thames outside of London, it was not known that the beginning of English constitutional law was at hand, or that its child, American constitutional law, would emerge some 570 years later.[3]

Any historical consideration of the recognition of rights could begin much earlier, looking to Greek and Roman sources, or to a Biblical basis, in both the Old and New Testaments.[4] But the Dark Ages were dark for a reason. To the extent prior expression of rights existed, it had not yet taken root. And so in thirteenth century England, the Crown ruled by fiat—divine right, absolute prerogative.[5] If some monarchs were known for benevolent rule, many were not.[6] Among the worst offenders was an early one, John I, whose reign lasted from 1199 to 1216.[7]

John was a harsh and ruthless king, taxing heavily, quarreling with the church, and constantly engaging England in war.[8] When the nobles finally had enough and refused further allegiance, John turned his army on them, and ultimately lost all support among the people.[9] To resolve this crisis, the barons demanded—swords ready—that King John (with the Archbishop of Canterbury by his side) put his seal to a unique charter

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(last visited Dec. 23, 2014).

3. MAGNA CARTA (June 15, 1215), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 11, 11–22 (Richard L. Perry & John C. Cooper eds., rev. ed. 1978). For concise consideration of the events leading to Magna Carta, please see Louis Ottenberg, *Magna Charta Documents: The Story Behind the Great Charter*, 43 A.B.A. J. 495 (1957), and Robert Aitken & Marilyn Aitken, *Magna Carta*, A.B.A. J. OF LITIG. Spring 2009, at 59.

4. *See, e.g.*, Arthur Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 310–11 (2014).

5. 22 THE ENCYCLOPAEDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION 280 (Hugh Chisholm ed., Encyclopaedia Britannica 11th ed. 1911) (entry for "prerogative").

6. The rebellion of 1215 sprang, in part, if not in whole, from recollection of an even more distant past where sovereigns had recognized limits on their rule—or at least rules with respect to how their power would be exercised. *See* ANNE PALLISTER, MAGNA CARTA: THE HERITAGE OF LIBERTY 2 (1971) ("[The barons] looked back to an idealized past in which men enjoyed all their rights and liberties and where government was according to law, and they demanded a return to this good and ancient practice."); DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 257–58 (Hodder & Stoughton 2003) (discussing coronation of Henry I in 1100, who listed in his coronation charter the unpopular practices of his predecessor, which he promised to abolish).

7. *John Lackland (r. 1199–1216)*, THE OFFICIAL WEBSITE OF THE BRIT. MONARCHY, www.royal.gov.uk/historyofthemonarchy/kingsandqueensofengland/theangevins/Johnlackland.aspx [perma.cc/C7HP-GTZJ] (last visited Dec. 24, 2014).

8. SOURCES OF OUR LIBERTIES, *supra* note 3, at 1–3.

9. DANZIGER & GILLINGHAM, *supra* note 6, at 258–60.

carving out a limited array of sixty-three guarantees from the Crown.[10] The very idea was so inflammatory that when word reached Pope Innocent III in Rome, he decreed Magna Carta void and a subject of excommunication.[11]

Most of Magna Carta's clauses are rather technical when listing items necessary to survive and maintain life in feudal England—rules respecting fisheries, forestry, inheritance, dower, wine measurements, and the like.[12] Others have clear echoes into our time, even if not revealed in any detail:

> In the first place, we have granted to God, and by this our present charter confirmed, for us and for our heirs forever, that the English church shall be free, and shall hold its rights entire and its liberties uninjured . . . .
>
> . . . .
>
> And the city of London shall have all its ancient liberties and free customs, as well by land as by water. Moreover, we will and grant that all other cities and boroughs and villages and ports shall have all their liberties and free customs.[13]

But despite the swords, Magna Carta was phrased not as something claimed by right, or even royal duty, but instead as a generous gift on the part of John.[14] And so, he parted not with

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10. SOURCES OF OUR LIBERTIES, *supra* note 3, at 2–3, 9; *see also* PALLISTER, *supra* note 6, at 2.

11. SOURCES OF OUR LIBERTIES, *supra* note 3, at 3–4; *see also* DANZIGER & GILLINGHAM, *supra* note 6, at 263.

12. MAGNA CARTA, *supra* note 3, at 11–22; *see also* GEORGE BURTON ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 210 (Fred B. Rothman & Co. 1986) (1912). Professor Adams categorizes the feudal traits of nearly all of Magna Carta's clauses as executed in 1215, and concludes:

> That Magna Carta is essentially a document of feudal law, resting for its justification upon feudal principles, giving expression to feudal ideas, and pledging the king to a feudal interpretation of his rights of action in so far as they affected the interests of the barons, must, I think, be clear from this analysis, or from any careful study of its provisions.

Id; see also SOURCES OF OUR LIBERTIES, *supra* note 3, at 9.

13. MAGNA CARTA, *supra* note 3, at 11 cl. 1, 14 cl. 13. As to Clause 1, *see* ADAMS, *supra* note 12, at 211 ("Clause 1 is a concession to the church of its rights and liberties . . . . To the church the concession meant escape from those consequences of feudalism which were most serious to itself."). As to Clause 13, and related Clauses 12 and 14, see *id.* at 217–29 (providing basis "to affirm and secure the right of consent to taxation," and providing protection to London and smaller villages).

14. *See* MAGNA CARTA, *supra* note 3, at 11. Magna Carta opens with a salutation: "John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, reeves, servants, and all bailiffs and his faithful people greeting." *Id.* The King then states that "for the good of our soul and those of all our predecessors and of our heirs, to the honor of God and the exaltation of holy church, and the improvement of our kingdom, [and] by the advice of our venerable fathers [including]

much, and remained absolute over all areas not, at least in some sense, given by him back to the people.[15] Unwittingly, however, King John gave sanction to that most venerable of institutions—the rule of law—while forever placing himself and his successors within its bounds.[16] For while one passage may read in an unfamiliar way, it is of signal import when we appreciate as lawyers the path it forged:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.
>
> [T]o no one will we sell, to no one will we deny, or delay right or justice.[17]

There shall be trials, and the King shall act not merely by decree, but only "by the law of the land."[18] So said Magna Carta in the 13th century, to which Winston Churchill observed in the 20th century that this was "reaffirmation of a supreme law," and that "here is a law which is above the King"—above the government—"and which even he must not break."[19] A century later, when Parliament set Magna Carta into statutory law in 1354, "by the law of the land" attained a phrasing that has now endured for more than 650 years: "That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement,

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Stephen, Archbishop of Canterbury," that "*we have granted* to God" certain liberties for the Church of England. *Id.* (emphasis added). Magna Carta then prefaces the balance of the individual grants with: "*We have granted moreover* to all free men of our kingdom for us and our heirs forever all the liberties written below, to be had and holden by themselves and their heirs *from us and our heirs.*" *Id.* at 12 (emphasis added).

15. DANZIGER & GILLINGHAM, *supra* note 6, at 260–61.

16. *Id.*

17. MAGNA CARTA, *supra* note 3, at 17, cls. 39 & 40. While the likely intent of the barons was simply to secure procedures according to feudal tradition, "what was then demanded was a trial according to law and securing to them their legal rights," which "proved historically fortunate, because, as men's legal ideas changed and feudalism disappeared, [the terms] could be adapted to new conceptions of civil rights and seemed in the end to embody a universal principle of political liberty." ADAMS, *supra* note 12, at 243–44.

18. *See* MAGNA CARTA, *supra* note 3, at 17, 19–20.

19. WINSTON S. CHURCHILL, 1 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 256 (1956) (emphasis added). Similarly, Professor Adams concluded:

> To repeat what has been already said, the controlling and moulding power of the Charter in English history is to be found in two things: First of all in the principle upon which it rests that there is a definite body of law by which the king's action is bound, and, second, that, if he insists upon violating it, he may be compelled by force to desist.

ADAMS, *supra* note 12, at 250.

nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer *by due Process of the Law.*"[20]

Could the nobles at Runnymede have imagined the force and scope that "due process of law" would attain from their demand that the King act only "by the law of the land"? Probably not.[21] But that is the momentum of rights once formally recognized: how far or how fast they will carry is not known on the first push.

A continuing lesson from Magna Carta is the idea of repetition. Rights must be acknowledged if they are to be honored and protected, and their repetition educates not just the people, but the government. King John was a devious man.[22] Having saved his own skin that day, he sought the upper hand in almost immediate clashes with the nobles.[23] But as fate (and a fatal bout of dysentery) would have it, he died a little over a year after Magna Carta, leaving his kingdom to his nine-year-old son, Henry III.[24] Henry's youth made it easy to have him accept an amended Magna Carta in 1217 and another amended version in 1225; these began to circulate widely with public recital throughout the lands.[25] With time, though, Henry's rule proved more tumultuous than his father's, and he was forced to swear oaths of recognition of Magna Carta six more times before his death in 1272.[26] In 1265, it was decreed that Magna Carta would be read twice annually, so that no person—citizen or monarch—could claim ignorance of its words.[27] By Sir Edward Coke's

20. Liberty of Subject, 1354, 28 Edw 3, c. 3 (Eng.), *available at* www.legislation.gov.uk/aep/Edw3/28/3 [perma.cc/NRK3-SJDY] (emphasis added).

21. "It is the unintended result which followed in course of time, which gives to the rebellion of 1215 its right to be regarded as the first step in the formation of the English Constitution." ADAMS, *supra* note 12, at 250.

22. *See* DANZIGER & GILLINGHAM, *supra* note 6, at 262–69.

23. *Id.*

24. *Id.* at 269–71.

25. SOURCES OF OUR LIBERTIES, *supra* note 3, at 4 & n.11; *see also* ADAMS, *supra* note 12, at 279–83. The guarantees within Magna Carta saw changes in phrasing between iterations, with some clauses dropped altogether. SOURCES OF OUR LIBERTIES, *supra* note 3, at 4 & n.11. But by 1297 its text stabilized, and a copy of such version resides at The National Archives. *Featured Documents: Magna Carta Translation*, NAT'L ARCHIVES & RECS. ADMIN, www.archives.gov/exhibits/featured_documents/magna_carta/translation.html [perma.cc/C4UR-AHP2].

26. Professor Adams argues that Henry III "was not intentionally a bad king." ADAMS, *supra* note 12, at 284. Rather, he suffered from weak intellect and terrible judgment of character, and so his reign "never had a consistent policy for any length of time except under the influence of a stronger personality." *Id.*

27. *See* DANZIGER & GILLINGHAM, *supra* note 6, at 279.

count, from 1297 to 1461, seven successive monarchs between them confirmed the charter thirty-two times.[28]

Repetition is a lesson worth heeding. In England, it ensured the King would not forget, but must observe his prior gifts. In America, our rights are preserved in a context where government does not have the ability to simply forget or ignore them. And so, repetition in some respects goes by another name here—litigation.

II. THE MAYFLOWER COMPACT (1620)

The "state of nature" is a concept in moral and political philosophy that starts from the hypothetical conditions of what the lives of people might have been before societies came into existence.[29] The idea of natural law and natural rights itself has a prominent place in the development of our American concept of liberties, requiring deeper treatment than intended here.[30] But I will observe that our next step is as pristine an example of the state of nature as we have in our continent's history—the landing of the *Mayflower* at Cape Cod in 1620. That the Pilgrims reacted to this fact with the Mayflower Compact is quite remarkable.

The *Mayflower* set off on August 5, 1620, but due to problems at sea, twice turned back to port, though the passengers were not allowed to disembark during repairs.[31] The actual departure came on September 6—the equivalent of spending four weeks on the tarmac waiting for your plane to take off.[32] With 102 passengers and crew on board, they aimed for the Hudson River

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28. *See* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 16 (William S. Hein & Co. 2006) (1908) England's monarchs between 1216 and 1461 were Henry III, Edward I, Edward II, Edward III, Richard II, Henry IV, Henry V, and Henry VI. *List of English Monarchs*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_English_monarchs [perma.cc/KH6K-MACL] (last visited Jan. 14, 2015).

29. *See, e.g.*, JOHN LOCKE: TWO TREATISES OF GOVERNMENT 330–32 (Peter Laslett ed., Student ed. 1988).

30. Thomas Jefferson, for instance, chose to lead the Declaration of Independence with his classic assertion:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

31. NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 27–29 (2006).

32. *Id.* at 29.

Valley as the lands set for them by the London Company, but they were blown off course northward.[33] With a harsh, early winter approaching even as they were departing a month later than intended, and unable to round the shoals below Cape Cod to head south, they headed for shelter in Massachusetts Bay.[34] Starving, ill, cramped, and grouchy, there were threats of mutiny and lawlessness by the non-Pilgrims aboard—threats that the strong would take what they would from the weak, because they were coming ashore on lands outside their lawful charter.[35]

The wiser minds aboard quickly fashioned the Mayflower Compact, and made signature to it a condition of being permitted even to disembark on November 11, 1620.[36] Any could stay aboard if they so chose, but for those exiting into that unknown and untamed land, they would exit together. The core of that agreement was but a single sentence:

> [We] do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.[37]

Government was established from thin air, for the sake of survival, and "all due submission and obedience" would—or rather, must—be given to that government. But more importantly, the idea of majority rule was expressly and simply established; the individually powerful would not simply overawe the feeble. Yet the Compact constrained that majority in turn. Submission and authority would be owed only to the laws that protected the rights of all, for all agreed that the majority could enact only "just and equal" laws. It is no small irony that the Pilgrim Separatists—now in a struggle for their lives in a distant land because they objected to the institution of state religion

33. *Id.* at 29, 33.
34. *Id.* at 35–39.
35. *Id.* at 39–40.
36. *Id.* at 40–41, 43.
37. MAYFLOWER COMPACT (1620), *reprinted in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 610, 610 (Philip B. Kurland & Ralph Lerner eds., 1987).

back home[38]—found this simple way to assert, in a governing context, the Golden Rule: "do to others what you would have them do to you."[39] Just, and equal.[40]

One of those who signed the Compact, John Alden, in time was the forebear of two Presidents—John Adams and John Quincy Adams.[41] The latter reflected on it in an essay, considering it the "first example in modern times of a social compact or system of government instituted by voluntary agreement conformable to the laws of nature, by men of equal rights and about to establish their community in a new country."[42] The simplicity and unanimity expressed in this document should give us pause today when political differences appear insoluble, and we shall return to the idea of unanimity—not mere majority—on our last steps considering the ratification of the Constitution and drafting of the Bill of Rights.

Before moving on, it is worth recalling what happened after the signing of the Mayflower Compact. The Pilgrims were ashore and could forage, but the cold generally forced them to shelter on ship until spring.[43] Of the 102 aboard, 52—one more than half—did not survive that first, desolate winter.[44] The *Mayflower* set back to England in April 1621, and after some other commercial runs, unaware of her place in history, she was probably salvaged for scrap just three years later.[45] Even so, she and her passengers had brought a continuing lesson to

38. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 9–10.

39. *Matthew* 7:12; *see also Luke* 6:31 (New International Version).

40. The Compact also provided that the laws would be only those "thought most meet and convenient for the general good of the Colony." MAYFLOWER COMPACT, *supra* note 37, at 610. While not exactly a robust statement of limited government, it does express two limitations towards that goal. *See id.* The majority could not touch all or every imaginable aspect of life, but would only legislate for the "general good" of their whole society, and only those means "thought most meet and convenient" to a legitimate end would be deployed, not simply any approximation of what might reach a desired end. *Id.*

41. *Descent of John Quincy Adams from John Alden*, ROOTSWEB, http://homepages.rootsweb.ancestry.com/~pmcbride/rfc/lodus2.htm [perma.cc/9XFL-BGAL?type=image] (last visited Dec. 28, 2014).

42. *The Mayflower Compact*, SOC'Y OF MAYFLOWER DESCENDANTS IN THE ST. OF WASH., www.washingtonmayflower.org/01-compact.html [perma.cc/3FEN-CLBK] (last visited Dec. 28, 2014).

43. PHILBRICK, *supra* note 31, at 80–98.

44. *Id.* at 90.

45. *Id.* at 100–01. Legend has it that the *Mayflower*'s wood was used in the construction of a barn in the English countryside, somewhere between London and Oxford, but that has been largely discredited. *See* Caleb Johnson, *The End of the* Mayflower, CALEB JOHNSON'S MAYFLOWERHISTORY.COM, http://mayflowerhistory.com/end-of-the-mayflower [perma.cc/YZB5-6ZB7] (last visited Dec. 28, 2014).

American shores—that we must carry with us the rule of law wherever we go.

III. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641)

From Magna Carta to Mayflower Compact was a step of 400 years, from London to Cape Cod. Our next step is but twenty years, from Cape Cod to Boston. After surviving that first winter, the population of settlers in Massachusetts Bay quickly grew to outnumber the Native Americans in all of New England.[46] Governing that society became a more complex task. The Body of Liberties of the Massachusets Collonie in New England was the first attempt at a written legal code over the area.[47]

The Mayflower Compact was only a temporary charter among those that first arrived on shore, and it was not intended to establish a permanent form of government.[48] Subsequent charters from England saw discretionary laws emanating from later-appointed governors and magistrates.[49] The laws flowing on this ad hoc basis were not simply gathered and codified. Instead, a Puritan minister, Nathaniel Ward, sought to cast a seeming intersection between Common Law, Magna Carta, and Puritan theology—to varying degrees of success.[50]

Some of those laws were quite specific, and to our eyes today, perhaps surprising and certainly harsh. For instance, capital laws were set by Biblical citation, and so by reference to Leviticus 24 and Deuteronomy 13, a colonist could be put to death for blaspheming the name of God or worshipping another.[51] In

46. PHILBRICK, *supra* note 31, at 179.

47. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 428; THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 5 THE FOUNDERS' CONSTITUTION: AMENDMENTS I–XII 46 (Philip B. Kurland & Ralph Lerner eds., 1987); *see generally Massachusetts Body of Liberties*, MASS.GOV, www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/body-of-liberties.html [perma.cc/Q4LC-WZCN?type=image] (last visited Dec. 28, 2014).

48. *See* 1 THE ANNALS OF AMERICA: 1493–1754: DISCOVERING A NEW WORLD 64 (Mortimer J. Adler et al. eds., 1968) ("By . . . [the] Mayflower Compact, the Pilgrims agreed to govern themselves until they could arrange for a charter of their own.").

49. SOURCES OF OUR LIBERTIES, *supra* note 3, at 143–44; *see also* 1 THE ANNALS OF AMERICA, *supra* note 48, at 163 (observing that by the corporate charter of the Massachusetts Bay Colony, "there was no limit whatever to the authority of its all but self-appointed magistrates.").

50. SOURCES OF OUR LIBERTIES, *supra* note 3, at 144–46.

51. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 47, cl. 94 ("Capitall Laws").

other respects where the Body of Liberties attempted compassion, it overlooked inherent inconsistency—for instance, giving explicit sanction to slavery, while insisting on "Christian" and humane treatment of the slave.[52]

But to its lasting credit, the Body of Liberties began with a recitation of rights, not the dictates of law. As its very name indicates, the Body of Liberties intended—however imperfectly—to establish a governing policy respecting the rights of those within its jurisdiction. The preamble to the Body of Liberties speaks with no less purpose today as the moment pen was set to paper nearly 400 years ago:

> The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance if not the ruine of both.
>
> We hould it therefore our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedomes as for present we foresee may concerne us, and our posteritie after us, And to ratify them with our sollemne consent.[53]

The first two clauses then immediately captured Magna Carta's guarantee of equal protection, trials, and due process of law.[54]

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52. *Id.* at cl. 91.

> There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawfull Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of god established in Israell concerning such persons doeth morally require. This exempts none from servitude who shall be Judged thereto by Authoritie.

Id. Massachusetts' experience with slavery may have been among the more moderate of the Colonies, but slavery was not effectively and entirely extinguished within it until the 1780s, in the wake of its post-Revolutionary Constitution. *See African Americans and the End of Slavery in Massachusetts*, MASS. HIST. SOC'Y, www.masshist.org/endofslavery/index.php?id=54 [perma.cc/6WAX-EE3X] (last visited Dec. 28, 2014).

53. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 428, pmbl.

54. *Id.* at cls. 1 & 2.

> 1. No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembered, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by

After that followed fifteen other enumerated categories of rights addressing in no uncertain terms life, liberty, just compensation for property, freedom of speech, religious toleration, and more.[55] All these rights were to be "impartiallie and inviolably enjoyed and observed throughout our Jurisdiction for ever."[56]

We will consider below why a declaration of rights did not attain this same favored position in the drafting of the federal Constitution. But surely, proclaiming rights first was no accident, and this provided a continuing message to succeeding generations regarding their primacy—before law would be commanded, rights should be established. And these rights were not something to be hoarded and parsed out with reluctance. Consider the treatment granted under a chapter titled "Liberties of Forreiners and Strangers":

> If any people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured amongst us, according to that power and prudence, god shall give us.[57]

This was all without question a religiously based call to law, as well as to rights; so yes, the requirement was that the contemporary pilgrims be Christian. But imagine, when fleeing persecution or famine or war—whatever devastation might befall life in another land—on reaching the shores of Massachusetts in the 17th century, the law accorded individual respect and protection. From their own harsh circumstances, these original settlers understood an important and continuing lesson. Recognizing the rights due to others in society recognizes their humanity and should make them strangers no more.

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a generall Court and sufficiently published, or in case of the defect of a law in any parteculer case by the word of God. And in Capitall cases, or in cases concerning dismembring or banishment according to that word to be judged by the Generall Court.

2. Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

Id.

55. *Id.* at cls. 3–17.

56. *Id.* at 428, pmbl.

57. THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND, *supra* note 47, at 47, cl. 89.

IV. THE ENGLISH BILL OF RIGHTS (1689)

On the last of our ten steps, we will observe James Madison move the First Congress to begin debate on our Bill of Rights in 1789.[58] As Americans, we tend to think of our Bill of Rights as "the one and only" Bill of Rights, but it is not. Exactly 100 years prior, in 1689, Parliament brought an end to a time of great turmoil in England—the Glorious Revolution—with the English Bill of Rights.[59]

Supremacy of the law after Magna Carta over time proved to be a fragile thing. The Crown was cunning and brazen in its expansion of power, and routinely disregarded rights. In direct response to royal provocation, the 1628 Petition of Right, among other things, deprived the King of power to collect taxes without an act of Parliament—no taxation without representation—and enacted clauses safeguarding personal liberty.[60] The Habeas Corpus Act of 1679 strengthened and extended the even-then ancient remedy requiring imprisonments to have a true cause in accord with law.[61]

In a brief three-year reign beginning in 1685, James II was a uniquely flagrant offender that proved an object lesson on the need for separation of powers.[62] He refused to be bound by duly enacted laws, suspended acts of Parliament, and collected unauthorized taxes.[63] He undermined the independence of the judiciary by discharging judges who opposed his will.[64] He interfered in the outcome of elections, and punished the right of petition.[65] He attempted to impose Catholicism, persecuting and forcibly disarming Protestant dissenters.[66] Parliament was dissolved, civil war ensued, and ultimately, James II fled to Paris.[67]

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58. *See infra* Part X.

59. *See* BILL OF RIGHTS (1689), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 1 [hereinafter ENGLISH BILL OF RIGHTS].

60. SOURCES OF OUR LIBERTIES, *supra* note 3, at 62; *see also* THE PETITION OF RIGHT (1628), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 304.

61. SOURCES OF OUR LIBERTIES, *supra* note 3, at 193; *see also* Habeas Corpus Act (1679), *reprinted in* 3 THE FOUNDERS' CONSTITUTION: ARTICLE I, SECTION 8, CLAUSE 5, THROUGH ARTICLE 2, SECTION 1 310, 310 (Philip B. Kurland & Ralph Lerner eds., 1987).

62. SOURCES OF OUR LIBERTIES, *supra* note 3, at 222–33.

63. *Id.*

64. *Id.* at 225.

65. *Id.* at 227–28, 232–33.

66. *Id.* at 225.

67. *Id.* at 222. Much of this history can be discerned from the expansive list of grievances with which the English Bill of Rights commences, including its lead recital that "the late King James the Second, by the assistance of divers evil counsellors, judges, and

The British, however, did not seek to establish a new government without monarchy.[68] They had found themselves without a monarch forty years earlier, and their experience under Oliver Cromwell as Lord Protector of the Commonwealth was not one they longed to repeat.[69] Better, they thought, to establish a succession of the Crown under limits and restraints protecting the people.[70] And so, the former members of Parliament assembled in London to consider next steps, and drafted the English Bill of Rights.[71]

They began with a formal enumeration of grievances against King James II—things he did, and why they were wrong by law and by reason.[72] The Petition of Right had itself used this logical method of proof,[73] and it became a template for demonstration of a people's entitlement to change the condition of their government, culminating in Thomas Jefferson's use of the form in his *tour de force.* But our Declaration of Independence was just that—an enumeration of grievances by which to justify separate and independent government during the American Revolution.[74] The English Bill of Rights instead paired twelve grievances almost directly in the next section to a declaration of thirteen rights and liberties.[75] In this way, the Crown was offered to William of Orange and Mary, the daughter of James II, who promised by their acceptance to protect those rights as acceding monarchs.[76]

Some are stated as absolute rights:

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ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom." ENGLISH BILL OF RIGHTS, *supra* note 59, at 1 recitals.

68. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

69. *See* 16 THE NEW ENCYCLOPAEDIA BRITANNICA 875–79 (15th ed. 2010) *available at* http://global.britannica.com/EBchecked/topic/143822/Oliver-Cromwell [perma.cc/4KBZ-EL8Y] (entry for "Cromwell"). After the restoration of Charles II, Cromwell's body was exhumed and desecrated. *Id.* at 879. While a figure of continual reassessment, he "was execrated as a brave bad man" through "the late 17th century." *Id.*

70. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

71. *See id.*

72. *See id.*

73. *See* THE PETITION OF RIGHT, *supra* note 60, at 304. The Petition of Right itself continued the path forged by Magna Carta of defining and expanding rights in terms of reaction to royal prerogative, which tradition continued into the English Bill of Rights. *See id.*; *see also* ADAMS, *supra* note 12, at 253. "Certain four acts of the king, which were thought to be of great importance, are alleged to be illegal, and the king is pledged in legal form to do them no more. Exactly the same thing is true of the corresponding portion of the Bill of Rights." *Id.*

74. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

75. *See* ENGLISH BILL OF RIGHTS, *supra* note 59, at 1.

76. SOURCES OF OUR LIBERTIES, *supra* note 3, at 222–23.

> [T]he pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.
>
> . . . .
>
> [I]t is the right of the subjects to petition the King, and all committments and prosecutions for such petitioning are illegal.[77]

But others are not absolute. Notice the crucial difference in these phrasings that parallel guarantees in our Bill of Rights:

> [T]he subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.
>
> . . . .
>
> [E]xcessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.[78]

A right to arms, but only as "allowed by law," and as to a certain class of persons.[79] A protection against certain punishments, but one which only "ought not"—as opposed to "shall not"—be disturbed.[80] Many of the liberties in the English Bill of Rights and other documents of the time were not made wholesale a matter of right, but instead remained of continuing discretion. This reflects more interest in confining the divine right of Kings—not eliminating it—and shifting the confined areas to the supremacy of Parliament, rather than directly to the people.[81]

Still, these thirteen expressed guarantees were deemed "the true, ancient, and indubitable rights and liberties of the people of this kingdom."[82] One hundred years later, our Framers not only had to determine which rights to consider "true, ancient, and indubitable" in America, but also the extent to which those rights should be absolute—and if not absolute, where to vest the power to define and limit them. As a society, we continue to wrestle with these same questions. Are there rights yet to be recognized, but which we may say are beyond doubt? If so, are those rights absolute or subject to regulation? If subject to

77. ENGLISH BILL OF RIGHTS, *supra* note 59, at 2, cls. 1 & 5.
78. *Id.* at cls. 7 & 10.
79. *See id.*
80. *See id.*
81. SOURCES OF OUR LIBERTIES, *supra* note 3, at 223. "In England the doctrine of parliamentary sovereignty makes impossible the imposition of restrictions upon the character of legislative enactments." *Id.* at 333.
82. ENGLISH BILL OF RIGHTS, *supra* note 59, at 3.

limitation, who decides those bounds? The President? Congress? Legislatures in the states? Or by persons directly affected, in litigation before judges?

Jeremy Bentham, a British philosopher, jurist, and social reformer of the late 18th century, cast more than a hint of the pejorative in his comment, "[T]he power of the lawyer is in the uncertainty of the law."[83] Yet that very power from uncertainty means that there have always been and always will be difficult questions—like those above—to sort out with a lawyer's skill. We should be careful and modest in the exercise of this power, if for no other reason than that Mr. Bentham is elsewhere reputed to have said, "Lawyers are the only persons in whom ignorance of the law is not punished."[84]

V. WILLIAM BLACKSTONE (1765)

Sir William Blackstone is someone we all know by reputation—or at least by the reputation of his *Commentaries on the Laws of England.* Legal scholars can rely on the *Commentaries* to be an objective chronicle of English legal history and an accurate statement of English law at the time of the American Revolution and Constitutional Convention. As far as he could see it, Blackstone aimed to present the trustworthy and honest view, leaving any partisan goals aside. In his last years, as a Member of Parliament, he described himself as "amid the Rage of contending Parties, a Man of Moderation."[85]

The *Commentaries* comprise four volumes. Blackstone simply and directly titled Book One as a consideration "Of the Rights of Persons," with Chapter One being his discussion "Of the Absolute Rights of Individuals."[86] From first word to last, he

83. *In re* Cheng, 943 F.2d 1114, 1117 (9th Cir. 1991) (quoting Letter from Jeremy Bentham to Sir Jas. Mackintosh (1808), *reprinted in* 10 THE WORKS OF JEREMY BENTHAM 429 (J. Bowring ed., 1962)).

84. THE DICTIONARY OF HUMOROUS QUOTATIONS 29 (Evan Esar ed., 1949). The Wikiquote entry for "Jeremy Bentham" notes a dispute on such attribution, as no direct sources appear. *Jeremy Bentham,* WIKIQUOTE, http://en.wikiquote.org/wiki/Jeremy_Bentham [perma.cc/7VQM-SSZZ] (last updated Dec. 10, 2014).

85. *See Blackstone, Sir William, in* 2 THE NEW ENCYCLOPAEDIA BRITANNICA 264 (15th ed. 2010) *available at* http://global.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone [perma.cc/7XE6-T9JQ].

86. *See Blackstone's Commentaries on the Laws of England,* THE AVALON PROJECT, http://avalon.law.yale.edu/subject_menus/blackstone.asp [perma.cc/BR8Y-BPMF] (last visited Dec. 31, 2014).

expounds each of the absolute and relative rights of the English people and closes his opening twenty-five pages with this passage:

> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of, than thoroughly understood .... And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliaments be supported in it's full vigor; and limits certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther enquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens.[87]

This was and is a powerful idea—that of rights attained by birthright. Approaching revolution, the citizens of the American colonies knew what Blackstone declared to be their "birthright" as Englishmen. The four volumes of Blackstone's *Commentaries* appeared between 1765 and 1769, quite proximate to the American Revolution.[88] A bookseller named Robert Bell published the first American edition beginning in 1771, in Philadelphia, at the moderate price of two dollars per volume.[89] In March of 1775, Edmund Burke observed to Parliament that there were "nearly as many of Blackstone's Commentaries in

87. WILLIAM BLACKSTONE, COMMENTARIES 1:120–41 (1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 388, 394.

88. *Blackstone, Sir William, supra* note 85, at "Early Life."

89. Gareth Jones, *Introduction* to THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S *COMMENTARIES ON THE LAWS OF ENGLAND*, at xlvii (Gareth Jones ed., 1973).

America as in England," and that this education in the law was a circumstance propelling what he called "[t]his fierce spirit of liberty" in the Colonies.[90]

With Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights, a truly significant array of rights came with being an Englishman in the latter half of the eighteenth century. And truth be told, for the longest time, the Colonists wanted to be more English, not less. The Founders saw no reason that birth across an ocean deprived them of rights unquestionably due to them—if not simply because they were born to the human race, then certainly because they had the good fortune to be born to enlightened England. They did not seek recognition of new rights, but rather, simple recognition that they were due the same rights owed to every Englishman.[91]

Blackstone's *Commentaries* did not change or enact law, but I mention it to emphasize the overall conversation with respect to rights and its accelerating pace in America. While harder to draw a modern lesson, perhaps we can simply learn from the man himself. William Blackstone was not born into nobility, but instead into the London middle class, the posthumous son of a silk mercer.[92] He was not destined for a life of great learning, but his quick mind led to education at Oxford.[93] Following his call to the bar in 1746, he experienced no greatness in practice as a barrister, which began slowly and not terribly successfully.[94] He turned to legal scholarship and eventually, to an absurd ambition to provide a complete and unified overview of English law.[95] He then labored for sixteen years and succeeded beyond the wildest imaginings, bringing forth a revered treatise that opened the law—and rights under the law—to an understanding by laymen.[96]

We should bear this in mind when undertaking our tasks as lawyers today, whether on behalf of a client or in public service. Sir Blackstone's experience says, "Aim high."

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90. Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 3, 4–5.

91. *See infra* Part VI.

92. *Blackstone, Sir William*, *supra* note 85, at 263.

93. *Id.*

94. *Id.*

95. *Id.* at 264.

96. *See id.*

VI. DECLARATIONS, RESOLVES, AND ADDRESSES (1774)

After Blackstone, we reach the very point of the revolution. 1770 opened with the Boston Massacre, and 1773 closed with the Boston Tea Party.[97] In 1774, Parliament responded with what it deemed The Coercive Acts—closing the Port of Boston, stripping Massachusetts of self-governance, moving trials of royal officials to London, and quartering British troops in and around Colonial homes.[98] These came to be known domestically as The Intolerable Acts, crystallizing a view that England believed the rights of colonial Americans were simply of a lower order than the rights of the English themselves.[99] Reaction to those Acts was a principal catalyst for change.

Bunker Hill and the Revolutionary War were still a year away, and the Colonists had just about enough of imperious rule from afar in the form of a distant and seemingly disconnected King and Parliament.[100] That discontent shot through the whole of American society, finding expression in local, national, and international form. Various groups and governing bodies spoke sharply and more directly to the abrogation of the people's rights over time—while still trying to maintain at least the gloss of sworn allegiance to the Crown.

Fairfax County, Virginia, is just across the Potomac River from what is now Washington, D.C. Mount Vernon sits within it.[101] In early July of 1774, in a show of solidarity with Massachusetts in the face of The Intolerable Acts, Washington commissioned efforts in Fairfax County to "define our Constitutional Rights."[102] This became the Fairfax County Resolves, signed later that month "[a]t a general Meeting of the Freeholders and Inhabitants of the County of Fairfax . . . at the Court House," with Washington as chairman.[103] The first resolution proclaimed the American birthright described by Blackstone:

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97. *Timeline of the Revolutionary War*, USHISTORY.ORG, July 4, 1995, www.ushistory.org/declaration/revwartimeline.htm [perma.cc/69X9-HP6G].

98. *See* ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789, at 233–40 (1st ed. 1982).

99. *See id.*; *see also* SOURCES OF OUR LIBERTIES, *supra* note 3, at 261 (noting the "indifference of England to American affairs").

100. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272 (describing England's inept handling of colonial affairs and the driving away of American colonies from the crown).

101. *See Hours & Directions*, GEORGE WASHINGTON'S MOUNT VERNON, www.mountvernon.org/library/hours-directions [perma.cc/4W9N-DV9N] (last visited Jan. 4, 2015).

102. JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 65 (2006).

103. FAIRFAX COUNTY RESOLVES (July 18, 1774), *reprinted in* 1 THE FOUNDERS'

> That our Ancestors, when they left their native Land, and setled in America, brought with them . . . the Civil-Constitution and Form of Government of the Country they came from; and were by the Laws of Nature and Nations, entitiled to all it's Privileges, Immunities and Advantages; which have descended to us their Posterity, and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England.[104]

Thirty other counties in Virginia did likewise, as did counties throughout the Colonies.[105] Unity is the only strategy, they said; the troubles of one are the troubles of all.[106] "Join, or die."[107] Benjamin Franklin had famously cartooned this intensely local slogan in 1754, urging colonial support of Britain in the French and Indian War.[108] To unite the Colonies against England, Paul Revere co-opted the message in his engraving for a Boston paper on July 7, 1774.[109]

Local action became the tentative first steps of truly national action in September 1774, with the First Continental Congress organized in the wake of these resolves.[110] The next month, the Continental Congress issued its own Declaration and Resolves to speak in solidarity—if not quite yet nationally—to the Crown.[111] It called for the repeal of a host of laws and set out ten resolutions declaring that American colonists had the same rights as all English citizens: entitlement to life, liberty, and property; participation in legislation; protection of the common law and trial by jury; and peaceable assembly and petition.[112]

CONSTITUTION, *supra* note 37, at 633, 633.

104. *Id.* at cl. 1.

105. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272–73.

106. For instance, a merchant committee from New York responded this way to an appeal from Boston merchants to halt trade with England: "As a sister colony, suffering in defense of the rights of America, we consider your injuries as a common cause, to the redress of which it is equally our duty and our interest to contribute." A Proposal for a Continental Congress (1774), *reprinted in* 2 THE ANNALS OF AMERICA: 1755–1783, RESISTANCE AND REVOLUTION 254, 254 (Mortimer J. Adler ed., 1968).

107. *See* Benjamin Franklin, *Join or Die*, PA. GAZETTE, May 9, 1754, at 2; *see also Benjamin Franklin . . .In His Own Words: Join or Die*, LIBR. OF CONGRESS (Aug. 16, 2010) www.loc.gov/exhibits/treasures/franklin-cause.html [perma.cc/BPH5-7DDF].

108. *See* Franklin, *supra* note 107; *see also* GORDON S. WOOD, THE AMERICANIZATION OF BENJAMIN FRANKLIN 72–78 (2004).

109. Paul Revere, *Unite or Die*, MASS. SPY, July 7, 1774, at 1; *see also A More Perfect Union: Symbolizing the National Union of the States*, LIBR. OF CONGRESS, www.loc.gov/exhibits/us.capitol/s1.html [perma.cc/34Q6-7Y9U] (last visited Dec. 31, 2014) (entry for "Paul Revere Adopts Snake Device").

110. SOURCES OF OUR LIBERTIES, *supra* note 3, at 272–73.

111. CONTINENTAL CONGRESS, DECLARATION AND RESOLVES (Oct. 14, 1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 1.

112. *Id.* at nos. 1, 4, 5 & 8, at 2.

Two weeks later the Continental Congress reached out with an Address to the Inhabitants of the Province of Quebec.[113] Quebec had its own concerns under rule from abroad, particularly regarding the fit of its French Catholicism with the Anglican Church of England.[114] That letter from Congress closed with a pledge to consider a violation of Quebec's rights as a violation of our own and an invitation to the people of Quebec to join our struggle, our cause, and our formative union.[115] In plain language to Quebec's citizens, the Continental Congress reviewed what it considered the preeminent rights of trial by jury, writ of habeas corpus, freedom of the press, and liberty of conscience in choice of religion.[116] But the entire discussion led with this: "[T]he first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by *laws*, which they themselves approve, not by *edicts* of *men* over whom they have no controul."[117]

John Marshall gets a lot of credit for saying well what others said first. In *Marbury v. Madison*, he cast the more memorable phrasing: "The Government of the United States has been emphatically termed a government of laws, and not of men."[118] We should recall today that Marshall said this not merely in

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113. Letter from Continental Congress to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 441.

114. *Id.* at 442.

> These are the rights *you* are entitled to and ought at this moment in perfection, to exercise. And what is offered to you by the late Act of Parliament in their place? Liberty of conscience in your religion? No. God gave it to you; and the temporal powers with which you have been and are connected, firmly stipulated for your enjoyment of it. If laws, divine and human, could secure it against the despotic caprices of wicked men, it was secured before. . . . Such is the precarious tenure of mere *will*, by which you hold your lives and religion.

Id.

115. *Id.* at 444.

> In this present Congress, beginning on the fifth of the last month, and continued to this day, it has been, with universal pleasure and an unanimous vote, resolved, That we should consider the violation of your rights, by the act for altering the government of your province, as a violation of our own, and that you should be invited to accede to our confederation, which has no other objects than the perfect security of the natural and civil rights of all the constituent members, according to their respective circumstances, and the preservation of a happy and lasting connection with Great-Britain, on the salutary and constitutional principles herein before mentioned.

Id.

116. *See id.* at 442–43.

117. *Id.* at 442.

118. 5 U.S. (1 Cranch) 137, 163 (1803).

service of defining and applying the power of judicial review. He asserted it in terms matching that "first grand right" claimed before the Revolution, a right respecting the very frame of government itself. Ours would and should always be a nation of just laws, determined by the people themselves, equally applicable to all.

VII. THE VIRGINIA DECLARATION OF RIGHTS, AND OTHERS (1776)

In the middle of the year 1776, the Declaration of Independence declared us to be a collection of free and independent states, with all ties of loyalty to England and her government dissolved.[119] This led to several interesting questions, including prominently: Well, now what do we do? We grew tired of the Crown, but how will we govern ourselves? Parliament failed us, so how will we establish and protect our own rights?

Several states were already crossing that bridge to independence. New Hampshire in January, South Carolina in March, and New Jersey in July each adopted their first fully autonomous constitutions.[120] Together with New York in 1777, these charters came with a list of grievances against the Crown—as seen a century before with the English Bill of Rights—but with no express enumeration of rights.[121]

Virginia struck a different path, becoming the model for other states. On June 12, Virginia formally adopted its own Declaration of Rights—sixteen rights it declared to be "the basis and foundation of government."[122] Only then did it adopt its Constitution on June 29, less than a week before July 4.[123] Later in 1776, Delaware, Maryland, North Carolina, and Pennsylvania each prefaced their own constitutions with their conception of a Declaration of Rights, as did Massachusetts in 1780.[124] The newly

119. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

120. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 309–10, 379; *see also* S.C. CONST. OF 1776, *available at* http://avalon.law.yale.edu/18th_century/sc01.asp [perma.cc/SA2L-G8PS]; N.J. CONST. of 1776, *available at* http://avalon.law.yale.edu/18th_century/nj15.asp [perma.cc/J576-ZPWS].

121. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 309–10.

122. VIRGINIA DECLARATION OF RIGHTS (June 12, 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 3.

123. VA. CONST., *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 7; *see also* SOURCES OF OUR LIBERTIES, *supra* note 3, at 311.

124. DELAWARE DECLARATION OF RIGHTS (Sept. 11, 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 5; PA. CONST. OF 1776, DECLARATION OF RIGHTS, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 6; MASS. CONST. OF

independent states fairly bristled with rights—more than 150 phrasings of various and overlapping guarantees.

Each of the individual liberties guaranteed in our Bill of Rights saw at least some phrasing in these earlier state declarations.[125] Yet many of those expressions of rights did not make our final, federal list. The breadth of those rights is something to keep in mind when puzzling the plain dictates of the Ninth Amendment that other rights exist and are retained by the people, neither denied nor disparaged merely because the Constitution did not enumerate them.[126]

Would express inclusion of any of those other rights at the national level have made a difference to the people and in our history? Consider:

- What if our Bill of Rights provided means to establish congressional term limits?[127]
- What if it enshrined widely open access to courts for injuries received?[128]
- What if the Bill of Rights granted an express and continuing right to alter or abolish the entirety of our governmental structure by majority vote?[129]

1780, PT. 1, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 7; MD. CONST. OF 1776, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 3, at 346; N.C. CONST. of 1776, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 3, at 355.

125. *See* U.S. CONST. amend. IX, X. The Ninth Amendment (consideration of non-enumerated rights) and the Tenth Amendment (consideration of powers not delegated to federal government or prohibited to states) were unnecessary to a state, rather than federal, charter.

126. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

127. The Virginia Declaration of Rights states:

> That the Legislative and Executive powers of the State should be separate and distinct from the Judicative; and, that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the law shall direct.

VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 4; *see also* MD. CONST. of 1776, DECLARATION OF RIGHTS, cl. XXXI, *available at* http://avalon.law.yale.edu/17th_century/ma02.asp [perma.cc/J5H7-TFKL].

128. The Delaware Declaration of Rights states:

> That every freeman for every injury done him in his goods, lands or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

DELAWARE DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 12; *see also* MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 8, cl. XI.

- What if it specifically proclaimed that the President could not unilaterally suspend laws or their exercise?[130]
- What if the Bill of Rights admonished us to adhere to moral-first principles, with suggestions we monitor the same in our elected officials?[131]

The Virginia Declaration of Rights served as a template for many of these expressions of rights, and one of its clauses could well have merited inclusion within the federal listing of rights. For Virginia's first enumerated right anticipated the very best language from the Declaration of Independence, and announced:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[132]

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129. The Pennsylvania Declaration of Rights states:

> That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.

PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 6–7, cl. V; *see also* VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 3.

130. *See* VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 7. "That all power of suspending laws, or the execution of laws, by any authority, without consent of the Representatives of the people, is injurious to their rights, and ought not to be exercised." *See also* DELAWARE DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 7; MD. CONST., *supra* note 124, at 347, cl. VII; MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 9, cl. XX; N.C. CONST., *supra* note 124, at 355, cl. V.

131. The Massachusetts Constitution of 1780 states:

> A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government: The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: And they have a right to require of their law-givers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth.

MASS. CONST. OF 1780, PT. 1, *supra* note 124, at 9, cl. XVIII; *see also* PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 7, cl. XIV; N.C. CONST., *supra* note 124, at 356, cl. XXI.

132. VIRGINIA DECLARATION OF RIGHTS, *supra* note 122, at 3, cl. 1; *see also* PA. CONST. OF 1776, DECLARATION OF RIGHTS, *supra* note 124, at 6, cl. 1.

Just imagine the traction a clause giving expression to rights in that form would have had in our history and in modern litigation. Perhaps it would have raised more questions than it answered. How can each of us better enjoy our life and liberty? Are the means by which to acquire and possess property sufficient? Is everyone equally entitled to pursue and obtain his or her own happiness and safety in this world? On the other hand, if we profess to care about rights, perhaps those are the very questions we should regularly ask and seek to redress through our political process, even today.

VIII. THE NORTHWEST ORDINANCE (1787)

In May of 1787 the Constitutional Convention assembled in Philadelphia, concluding its work on September 17, with a draft Constitution transmitted to Congress and suggested for ratification by the states.[133] Before taking that step, however, we must stop just short.

Sanction of slavery was a painful compromise thought necessary to establish and then continue the Union.[134] In a discussion of inalienable rights and liberties, we cannot just ignore the Constitution's clauses that accommodated slavery while going to great lengths to avoid even speaking its name—the "three-fifths" rule,[135] the continuance of the slave trade,[136]

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133. *See* Federal Convention, Resolution and Letter to the Continental Congress (Sept. 17, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 194.

134. "The Southern States would not have entered into the Union of America without the temporary permission of that trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us." Debate in Virginia Ratifying Convention (June 15, 1788) (statement of Mr. Madison), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 292, 292; *see also* Letter from John Jay to Richard Price (Sept. 27, 1785), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 538; RECORDS OF THE FEDERAL CONVENTION (Aug. 8–25, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 279–82; James Wilson, Pennsylvania Ratifying Convention (Dec. 3–4, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 283–84; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 2:§§ 630–35, 641–47, 673–80 (1833), *reprinted in* 2 THE FOUNDERS' CONSTITUTION: PREAMBLE THROUGH ARTICLE 1, SECTION 8, CLAUSE 4, at 140 (Philip B. Kurland & Ralph Lerner eds., 1987).

135. U.S. CONST. art. I, § 2, cl. 3.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

136. *Id.* art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.").

and the recovery of slaves.[137] This was a conscious choice over the loud dissent of writers and orators who lamented the rationalizations that marginalized and diminished persons among us, who were indeed part of "us," even as they were not deemed to be part of "we, the people."[138]

Advocacy in the South acknowledged the reality of the harsh circumstances facing slaves:

> [W]hile there remain[s] one acre of swamp-land uncleared of South Carolina, I [will] raise my voice against restricting the importation of negroes. I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a desert waste.[139]

Opinion in the mid-Atlantic and Northeast ran just as passionately in opposition:

> It does not seem to be justice, that one man should take another from his own country, and make a slave of him; and yet we are told by this new constitution, that one of its great ends, is to establish justice; alas! my worthy friend, it is a serious thing to trifle with the great God; his punishments are slow, but

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137. *Id.* art. IV, § 2, cl. 3.

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

See also id. art. V (forbidding amendment to Art. I, sec. 9, cl. 1 until 1808).

138. Brutus referred to the "three fifths of all other Persons" phrasing in the Apportionment Clause and wryly observed:

> What a strange and unnecessary accumulation of words are here used to conceal from the public eye, what might have been expressed in the following concise manner. Representatives are to be proportioned among the states respectively, according to the number of freemen and slaves inhabiting them, counting five slaves for three free men.

BRUTUS, NO. 3 (Nov. 15, 1787), *reprinted in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 134, at 115, 115. Condemning the practice, he also foresaw the political ramifications from allowing continuation of the slave trade to count towards later apportionment in the House:

> What adds to the evil is, that these states are to be permitted to continue the inhuman traffic of importing slaves, until the year 1808—and for every cargo of these unhappy people, which unfeeling, unprincipled, barbarous, and avaricious wretches, may tear from their country, friends and tender connections, and bring into those states, they are to be rewarded by having an increase of members in the general assembly.

Id.

139. Debate in South Carolina House of Representatives (Jan. 17, 1788) (statement of Gen. C.C. Pinckney), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 287, 287.

> always sure; and the cunning of men, however deep, cannot escape them.[140]

Was another path available? If immediate ratification by every state was the only and necessary goal, perhaps not. But politically, the Confederation Congress in New York actually cleared the path away from slavery even as the Framers proceeded in Philadelphia.[141] On July 13, 1787, the Northwest Ordinance established the temporary, territorial government over lands that would go on to become Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.[142] These areas lay outside the thirteen original states, and so they were without an inherent frame of government.[143] For those settlers and pioneers, it was a place upon which a framework of government could proceed from a genuinely national perspective when seeking to promote the purchase and settlement of these lands.[144] And it was here that Congress set down what truly may be called our first national bill of rights, "considered as articles of compact, between the original States and the people and States in the said territory" to "forever remain unalterable."[145]

These six Articles guaranteed rights including religious freedom, resort to habeas corpus, trial by jury, due process of law, no cruel or unusual punishment, and the like.[146] But one clause, Article VI, commands special respect: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted . . . ."[147]

In 1809, Abraham Lincoln was born in Kentucky to a father opposed to slavery.[148] As a young man he moved to Illinois, so he

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140. A COUNTRYMAN (Dec. 13, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 284, 285; *see also* Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 517; Joshua Atherton, New Hampshire Ratifying Convention (1788), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 286.

141. NORTHWEST ORDINANCE (July 13, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 27, 29, sec. 14, art. VI.

142. *Id.* at 27.

143. *See* SOURCES OF OUR LIBERTIES, *supra* note 3, at 389 (explaining how new territories were to establish their own governments).

144. *See id.* at 387–89.

145. NORTHWEST ORDINANCE, *supra* note 141, at 28, sec. 14.

146. *Id.* at 28–29.

147. *Id.* at 29, sec. 14, art. VI.

148. *Abraham Lincolns Slavery*, ABRAHAMLINCOLNS.COM, www.abrahamlincolns.com/abraham-slavery.php [perma.cc/C85A-U2H7] (last visited Dec. 31, 2014).

came of age within the promise of the Northwest Ordinance.[149] He looked to this document in his path-marking Peoria speech in 1854, arguing against the extension of slavery with the expansion of the boundaries of the United States.[150] The Ordinance set a policy of prohibiting slavery in new territory, and Lincoln said this was evidence of original intent.[151] And thus Lincoln pleaded for the nation to recognize that the founding generation venerated individual rights, largely deplored slavery, and intended for it never to exist outside the territorial bounds of the original Colonies.[152]

This was two years before *Dred Scott*,[153] and seven years before the conflagration of the Civil War.[154] But still that war came, a fate clearly foretold at the Constitutional Convention in 1787. Slavery was the focus of debate there at least three times.[155] Bluffs were made and not called, for instance, with respect to the Importation of Persons Clause:

> If the Convention thinks that N. C; S. C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States

149. *American President: A Reference Resource*, MILLER CENTER, http://millercenter.org/president/lincoln/essays/biography/2 [perma.cc/HYK3-FSVC] (last visited Dec. 31, 2014).

150. *See* Abraham Lincoln, Against the Extension of Slavery (16 Oct. 1854), *reprinted in* 8 THE ANNALS OF AMERICA: 1850–1857, A HOUSE DIVIDING 276, 276–82 (Mortimer J. Adler ed., 1968).

151. *See id.* at 281.

152. *See id.* Lincoln stated:

> I object to [the extension of slavery] because it assumes that there can be moral right in the enslaving of one man by another. I object to it as a dangerous dalliance for a few people; a sad evidence that, feeling prosperity, we forget right; that liberty, as a principle, we have ceased to revere. I object to it because the fathers of the republic eschewed and rejected it. The argument of "necessity" was the only argument they ever admitted in favor of slavery, and so far, and so far only as it carried them, did they ever go. They found the institution existing among us, which they could not help; and they cast blame upon the British king for having permitted its introduction. Before the Constitution, they prohibited its introduction into the Northwestern Territory—the only country we owned then free from it. At the framing and adoption of the Constitution, they forbore to so much as mention the word "slave" or "slavery" in the whole instrument.

Id.

153. 60 U.S. (19 How.) 393 (1856).

154. *American Civil War*, ENCYCLOPAEDIA BRITANNICA ONLINE, www.britannica.com/EBchecked/topic/19407/American-Civil-War [perma.cc/YTY2-4KW3] (last visited Dec. 31, 2014).

155. *See infra* notes 159–60 and accompanying text.

> will never be such fools as to give up so important an interest.[156]

In opposition, George Mason—credited by history as the author of the Virginia Declaration of Rights—argued the consequences of national acquiescence:

> Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes & effects providence punishes national sins, by national calamities.[157]

Not nearly enough was done on this issue and for these individual persons at the time of framing. Resolution in 1787—within the fabric of the Constitution as in the Northwest Ordinance—would have altered the history of our first hundred years, and thus also the history of our second hundred and beyond.[158] This was an opportunity missed, and that is a continuing lesson. History will set straight the path, but that is not enough—for it should always be today's task.

IX. THE CONSTITUTIONAL CONVENTION AND RATIFICATION DEBATES (1787)

When I teach my class on Origins of the Federal Constitution, a couple of my favorite documents are influential speeches from the day, which are somewhat lost now to the popular mind. One is Benjamin Franklin's speech to the Constitutional Convention,

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156. RECORDS OF THE FEDERAL CONVENTION (Aug. 22, 1787), *supra* note 134, at 281 (John Rutledge). Rutledge was a delegate from South Carolina, and the second Chief Justice of the U.S. Supreme Court. EDWARD J. LARSON & MICHAEL P. WINSHIP, THE CONSTITUTIONAL CONVENTION: A NARRATIVE HISTORY FROM THE NOTES OF JAMES MADISON 175–76 (2005). Hugh Williamson of North Carolina and Abraham Baldwin of Georgia flatly confirmed their states would not join a government under a Constitution that prohibited slavery. *See* RECORDS OF THE FEDERAL CONVENTION (Aug. 22, 1787), *supra* note 134, at 281.

157. RECORDS OF THE FEDERAL CONVENTION, *supra* note 134, at 280 (George Mason).

158. The design of the Northwest Ordinance also required a different, higher path with respect to Native Americans here before any settlers and colonists:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

NORTHWEST ORDINANCE, *supra* note 141, at 28–29, sec. 14, art. III. Within the Constitution, their fate was left simply to the shifting tides of popular opinion. *See* U.S. CONST. art. I, § 8, cl. 3 (commerce); art. II, § 2, cl. 2. (treaties).

who at age eighty-two urged not just unity, but unanimity on the very day the Framers accepted the final draft:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.
>
> . . . .
>
> . . . I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument.[159]

Franklin's was a call to reach across lingering differences, and to put aside vanity and individual preference in favor of the continued strength and security of a nation still struggling, in the words of the Declaration of Independence, "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."[160] But unanimity faltered, with three of the forty-two delegates still involved that last day refusing to sign—due most directly to their objection that the Constitution provided no Bill of Rights.[161]

Was a Bill of Rights necessary to the new Constitution? The example of the Virginia Declaration of Rights was freshly before them, as were the recent declarations from several other states.[162] And a long tradition dating back to the Massachusetts Body of Liberties suggested that in America, recognition and protection

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159. Benjamin Franklin to the Federal Convention (Sept. 17, 1787), *reprinted in* 4 THE FOUNDERS' CONSTITUTION: ARTICLE 2, SECTION 2, THROUGH ARTICLE 7, at 657, 657–58 (Philip B. Kurland & Ralph Lerner eds., 1987).

160. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

161. *See* LARSON & WINSHIP, *supra* note 156, at 156. Edmund Randolph and George Mason, both of Virginia, and Elbridge Gerry, of Massachusetts, refused. *Id.* Randolph ultimately switched his view, and worked in support of ratification. *Id.* at 175. Others of the fifty-five original delegates were absent or had previously departed in protest before the signature date. *See id.* at 168–78.

162. *See The Virginia Declaration of Rights*, THE CHARTERS OF FREEDOM, www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html [perma.cc/V26U-DN5Y] (last visited Dec. 31, 2014) (describing the Declaration's role in the drafting of the Bill of Rights).

of rights was not a matter separate from the frame of government and its laws.

Madison's notes from the Convention show that they took up the issue.[163] Very late in the process there came a request for provisions protecting habeas corpus, prohibiting religious tests or qualifications, preserving the liberty of the press, and forbidding the quartering of soldiers in homes in time of peace.[164] The first two found their way into later drafts of the Constitution; the latter two did not.[165] This led George Mason in the final week to seek more, and move inclusion of the important liberties that had not found their express place:

> A general principle laid down [as to civil jury trial] and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.[166]

They had been at it since May; it was now September and not a single state supported the motion.[167] Yet events quickly proved Mason correct, and that gap became a major flashpoint for opposition.[168]

This probably surprised the members of the Convention. The Articles of Confederation hardly addressed the protection of rights at all, beyond provision that "free inhabitants . . . shall be entitled to all privileges and immunities of free citizens in the several states."[169] But then again, the Articles established only a "firm league of friendship" between the States and reserved almost all powers to them.[170] The structure of that first national government indicates just how scant were the powers given to it: no chief executive, no national judiciary, no ability to take any

163. LARSON & WINSHIP, *supra* note 156, at 149–50.

164. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341–42 (Max Farrand ed., 1911).

165. U.S. CONST. art. I, § 9, cl. 2 (habeas corpus); U.S. CONST. art. VI, cl. 3 (prohibiting religious tests for federal office).

166. RECORDS OF THE FEDERAL CONVENTION (Sept. 12, 1787) (noting remarks of George Mason), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 447, 447.

167. *Id.*

168. *See infra* text accompanying notes 178–82.

169. ARTICLES OF CONFEDERATION (1 Mar. 1781), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 23, art. IV.

170. *Id.* at art. III.

significant action without a unanimous vote from the states.[171] The new federal Constitution would upend all that.[172]

At the Convention, the very structure of the new government was argued as its own protector and guarantor of rights.[173] Picking up and amplifying the theme, the Federalists in favor of ratification argued that, for the first time in history, the people themselves would establish a government of limited and enumerated powers, and where that government did not receive power, it did not have the means to infringe the rights of the people.[174] Alexander Hamilton expanded on this best, in Federalist No. 84:

> Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. "We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.[175]

The argument utterly failed to mollify the Anti-Federalists. They took the new Constitution at face value, and under pseudonyms took pen in hand to argue almost from syllogism. *Major premise*, from Federal Farmer: the Supremacy Clause establishes that the national Constitution, laws, and treaties will be the supreme law of the land, displacing contrary state laws.[176]

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171. *See id.* at 23–26 (noting the lack of power given to the national government).

172. *See* Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 534–37 (1908) (discussing the defects of the Articles of Confederation and the Constitution's remedies).

173. RECORDS OF THE FEDERAL CONVENTION, *supra* note 166, at 447 (Sept. 12, 1787) (noting remarks of Roger Sherman, that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient").

174. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 467.

175. *Id.* at 468.

176. FEDERAL FARMER, NO. 4 (Oct. 12, 1787), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 159, at 597.

> [W]herever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away: And not only this, but the laws of the United States which shall be made in pursuance of the federal constitution will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away.

Id. at 598.

Minor premise, per Brutus: the Necessary and Proper Clause will come to mean that no limit exists on areas over which the federal government has power.[177] *Conclusion*, via An Old Whig: the federal government has power to trump all that has been set down in various state declarations of rights, and so the people's rights are at risk.[178]

George Mason intensified his objection from the Convention in his argument at the Virginia Ratifying Convention:

> All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared to be paramount to the power of the legislature. He asked, why should it not be so in this constitution? . . . He declared, that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.[179]

Thomas Jefferson followed the Convention and ratification process from Paris while serving as Minister to France.[180] In various letters to James Madison and others, he expressed the rippling discontent many felt with the idea of an implied protection of rights—an implication itself resting only upon the self-restraint of the new federal government.[181] To Madison, in December 1787: "Let me add that a bill of rights is what the people are entitled to against every government on earth,

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177. BRUTUS, NO. 1 (Oct. 18, 1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 61, at 240, 240 ("The powers given by this article are very general and comprehensive, and it may receive a construction to justify the passing almost any law.").

178. AN OLD WHIG, NO. 5 (Fall 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 85.

> Wise and prudent men always take care to guard against danger beforehand, and to make themselves safe whilst it is yet in their power to do it without inconvenience or risk.—[W]ho shall answer for the ebbings and flowings of opinion, or be able to say what will be the fashionable frenzy of the next generation?

Id. at 86.

179. George Mason, Virginia Ratifying Convention (June 16, 1788), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 472, 472.

180. *Colleagues and Friends: Thomas Jefferson*, JAMES MADISON'S MONTPELIER, www.montpelier.org/james-and-dolley-madison/james-madison/politician-and-statesman/colleagues/thomas-jefferson [perma.cc/YN28-QFMN] (last visited Jan. 3, 2015).

181. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 456.

general or particular, and what no just government should refuse, or rest on inference."[182]

But unlike the Anti-Federalists—who really wanted nothing much to do with the new Constitution except to see it voted down—Jefferson saw the means to a cure. To another friend, in February 1788:

> I wish with all my soul that the nine first Conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they be, may refuse to accede to it till a declaration of rights be annexed. This would probably command the offer of such a declaration, and thus give to the whole fabric, perhaps as much perfection as any one of that kind ever had. By a declaration of rights I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. These are fetters against doing evil which no honest government should decline.[183]

The vote did not go down exactly as Jefferson hoped, but as noted next, it was a fair approximation.[184] We would have a new Constitution in force aiming to "establish Justice" and "secure the Blessings of Liberty to ourselves and our Posterity."[185] But that "more perfect Union" part would require a bit more work.

X. CONGRESSIONAL DEBATE ON THE BILL OF RIGHTS (1789)

All persons like to believe they live in extraordinary times, and so we commonly hear that our current Congress is the most fractious in history. But by any measure, when the First Congress assembled in March 1789, all was not harmony and grace. Six states had approved the Constitution in short order.[186] But Massachusetts ratified on a very close vote, and proposed nine amendments to "remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal

182. *Id.* at 457.

183. Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788), *in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 159, at 663.

184. *See infra* Part X.

185. U.S. CONST. pmbl.

186. By February 1788, Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut had each in turn ratified the proposed Constitution. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 6 (2005).

government."[187] With that, the cascade began.[188] South Carolina ratified and proposed two amendments.[189] New Hampshire, twelve.[190] Virginia, twenty.[191] New York, thirty-three, while barely ratifying by a 30–27 margin.[192] When that First Congress met, two of the original Colonies were not yet even part of the United States.[193] Rhode Island refused entirely to call a ratification convention.[194] And while the North Carolina convention met, it refused to ratify until Congress considered a declaration of twenty proposed rights and twenty-six amendments.[195]

So profound was this division that George Washington directed large concern to it in his first inaugural address. "[I]t will remain with your judgment to decide," he told Congress, "how far an exercise of the occasional power delegated by the Fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the System, or by the degree of inquietude which has given birth to them."[196] And he reposed great faith and trust in Congress, urging them to amend the fledgling Constitution after considering how best, in his words, to "impregnably

187. MASSACHUSETTS RATIFYING CONVENTION, RATIFICATION AND PROPOSED AMENDMENTS (Feb. 6, 1788), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 37, at 461, 461; *see also* AMAR, *supra* note 186, at 6.

188. *See generally* FRAMERS OF THE CONSTITUTION 94–96, (James H. Charleton, Robert G. Ferris & Mary C. Ryan eds., Nat'l Archives and Records Admin. 1986) (1976).

189. *Ratification of the Constitution by the State of South Carolina; May 23, 1788*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/ratsc.asp [perma.cc/TQ52-XJSY] (last visited Jan. 3, 2015).

190. *Ratification of the Constitution by the State of New Hampshire; 21 June, 1788*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/ratnh.asp [perma.cc/PKS2-W5JW] (last visited Jan. 2, 2015).

191. VIRGINIA RATIFYING CONVENTION, PROPOSED AMENDMENTS TO THE CONSTITUTION (June 27, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 15, 16–17.

192. NEW YORK RATIFICATION OF CONSTITUTION (July 26, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 11, 13–15; AMAR, *supra* note 186, at 6; *see also* FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99.

193. FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99. *See generally The American Constitution: A Documentary Record*, THE AVALON PROJECT, http://avalon.law.yale.edu/subject_menus/constpap.asp [perma.cc/7DJ2-CDET] (providing documents related to the ratification of the Constitution in North Carolina (Nov. 21, 1789) and Rhode Island (May 29, 1790)).

194. *See* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION 417 (Transaction Publishers 1992) (1958); FRAMERS OF THE CONSTITUTION, *supra* note 188, at 99.

195. AMAR, *supra* note 186, at 6; NORTH CAROLINA RATIFYING CONVENTION, DECLARATION OF RIGHTS AND OTHER AMENDMENTS (Aug. 1, 1788), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 17, 17–20.

196. President George Washington, First Inaugural Address (Apr. 30, 1789), *available at* www.archives.gov/exhibits/american_originals/inaugtxt.html [perma.cc/ZKG8-Q354].

fortif[y]" the people's liberties and "safely and advantageously promote[]" public harmony.[197]

And so on the floor of the First Congress, in the fourteenth week of its very first session, James Madison rose to move that body towards a Bill of Rights.[198] Madison said he considered himself "bound in honor and in duty" to bring such a bill before the First Congress so as to "render [the Constitution] as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."[199] Like Franklin at the Convention, Madison strove for unanimity not mere majority, because many who struggled with us through the Revolutionary War feared as inadequate the protection afforded the liberties for which we all fought: "We ought not to disregard their inclination, but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. The acquiescence which our fellow-citizens show under the Government, calls upon us for a like return of moderation."[200]

On first glance, the lesson seems obvious enough. This matter of rights, in its origin, was not about what sets apart each from the other. This was not about wedge issues or partisan goals. Our Founders viewed this conversation about rights as a means by which to draw the Nation more closely together. And so, this impulse all persons of good faith feel respecting the recognition of rights is one on which we should patiently seek agreement, together as Americans.

I think we can all admire that sentiment, even if we do not quite know how to pursue its accomplishment today in line with yesterday's aspirations. It seems so contrary to modern dialogue and politics. Indeed, the entirety of law school is a seemingly endless array of litigated cases, to say nothing of the headlines on any given day, and so we have in mind countless situations where agreement on fundamental issues perhaps never can be reached. And is that really so surprising? The history of these rights

197. *Id.*

198. *Primary Documents in American History: The Bill of Rights*, THE LIBR. OF CONGRESS, www.loc.gov/rr/program/bib/ourdocs/billofrights.html [perma.cc/YQ8V-M52H?type=image] (last updated Sept. 14, 2014).

199. House of Representatives, Amendments to the Constitution (June 8, 1789) (James Madison), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 47, at 20, 20, 24.

200. *Id.* at 24.

reflects bitter acrimony and difficult lessons obtained over centuries. Remember that it was only drawn swords that compelled King John's acquiescence to Magna Carta.[201] Yesterday's battles were hard-fought among fierce opponents—today's are little different.

Before preparing my class, if I had heard of Roger Sherman, it had not stuck. From Connecticut, he is the only person to sign all four great charters of the United States: the Continental Association in 1774, the Declaration of Independence in 1776, the Articles of Confederation in 1778, and the Constitution in 1787.[202] Though not widely recalled today, in John Trumbull's famous painting of the presentation of the Declaration of Independence at the Continental Congress, Sherman stands front and center with the other members of the Committee of Five that drafted the document—Thomas Jefferson, John Adams, Benjamin Franklin, and Robert Livingston.[203]

At the Constitutional Convention, Madison recorded Sherman as the only spoken opposition to Mason's call for a Bill of Rights.[204] Sherman did not oppose the idea of guaranteed rights—far from it. He simply believed the various states' declarations of rights to be sufficient, since they were not repealed.[205] But Sherman was also on the floor as a member of the First Congress when Madison spoke that day.[206] He thought it impossible that a Bill of Rights could be drafted agreeably to the chamber, and even if it could, that it would not obtain the three-fourths support necessary in the states.[207] In this, Sherman had no illusions:

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201. *See supra* note 10.

202. *See* FRAMERS OF THE CONSTITUTION, *supra* note 188, at 200–01.

203. *See Explore Capitol Hill: Declaration of Independence*, ARCHITECT OF THE CAPITOL, www.aoc.gov/capitol-hill/historic-rotunda-paintings/declaration-independence [perma.cc/WX8B-SP8A] (last updated Oct. 10, 2014). John Trumbull's painting, *Declaration of Independence* (1817), resides on permanent display in the United States Capitol Rotunda. *Id.*

204. THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 114 (Patrick T. Conley & John P. Kaminski eds., 1992).

205. RECORDS OF THE FEDERAL CONVENTION, *supra* note 166, at 447 (Sept. 12, 1787) ("Mr. Sherman[] was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient—There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.").

206. *See* House of Representatives, Amendments to the Constitution, *supra* note 199, at 22 (June 8, 1789) (Roger Sherman).

207. *Id.* at 31–32.

> I do not suppose the Constitution to be perfect, nor do I imagine if Congress and all the Legislatures on the continent were to revise it, that their united labors would make it perfect. I do not expect any perfection on this side the grave in the works of man; but my opinion is, that we are not at present in circumstances to make it better.[208]

Even with those doubts, Roger Sherman helped draw that day's debate to closure by inviting Madison to commence work on a draft in consultation with each and every member of Congress.[209] Madison did, and so Congress set its face towards our Bill of Rights.[210] We know the result, and the Constitution was brought one step closer to the first-enumerated purpose of the Preamble: formation of that "more perfect Union."[211]

Of Roger Sherman, Thomas Jefferson once said: "That is Mr. Sherman, of Connecticut, a man who never said a foolish thing in his life."[212] Let us take this last lesson from Mr. Sherman. Perfection will elude us in this world. But we can—and we must—continue to seek it together.

208. *Id.* at 31.

209. *Id.* at 32.

210. *See generally* MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 133–41 (2013).

211. U.S. CONST. pmbl.

212. ROBERT WALN, 3 BIOGRAPHY OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE (1823), *reprinted in* 18 THE PORT FOLIO 441, 450 (John E. Hall ed., 1824), *available at* https://archive.org/details/portfolio02hallgoog [perma.cc/X8UC-NBZX].

NATURAL LAW, NATURAL RIGHTS, AND SAME-SEX CIVIL MARRIAGE: DO SAME-SEX COUPLES HAVE A NATURAL RIGHT TO BE MARRIED?

BY SHANNON HOLZER*

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In contemporary liberal societies, those who want to enact new legislation that will coerce fellow citizens to act or refrain from acting bear the burden to justify their laws.[1] Legislation that recognizes same-sex civil marriage is no different than any other laws. This is especially true because there is a strong coercive element that accompanies the legalization of same-sex civil marriages. That is, the government's endorsement of same-sex civil marriage entails the enforcement of this legislation. In this case, same-sex civil marriage advocates can use the government as a tool to force those who would not otherwise do so to believe or act as though same-sex civil marriage is the same thing as traditional marriage. At this point in history, it is clear that many do not want to accept same-sex civil marriage as an authentic marriage or as an acceptable lifestyle.[2]

It is my claim that the same-sex civil marriage advocates bear a heavy burden to prove that same-sex civil marriage is actually a natural marriage. If same-sex civil marriage is not a natural marriage, then there can be no natural right to same-sex civil marriage. The same-sex civil marriage advocate must prove that there is an underlying principle with the moral force to justify the government's enforcement of the recognition of same-sex civil marriage. If so, this commands a change in legislation in order to protect this right. I argue that only the natural moral law can grant this natural right. It follows, therefore, that there should be legislation to secure the right of same-sex civil marriage only if there is a natural right to it. Further, there can be a natural right to same-sex civil marriage only if there is actually such a thing as same-sex civil marriage that has an ontological status of existing naturally. If same-sex civil marriage advocates claim that same-sex couples have a right to marry, then they cannot mean that there is a posited right, because only a few states have the legal right written into the books.[3] Thus, the

1. *See, e.g.*, TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 9 (2014); *see also* RANDY BARNETT, RESTORING THE LOST CONSTITUTION 11–13 (2004).

2. *See, e.g.*, State Marriage Defense Act of 2014, H.R. 3829, 113th Cong. (2014); United States v. Windsor, 133 S. Ct. 2675 (2013); Nat'l Gay and Lesbian Task Force, *Relationship Recognition for Same-Sex Couples in the U.S.*, THETASKFORCE.COM, www.thetaskforce.org/static_html/downloads/reports/issue_maps/rel_recog_10_7_14_color.pdf [perma.cc/K4FF-UDC9] (last updated Oct. 7, 2014).

3. *Gay Marriage*, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 [perma.cc/6RJQ-KLJJ] (last updated Nov. 26, 2014). Eleven states have same-sex civil marriage "on the books," as passed by legislature or by popular vote. *Id.* Twenty-four states have legal same-sex civil marriage as the result of a court case. *Id.*

claim that there is a right to same-sex civil marriage must mean that there is a naturally existing right that society ought to recognize and defend. Is this true?

I. ONLY NATURAL MORAL LAW CREATES NATURAL RIGHTS

The American Founding Fathers believed in natural law.[4] They justified going to war on the grounds of the natural moral law.[5] They further justified abandoning the Articles of Confederation by appealing to the natural law "in Order to form a more perfect Union."[6] The Framers of the Constitution wrote the Ninth Amendment in order to defend the existence of unwritten natural rights.[7] In the Declaration of Independence, Thomas Jefferson referenced the "Laws of Nature and of Nature's God," and noted that all men are "endowed by their Creator with certain unalienable Rights."[8] This, however, is not the argument that same-sex marriage advocates use. We must then ask: what is this natural law of which I speak?

Man discovers natural law as a part of reality. That is, man does not create the laws of nature. Man may deny the laws of nature or ignore them, but he does so at his own peril. Natural laws of this sort do not stir much debate; they are nearly universally accepted as fact. For example, the force of gravity is part of the laws of nature. Mankind did not posit this law into existence, but instead lives according to it. One may choose to deny the existence of gravity, but he may not escape the consequences of his choices, because the force of gravity is part of the laws of nature. Although natural moral laws are quite controversial, they follow the same basic principle as the law of gravity. That is, the natural moral law is part of reality, discoverable by mankind, and one either lives within it or denies it at his own peril. Randy Barnett argues that the complexity and controversy surrounding these moral laws of nature do not make them any less real than the laws of nature that govern engineering and architecture.[9] Barnett writes:

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4. *See, e.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).
5. *Id.*
6. U.S. CONST. pmbl.
7. U.S. CONST amend. IX; *see also* United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947) (describing judicial balancing between unenumerated rights and congressional prohibitions).
8. THE DECLARATION OF INDEPENDENCE para. 1–2.
9. Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 657 (1997) [hereinafter *Law Professor's Guide*].

> Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted.[10]

To be fully addressed, this concept of law must be briefly compared to legal positivism.

A line must be drawn between the concept of natural law and legal positivism, also known as positive law. Briefly, legal positivism is the view that existing legal principles are socially constructed.[11] Legal positivism recognizes laws and rights based on the pedigree and status of those who enact them.[12] John Austin argued that what makes a legal system legitimate is the presence of a habitually obeyed sovereign who has the power to enforce his will with sanctions.[13] Austin's view has been the subject of criticism in light of a democracy's fundamental lack of a sovereign.[14] In contrast, H.L.A. Hart describes the pedigree of a complete legal system with three types of second-order rules that govern primary rules of government.[15] First, the rule of recognition "specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[16] Second, the rule of change allows citizens to add to, take away from, or change rules of society.[17] Third, the rule of adjudication is the means by which society determines whether or not rules have been broken.[18]

Many positive law theorists subscribe to the "separability thesis," or the belief that there is no necessary connection between law and morality.[19] From this belief, it follows that there

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10. *Id.* at 658.

11. Kenneth Einar Himma, *Legal Positivism*, INTERNET ENCYCLOPEDIA PHIL., www.iep.utm.edu/legalpos [perma.cc/ZQE4-QFVP] (last visited Dec. 10, 2014).

12. *Id.*

13. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 166 (Wilfrid E. Rumble ed. 1995).

14. *See* H. L. A. HART, THE CONCEPT OF LAW 73–78 (2d. ed. 1994); *see also* Himma, *supra* note 11.

15. *Id.* at 94.

16. *Id.*

17. Stuart M. Brown Jr., *The Concept of Law by H. L. A. Hart*, 72 PHIL. REV. 250, 250–53 (1963) (book review); *see also* HART, *supra* note 14, at 95–96.

18. HART, *supra* note 14, at 96–97.

19. Himma, *supra* note 11; *see also* Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL.: FALL 2009 EDITION (Jan. 3, 2003),

must be a real distinction between positive laws on the one hand and rights and morality on the other. This distinction implies that law and morality can exist independently of one another.[20] Hart writes that the separability thesis is the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[21] According to positive law, a just law is one that is created according to certain legal standards, not a code of morality.[22] Further, proponents of positive law have admitted that "[n]o legal positivist argues that the *systemic validity* of law establishes its *moral validity*."[23] Understanding this argument is key to comprehending the fact that posited laws cannot be the basis for a societal recognition of same-sex civil marriage. This recognition must come before the law and not as a result of it. Positive law can enforce natural law, can protect natural rights, and can grant allowances—but it cannot create natural rights.[24]

Aquinas explained that no just law can violate the natural law.[25] This is not to say that all laws must correspond to the natural law—many argue that laws specifying speed limits, for example, are not bound up by the natural law.[26] But it can be argued that the natural moral law contains an underlying principle of safety, such that the intrinsic value of human life grounds the instrumental value of traffic laws. The corollary to this is that positive laws that violate the natural law cannot be just, even if they are formed in accordance with accepted legal standards. If society posited a law that all of its citizens had the right to step off the tops of buildings, the law of gravity would not acquiesce. I argue that natural moral laws have the same force as the universally recognized natural laws because they are just as rooted in reality as the laws of gravity and inertia. For example, laws that required black citizens to sit in the back of the

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http://plato.stanford.edu/archives/fall2009/entries/legal-positivism [perma.cc/TG4L-KK5J].

20. The claim that law and morality can exist independently of one another is not the claim that there is never a connection, or the claim that there ought not be a connection.

21. HART, *supra* note 14, at 185–86.

22. Himma, *supra* note 11 (discussing exclusive positivism).

23. Green, *supra* note 19.

24. M.M. Goldsmith, *Normative Resilience—A Response to Waldron*, *in* PROPERTY AND THE CONSTITUTION 197, 203–04 (Janet McLean ed., 1999).

25. Brian Bix, *Natural Law Theory*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 211, 213 (Dennis Patterson ed., Wiley-Blackwell 2010) (1996).

26. Goldsmith, *supra* note 24, at 203.

bus were formed according to accepted legal practices of the day, but they were unjust because they violated the natural rights of black citizens.[27]

The rationale behind the American Revolution is useful in strengthening the case that morally wrong laws are not merely wrong because they violate a citizen's unclaimed legal right, but because they violate the natural law. The American Revolution was justified on the ground that the laws, despite having the proper legal pedigree, violated the natural rights with which God endowed men.[28] Just as the laws of gravity and inertia exist apart from the decisions of man, the rights that justified the American Revolution and the civil rights movement existed apart from the positive law.

Yet, how does one determine what the natural moral law is? Aristotle argued that:

> Every craft and every line of inquiry, and likewise every action and decision, seems to seek some good, that is why some people were right to describe the good as what everything seeks. But the ends [that are sought] appear to differ; some are activities, and others are products apart from the activities. Wherever there are ends apart from the actions, the products are by nature better than the actions.[29]

The ends are that for which any object or action is designed. Aristotle argues that the duty of a general is to ensure victory and the purpose of medical activity is to ensure health.[30] Natural law theorists assert that we discover the natural moral law from the natural ends towards which an act is directed.[31] That which fulfills the natural teleology is good, and that which deviates from the natural teleology is bad.[32] For example, the end of the eye is to see. Thus, to use the eye in a manner that deviates from, and is perhaps destructive to, this end is bad.

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27. 151 CONG. REC. 9,491 (2005) (statement of Rep. Paul).

28. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

29. ARISTOTLE, NICOMACHEAN ETHICS, bk. I, at 1094a (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999) (c. 384 B.C.E.).

30. *Id.*

31. *See, e.g.*, FREDERICK COPLESTON, 2 A HISTORY OF PHILOSOPHY 409 (Image Books 1993) (1950) *available at* www.dhspriory.org/kenny/PhilTexts/Copleston/HistoryPhilosophy2.pdf [perma.cc/J2U6-UH55] (describing Aquinas's view of natural and eternal law).

32. *See* ARISTOTLE, *supra* note 29, at 1097b–1098b (explaining that the good harpist's function is to play the harp well).

II. NATURAL RIGHTS AND UNNATURAL ACTS

If it is the case that only those acts or things that conform to the natural law possess natural rights, then that which is unnatural does not possess natural rights. According to the natural moral law, this is not something society can decide—it would be irrational to try to take a vote on whether or not it is permissible to ignore the laws of physics. If homosexuality is unnatural, then suggesting that same-sex couples have the natural right to marry is just as irrational as positing the right to ignore gravity or legislate square circles.

According to natural moral law, homosexuality is unnatural. By unnatural, I mean that the acts performed by same-sex partners do not fulfill the purpose for which the body parts are intended.[33] Moreover, not only are the body parts in question not used for their designated purpose, homosexual acts are often injurious to the body.[34] Though discussing this aspect of the homosexual union is often avoided, there is literature that supports this claim.[35]

Jeffery Satinover writes:

> [H]omosexual men are disproportionately vulnerable to a host of serious and sometimes fatal infections caused by the entry of feces into the bloodstream. These include hepatitis B and the cluster of otherwise rare conditions, such as shigellosis and Giardia lamblia infection, which together have been known as the "Gay Bowel Syndrome."[36]

Homosexual men are at risk for these pathologies even if they are in a monogamous relationship,[37] and homosexual women face their own health risks.[38] Lesbians face a greater risk of several different types of infections, including bacterial vaginosis, chlamydia, trichomoniasis, and the human papillomavirus (HPV).[39]

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33. Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245, 254–55 (2011).

34. JEFFREY SATINOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH, 67–68 (1996).

35. *Id.*

36. *Id.*

37. *Id.* (these risks arise from sodomy itself, not from multiple partners).

38. *See, e.g.*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., TOP HEALTH ISSUES FOR LGBT POPULATIONS: INFORMATION & RESOURCE KIT (2012), *available at* http://store.samhsa.gov/shin/content//SMA12-4684/SMA12-4684.pdf [perma.cc/L2AS-8FAV].

39. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE ON WOMEN'S HEALTH, LESBIAN AND BISEXUAL HEALTH FACT SHEET (2009), *available at*

If following the natural law creates conditions for individuals to flourish both mentally and physically, then acts that diminish the chances of one's flourishing are not part of the natural law.

Beyond the physical risks of homosexual behavior, the behavior requires using body parts contrary to their design. Specifically, the end or purpose of genitals is procreation and the end or purpose of the lower digestive tract is the expulsion of waste. Using these two body parts together is not only counter to the purpose of each, but often destructive to their purposes.[40]

The pertinent question is whether or not a homosexual uses his body in accordance with its function. Describing the natural law, Timothy Hsiao writes:

> [S]omething is good by *functioning as it should.* A firefighter is good by fighting fires, since that is what firefighters are supposed to do. A vehicle is good by transporting people and goods well, since that is how vehicles are supposed to function. An orange tree is good by producing fruit, since that is how orange trees are supposed to develop. . . . Good firefighters, good cars, and good orange trees are all good in the sense that they are fulfilling their respective ends. . . . The standard of goodness for any being consists in what perfects it according to the kind of thing it is.[41]

Hsiao further writes:

> Now our actions are executed by engaging bodily faculties. When we breathe, we use our lungs. When we see, we use our eyes. When we engage in sexual activities, we use our sexual organs. These faculties have natural purposes that direct us to the achievement of their end. Lungs are *for* breathing, eyes are *for* seeing, and sex, as I will argue, is *for* procreation.[42]

Natural law presupposes that all things aim at some good.[43] Does homosexuality aim at some good? Hsaio argues that badness is "a type of privation"—it is a lack of fulfillment of the act or object's purpose.[44] Examples of this include medicine that

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http://womenshealth.gov/publications/our-publications/fact-sheet/lesbian-bisexual-health.pdf [perma.cc/JC8K-4VUF].

40. *See* Girgis, *supra* note 33, at 254–55; *see also* SATINOVER, *supra* note 34, at 67–68.

41. Timothy Hsiao, *A Defense of the Perverted Faculty Argument Against Homosexual Sex*, HEYTHROP J., 1, 1 (first published online Mar. 24, 2014), http://onlinelibrary.wiley.com/doi/10.1111/heyj.12134/pdf [perma.cc/4NHG-TDQK].

42. *Id.* at 2.

43. ARISTOTLE, *supra* note 29, at 1094a.

44. Hsiao, *supra* note 41, at 1.

does not produce health, cars that do not transport people or goods, and sex that is not sufficient to procreate.[45] Given all of this, it appears that homosexual acts are insufficient at best, and often destructive to the ends of the individual—thus, they are unnatural. Further, if the act is not natural, there is no natural right that requires the state's endorsement.[46]

What if, apart from the sexual act, there is a natural right to same-sex civil marriage because of the nature of marriage itself? If there is a natural right to same-sex civil marriage, then there is an implicit obligation that is placed upon citizens to accept such unions as legitimate. If, however, there is no natural right to same-sex civil marriage, then there is no obligation for citizens to treat same-sex civil marriage as true marriage. I now turn to this question.

III. Is Same-Sex Civil Marriage the Same as Conjugal Marriage?

Presupposing the equality of all marriages, same-sex civil marriage advocates make the claim that legislation legalizing same-sex civil marriages should be passed. Claims that there should or ought to be legislation are the moral grounding upon which same-sex civil marriage laws will be passed. The question is whether or not the same-sex civil marriage advocate is on firm ground. As written above, there should be a positive right to same-sex civil marriage only if there is a natural right to same-sex civil marriage. This is to say that there needs to be a non-arbitrary reason for approving such culture-changing legislation.

Without giving an entire course on how specifically every other moral theory is inadequate, it should suffice to say that natural moral law offers a universal, non-subjective account of the Good that transcends time and location.[47] That means that if homosexual behavior is moral according to natural moral law, then it has always been moral in all places, and it will continue to

45. It is often the case that heterosexual couples engage in sexual activity even when they cannot conceive. This does not indicate that their sexual acts are morally wrong. Though they are engaging in the natural sexual act, there is a malfunction of one, or both, of the spouses' organs. The heterosexual act by nature produces offspring, whereas the homosexual act does not. *See* Girgis, *supra* note 33, at 266–68.

46. *See Law Professor's Guide*, *supra* note 9, at 661–62 (describing the immutability of natural law, though some beliefs may change).

47. *See* J.P. Moreland & William Lane Craig, Philosophical Foundations for a Christian Worldview 491 (2003).

be moral in all places even if it is not popular. However, if homosexual behavior is not moral according to natural moral law, then it has never been moral, nor will it ever be moral. This is true even if homosexuality becomes a sociological norm. Further, even if homosexuality could be determined to be morally acceptable according to natural moral law, it does not follow that there is a natural right to marriage. For there to be a natural right to same-sex civil marriage, the same-sex civil marriage advocate must first show that there is an essential feature of marriage that is not heterosexual. Second, the same-sex civil marriage advocate must show that the essence of marriage includes same-sex couples.

Fairness demands that things that are the same be treated the same way. That is, equals should be treated as equal, and those that are not equal should be treated as unequal. Proponents of same-sex civil marriage demand equal treatment of same-sex civil marriage as though it is the same thing as traditional marriage.[48] This is a statement of knowledge that needs to be shown, not merely asserted.

The claim that there is an essential feature to marriage is bold indeed. However, the same-sex civil marriage advocate is placed in an awkward position. She has the choice to affirm one of two propositions: first, same-sex civil marriage fulfills natural moral law, and thus, there is a natural right to marriage; or second, there is no essence to marriage, and therefore there is no reason to include or exclude same-sex couples in this class of citizens. The former is a metaphysical claim that there is an essential feature of marriage that excludes all other types of relationships. Thus, to call a same-sex union a marriage if it did not share this essential feature would be akin to calling a circle a square. They are both shapes, but they are not the same type of shape.

There are several types of definitions.[49] With that in mind, there are also different types of definitions concerning the debate over same-sex civil marriage. For example, there are definitions that describe merely the use of a term.[50] When defining marriage using this type of definition, one would be

48. *See, e.g.*, *Just the Facts: Q and A*, WHY MARRIAGE MATTERS, www.whymarriagematters.org/pages/just-the-facts-q-and-a [perma.cc/22EA-629D] (last visited Dec. 22, 2014).

49. *See* Peter Kreeft, SOCRATIC LOGIC: A LOGIC TEXT USING SOCRATIC METHOD, PLATONIC QUESTIONS, AND ARISTOTELIAN PRINCIPLES 123–30 (2d ed. 2005).

50. *Id.*

discussing the use of the word "marriage" rather than the object to which that word attaches. In the debate over same-sex civil marriage, this type of definition asks how society should extend or retract the word. Should the word "marriage" be used to tag relationships that include same-sex partners, or should the word "marriage" be reserved to refer to relationships that include (among other things) only opposite-sex partners? I could say that I am married to an idea, I am married to a job, and I am (or at least will be) married to my fiancée. In these cases, I am using the word "marriage" to describe my relationship with many different things. The problem with this is that I have equivocated—the term is not consistent in its meaning. Though I used the same term, marriage to an idea is not the same thing as marriage to a spouse. The question then is whether the marriage of two same-sex partners is the same thing as the marriage of two opposite-sex partners. If we insist that marriage is merely a word that can be applied to whatever we desire, then I truly can be married to intangibles such as work and ideas. However, I do not believe that such an arbitrary definition is what anybody desires marriage to be.

Determining whether same-sex civil marriage is an identical type of relationship as traditional marriage requires an essential definition. An essential definition of marriage asks what must be present for a relationship to be a marriage.[51] If the essential element, whatever it is, is missing, then so too is the relationship we call marriage. In this case, the word "marriage" is merely a word that tags an essential object or relation that fulfills the necessary criteria. If same-sex civil marriage possesses all the same essential properties of marriage that opposite-sex marriages possess, then they are *essentially* the same. However, if any essential properties are missing from either one of the two relationships, then they are not identical types, and using the same term serves only to confuse the subject.

To understand what is essential to marriage, one must know what is non-essential. Non-essential properties are called accidents; they are often associated with a thing's identity, but they are not essential to a thing's identity.[52] For example, I can be described as a professor who is 5'10," 195 pounds, and has brown hair; however, none of these descriptors is essential to

51. *Id.*
52. *Id.*

who I am. I can shrink with age, gain or lose weight, and lose my hair, but I would still be identical to who I am. Just like those incidental personal characteristics, there are several accidents that describe marriage. First, the concept of love in the form of passion is non-essential to marriage. Many people are married who rarely, if ever, feel passion for their spouse.[53] Passion is not even sufficient for marriage since there are many people who are passionate for one another that are not married. Second, marriage licenses are non-essential to marriage.[54] History indicates that marriage existed long before the issuance of licenses by the state.[55] If licenses are essential to marriage, then marriage did not exist until governments started issuing these arbitrary pieces of paper. Further, this would mean that nineteenth-century marriages between slaves were not real marriages. Slave states did not issue marriage licenses to enslaved people.[56] Despite this, however, no one argues that slaves were never married. Therefore, if we assert that the slaves were truly married, it follows that the marriage license is non-essential to the true nature of marriage.

So what is essential to marriage? Is a partner essential, or can one be married to oneself?[57] It seems to me that a relationship is essential to marriage. Relationships require more than one participant. To be married, one must be wedded to something other than oneself. Though marriage requires at least two *relata*,

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53. *See generally* Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides,"* 70 GEO. WASH. L. REV. 475 (2002).

54. This statement is true if marriage is not merely identical to a contractual agreement with the state that requires a license.

55. *See generally* JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012) (charting the history of marriage in the western world).

56. Jennifer Hallam, *Family*, SLAVERY AND THE MAKING OF AMERICA, www.pbs.org/wnet/slavery/experience/family/history.html [perma.cc/L87F-CU83] (last visited Dec. 22, 2014); *see also* Reginald Washington, *Sealing the Sacred Bonds of Holy Matrimony: Freedmen's Bureau Marriage Records*, 37 PROLOGUE MAG., no. 1, 2005.

57. My good friend Luke Mather asked this of his students, and popular culture has answered that nominally one can marry oneself—if not for love, at least for publicity. *See, e.g.*, David Francis, *Dennis Rodman's Timeline of the Absurd*, THE FISCAL TIMES, Jan. 8, 2014, www.thefiscaltimes.com/Articles/2014/01/08/Dennis-Rodman-s-Timeline-Absurd [http://perma.cc/XN7N-PVDN] (describing Rodman's marrying himself in 1996); *see also Glee: Furt* (Fox television broadcast Nov. 23, 2010) (in which track coach Sue Sylvester marries herself). Non-celebrities have followed suit, and there is now a kit available for those who want to marry themselves. Kat Kinsman, *With This Ring, I Me Wed*, CNN, Nov. 15, 2013, www.cnn.com/2013/11/15/living/matrimony-marry-yourself [perma.cc/GJ6W-9VFS]. Although these instances are nominally called "marriage," individuals who marry themselves may or may not already be married, which defeats the claim that they are married in any legal or philosophical sense. *Id.*

not all things that are related are married. I am related to my sisters, my parents, my friends, and my students, but I am married to none of them. What has to be present in a relationship to make it a marriage? As asked before, can I actually be married to my job instead of my wife? A wife can accuse her husband of being married to his job, but that does not make him a bigamist—to suggest such a thing is clearly absurd. Or is it? The argument over the definition of marriage takes place in the theater of the absurd. We can and should ask whether or not that which we marry must even be human. Recently, a woman "married" a Ferris wheel.[58] France granted a woman a marriage license to "marry" her dead boyfriend.[59] In 2006 a woman "married" a dolphin.[60] The list goes on. In Germany a man "married" his cat,[61] in China a man "married" himself,[62] and in South Korea a man "married" his pillow.[63] All of these "marriages" boast a romantic attraction. Yet, as determined earlier, romantic attraction is not essential to marriage. Further, the romance is one-sided. Ferris wheels and pillows cannot reciprocate romantic love, and neither can dead bodies or other species. Although those who claim to be married to objects may feel romantic attachments to them, they do not possess that which is necessary for a true marriage.

One might argue that commitment is an essential property of marriage. I can agree with this. However, commitment covers too much ground. That is, though commitment may be necessary for a marriage, it is not unique to marriage. I am committed to my work, but I am not married to it in the way that I will be to my fiancée. I am committed to being a good father to my son, but I am neither his husband nor his wife. Commitment is necessary

58. David Moye, *Linda Ducharme Gets Married To Ferris Wheel Named 'Bruce,'* HUFFINGTON POST, Nov. 19, 2013, www.huffingtonpost.com/2013/11/18/linda-ducharme_n_4298963.html [perma.cc/VB8W-KPMD].

59. *Corpse Bride: French Woman Marries Her DEAD Boyfriend,* DAILY MAIL, June 24, 2011, www.dailymail.co.uk/news/article-2007803/Karen-Jumeaux-marries-DEAD-boyfriend-Nicolas-Sarkozys-blessing.html [perma.cc/5WGP-52JV].

60. *British Woman Marries Dolphin,* FOX NEWS, Jan. 3, 2006, www.foxnews.com/story/2006/01/03/british-woman-marries-dolphin [perma.cc/H8UX-6HDS].

61. *German Man 'Marries' His Dying Cat,* BBC NEWS, May 3, 2010, http://news.bbc.co.uk/2/hi/8658327.stm [perma.cc/RW6Y-PUL3].

62. Geozone, *Chinese Man Marries Himself,* DIGITAL J., Jan. 29, 2007, www.digitaljournal.com/article/102003 [perma.cc/RW6Y-PUL3].

63. Dan Abramson, *Korean Man Marries Pillow,* HUFFINGTON POST, May 10, 2010, www.huffingtonpost.com/2010/03/10/korean-man-marries-pillow_n_494122.html [perma.cc/V879-P9SA].

(perhaps) for marriage, but it is not sufficient. We need to ask what is essential and unique that makes some relationships marriages and excludes others. If we can apply the term marriage to any and every type of relationship, then all relationships are marriages. If every relationship is a marriage, then nothing is really married. This is much like the saying, "if everyone is special, then nobody is special."

There are many relationships that possess both passion and commitment, but these are not marriages. Many cohabitate with one another under such circumstances, and there is almost universal agreement that the couples are not married. Why is this? One obvious reason is that there has not been a marriage ceremony to declare that the couple has transitioned from being non-married to being married. This ceremony centers on the stating of vows and declarations. But what does stating vows do that makes a relationship a marriage? For most theists, including Jews, Christians, and Muslims, the marriage ceremony establishes a covenant with God.[64] For Jews, the term "marriage" is the Hebrew word *kiddushin*, which is translated as "sanctification."[65] George Robinson writes, "Marriage is viewed by Judaism as a *sacred* act, also an imperative one."[66] Robinson goes on to say:

> Marriage as an institution is as much the creation of God as anything in the Torah. 'It is not good for man to be alone,' the Creator says of Adam in Genesis 2:18 before creating Eve as his companion. By investing marriage with a Divine origin, Judaism gives it even greater weight and sanctity.[67]

The Catholic Church teaches:

> The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.[68]

The above definition is known as the "conjugal" view of

64. *See* Rochelle Cade, *Covenant Marriage*, 18 FAM. J. 230, 230–31 (2010).

65. Gail Labovitz, *The Language of the Bible and the Language of the Rabbis: A Linguistic Look at* Kiddushin, *Part 1*, CONSERVATIVE JUDAISM, Fall 2011, at 25, 26–27.

66. GEORGE ROBINSON, ESSENTIAL JUDAISM: A COMPLETE GUIDE TO BELIEFS, CUSTOMS & RITUALS 160 (2000) (emphasis added).

67. *Id.*

68. CATECHISM OF THE CATHOLIC CHURCH, ¶ 1601 (2d ed. 1997).

marriage.[69] This is in contrast to what many same-sex couples refer to as "civil marriage." Civil marriage is defined as "a unique legal status conferred by and recognized by governments all over the world. It brings with it a host of reciprocal obligations, rights and protections. It is also a cultural institution. No other word has that power and no other status can provide that protection."[70]

Currently, civil marriages include the following legal rights:

> •Social Security benefits upon death, disability or retirement of spouse, as well as benefits for minor [children]
>
> •Family and Medical Leave protections to care for a new child or a sick or injured family member
>
> •Workers' Compensation protections for the family of a worker injured on the job
>
> •Access to COBRA insurance benefits so the family doesn't lose health insurance when one spouse is laid off
>
> •ERISA (Employee Retirement Income Security Act) protections such as the ability to leave a pension, other than Social Security, to your spouse
>
> •Exemptions from penalties on IRA and pension rollovers
>
> •Exemptions from estate taxes when a spouse dies
>
> •Exemptions from federal income taxes on spouse's health insurance
>
> •The right to visit a sick or injured loved one, to have a say in life and death matters during hospitalization.[71]

By contrasting these two uses of the term "marriage," one can see the obvious differences. The theistic understanding of marriage centers on two things: (1) a covenant with God, and (2) the type of relationship that can potentially create offspring. On the other hand, the civil marriage that same-sex couples fight for centers on a legal status that brings legal rights and

69. Girgis, *supra* note 69, at 246.

70. *Civil Marriage v. Civil Unions*, NAT'L ORG. FOR WOMEN, http://now.org/resource/civil-marriage-v-civil-unions [perma.cc/W493-KLXD] (last visited Dec. 23, 2014).

71. *Id.*

benefits.[72] For Catholics and many Protestants, the essential element for a true marriage is a covenantal relationship with God.[73] Government-granted legal status and privileges are merely accidental properties that can be given or taken away. If, for instance, the United States government decides to take away the legal rights contained in a civil marriage from those in a covenantal agreement with God, the wedded do not cease to be married. However, if one takes marriage to be merely these governmental rights, protections, and responsibilities, then the loss of these rights entails the loss of the marriage. Remember that American slaves prior to the Civil War were married, even without government approval. They entered into covenantal marriages with each other without these non-essential elements of civil marriages. Though they were not *legally* able to wed, they were in fact married according to the *conjugal* view of marriage. Government can neither dissolve nor dismiss a conjugal marriage; the same cannot be said of civil marriages.

If same-sex couples accept the above as true, then should they instead seek to enter into a conjugal marriage? Are conjugal marriages even possible for same-sex couples?[74] As said above, the conjugal view of marriage necessitates the type of relationship that by nature results in the procreation of children.[75] This means that those who enter into the union of a conjugal marriage create the *type* of relationship that by nature produces offspring.[76] This is not a biased claim; it is merely the observation that same-sex couples do not possess the essential type of relationship that is required for a conjugal marriage. This is not something that one can argue for or against in court—it is part of reality. Those in same-sex civil marriages are similar to the woman who "married" a Ferris wheel: they can perhaps get

72. These benefits are arguably given to encourage and strengthen marriage. Same-sex civil marriage advocates tend to assume that these benefits define marriage.

73. Catechism, *supra* note 69, at ¶ 1601 (describing Catholic view of marriage); *e.g.*, EVANGELICAL PRESBYTERIAN CHURCH, POSITION PAPER ON THE SANCTITY OF MARRIAGE (2004) *available at* www.epc.org/about-the-epc/position-papers/sanctity-of-marriage [perma.cc/59YY-V7GJ] (describing one protestant denomination's beliefs about marriage).

74. In a similar vein, one might also ask whether same-sex couples can enter into a marital covenant with God, which is a theological question. Thus, same-sex civil marriage puts the state in the position of determining the validity and truth of theological claims.

75. *See* Girgis, *supra* note 33, at 246.

76. It is important to note that the conjugal view of marriage necessitates only the *type* of relationship that creates offspring. The actual creation of offspring is not necessary for marriage in this view.

the civil rights of a legal marriage, but they cannot naturally procreate. They may obtain licenses and legal rights that grant the privileges of civil marriage, but natural law shows that they can never be married in the conjugal sense of the word. This is because it is not part of mankind's nature or biology to conjugally marry the same sex, just as it is not part of our nature to conjugally marry Ferris wheels. Society may start calling same-sex relationships marriages, just as one can start referring to squares as circles, but merely using the same term does not make two things identical.

IV. CONCLUSION

In this paper, I suggested that the same-sex civil marriage advocate has a strong burden to prove that there is a natural right to same-sex civil marriage. In order for there to be a natural right to same-sex civil marriage, the union must adhere to the natural law. I then argued that same-sex civil marriage fails to fulfill the natural law for many reasons. First, homosexuality fails to fulfill the natural ends for the body parts that are used in this union. Second, homosexuality is often deleterious to the health of those who participate in it. Third, for there to be a natural right to same-sex civil marriage, same-sex unions must actually be marriage by nature. Natural rights require natures. If we take constructivist accounts of marriage to be correct in saying that there are no such things as natures, then there also is no natural right to same-sex civil marriage. Thus, to say one has the "natural right" to same-sex civil marriage in the same way the Founding Fathers used the term to refer to other rights, one must embrace natural law. Further, in appealing to natural law, the same-sex civil marriage advocate may be judged by it. By getting rid of the natural law to avoid this judgment, the same-sex civil marriage advocate has thrown out the ability to appeal to an objective principle upon which one can justify the written law. Thus, the same-sex civil marriage advocate cannot appeal to natural rights for the endorsement of same-sex civil marriage laws. By demanding that one has a natural right to same-sex civil marriage, the union is judged against the natural law and found wanting.

AGAINST ARBITRARY GOVERNMENT AND THE AMORAL CONSTITUTION

BY CLARK M. NEILY III*

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I. INTRODUCTION

The most important debate in constitutional law today is within the conservative-libertarian movement over the proper role of courts in mediating personal freedom and government power. At one end of the spectrum are those who support robust judicial review and the protection of rights not specifically enumerated in the text of the Constitution; at the other are those who favor judicial restraint and deference to majoritarian politics. This tension parallels an even more fundamental debate about the relationship of the individual and the state. Simply put, does the state exist to serve the interests of individuals or do individuals exist to serve the interests of the state?

The Founders had a clear answer to that question, which they expressed "to a candid world" in the Declaration of Independence.[1] "We hold these truths to be self-evident," they begin: not debatable, not relative, not purely a matter of subjective preference or social mores, but *self-evident*—that is, objectively true in all settings, for all people, for all time.[2] And what are these objective, self-evident truths? That individuals have certain natural rights to which they are all equally entitled, and that the purpose of government is to secure those rights. It did not give them to us; and it cannot (legitimately) take them away.

The reason America has the longest-running constitution in the world is because the Founders got it right. Government exists to protect individual liberty. It does not exist to enable some people—be they monarchs or majorities—to arbitrarily impose their will on others. Accordingly, while government may regulate the exercise of individual rights, it may only do so for good reason. How do we know what constitutes good reason? That is the question Tim Sandefur tackles with keen insight and characteristic verve in *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty.*

Sandefur begins with a metaphor borrowed from Abraham Lincoln about a shepherd driving a wolf away from a sheep's throat, an act "for which the sheep thanks the shepherd as a liberator while the wolf denounces him . . . as the destroyer of

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. *Id.*

liberty."[3] It is clear, Lincoln quips, that "the sheep and the wolf are not agreed upon a definition of the word liberty."[4] Neither are we agreed upon the definition of liberty today or the proper role of our constitutional shepherd, the judiciary, in protecting it. The result has been a haphazard jurisprudence of liberty filled with glaring inconsistencies, disingenuous rationalizations, and an assortment of morally indefensible holdings by the Supreme Court.

Sandefur's thesis is simple, but he must prune back a thicket of bad reasoning and errant precedent to make space for it. In a nutshell, his argument is this: to develop an operational grasp of the Constitution, one must understand and accept the moral framework in which it is situated. The best explication of that moral framework is the Declaration of Independence, which Sandefur calls the "conscience" of the Constitution.[5] Above all else, the Declaration stands for the primacy of liberty over any form of political power, including democracy.[6]

Various groups have challenged this ordering of values during our nation's history, particularly the pro-slavery movement and political Progressives. The latter finally upended the Founders' hierarchy during the New Deal by persuading the Supreme Court to replace it with their own government-centric vision of the Constitution.[7] Unfortunately, modern conservatives like Robert Bork have helped cement that inversion by embracing—indeed, exalting—the progressive jurisprudence of judicial restraint and the presumption of constitutionality.

The Conscience of the Constitution reminds us that for the Framers, limited government was not merely a goal, but a moral imperative. Any attempt to interpret and apply the Constitution without appreciating that fact is bound to fail. And fail we have. We failed countless men and women held to bondage on American soil for centuries before the Civil War; we failed their

3. TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 1 (2014) [hereinafter SANDEFUR] (quoting Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864) *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, 589, 589–90 (Don E. Fehrenbacher ed., 1989).

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L & PUB. POL'Y 925 (2013).

sons and daughters by abandoning the promise of freedom embodied in the Reconstruction Amendments; we failed generations of women by excluding them from the polity and from much of civil society; and we fail our fellow citizens every time we permit government to restrict their freedom without sufficient justification.

In short, we have treated the Constitution as if it were an amoral document, one that was made, as Justice Holmes famously claimed, "for people of fundamentally differing views."[8] That would have shocked the authors of our founding documents, who believed they were expressing universal truths, not merely their personal opinions. But Holmes's view has gained ascendancy, particularly among modern conservatives who pride themselves—often mistakenly, as we shall see—on being "strict constructionists." As Sandefur laments, this moral relativism means "[t]he Constitution's real promise thus remains imperfectly redeemed."[9] Amen.

II. IN THE BEGINNING

Like siblings sent off to live with different parents after a divorce, the Declaration of Independence and the Constitution have grown apart over the years, becoming increasingly unfamiliar to one another and sometimes awkward in each other's presence. No doubt that would have appalled members of the Founding generation, who endured great hardships to provide themselves a blank slate upon which to write their plan for "a new nation, conceived in Liberty."[10] The Declaration of Independence and the Constitution *together* comprise our nation's founding documents.[11] The Declaration provides the moral framework for understanding the Constitution and a compass to help guide us when applying it to situations the Framers could never have foreseen.[12]

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8. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

9. SANDEFUR, *supra* note 3, at 160.

10. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* ABRAHAM LINCOLN, *supra* note 3, at 536, 536.

11. SANDEFUR, *supra* note 3. *See generally* Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006) (surveying debate regarding the Declaration's place in constitutional law).

12. *See* Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 507–08 (2004) [hereinafter *Liberal Originalism*] (describing the Declaration and Constitution as "a political system with worldwide ramifications").

Some find this talk of "frameworks" and "compasses" gauzy and undisciplined. But they are wrong. America has the shortest constitution of any major country. That helps make it more accessible, but the price of brevity is detail. For example, government may not take a person's life, liberty, or property without due process of law,[13] but we are not told just what process is "due" in any given setting. Judges hold their offices during "good Behaviour"[14] and the Fourth Amendment prohibits searches that are "unreasonable,"[15] but again, the Constitution provides no definition or elaboration of those terms.

Even where the Constitution appears to speak with greater precision—stating that Congress "shall make no law" respecting an "establishment" of religion or "abridging" the freedom of speech[16]—difficult line-drawing questions inevitably arise, such as whether states may display religious monuments[17] and whether burning an American flag should be considered protected speech or punishable conduct.[18] The answers to those questions cannot be derived from the plain text of the Constitution. Indeed, as Professor Kermit Roosevelt—whose excellent book on judicial activism Sandefur discusses and critiques at some length—correctly notes, "the words of the Constitution alone seldom decide difficult cases."[19] Instead, you must have what Cato Institute scholar Roger Pilon likes to call "a theory of the matter."[20]

Sandefur's theory of the matter is that the Declaration of Independence provides the key to understanding the Constitution and that any attempt to divorce the two inevitably

13. U.S. CONST. amend. XIV, § 1.
14. U.S. CONST. art. III, § 1.
15. U.S. CONST. amend. IV.
16. U.S. CONST. amend. I.
17. Sometimes yes, sometimes no. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (holding that display of monument inscribed with the Ten Commandments on grounds of state capitol did not violate Establishment Clause), *with* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005) (holding that display of Ten Commandments in county courthouses violated Establishment Clause).
18. Speech. Texas v. Johnson, 491 U.S. 397 (1989).
19. KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 38 (2006).
20. Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter*, CATO SUP. CT. REV., 2008–2009, at vii, ix, *available at* http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/foreword-pilon_0.pdf [perma.cc/V8BZ-JV7H].

leads to error and injustice.[21] The Declaration's essential point, he says, was to make clear which understanding of liberty prevails on American soil: the sheep's liberty to live free of wolfish violence and coercion, or the wolf's "liberty" to do as it will with the sheep.[22] "The wolf is wrong to imagine that he has a fundamental right to rule others, or that the sheep's rights are simply whatever the wolf decides to allow."[23] The Declaration of Independence makes clear that "America's constitutional order is premised on the opposite principle: on the basic right of each person to be free."[24] Importantly, this freedom is not limited to a mere handful of discrete rights. As Sandefur explains, the Founders understood that "[l]iberty does not come in discrete quanta; it is a general absence of interference. It is, in Jefferson's words, 'unobstructed action according to our will, within the limits drawn around us by the equal rights of others.'"[25]

But "freedom," "liberty," and even "rights" are notoriously malleable terms whose meanings have been made obscure by two centuries of constitutional dialogue and debate. A more precise way of conceptualizing the issue—one that neatly frames not only those two centuries of debate here in America, but the centuries-long debate among political philosophers throughout the world—is whether there is a right to be free from the *arbitrary* exercise of government power.

As Sandefur explains, "[a]n arbitrary act is one that does not accord with a rational explanatory principle: one that has no connection to a legitimate purpose or goal. It may lack reasons to explain it, or be supported by illegitimate reasons."[26] These two distinct meanings of the word "arbitrary" encompass a crucial point in the context of judicial review, because it is the second connotation that captures most unconstitutional government action, not the first.

For example, when the state of Florida requires an occupational license to perform interior design work, it is not because the legislature set out to regulate architects, got confused about who does what, and accidentally imposed

21. SANDEFUR, *supra* note 3, at 3–4.
22. *Id.* at 2.
23. *Id.*
24. *Id.*
25. *Id.* at 9 (quoting Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), *in* THOMAS JEFFERSON: POLITICAL WRITINGS 224, 224 (Joyce Appleby & Terence Ball eds., 1999)).
26. *Id.* at 73.

licensing on interior designers instead of architects. That would be arbitrary in the first sense of the word: a mistake with no reason to explain it. Instead, when the Florida legislature imposed licensing on interior designers it did so consciously, deliberately, and for a manifestly illegitimate reason: namely, economic protectionism for industry insiders, including particularly members of the politically influential American Society of Interior Designers (ASID).[27]

If the definition of arbitrary government power is the naked assertion of authority to restrict another's freedom, then state-sanctioned chattel slavery is its ultimate manifestation. Thus, it is not surprising that the first sustained challenge to the Declaration's recognition of "inalienable rights" came from the pro-slavery movement.[28] Sandefur recounts how "[a]ttacks on the principles of the Declaration began at an early point in American history" with defenders of slavery calling them "'self-evident lie[s].'"[29] Because it is impossible to reconcile human bondage with the proposition that "all men are created equal" and are equally endowed with the right to "Life, Liberty, and the pursuit of Happiness,"[30] pro-slavery advocates fought to sever the link between the Declaration of Independence and the Constitution.[31]

Of particular concern to defenders of slavery was the proposition that the Due Process Clause—which Sandefur correctly reminds us actually refers to due process of *law*[32]—"prohibits all arbitrary government action, including unjustified restrictions of individual liberty."[33] Thus interpreted, the Due Process Clause would have provided a powerful weapon with

27. *See, e.g.*, DICK M. CARPENTER II, DESIGNING CARTELS: HOW INDUSTRY INSIDERS CUT OUT COMPETITION (Inst. for Justice ed. 2007), *available at* www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf [perma.cc/ZZP9-MA3A] (explaining and documenting ASID's strategy for enacting protectionist interior design licensing requirements); *see also Florida Interior Design*, INST. FOR JUSTICE, www.ij.org/locke-v-shore [perma.cc/44H4-HEDP] (last visited Nov. 30, 2014) (documenting a partially successful challenge to Florida's interior design law).

28. SANDEFUR, *supra* note 3, at 22.

29. *Id.* (quoting CONG. GLOBE, 33rd Cong., 1st Sess., app. 214 (1854) (Sen. Petit)).

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31. *See Liberal Originalism*, *supra* note 12, at 498–507 (2004).

32. SANDEFUR, *supra* note 3, at 71. As Sandefur explains, not everything that government purports to do—even pursuant to a law enacted through valid legislative procedures—is necessarily "law." *Id.* at 78. Instead, "the ingredients of [true] law include generality, regularity, fairness, rationality, and public orientation." *Id.* at 79. A "law" that lacks these ingredients is not truly a law at all. *Id.*

33. SANDEFUR, *supra* note 3, at 71.

which to attack federal legislation, including the Fugitive Slave Law, designed to help perpetuate the peculiar institution.[34] But the requirement to provide due process—whether procedural, substantive, or both—did not apply to the states and therefore threatened neither to eradicate the institution of slavery itself nor enshrine, at the level of government where it was most urgently needed, a constitutional prohibition against the arbitrary exercise of government power. Those would be the jobs of the Thirteenth and Fourteenth Amendments, respectively.

III. FROM RECONSTRUCTION TO *LOCHNER*

Ratified in 1865, the Thirteenth Amendment ended legal slavery in America.[35] But many in the South were determined to keep newly free blacks, or "Freedmen," in a state of constructive servitude, and they responded with a web of regulations that came to be known as the "Black Codes."[36] These laws prohibited everything from Freedmen owning guns for self-defense, to leaving their master's property in search of better economic opportunities without permission, to restricting their ability to enter into contracts.[37]

The Black Codes represented a frontal assault on the very notion of personal sovereignty, and they infuriated Republicans in Congress, who pledged to eliminate them and stamp out slave culture once and for all.[38] Their initial response was to enact a series of federal laws, including the Civil Rights Act of 1866, which provided that all persons born in the United States have the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[39] After doubts were

34. *Id.* at 42–43.

35. U.S. CONST. amend. XIII.

36. SANDEFUR, *supra* note 3, at 100–01; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 162 (1998) (noting southern governments' attempts to "resurrect[] de facto slavery through the infamous Black Codes").

37. W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, 167–78 (Harcourt, Brace and Co., 1st ed. 1935), *available at* http://archive.org/stream/blackreconstruc00dubo#page/172/mode/2up [perma.cc/R498-GTVL].

38. *See* CONG. GLOBE, 39th Cong., 1st Sess., 1151 (1866) (Rep. Thayer).

39. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 176–77 (1866) (protecting right to bear arms).

raised about the constitutionality of those laws, Congress proposed the Fourteenth Amendment to empower the federal government, including particularly the federal courts, to protect the basic civil rights of all Americans.[40]

The Supreme Court, however, had other plans, and it rendered the Fourteenth Amendment practically meaningless in the aptly named *Slaughter-House Cases.*[41] As Sandefur recounts, *Slaughter-House* involved a challenge to a Louisiana law requiring butchers to slaughter cattle at a single, privately owned facility.[42] This state-sanctioned monopoly "put hundreds of small-scale butchers out of business,"[43] who then sued the state, arguing that the Louisiana law deprived them of their right to earn a living in violation of the Fourteenth Amendment's proscription against any state law that shall abridge "the Privileges or Immunities of citizens of the United States."[44]

In a 5–4 opinion that misquoted relevant text,[45] twisted precedent, and flatly ignored the abuses the Fourteenth Amendment was plainly designed to correct, the Supreme Court held that the Privileges or Immunities Clause prevents the states from infringing only a small handful of rights that "owe their existence to the Federal government," such as the right of "free access to [America's] seaports" and to "demand the care and protection of the Federal government . . . when on the high seas."[46] This was a preposterous reading of the Privileges or Immunities Clause, and Sandefur provides a fresh and sophisticated critique of the majority opinion.[47] Inevitably, "[t]he *Slaughter-House* Court's withdrawal of the protections promised by the Fourteenth Amendment was a calamity for civil rights, and along with similar rulings it prepared the way for what historian

40. STAFF OF S. COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 30–32 (Comm. Print 1985), *available at* www.senate.gov/artandhistory/history/resources/pdf/SPrt99-87.pdf [perma.cc/QPT9-BWTC].

41. 83 U.S. 36 (1872).

42. SANDEFUR, *supra* note 3, at 65.

43. *Id.*

44. U.S. CONST. amend. XIV, § 1; *Slaughter-House Cases*, 83 U.S. at 74.

45. *See, e.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 646–48 (1994) (identifying and discussing Justice Miller's misquotations of constitutional text in *Slaughter-House*).

46. *Id.* at 79.

47. SANDEFUR, *supra* note 3, at 63–68.

Douglas Blackmon calls a 'torrent of repression' and the practical reestablishment of slavery."[48]

But a truth as profound as the one expressed in the Declaration of Independence—that all human beings have a natural right to be free from arbitrary government oppression—is not so easily extinguished. Disagreements soon arose among lower courts about whether the Constitution really allows government to restrict people's freedom for no good reason.

That question was presented with particular clarity in a trio of cases involving the humble non-dairy spread we call margarine. Invented in the latter half of the nineteenth century, oleomargarine, as it was then known, quickly drew the ire of the dairy industry, which used its political muscle to suppress competition.[49] Laws enacted at the behest of Big Dairy included mandatory disclosures, prohibitions against coloring oleomargarine yellow to make it look more like butter, and outright prohibitions against the shipment or sale of margarine.[50]

Professor Noga Morag-Levine recounts that between 1882 and 1887, the high courts of three states—Missouri, New York, and Pennsylvania—handed down decisions in cases challenging the constitutionality of oleomargarine bans.[51] She explains that the defendants in all three cases "offered to present expert testimony regarding the wholesomeness of the product they sold."[52] All three trial courts *excluded* that testimony as irrelevant, a decision with which only the New York Court of Appeals ultimately disagreed.[53] Based on evidence presented by the would-be seller, it appeared "quite clear" to the New York Court of Appeals that the true object of the law was not to prevent fraud or protect the public, but rather "to drive [oleomargarine] from the market."[54] Somewhat surprisingly (at least by modern standards), the government's lawyer did not dissemble on this point. Instead,

48. SANDEFUR, *supra* note 3, at 68 (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 93 (2008)).

49. Adam Young, *The War on Margarine*, THE FREEMAN, June 2002, http://fee.org/the_freeman/detail/the-war-on-margarine [perma.cc/6E5P-2CGP].

50. *Id.*

51. Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. Ill. L. Rev. 59, 72 (2013).

52. *Id.* at 72–73.

53. *Id.* at 73.

54. People v. Marx, 2 N.E. 29, 32 (N.Y. 1885).

> The learned counsel for the [state] frankly [met] this view and claim[ed] . . . that even if it were certain that the sole object of the enactment was to protect the dairy industry in this state against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature.[55]

Here in one passage is the great unresolved tension in American constitutional law, and the essence of Sandefur's book: May government restrict one person's freedom simply to promote the selfish interests of another, and is it any of the judiciary's business? The Supreme Court's treatment of that issue over the years has been a jurisprudential game of pin the tail on the donkey, with judges stumbling around in blindfolds to avoid confronting the true object of government regulation and only occasionally peeking out to see what the government is really up to. We call this the rational-basis test, and it made an early appearance (though not by name) in—surprise!—a margarine case.

Powell v. Pennsylvania[56] involved a prosecution for selling margarine in violation of state law.[57] In an opinion by Justice Harlan, the Court began by recognizing that the Fourteenth Amendment protects "the privilege of pursuing an ordinary calling or trade" and that the law in question would violate that right unless it had a "real or substantial relation" to a legitimate government interest, such as protecting public health or preventing fraud.[58] At trial, the defendant sought to prove that the margarine he sold was "a wholesome and nutritious article of food," but the trial court deemed that evidence irrelevant and excluded it.[59] The Supreme Court affirmed.[60] Applying "[e]very possible presumption" in favor of the validity of the statute, the Court held that whether margarine presents any *actual* health risk is a "question[] of fact and of public policy which belong[s] to the legislative department to determine."[61] In other words, truth doesn't matter; the mere assertion of a legitimate government interest will suffice.

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55. *Id.* at 32–33.
56. 127 U.S. 678 (1888).
57. *Id.* at 679.
58. *Id.* at 684.
59. *Id.* at 682.
60. *Id.* at 687.
61. *Id.* at 684–85.

Of course, courts do not usually accept assertions of fact that are false or unsubstantiated, so it is hardly surprising that the *Powell* Court's indifference to reality would not be the last word on the subject. The most famous rejoinder came seventeen years later in *Lochner v. New York*,[62] where the Court split over the constitutionality of a law limiting the number of hours bakers could work in any one day or week.[63] As Sandefur explains, the 5–4 majority "found no reason to believe the maximum-hours rule actually protected the public or the bakery workers."[64] Because the law restricted the bakers' freedom "without advancing any public goal,"[65] the law was an arbitrary—and therefore unconstitutional—exercise of government power.[66]

Though the case is reviled by most conservatives and nearly all liberals, Sandefur correctly asserts that "*Lochner* was a textbook application of the classical liberal principles embodied in the Declaration of Independence and the Constitution."[67] Distilled to its essence, *Lochner* stands for two propositions: First, the government must have a public-spirited reason for restricting people's freedom. Second, courts should not accept uncritically the government's naked assertions to that effect. Unfortunately, that commitment to defending the principle of non-arbitrariness would soon be replaced by the Progressive vision of the rubber-stamp judiciary championed in Justice Holmes's *Lochner* dissent.[68]

IV. THE PROGRESSIVE INVERSION

The Founders were classical liberals for whom individual freedom was the ultimate political value. For them, the point of government was to create a society where people could pursue their own goals and interests so long as they respected the equal right of others to do the same.[69]

The Progressive vision of government is very different. Progressives believe the role of government is to improve the

62. 198 U.S. 45 (1905).
63. *Id.* at 52–53.
64. SANDEFUR, *supra* note 3, at 131.
65. *Id.*
66. *Lochner*, 198 U.S. at 64.
67. SANDEFUR, *supra* note 3, at 131.
68. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).
69. ROGER PILON, *The Purpose and Limits of Government*, CATO'S LETTER NO. 13, 1999, at 9, *available at* www.cato.org/sites/cato.org/files/pubs/pdf/cl-13.pdf [perma.cc/TYK4-D63C].

human condition by ensuring particular outcomes, especially in the distribution of resources and opportunities. Because those resources and opportunities belong where the government thinks they ought to belong—and not simply wherever they happen to end up as a result of individual decisions and actions—Progressives have little patience for individual rights. As recounted by Professor David Bernstein, Woodrow Wilson "dismissed talk of 'the inalienable rights of the individual' as 'nonsense.'"[70] "'The object of constitutional government,' according to Wilson, was not to protect liberty, but 'to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.'"[71]

As Sandefur notes, "Progressive politicians presided over a dramatic expansion of government programs—everything from minimum-wage legislation to laws banning alcohol and segregating people by race—aimed at transforming people's very nature."[72] Courts often resisted those efforts when they impinged on individual liberty by employing robust concepts of due process, property rights, and freedom of contract. In *Buchanan v. Warley*,[73] for example, the Supreme Court struck down a residential segregation ordinance in Louisville, Kentucky, not on equal-protection grounds, but on the grounds that it violated due process "by depriving the plaintiffs of liberty and property without a valid police power justification."[74] Similarly, laws prohibiting parents from sending their children to private schools or teaching them in any language other than English were struck down not only as a violation of parents' freedom to "direct the upbringing and education" of their children,[75] but also as an unjustified interference with the occupational freedom of teachers[76] and the private schools' property rights.[77]

Unfortunately, the justices were not always consistent in their protection of individual liberty from the Progressives' utopian social policies, failing, for example, to prevent one of the most immoral programs in the history of America: eugenic

70. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 92 (2011).
71. *Id.*
72. SANDEFUR, *supra* note 3, at 127.
73. 245 U.S. 60 (1917).
74. BERNSTEIN, *supra* note 70, at 81; *see also Buchanan*, 245 U.S. at 82.
75. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).
76. Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923).
77. *Pierce*, 268 U.S. at 535–36.

sterilization.[78] As Professor Bernstein notes, "[c]oercive eugenics was a quintessentially Progressive movement in that it reflected ideological commitments to anti-individualism, efficiency, scientific expertise, and technocracy."[79] And when that policy reached the Supreme Court, in the tragic and appalling case of *Buck v. Bell*,[80] it was that champion of judicial deference to democratic will, Justice Oliver Wendell Holmes, Jr., who wrote the opinion upholding Virginia's compulsory sterilization law and condemning Carrie Buck—and thousands of other young men and women—to a childless future.[81] As Holmes callously quipped in his breezy, page-and-a-half opinion, "Three generations of imbeciles are enough."[82]

According to Sandefur, this indifference to human dignity and the importance of self-determination is neither surprising nor anomalous.[83] On the contrary, "[i]n a Progressive world of process and moral agnosticism, judicial review exists not primarily to protect substantive rights, or to promote pre-political ideas of justice, but to sustain the machinery of collective decisionmaking."[84] As a pithy expression of this moral agnosticism, Sandefur offers a famous Holmes quote in which he tells a friend, "If my fellow citizens want to go to Hell . . . I will help them. It's my job."[85] But in fact, that is not quite right. What Holmes really means is, "If some of my fellow citizens want to send *other fellow citizens*—like Carrie Buck—to Hell, I will help them." Let there be no mistake: when Holmes and his fellow Progressives talk about self-government, they are not talking about the individual right to make bad decisions about one's own life. They are talking about a so-called "collective right" possessed by majorities to make bad decisions about other

78. *See generally* Buck v. Bell, 274 U.S. 200 (1927).

79. BERNSTEIN, *supra* note 70, at 96.

80. 274 U.S. 200 (1927).

81. *Id.* at 205–08. Carrie Buck was an unwed teenage mother, which was part of the state's reason for sterilizing her. *Id.* at 205. Holmes describes Buck's daughter Vivian as an "illegitimate and feeble-minded child." *Id.* Contrary to Holmes's description, Vivian was not feeble-minded. Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 419–20 (1998). And it appears she was conceived not in an act of promiscuity, as the state claimed, but rape. *Id.* at 413.

82. *Buck*, 274 U.S. at 207.

83. *See* SANDEFUR, *supra* note 3, at 25–26.

84. *Id.* at 128.

85. *Id.* at 127 (quoting Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES–LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, 248, 249 (Mark DeWolfe Howe ed., 1953)).

people's lives and enforce those sometimes horrifyingly immoral decisions through the coercive power of law. They are talking about the wolf's liberty to have his way with the sheep.

Sandefur refers to this as the "Progressive inversion of constitutional priorities."[86] Together, the Declaration of Independence and the Constitution establish a system in which "[l]iberty is the goal at which democracy aims, not the other way around."[87] Progressives, by contrast, "see the Constitution as concerned primarily with fostering democracy and enabling the majority to create its preferred society through legislation."[88] It may come as a surprise, then, to discover who has taken up the banner of this morally agnostic, government-friendly jurisprudence: modern conservatives.

V. CONSERVATIVE PROGRESSIVISM: DENYING AND DISPARAGING UNENUMERATED RIGHTS

Perhaps no issue more profoundly divides the libertarian and conservative wings of the limited-government movement than the status of "unenumerated" rights and the doctrine of substantive due process that the Supreme Court (occasionally) uses to protect them. Sandefur's thoughtful discussion of those points represents a tremendous contribution to one of the most interesting and important debates in American constitutional law.

The Constitution spells out approximately two dozen specific individual rights—mostly in the Bill of Rights, but some in the body of the Constitution as well, such as Article I's command that no state shall pass any "Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[89] But do we have other rights besides those specifically set forth in the Constitution, and if so, is it appropriate for courts to enforce these "unenumerated" rights? That debate is nearly as old as the Constitution itself, as Sandefur explains in summarizing the competing opinions of Justices Samuel Chase and James Iredell in the 1798 case *Calder v. Bull*.[90]

86. *Id.* at 154.
87. *Id.* at 2.
88. *Id.* at 121.
89. U.S. CONST. art. 1, § 10, cl. 1.
90. 3 U.S. 386 (3 Dall.) (1798).

Though they agreed on the holding of the case—that the Ex Post Facto Clause did not apply to a Connecticut law granting a new hearing to the losing party in a probate case—they clashed over whether "the Constitution imposes certain inherent restrictions on legislatures" beyond those expressly set forth in the text.[91] Chase believed the answer must be yes because legislatures are necessarily limited in the "objects" they can pursue.[92] Thus, the legitimate ends of legislative power "will limit the exercise of it."[93] So what are the legitimate ends of legislative power, or what we today call the police power? They include protecting people and property from violence, securing liberty, and otherwise promoting the general welfare.[94] Illegitimate ends of government—policies the government simply may not pursue because it has no legitimate authority to do so—include taking property from one person and giving it to another, punishing citizens for innocent acts, and allowing individuals to judge their own cases.[95] As Chase explains, it is simply not reasonable to suppose that anyone would entrust a legislature with such powers, "and, therefore, it cannot be presumed that they have done it."[96]

Justice Iredell disagreed. He argued that unless a given law contravenes some specific constitutional provision, courts "cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[97] This certainly sounds reasonable at first blush, and indeed many conservatives embrace Iredell's position as a laudable expression of judicial modesty. In practice, however, the idea that courts should only strike down laws that violate specific constitutional provisions produces results "that are often embarrassing, and sometimes horrifying."[98]

Tragically, one can illustrate that observation with any number of historical examples, but consider just one: was *Buck v. Bell* correctly decided? Was there really no legitimate constitutional objection to the forced sterilization of some 60,000 young people, most of them impoverished, uneducated, and politically

91. SANDEFUR, *supra* note 3, at 88; *Calder*, 3 U.S. at 387.
92. *Calder*, 3 U.S. at 388.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 399 (Iredell, J., concurring).
98. SANDEFUR, *supra* note 3, at 153.

disenfranchised? Was their only recourse to the ballot box?[99] It is difficult to find anyone who will say yes, at least in public, to any of those questions. But that is the practical consequence of Justice Iredell's position, of which perhaps the most influential modern exponent was Judge Robert Bork.[100]

Bork's writings, particularly his book *The Tempting of America*, profoundly influenced an entire generation of conservative scholars, judges, and policymakers. As Sandefur recounts, the "temptation" to which Bork is referring is that of "judges to implement their political preferences as constitutional law and thus intrude on the power of the majority."[101] Bork believes (along with Justices Iredell and Holmes) that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."[102] Indeed, the only "areas of life" where majorities are *not* entitled to rule are those explicitly carved out by the Bill of Rights or some other unambiguous constitutional provision.[103]

But there are a host of problems with that Manichean perspective. First and foremost, "the Ninth Amendment declares that this is the wrong way to read the Constitution: it says that the fact that some rights are specified must *not* be interpreted to deny the existence or importance of other rights."[104] Second, it ignores the text of the Fourteenth Amendment, particularly the requirement that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[105] Bork, like most conservatives, prides himself on being a faithful textualist; yet, like most conservatives, he has no theory about how to interpret the Privileges or Immunities Clause. Instead, he famously likened it to an "ink blot," arguing, mistakenly, that the clause "has been a mystery since its

99. While the Supreme Court has never officially overruled *Buck v. Bell*, most commentators would likely agree that the decision was effectively overruled by *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), when the Court struck down an Oklahoma law mandating sterilization of certain recidivist criminals.

100. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 264–65 (1990).

101. SANDEFUR, *supra* note 3, at 128.

102. BORK, *supra* note 100, at 139.

103. *See* SANDEFUR, *supra* note 3, at 128.

104. *Id.* The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

105. U.S. CONST. amend. XIV, § 1, cl. 2.

adoption."[106] He makes the same false claim about the Ninth Amendment later in the book, asserting risibly, that, "[t]here is almost no history that would indicate what the [N]inth [A]mendment was intended to accomplish."[107] In reality, "Madison, Hamilton, and others wrote at length about what the amendment was intended to accomplish, making clear that it was designed to ensure that nobody would think the Bill of Rights lists all individual rights."[108]

Bork also rejects the use of substantive due process to protect unenumerated rights, claiming there is no "'intellectual structure'" to support that approach.[109] But again he is wrong, and Sandefur devotes two full chapters to demonstrating the doctrine's ample historical pedigree—which dates back to the "law of the land" provision in Magna Carta[110]—and refuting its many detractors, the volume of whose critiques far exceeds their depth.[111] Of course, it would rarely be necessary to invoke the concept of substantive due process if the Privileges or Immunities Clause of the Fourteenth Amendment and the doctrine of enumerated federal powers embodied in the Tenth Amendment were given their proper constitutional significance. Properly interpreted and applied, those two provisions alone would suffice to protect people from a vast range of illegitimate state and federal action, respectively.

And then there is the inability to answer the question about *Buck v. Bell.* Was it rightly decided? Silence. What about the Court's decision to strike down Oregon's requirement that all children attend public schools in *Pierce v. Society of Sisters* and its conclusion that parents have a right—nowhere mentioned in the text of the Constitution—to guide the upbringing of their own children?[112] Was that an example of the justices imposing their own personal policy preferences on a legislature that had determined, contrary to the Court's holding, that in fact the child *is* "the mere creature of the State"?[113] More silence.

106. BORK, *supra* note 100, at 166.
107. *Id.* at 183.
108. SANDEFUR, *supra* note 3, at 129.
109. *Id.* at 95 (quoting ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 55 (2003)).
110. *Id.* at 72.
111. *Id.* at 95–120.
112. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
113. *Id.* at 535.

Judge Bork had no good answer to these and myriad other questions because "despite his reputation for moralistic conservatism, [he] was actually a relativist: the majority has virtually unlimited freedom to adopt its (entirely subjective) moral preferences as law, and to impose those preferences on others"—including Carrie Buck.[114] It won't do. These are difficult issues, not easy ones as Bork and company try to pretend. You won't get the right answers to hard questions by "ink blotting" inconvenient constitutional provisions, nor can the Constitution be properly understood outside the moral and political framework set forth in the Declaration of Independence.

VI. THE MORAL CONSTITUTION

After showing why the Constitution and the Declaration of Independence must be read together, Sandefur wisely avoids any sweeping prescriptions or promises that all will be easy and well if we simply follow that precept. The truth is there will always be hard questions in constitutional law, and any theory that purports to eliminate them is certain to be wrong. But there are better and worse ways of coming at those questions, and Sandefur offers three suggestions and a trenchant closing observation.

First, we must "eliminate the double standard by which some rights are given meaningful judicial protection while other, equally important rights are treated like poor relations and accorded practically meaningless rational-basis scrutiny."[115] Second, "courts should reexamine the Progressive inversion of constitutional priorities" and recognize that while democracy "is a valuable part of the constitutional structure, limits on freedom must be justified by some genuine public purpose and must be no greater than necessary to accomplish that goal."[116] Finally, "a jurisprudence rooted in this nation's substantive commitment to liberty must have a healthy respect for the natural-rights

114. SANDEFUR, *supra* note 3, at 129.

115. *Id.* at 154 (citation omitted) (internal quotation marks omitted); *see also* CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 33–63 (2013) (describing court-created dichotomy between "meaningful" and "meaningless" rights and critiquing rational basis test).

116. SANDEFUR, *supra* note 3, at 154.

philosophy on which the Constitution was based."[117] Contrary to the perception of Progressive constitutional relativists on the left and the right, "Americans in general share, and rightly share, a belief in the basic truth of the principles enunciated in the Declaration of Independence."[118]

Sandefur concludes with this astute critique of the moral relativism that has guided constitutional doctrine for nearly a century: "A society in which some people claim the right to control the lives of others experiences not harmony, cooperation, and freedom, but bitterness, hostility, and strife."[119] Looking around today, can anyone in good conscience say otherwise?

117. *Id.*
118. *Id.* at 154–55.
119. *Id.* at 159.

EVERYTHING IS BIGGER IN TEXAS—ESPECIALLY THE ABORTION DEBATE: WHY TEXAS HOUSE BILL 2 CAN SURVIVE A CONSTITUTIONAL CHALLENGE AND HOW IT SHOULD CHANGE THE ABORTION ANALYSIS

BY CATHERINE MAGGIO SCHMUCKER*

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I. THE FILIBUSTER: THE "TEXAS TORNADO" THAT SLAMMED AUSTIN

On June 25, 2013, a single pair of pink running shoes became famous.[1] Laces tied tight, Texas Democratic Senator Wendy Davis stood in those shoes for thirteen hours as she filibustered a highly controversial bill regulating abortion in Texas.[2] All eyes were on Davis and the Lone Star State as the abortion debate intensified around the steadfast senator.[3] Pro-choice and pro-life advocates, bringing with them even more controversy, flooded the state's capitol.[4] Though Davis's efforts were successful at first, the Texas Legislature eventually passed the abortion regulations, and Governor Rick Perry signed the legislation into law as Texas House Bill 2.[5] The controversy, however, did not end when Davis put away her sneakers.[6] Almost immediately, pro-choice advocates vowed to challenge the law, confidently proclaiming its unconstitutionality, and on September 27, 2013, Planned Parenthood—represented by the American Civil Liberties Union (ACLU)—filed a complaint in the United States District Court for the Western District of Texas.[7] With Texas Attorney General Greg Abbott vowing to defend the bill, the stage was set for an intense legal battle over what has been both praised and

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1. Mark Z. Barabak, *Outrage Spreads After Wendy Davis Runs Wheelchair Campaign Ad*, L.A. TIMES, Oct. 10, 2014, www.latimes.com/nation/politics/politicsnow/la-pn-wendy-davis-wheelchair-ad-20141010-htmlstory.html [perma.cc/WHB6-TMG4].

2. Karen Tumulty & Morgan Smith, *Texas State Senator Wendy Davis Filibusters Her Way to Democratic Stardom*, WASH. POST, June 26, 2013, www.washingtonpost.com/politics/texas-state-senator-wendy-davis-filibusters-her-way-to-democratic-stardom/2013/06/26/aace267c-de85-11e2-b2d4-ea6d8f477a01_story.html [perma.cc/97VN-US29].

3. Matt Smith & Joe Sutton, *Perry Renews Texas Abortion Battle with Special Session*, CNN, June 28, 2013, www.cnn.com/2013/06/26/politics/texas-abortion-bill [perma.cc/WZ92-S9DH].

4. Morgan Smith, Becca Aaronson & Shefali Luthra, *Abortion Bill Finally Passes Texas Legislature*, TEX. TRIB., July 13, 2013, www.texastribune.org/2013/07/13/texas-abortion-regulations-debate-nears-climax [perma.cc/JT9L-TC77].

5. Joan E. Greve, *Rick Perry Signs Restrictive Abortion Bill into Law*, ABCNEWS, July 18, 2013, http://abcnews.go.com/blogs/politics/2013/07/rick-perry-signs-restrictive-abortion-bill-into-law [perma.cc/86CU-Q8B7].

6. Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES, July 18, 2013, www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html?_r=1& [perma.cc/FS4Y-DQ55].

7. Complaint & Application for Preliminary and Permanent Injunction at 1, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891 (W.D. Tex. 2013) (No. 1:13-CV-00862) [hereinafter Complaint], *available at* www.aclu.org/sites/default/files/assets/planned_parenthood_1.pdf [perma.cc/E482-89NJ], *aff'd in part, rev'd in part*, 748 F.3d 583 (5th Cir. 2014); *see also* Fernandez, *supra* note 6.

condemned as one of the strictest abortion laws since *Roe v. Wade*.[8]

This note argues that Texas House Bill 2 fits comfortably within both Fifth Circuit and Supreme Court abortion law precedent because Texas has an inherent right to regulate medicine through its police power and the bill does not place an "undue burden" on women seeking an abortion.[9] This note focuses on the two aspects of the bill that Planned Parenthood first challenged: the admitting-privileges requirement and the restrictions on chemical abortions.[10]

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8. 410 U.S. 113 (1973); *Lawsuit Against Texas' Pro-Life Bill Hurts Women, Protects Abortion Industry's Bottom Line*, LIFENEWS.COM, Sept. 27, 2013, www.lifenews.com/2013/09/27/lawsuit-against-texas-pro-life-bill-hurts-women-protects-abortion-industrys-bottom-line [perma.cc/VY6D-AW9N]; Tara Culp-Ressler, *The Six Worst Attacks On Reproductive Freedom in 2013*, THINKPROGRESS, Dec. 13, 2013, http://thinkprogress.org/health/2013/12/13/3056151/worst-attacks-reproductive-freedom-2013 [perma.cc/NES9-Q7BK]; William Saunders & Mary Novick, *Give Thanks for Pro-Life Victories on Abortion this Year*, LIFENEWS.COM, Nov. 27, 2013, www.lifenews.com/2013/11/27/give-thanks-for-pro-life-victories-on-abortion-this-year [perma.cc/3ET2-BZ3K].

9. *See infra* Parts VI–VII.

10. TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.061, 171.063 (West 2013); *see also infra* Part V, Section A (outlining the contents of the bill). The ambulatory surgical center requirement has now also been challenged. *See* Whole Woman's Health v. Lakey, No. 1-14-CV-284-LY, 2014 WL 4346480, at *1 (W.D. Tex. Aug. 29, 2014). This lawsuit brought a facial challenge to the ambulatory surgical center requirement, as-applied challenges to both the ambulatory surgical center requirement and the admitting-privileges requirement for the McAllen and El Paso abortion clinics, and a challenge to the ambulatory surgical center requirement as applied to chemical abortion. *Id.* Judge Yeakel, the same judge who heard *Planned Parenthood v. Abbott* at the district court level, once again held the law to be unconstitutional. *Id.* at *1–2. The Fifth Circuit, however, granted the State an emergency stay, once again allowing the law to go into effect largely unaltered. Whole Woman's Health v. Lakey, 769 F.3d 285, 305 (5th Cir. 2014) *vacated in part*, 135 S. Ct. 399 (2014). The Supreme Court vacated the Fifth Circuit's stay regarding the ambulatory surgical center requirement and the as-applied admitting-privileges requirement for the McAllen and El Paso clinics. Whole Woman's Health v. Lakey, 135 S. Ct. 399, 399 (2014). The Supreme Court upheld the rest of the Fifth Circuit's stay. *Id.* The Fifth Circuit heard oral arguments in *Lakey* on January 7, 2015. *See* Josh M. Shepherd, *In Latest Legal Challenge to Texas Pro-Life Law, Judges Consider Health Risks of Abortion to Women*, LIFESITE, Jan. 9, 2015, www.lifesitenews.com/news/in-latest-legal-challenge-to-texas-pro-life-law-judges-consider-health-risk [perma.cc/UG4V-NJGN].

While this note does not specifically address the ambulatory surgical center requirements or the as-applied admitting privileges requirements, the same arguments made here can and should be applied to uphold those requirements. The ban on abortions past twenty weeks of pregnancy is also beyond the scope of this note because that provision is not being challenged at this time. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.044. *See generally* Complaint, *supra* note 7 (lacking a challenge to the twenty-week ban). Notably, Planned Parenthood has not chosen to challenge this aspect of the bill despite its ongoing controversy. *See id.* Though thirteen other states have enacted similar twenty-week bans, Planned Parenthood has avoided challenging most of them as a litigation strategy. *See* Reply Brief of Petitioners at 8–11, Horne v. Isaacson, 134 S. Ct. 905 (2014) (No. 13-402). For instance, challenging the Texas version of the twenty-week ban

Zeroing in on the "undue burden" analysis and how the Fifth Circuit has addressed that particular issue, Part II provides a historical overview of the legal right to an abortion through case law on the subject. Part III outlines states' historical right to regulate medicine and drugs within their borders by virtue of their police power. Next, Part IV briefly surveys other state laws regulating abortion, the current challenges against them, and more liberal abortion laws in other states. Part V offers a background and explanation of the contents of Texas House Bill 2, as well as Planned Parenthood's legal challenges. Part VI argues that Texas's power to regulate medicine supports the constitutional merit of House Bill 2, while Part VII argues that these laws also pass the undue burden test. Finally, Part VIII recommends that the Supreme Court eliminate the two-step undue burden standard and instead analyze state abortion regulations under the same rational basis standard that is applied to other medical regulations.[11]

II. DEEP IN THE HEART OF TEXAS: THE EVOLUTION OF A RIGHT THAT BEGAN IN TEXAS

An analysis of a law restricting the right to abortion requires an understanding of the contours of that right and how they developed. Unlike the right to free speech or the right to assemble, the right to an abortion is not explicitly protected by the text of the Constitution. Historically, abortion was illegal under most state laws.[12] The Supreme Court changed this and nationalized the issue in its landmark case *Roe v. Wade*.[13] Since then, the limits of abortion jurisprudence have been tested at both the Supreme Court and the Fifth Circuit.

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would trigger review by the conservative Fifth Circuit. *Id.* at 9–10 (citing Irin Carmon, *Planned Parenthood Takes Texas Abortion Laws to Court*, MSNBC, Sept. 27, 2013, www.msnbc.com/msnbc/planned-parenthood-takes-texas-abortion-laws [perma.cc/TC5L-QPFF]. A circuit split between the Fifth and Ninth Circuits would make Supreme Court review more likely—an outcome that abortion advocates wish to avoid. *Id.*

11. This argument assumes that the Court will not completely overrule *Roe v. Wade*. *See infra* Part VIII. An argument can be made, and has been made, that the constitutional right of life should be extended to unborn children on a national level. *See infra* note 277. That argument is beyond the scope of this note, but it should not be ignored.

12. *See* David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RES. CENTER (Jan. 16, 2013), www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court [perma.cc/FGA6-85PY].

13. 410 U.S. 113 (1973).

A. The Federal Precedent

The illegality of abortion changed with *Roe v. Wade* in 1973 when the Supreme Court overturned a Texas law that criminalized abortion except when the life of the mother was in danger.[14] The Court rooted its decision within the right to privacy recognized in *Griswold v. Connecticut.*[15] There, the Court established that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[16] Eight years later, in *Roe v. Wade,* the Court further extended these "zones of privacy" and found them "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[17]

This right, however, even from its inception, was not absolute. The Court never created an unqualified right, but rather one that must be weighed against the valid and important interests that states may protect through regulation.[18] This gave rise to *Roe's* infamous trimester approach.[19] The state could enact certain restrictions in each trimester. In the second trimester, for example, the state could enact restrictive laws in order to protect the health of the mother, such as:

> [R]equirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to

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14. *Id.* at 166.

15. 381 U.S. 479 (1965); *Roe,* 410 U.S. at 152.

16. *Griswold,* 381 U.S. at 484 (citations omitted) (holding that a state law prohibiting the use of contraception by a married couple violated their constitutional right to privacy).

17. *Roe,* 410 U.S. at 153.

18. *Id.* at 154.

19. The Court laid out the following trimester approach governing a state's ability to regulate abortion:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164–65.

> the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.[20]

Roe's approach attempted to balance the state's dual interests of protecting the life and health of the mother and the "potential life" of the fetus with the woman's newly recognized right to an abortion.[21]

Roe was not the only decision regarding abortion handed down that day. The companion case to *Roe*, *Doe v. Bolton*, provided even more guidance on the newly recognized abortion right.[22] Reiterating that states have an interest in protecting the health of the mother, the Court issued the following broad definition of health:

> [T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[23]

This definition did not confine a woman's health to life and death situations, nor did the *Doe* decision define the right to an abortion as unqualified. The challenged law in *Doe* required, in part, that abortions be performed at hospitals accredited by the Joint Commission on Accreditation of Hospitals.[24] Concerned that this requirement had no nexus to the abortion procedure, the Court struck it down.[25] It reasoned that because the process for accreditation "ha[d] no present particularized concern with abortion as a medical or surgical procedure," the requirement was "not 'based on differences that are reasonably related to the purposes of the Act in which it is found.'"[26]

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20. *Id.* at 163.
21. *See id.* at 149–50.
22. Doe v. Bolton, 410 U.S. 179, 187–202 (1973) (expounding on principles pronounced in *Roe v. Wade*); *see also Roe*, 410 U.S. at 165 (directing that the two cases should be read together).
23. *Doe*, 410 U.S. at 192.
24. *Id.* at 184.
25. *Id.* at 194.
26. *Id.* at 193–94 (quoting Morey v. Doud, 354 U.S. 457, 465 (1957)).

The Court's decisions in *Roe* and *Doe* unleashed political and cultural storms, and their constitutional analyses were highly criticized, even by some who were strongly in favor of abortion.[27] Consequently, nineteen years later, when the Court decided to review a Pennsylvania abortion law, many thought that it was poised to reverse *Roe*.[28] Pro-life activists were disappointed, however, when the Court upheld *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* on the basis of stare decisis.[29] Although the Court nominally handed a second victory to pro-choice activists, it also delivered a stunning setback to them. The Court in *Casey* refused to accept that *Roe* encompassed an unqualified right to abortion on demand.[30] Instead, the plurality reiterated that the state had a legitimate interest in protecting the health of the mother and the life of the fetus.[31] These interests justified restrictions on abortion from the outset of a pregnancy as long as they did not create an "undue burden."[32] The Court rejected the bright-line rule set out in *Roe*, explaining that *Roe*'s trimester approach "sometimes contradicted the State's permissible exercise of its powers."[33]

The heart of the *Casey* decision was the rejection of the trimester framework and the creation of the "undue burden" test.[34] Under this new standard, abortion regulations are subject

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27. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 926, 946–47 (1973) (Ely admitted that while he would have voted that the law be upheld as a legislator, the *Roe* decision "is bad constitutional law, or rather . . . it is *not* constitutional law and gives almost no sense of an obligation to try to be."). Ely was not the only liberal legal scholar who struggled with the Court's rationale. *See* Gerald Gunther, *Commentary—Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L. Q. 817, 819 (1979) ("I have not yet found a satisfying rationale to justify *Roe v. Wade*, the abortion ruling, on the basis of modes of constitutional interpretation I consider legitimate.").

28. *See History & Successes*, PLANNED PARENTHOOD, www.plannedparenthood.org/about-us/who-we-are/history-and-successes.htm [perma.cc/F23F-JYGJ] (last visited Jan.13, 2015).

29. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 854–61 (1992) (plurality opinion) (defining stare decisis and declaring that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed"); *see also* Michael F. Moses, *Institutional Integrity and Respect for Precedent: Do They Favor Continued Adherence to an Abortion Right?*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 541–43 (2013) (discussing the *Casey* Court's reliance on stare decisis as opposed to independent legal reasoning).

30. *Casey*, 505 U.S. at 887.

31. *Id.* at 871.

32. *Id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

33. *Id.* at 872.

34. *Id.* at 872–76.

to a two-part test: rational basis and undue burden.[35] In creating this test, the Court lowered the hurdle that abortion laws have to clear, raising concerns among pro-choice activists.[36] Much of the abortion jurisprudence since the *Casey* decision has focused on determining what constitutes an "undue burden."[37] *Casey* itself tried to provide some guidance.[38] The Court, almost tautologically, defined an undue burden as one that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[39] Recognizing that all abortion regulations pose some type of burden, the Court clarified that merely making it harder or more expensive to procure an abortion was not sufficient for a finding of an undue burden.[40] States are granted "substantial flexibility" in regulating access to other medical procedures and even fundamental rights, such as voting.[41] The Court found no reason to apply a stricter approach to abortion.[42] Under this new standard, the Court upheld five of the six requirements of the Pennsylvania law.[43]

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35. Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (explaining *Casey* and holding that a state may restrict abortion "[w]here it has a rational basis to act, and it does not impose an undue burden").

36. *See* Emma Freeman, Note, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 280 (2013).

37. *Casey*, 505 U.S. at 985–86 (Scalia, J., dissenting) ("[T]he standard is inherently manipulable and will prove hopelessly unworkable in practice."); *see also* Ruth Burdick, Note, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split Over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825, 826 (1996); Freeman, *supra* note 36, at 279–80.

38. *Casey*, 505 U.S. at 876 (plurality opinion) ("Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.").

39. *Id.* at 877.

40. *Id.* at 874.

41. *Id.* at 873–74 ("Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

42. *See id.* at 871 (choosing to rely upon *Roe* instead of the later cases that employed strict scrutiny); Freeman, *supra* note 36, at 279 (noting that *Casey* rejected strict scrutiny within the abortion context). The Fifth Circuit similarly applies the rational basis test and the undue burden test to state abortion laws. *E.g.* K.P. v. LeBlanc, 729 F.3d 427, 440 (5th Cir. 2013).

43. *See generally Casey*, 505 U.S. at 833 (upholding informed consent, twenty-four-hour delay, parental consent, and recordkeeping requirements, but striking down the spousal notification requirement).

In one of the more recent abortion controversies to reach the Supreme Court, *Gonzales v. Carhart*, the Court addressed a facial constitutional challenge to the Partial-Birth Abortion Ban Act of 2003.[44] The case came seven years after the Court's decision in *Stenberg v. Carhart*,[45] in which the Court held that Nebraska's partial-birth abortion ban was unconstitutional. In *Gonzales*, however, the Court upheld the federal ban.[46] The justices held that the federal law proscribed only the intact Dilation and Evacuation (D&E) procedure (unlike the Nebraska statute in *Stenberg*) and was not facially unconstitutional.[47] Intact D&E is an abortion procedure in which the doctor delivers the baby up to the head and then kills the baby by crushing or slicing the neck.[48] It differs from standard D&E because the baby is delivered intact, not dismembered, as in standard D&E.[49] The Court, in upholding a ban on a practice that Congress labeled inhumane, recognized yet again the interest that government, particularly the state, has in guarding the integrity of the medical profession.[50] Furthermore, the Court held that the law was not unconstitutional simply because it lacked an exception for the health of the mother.[51] A factual dispute existed as to whether or not intact D&E was ever medically necessary to protect the mother—Congress had made findings that it was not.[52] The Court, noting that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts," deferred to the legislature on this

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44. Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

45. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down Nebraska's partial birth abortion ban).

46. *Gonzales*, 550 U.S. at 133.

47. *Id.* at 147. The Court interpreted the statute to only include intact D&E. *Id.* The statute defined partial birth abortion as

> deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus . . . .

Id. at 142.

48. *Id.* at 137–40.

49. *Id.* at 135–40.

50. *Id.* at 157.

51. *Id.* at 125.

52. *Id.* at 163–64, 176.

point.[53] The decision did allow, however, for future as-applied challenges to the partial-birth abortion law.[54] Justice Ginsburg, in her dissenting opinion, anticipated that such cases would swiftly find their way to the Court.[55] Years later, no such case has been filed.[56]

B. The Fifth Circuit Precedent

The Fifth Circuit was the first circuit to apply the Supreme Court's newly fashioned undue burden standard from *Casey*.[57] In 1992 and 1993, the court handed down three decisions regarding state abortion restrictions, rejecting only one—a Louisiana law that prohibited and criminalized abortion except in very narrow circumstances—as an undue burden.[58] The court upheld a two-parent consent requirement and an informed consent law that mandated a twenty-four-hour waiting period between an ultrasound and an abortion.[59] These cases provide some clarity on how the Fifth Circuit interprets the undue burden test: the court balances the importance of the interest that the regulation advances with the severity of the burden on the right to an abortion.[60] Overall, the Fifth Circuit has proven friendly to state regulations of abortion, upholding two recent Texas laws in the face of challenges.[61]

For example, in *K.P. v. LeBlanc*, the Fifth Circuit confirmed its hesitation to condemn state regulations as undue burdens.[62]

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53. *Id.* at 164, 176.

54. *Id.* at 167.

55. *Id.* at 189 (Ginsburg, J., dissenting).

56. Casey Mattox, *Eleven Thousand Reasons Why Planned Parenthood Can't Be Trusted*, TOWNHALL.COM, Apr. 19, 2012, http://townhall.com/columnists/caseymattox/2012/04/19/eleven_thousand_reasons_why_planned_parenthood_cant_be_trusted/page/full [perma.cc/E69E-RZSU].

57. Burdick, *supra* note 37, at 845.

58. Sojourner T. v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (striking down the Louisiana law).

59. Barnes v. Mississippi, 992 F.2d 1335, 1343 (5th Cir. 1993) (upholding a two-parent consent restriction); Barnes v. Moore, 970 F.2d 12, 13 (5th Cir. 1992) (per curiam) (upholding a twenty-four-hour waiting period restriction).

60. *E.g.*, Barnes v. Mississippi, 992 F.2d at 1339.

61. Planned Parenthood Ass'n of Hidalgo Cnty. Tex. v. Suehs, 692 F.3d 343, 352 (5th Cir. 2012) (upholding a prohibition on the receipt of certain state funds for abortion providers); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573, 584 (5th Cir. 2012) (upholding Texas's informed consent laws which, in part, mandate ultrasounds and a twenty-four-hour waiting period). *See generally* Burdick, *supra* note 37, at 845–51.

62. 729 F.3d 427, 441–42 (5th Cir. 2013).

There, the court reviewed a state law that prohibited abortion providers from taking advantage of the coverage available through Louisiana's Patient's Compensation Fund.[63] Relying on *Harris v. McRae* and *Maher v. Roe*, the Fifth Circuit recognized a "distinction between not providing benefits and restricting choice."[64] The court observed that "[t]his exemption may make it difficult—perhaps prohibitively difficult—for [abortion] providers to obtain the relevant insurance," a difficulty that the providers claimed would detrimentally limit the availability of abortion providers within the state.[65] Yet, "while [the] 'government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those' obstacles, like Louisiana's dearth of affordable insurance, that are 'not of [the government's] own creation.'"[66] This case confirms the Fifth Circuit's historical acceptance of state regulation of abortions, and this approach is in accordance with the state's ability to regulate all medicine within the state.

III. TEXAS STRONG: A STATE'S ABILITY TO REGULATE MEDICINE

As part of state sovereignty, a state "of course, has a legitimate interest in maintaining the quality of medical care provided within its borders," and therefore has the right to regulate the practice of medicine.[67] This concept has been the historical practice since the country's founding and stems naturally from the police power of the states.[68] In fact, the history of epidemic

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63. *Id.* at 431–35.

64. *Id.* at 442; *see also* Maher v. Roe, 432 U.S. 464, 477–80 (1977) (holding that participation in Medicaid does not require a state, under the Equal Protection Clause, to pay for abortions for women who are unable to afford them); Harris v. McRae, 448 U.S. 297, 302, 326 (1980) (upholding the Hyde Amendment, which prohibits the use of federal funds to pay for abortions under Medicaid, because the prohibition did not violate either Title XIX of the Social Security Act or the Constitution).

65. *K.P.*, 729 F.3d at 441–42.

66. *Id.* at 442 (quoting *McRae*, 448 U.S. at 316).

67. Bigelow v. Virginia, 421 U.S. 809, 827 (1975) (citing Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954)); *see also, e.g.*, Minnesota *ex rel.* Whipple v. Martinson, 256 U.S. 41, 45 (1921) ("The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."); Pegram v. Herdrich, 530 U.S. 211, 237 (2000) (noting that health care is a subject of traditional state regulation).

68. *See, e.g.*, Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 201–03 (1999) (noting that medicine is ideally suited as an exercise of a state's police power because it is a

diseases and the need to control them on a local level had a profound impact on the ultimate distribution of power within the new country.[69] Preventing the spread of deadly diseases such as yellow fever and malaria was vital, and to do so, the local government needed plenary power to promulgate regulations.[70] The state's police power was an obvious continuation of the common law, and was accepted as inherent to a state's sovereign authority from the beginning of this country's jurisprudence.[71] With this historical background, the plenary police power continued to be reserved to the states.[72] Further, it has been widely acknowledged that, even in the abortion context, the state's authority to regulate medicine extends to the regulation of medical practitioners and pharmaceuticals.[73]

A. Regulation of Medicine as a Profession

It has been "too well settled to require discussion" that a state's police power includes the ability to regulate certain professions, "particularly those which closely concern the public health."[74] In fact, "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."[75] Such regulation relates back to the state's interest in providing for the health and safety of its citizens, a power inherent in its sovereignty.[76] Thus, a state's ability to provide for its citizens' general welfare allows it to protect them from ignorance, incapacity, deception, and fraud in the medical profession.[77] Moreover, this power also extends to an additional

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profession, poses peculiar risks to public health and safety, and is intimately connected to regulations regarding epidemic disease and sanitation).

69. *Id.* at 203.

70. *Id.* at 203–06.

71. *See id.* at 203 n.3; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat 1) 1, 3 (1824) (recognizing that providing for the health of its citizens is within the power of the state).

72. *Gibbons*, 22 U.S. at 3.

73. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 165–66 (1973).

74. Watson v. Maryland, 218 U.S. 173, 176 (1910); *see also* Reetz v. Michigan, 188 U.S. 505, 506 (1903) (declaring that the state's power to regulate those practicing medicine "is not open to question").

75. *Watson*, 218 U.S. at 176.

76. Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954) (explaining that the power to establish standards within the health field is "vital" to a state's police power).

77. Dent v. West Virginia, 129 U.S. 114, 122 (1889) ("Few professions require more careful preparation by one who seeks to enter it than that of medicine.").

"interest in protecting the integrity and ethics of the medical profession."[78]

Consequently, in order to ensure that only qualified people engage in the practice of medicine, the state has a compelling interest in regulating who may practice.[79] These regulations are valid unless there is no rational basis for them.[80] The state's power within this field is "broad."[81] The most obvious examples of state regulation of the medical profession are state licensing requirements. A state is free to restrict the practice of medicine, through these requirements, to only those it deems fit.

The state's power, however, does not end with licensing. Even after meeting licensing requirements, physicians do not have an unlimited right to practice medicine free from regulation and with full discretion.[82] In fact, "[i]t is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing."[83] Not only is the state capable of controlling whether or not a doctor may practice medicine, it is also able to mandate how a doctor practices medicine. Additional conditions are appropriately added by the state after a physician has gained his license, especially as medical knowledge increases.[84]

Notably, courts have also approved state regulations concerning who can perform a procedure, even when the restrictions are not objectively necessary.[85] For example, in *Williamson v. Lee Optical of Oklahoma*, the Supreme Court upheld a regulation that allowed only optometrists or ophthalmologists

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78. Washington v. Glucksberg, 521 U.S. 702, 731 (1997). The Supreme Court also acknowledged this interest in *Gonzales v. Carhart*, when it accepted congressional findings that partial-birth abortion confuses the duties of physicians. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

79. *Watson*, 218 U.S. at 176; Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) (holding that under the state's power to protect the health of its citizens, it has the power to license and regulate physicians).

80. *Watson*, 218 U.S. at 178 (holding that regulations are valid unless they are "unreasonable and extravagant" and "unnecessarily and arbitrarily" interfere with rights).

81. *Goldfarb*, 421 U.S. at 792.

82. *See Dent*, 129 U.S. at 123.

83. Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954).

84. *Dent*, 129 U.S. at 123 (noting that a state may place "further conditions" on the practice of medicine beyond initial licensing).

85. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992) (plurality opinion) ("[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.").

to fit optical wear.[86] The district court had rejected the regulation as not reasonably related to the state's police power, but the Supreme Court disagreed.[87] The Court held that the prudence of the law was for the state legislature to decide, not the courts, even if the law was a "needless, wasteful requirement in many cases."[88] The justices determined that a court cannot strike down a law simply because it finds it "unwise, improvident, or out of harmony with a particular school of thought," nor does the law have to be "in every respect logically consistent with its aims to be constitutional."[89] Furthermore, a law regulating the practice of medicine does not have to apply equally to all doctors to be rational.[90] The state's ability to regulate the health profession extends beyond the ability to regulate physicians. States also have the authority to regulate the drugs that physicians prescribe.[91]

B. Regulation of Drugs

A state's power to regulate medicine encompasses an ability to regulate pharmaceuticals that are dispensed within the state.[92] This practice dates back to colonial times.[93] For example, in 1736, the State of Virginia enacted legislation to address medical practitioners' tendency to "load their Patients with greater Quantities thereof, than are necessary or useful . . . which [has] become a Grievance, dangerous and intolerable."[94] Regulation only increased as the nation grew. For instance, by the end of the

86. 348 U.S. 483, 485, 491 (1955).

87. *Id.*

88. *Id.* at 487.

89. *Id.* at 487–88.

90. *E.g.* Watson v. Maryland, 218 U.S. 173, 178 (1910) ("[T]he classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws."); Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610 (1935) (recognizing that a state does not have to deal with all "evils" at the same time).

91. Whalen v. Roe, 429 U.S. 589, 604 (1977).

92. *Id.* at 603 n.30 (noting that it is "well settled" that the state's police power extends to regulating the administration of drugs).

93. *See* EDWARD KREMERS, KREMERS AND URDANG'S HISTORY OF PHARMACY 158 (Glenn Sonnedeker ed., 4th ed. 1976).

94. *Id.* (quoting David L. Cowen, *Colonial Laws Pertaining to Pharmacy*, 23 J. AM. PHARM ASS'N. 1236, 1237 (1934) *reprinted in* 48 PHARMACY HIST. 24, 25 (2006), *available at* www.jstor.org/stable/41112299).

1800s, every state except one had laws regulating pharmacy.[95] The Supreme Court recognized this fundamental principle in *Whalen v. Roe*, in which the Court addressed a challenge to the New York State Controlled Substances Act of 1972.[96] Notably, the challenge was brought on right of privacy grounds, the same right which anchors the right to an abortion.[97] The district court in *Whalen* found that because the state could not show the necessity of the regulation, which required that the state be furnished a record of patients receiving certain drugs, the regulation could not be upheld.[98] The Supreme Court disagreed: "State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."[99] The Supreme Court thus acknowledged the state's broad power to regulate medicine.[100]

The advent of federal regulation within this area of medicine, including the creation of the Food and Drug Administration (FDA), did not change the traditional use of the state's police power.[101] A state may properly regulate a drug more stringently than the FDA.[102] Beyond FDA regulations, the Supreme Court has also ruled on the tension between other federal drug regulations and the state's power to regulate medicine. In *Gonzales v. Oregon*, for example, the Court explained that the Controlled Substances Act (CSA) did not give the federal government the authority to regulate the medical profession generally.[103] As a regulation intended to control drug trafficking, the CSA was not meant to infringe upon the state's ability to regulate the dispensing of drugs within the state.[104] *Gonzales*

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95. David L. Cowen, *The Development of State Pharmaceutical Law*, 37 PHARMACY HIST. 49, 49 (1995).

96. *Whalen*, 429 U.S. at 591.

97. *Id.* at 596.

98. *Id.*

99. *Id.* at 597.

100. *Id.* at 603–04.

101. *See History*, FDA, www.fda.gov/AboutFDA/Whatwedo/History/default.htm [perma.cc/C6YS-46S2] (last updated Dec. 17, 2014). The FDA's function dates back to the 1906 Pure Food and Drugs Act, and the FDA as it is known today came into existence in 1930. *Id.* Cases recognizing a state's power to regulate medicine post-date the creation of the FDA. *E.g.*, *Whalen*, 429 U.S. at 603 n.30.

102. *See* JAMES ROBERT NIELSEN, HANDBOOK OF FEDERAL DRUG LAWS, vi (2d ed. 1992).

103. 546 U.S. 243, 270 (2006).

104. *Id.* at 268–70.

involved a conflict between the Oregon Death with Dignity Act and the United States Attorney General's interpretation of the CSA.[105] After Oregon legalized physician-assisted suicide, the U.S. Attorney General issued an interpretive ruling, holding that physician-assisted suicide was not a "legitimate medical practice" under the federal law.[106] Physicians who performed euthanasia by administering a lethal dose of drugs under the Oregon Act would, therefore, be violating the CSA. The Supreme Court refused to give deference to the Attorney General's ruling, instead interpreting the CSA as respecting the "structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"[107] Accordingly, the Supreme Court held that the CSA did not authorize the Attorney General to prohibit doctors from distributing drugs for the purpose of euthanasia.[108] The power to regulate these drugs, other than for purposes of drug trafficking, remained with the states.

In fact, a state's power to regulate drugs extends far enough to completely prohibit the use of certain drugs within the state.[109] For example, the Sixth Circuit has approved state restrictions on off-label uses of drugs.[110] Consequently, because the state has the ability to regulate abortion, abortion-inducing drugs have not received special treatment from the courts.

C. Regulation in the Abortion Context

A state's ability to regulate medicine has also consistently been acknowledged within existing abortion jurisprudence.[111] The Supreme Court has never recognized an unlimited right to abortion, and the state's ability to regulate medicine is always recognized as partial justification for this.[112] Even the

105. *See id.* at 248–49.

106. *Id.* at 249.

107. *Id.* at 270 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

108. *Id.* at 274–75.

109. Whalen v. Roe, 429 U.S. 589, 603 (1977).

110. *See* Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 494 (6th Cir. 2012) (upholding an Ohio statute, similar to the Texas statute in question, that restricted the off-label use of RU-486).

111. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 149–50, 154 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992) (plurality opinion).

112. *Roe*, 410 U.S. at 153–54 (acknowledging that regulations to protect health and

Guttmacher Institute, a research center associated with Planned Parenthood, admits that "[s]tates have broad authority to regulate abortion providers as they regulate other health care providers to ensure safe and sanitary care."[113] The Court has also repeatedly compared abortion to other medical procedures and has refused to give abortion special status.[114]

The Court's refusal to curtail a state's authority to regulate physicians within the abortion context follows from the state's compelling interest in protecting the health of the mother: "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."[115] This power is analyzed under a rational basis test and "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[116] Medical or scientific uncertainty about a medical procedure—even abortion—expands, rather than limits, a state's regulatory power.[117]

The state's power to regulate medicine encompasses not only regulation of the abortion procedure, but also the physicians who perform it.[118] The Supreme Court has refused to elevate physicians who perform abortions above those who do not, and has also refused to grant them special discretion or protection in their practice.[119] Just like a state may restrict the fitting of eyewear to optometrists and ophthalmologists, a state may also

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maintain high medical standards are appropriate, even within the abortion context).

113. Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER POL'Y REV., Spring 2013, at 8, *available at* www.guttmacher.org/pubs/gpr/16/2/gpr160207.html [perma.cc/U49Z-LQKS].

114. *Casey*, 505 U.S. at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."). These regulations are still, however, subject to the undue burden test. *Id.*

115. *Roe*, 410 U.S. at 150.

116. Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

117. *Id.* at 163 (citing cases).

118. *See id.*; *see also* Mazurek v. Armstrong, 520 U.S. 968, 974 (1997) (per curiam) (upholding a state law limiting the performance of abortion to doctors); *Casey*, 505 U.S. at 884 (recognizing that abortion doctors are "subject to reasonable licensing and regulation by the state").

119. *Gonzales*, 550 U.S. at 163.

restrict the performance of abortion procedures to licensed physicians.[120]

IV. "YOU MAY ALL GO TO HELL AND I WILL GO TO TEXAS": OTHER STATES' ABORTION LAWS

Since *Roe v. Wade*, the abortion debate has returned to the states in full force. Texas House Bill 2 is merely one example of the recent trend of passing laws regulating abortion on the state level. Similar laws have been passed and challenged throughout the country.[121] For example, both Alabama and Wisconsin are currently defending recently passed state laws similar to Texas's House Bill 2.[122] Fetal pain legislation has also been a recurring theme in state abortion restrictions.[123]

Despite the growing number of states passing pro-life legislation, the concerns of pro-choice activists continue to influence legislation elsewhere. Some states have liberalized abortion laws and lifted restrictions on state constitutional grounds.[124] For instance, Washington recognizes a state statutory right to abortion.[125] California has a similar statute, and the California State Constitution has been interpreted to provide a right to choose whether or not to bear children.[126] Recently, California passed legislation that allows non-physicians to perform abortions.[127] In *Hope v. Perales*, the court found a right to an abortion in the due process clause of the New York State Constitution.[128] The contrast between different states' abortion

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120. *Mazurek*, 520 U.S. at 974; *see also Casey*, 505 U.S. at 884–85.

121. *See* Juliet Eilperin, *Abortion Limits at State Level Return Issue to the National Stage*, WASH. POST, July 5, 2013, www.washingtonpost.com/politics/abortion-limits-at-state-level-return-issue-to-the-national-stage/2013/07/05/f86dd76c-e3f1-11e2-aef3-339619eab080_story.html [perma.cc/N5X-ZUR9].

122. *See* Women's Health and Safety Act, ALA. CODE § 26-23E (2013); 2013 Wisconsin Act 37, WIS. STAT. §§ 253.095, 253.10 (2014); *see also infra* note 189.

123. John A. Robertson, *Fetal Pain Laws: Scientific and Constitutional Controversy*, BILL OF HEATH BLOG, HARV. L. PETRIE-FLOM CENTER (June 26, 2013), http://blogs.law.harvard.edu/billofhealth/2013/06/26/fetal-pain-laws-scientific-and-constitutional-controversy [perma.cc/83FG-EYNN].

124. *See* Amanda Marcotte, *Blue States Buck Abortion Trend*, THE DAILY BEAST, Aug. 29, 2013, www.thedailybeast.com/witw/articles/2013/08/29/blue-states-get-creative-in-expanding-abortion-access.html [perma.cc/G4LG-LB3V].

125. WASH. REV. CODE ANN. § 9.02.100 (West 2014).

126. CAL. HEALTH & SAFETY CODE § 123462 (West 2014); People v. Belous, 458 P.2d 194, 199–200 (Cal. 1969).

127. CAL. BUS. & PROF. CODE § 2253(b)(2) (West 2014).

128. 83 N.Y.2d 563, 575 (N.Y. 1994).

laws illustrates that the abortion debate has returned to the states, and Texas is at the forefront of this debate with Texas House Bill 2.[129]

V. TEXAS HOUSE BILL 2: THE NEW "YELLOW ROSE OF TEXAS"

A. The Bill

Texas House Bill 2 has four main components.[130] First, the Bill requires that doctors performing abortions must have admitting privileges at a nearby hospital.[131] The hospital must be located no more than thirty miles from where the abortion is performed and must provide obstetrical or gynecological services.[132] The Bill also requires the physician to provide the woman with information regarding the closest hospital to her home.[133] The physician must provide the woman with his or her contact information or the contact information for a health care worker with access to the woman's medical records in case complications arise.[134] Second, the Bill requires abortion facilities to upgrade to the level of an ambulatory surgical center.[135] Third, the Bill contains certain restrictions on chemical abortions.[136] Specifically, a physician, and only a physician, may prescribe abortion-inducing drugs, and only if he does so in accord with the protocol required by the FDA on the final printed label of the drug.[137] Finally, the Bill prohibits abortions past twenty weeks of pregnancy.[138]

The Bill's passage was largely a response to concerns about the health standards at abortion facilities—concerns that greatly increased after the trial of Pennsylvania abortion doctor Kermit

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129. *See* Stephanie Condon, *As More States Restrict Abortions, Fights Rage On*, CBS NEWS, July 10, 2013, www.cbsnews.com/news/as-more-states-restrict-abortions-fights-rage-on [perma.cc/5FAS-NNGS].

130. TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.044, 171.061-064, 245.010(a) (West 2013).

131. *Id.* § 171.0031(a)(1).

132. *Id.* § 171.0031(a)(1)(A)–(B).

133. *Id.* § 171.0031(a)(2)(B).

134. *Id.* § 171.0031(a)(2)(A).

135. *Id.* § 245.010(a).

136. *See id.* §§ 171.061–64.

137. *Id.* § 171.063 (allowing for the physician to prescribe the dosage amount approved by the American Congress of Obstetricians and Gynecologists Practice Bulletin).

138. *Id.* § 171.044.

Gosnell, who was found guilty of the involuntary manslaughter of forty-one-year-old Karnamaya Mongar, a patient who died during her abortion procedure.[139] His conviction sparked a renewed debate regarding abortion around the country—a debate that was intensified with the passage of Texas House Bill 2.[140]

B. The FDA Regulations

Texas House Bill 2 restricts the use of abortion-inducing drugs by requiring that physicians prescribe them in accordance with the regulations set forth by the FDA.[141] Chemical abortions are generally administered using two drugs—mifepristone (RU–486 or Mifeprex) and misoprostol.[142] Mifepristone is the only FDA-approved chemical abortion drug.[143] When using the drugs, the woman first takes mifepristone, which blocks progesterone, a hormone that is necessary to support a pregnancy.[144] A few days later, the woman takes misoprostol, which contracts the uterus and expels the fetus.[145] The FDA protocol requires that both drugs be administered at the abortion facility.[146] The common practice deviates from this protocol, however, with physicians administering the first medication at the abortion facility and patients self-administering the second drug at home.[147] Typically, abortion providers will offer chemical abortions up to sixty-three days after a woman's last menstrual period, though the FDA has only approved RU–486 for safe usage up to forty-nine days after

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139. *See* Sarah Hoye & Sunny Hostin, *Doctor Found Guilty of First-Degree Murder in Philadelphia Abortion Case*, CNN, May 14, 2013, www.cnn.com/2013/05/13/justice/pennsylvania-abortion-doctor-trial/index.html [perma.cc/873G-PH4L]. Gosnell was also convicted of first-degree murder of babies who were born alive. *Id.*

140. *See* Kirsten Powers, *On Abortion, Wendy Davis Doesn't Know What She's Talking About*, THE DAILY BEAST, Aug. 8, 2013, www.thedailybeast.com/articles/2013/08/08/on-abortion-wendy-davis-doesn-t-know-what-she-s-talking-about.html [perma.cc/MNX9-5TFQ] (noting both that the Texas bill was "drafted in response to the abuses at Gosnell's clinic" and that a twenty-two-year-old died during an abortion at Gosnell's clinic).

141. § 171.063.

142. Complaint, *supra* note 7, at 13.

143. *Id.* at 22.

144. *Id.* at 13–14.

145. *Id.* at 14.

146. FDA, MIFEPREX FINAL PRINTED LABEL [hereinafter MIFEPREX FPL] 13 (2004), *available at* www.accessdata.fda.gov/drugsatfda_docs/label/2004/020687s010-lbl.pdf [perma.cc/FU65-UVKB] [hereinafter FINAL PRINTED LABEL].

147. Complaint, *supra* note 7, at 13–14.

the beginning of a woman's last menstrual period.[148] It is these discrepancies between the practices of some abortion providers and FDA-approved procedures that the Texas bill seeks to change.[149]

The FDA approved the abortion-inducing drug mifepristone in 2000, four years after the application for approval was submitted.[150] After several years of the normal approval process, the FDA suddenly, at the end of the Clinton administration, approved the drug using the "fast track" process.[151] This process allows the FDA to approve a drug before clinical trials are complete.[152] Under this process, if the FDA concludes that a drug can only be safely used if such use is restricted, it will require post-marketing restrictions to that effect.[153] When the FDA approves a drug with post-marketing restrictions, it indicates that it "would not have been approved for use without those restrictions because the risk/benefit balance would not justify such approval."[154]

In fact, in an Approvable Letter for RU-486, the FDA concluded that the drug required restrictions because it was not safe or effective as it was submitted for approval.[155] The FDA's final determination was that RU-486 was only safe if its use was restricted.[156] The restrictions, in part, approved use only

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148. *Compare id.* at 14 (noting availability through sixty-three days after the last menstrual period), *with* FINAL PRINTED LABEL, *supra* note 146, at 5 (approving use only up to forty-nine days after the beginning of a woman's last menstrual period).

149. TEX. HEALTH & SAFETY CODE ANN. §§ 171.061–64 (West 2013).

150. Brief Amici Curiae of the Family Research Council and Alliance Defending Freedom in Support of Petitioners at 9, Cline v. Okla. Coal. for Reprod. Justice, 313 P.3d 253 (Okla. 2013) (No. 12-1094) [hereinafter Cline Brief] (citing FDA, NDA 20-687, Feb. 18, 2000, *available at* www.accessdata.fda.gov/drugsatfda_docs/appletter/2000/20687approvable00.pdf [perma.cc/VC6B-XYYZ] [hereinafter Feb. 2000 Approval Letter]).

151. Cline Brief, *supra* note 150, at 9; *see also* 21 U.S.C. § 356 (2013); 21 C.F.R. §§ 314.500–314.560 (2014).

152. *See generally* Accelerated Approval of New Drugs for Serious or Life-Threatening Illnesses, § 314.500.

153. 21 C.F.R. § 314.520.

154. New Drug, Antibiotic, and Biological Drug Product Regulations; Accelerated Approval, 57 Fed. Reg. 58,942-01, 58,949 (Dec. 11, 1992).

155. Cline Brief, *supra* note 150, at 9 (citing Feb. 2000 Approval Letter, *supra* note 150).

156. *Id.* (citing Feb. 2000 Approval Letter, *supra* note 150).

"through 49 days' pregnancy."[157] The Final Printed Labeling (FPL) required by the FDA reads: "Mifepristone is indicated for use in the termination of pregnancy (through 49 days' pregnancy) and has no other approved indication for use during pregnancy" and also warns "women should not take [mifepristone] . . . if: [i]t has been more than 49 days (7 weeks) since your last menstrual period began."[158]

In addition, the FDA requires three doctor visits: before, during, and after using the drugs.[159] Furthermore, both the doctor and patient must sign the "Patient Agreement Form," which states, in part, that the patient believes she is "no more than 49 days (7 weeks) pregnant."[160] In the thirteen years since RU–489 has been approved, the FDA has continued to deem the restrictions necessary.[161] As of April 30, 2011, eight women have died from bacterial infections after using mifepristone, all of whom used the drug in a manner inconsistent with the FDA restrictions.[162] Texas House Bill 2 restricts the use of this drug to the FDA protocol.[163] These limitations, now codified in Texas law, as well as the admitting-privileges requirement, are the subject of Planned Parenthood's lawsuit.[164]

C. The Challenge

On September 27, 2013, Planned Parenthood filed a lawsuit challenging the implementation of two of the four main

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157. FDA, *Approval Letter MIFEPREXTM (mifepristone) Tablets*, Sept. 28, 2000, *available at* www.accessdata.fda.gov/drugsatfda_docs/appletter/2000/20687appltr.htm [perma.cc/RW56-YXXM].

158. FINAL PRINTED LABEL, *supra* note 146, at 9, 16; *see also Mifeprex (mifepristone) Information*, FDA, www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm [perma.cc/A69V-XDGY] (last updated July 19, 2011) [hereinafter *Mifeprex Information*].

159. *See* FINAL PRINTED LABEL, *supra* note 146, at 13.

160. *Id.* at 18.

161. *See Mifeprex Questions and Answers*, FDA, www.fda.gov/Drugs/DrugSafety/%20PostmarketDrugSafetyInformationforPatientsandProviders/ucm111328.htm [perma.cc/GJ7D-42TE] (last updated Feb. 24, 2010) [hereinafter *Mifeprex Q&A*].

162. *See* FDA, RCM 2007–525, MIFEPRISTONE U.S. POSTMARKETING ADVERSE EVENTS SUMMARY THROUGH 04/30/2011, *available at* www.fda.gov/downloads/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/UCM263353.pdf [perma.cc/F6ZF-9B4D] [hereinafter *Adverse Events Summary*].

163. TEX. HEALTH & SAFETY CODE ANN. § 171.063 (West 2013).

164. Complaint, *supra* note 7, at 2.

requirements of Texas House Bill 2.[165] The complaint alleges that the Bill is unconstitutionally vague, unintelligible, and is a violation of Plaintiffs' (healthcare providers) and their patients' Fourteenth Amendment right to privacy.[166] Planned Parenthood complains that implementing the restrictions would force more than one-third of abortion facilities in Texas to close their doors and would require other facilities to decrease the number of abortions provided.[167] The complaint further alleges that abortion services would be eliminated in six Texas cities, thereby forcing some women to travel great distances to obtain an abortion.[168]

Moreover, the complaint asserts that because of the "hostility towards abortion" in Texas, it is difficult to retain abortion doctors.[169] According to the complaint, many doctors who do perform abortions do so only on a part-time basis.[170] Frequently, these doctors do not perform abortions in their own communities but must travel to clinics and are only on-site the day of the procedure.[171] Planned Parenthood also asserts that admitting privileges are not needed to provide continuity of care to a woman admitted to the hospital following an abortion.[172] Planned Parenthood alleges that the admitting-privileges requirement will "dramatically reduc[e] abortion access throughout the state" and is not needed.[173] The complaint also states that it is common practice for physicians to prescribe drugs for uses other than those approved by the FDA, so-called "off-label use," and that the FDA approves of this practice.[174] Consequently, the plaintiffs claim that the regulation requiring FDA compliance has "no medical reason" and will prohibit some women seeking chemical abortions past forty-nine days from

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165. *Id.* Planned Parenthood did not challenge the twenty-week ban or the ambulatory surgical center requirement. *Id.* at 11–13; *see also supra* note 10 (describing strategy).

166. Complaint, *supra* note 7, at 2. This note only addresses the right to privacy claim. *See infra* Parts VI & VII.

167. Complaint, *supra* note 7, at 16.

168. *Id.*

169. *Id.* at 14; *but see infra* notes 249–59 and accompanying text.

170. Complaint, *supra* note 7, at 14.

171. *Id.*

172. *Id.* at 18.

173. *Id.* at 16.

174. *Id.* at 22; *see also* Cline Brief, *supra* note 150, at 17–18 (noting that states, not the FDA, police off-label use).

obtaining them because of the four trips to the abortion facility that they may be required to make.[175]

Judge Lee Yeakel of the Federal District Court for the Western District of Texas considered these arguments and on October 28, 2013, one day before the law was scheduled to go into effect, issued a ruling on Planned Parenthood's motion for a preliminary injunction.[176] The judge ruled that the admitting-privileges requirement was unconstitutional and enjoined its enforcement.[177] In doing so, he employed a two-part analysis. First, he subjected the law to "a rational-basis review to determine whether the law's purpose or effect is rationally related to the state's legitimate interest balanced with the woman's interest."[178] Second, he scrutinized the purpose of the law to determine "whether the state's purpose is to hinder autonomous reproductive choice, distinct from a rational-basis analysis."[179] Judge Yeakel found that the admitting-privileges requirement failed both of these prongs. First, he held that the state could not show that admitting privileges "rationally relate to the State's legitimate interest in protecting the unborn," and that "admitting privileges have no rational relationship to improved patient care."[180] Second, he found that because of the requirement, "abortion clinics . . . will close," placing an undue burden on a woman's right to an abortion.[181] He therefore enjoined the admitting-privileges requirement.[182] Regarding the restrictions on chemical abortions, Judge Yeakel found that they did not place an undue burden on a woman's right to an abortion except in cases where the health or life of the mother was at risk and required a chemical abortion past forty-nine days; Judge Yeakel did not define "health" in his opinion, but seemed

175. Complaint at 26 (noting that visits are required for a sonogram, a first dose of mifepristone, a dose of misoprostol, and a required follow-up visit).

176. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), *aff'd in part, rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

177. *Id.*

178. *Id.* at 898.

179. *Id.* at 899.

180. *Id.* at 900.

181. *Id.*

182. *Id.* at 909.

to imply that it was expansive.[183] The State of Texas filed an emergency appeal to the Fifth Circuit, requesting that the court overturn Judge Yeakel's decision regarding the admitting-privileges requirement.[184] On October 31, 2013, the Fifth Circuit granted a stay to the State, allowing the Bill's provisions to go into effect essentially as they were written.[185] In a 5-4 decision, the United States Supreme Court denied Planned Parenthood's motion to vacate the stay.[186] The Fifth Circuit issued a final merits decision on March 27, 2014, reversing the district court's opinion and upholding both the admitting-privileges requirement and the chemical abortion regulations.[187] The plaintiffs petitioned for en banc review, which was denied on October 9, 2014.[188] The Fifth Circuit's decision, along with other recent decisions on similar bills, has set the stage for possible Supreme Court review of the constitutionality of Texas House Bill 2.[189] In fact, in his dissent to the Supreme Court decision

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183. *Id.* at 908–09; *see also* Appellant's Brief at 39, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2013) (No. 13-51008) [hereinafter *Abbott* Appellant Brief].

184. Emergency Motion to Stay Final Judgment Pending Appeal, and Motion for a Compressed Briefing Schedule and Expedited Consideration at the January Sitting at ii, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406 (5th Cir. 2013) (No. 13-51008), *available at* http://pdfserver.amlaw.com/tx/oagemergencymotion.pdf [perma.cc/K7XL-RR84]; Becca Aaronson, *State Seeks Emergency Stay Over Abortion Ruling*, TEX. TRIB., October 29, 2013, www.texastribune.org/2013/10/29/federal-court-rules-abortion-restriction-unconstit [perma.cc/9S4P-H8CC].

185. *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013) [hereinafter *Abbott I*].

186. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506 (2013).

187. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 587 (5th Cir. 2014) [hereinafter *Abbott II*]. The Fifth Circuit chastised the district court for improperly applying the rational basis and undue burden tests. *Id.* at 593–94. It explained that "[a]pplying the rational basis test correctly, we have to conclude that the State acted within its prerogative to regulate the medical profession by heeding these patient-centered concerns and requiring abortion practitioners to obtain admitting privileges at a nearby hospital." *Id.* at 595. The court also upheld the chemical abortion regulations, noting that "H.B. 2's regulations on medication abortion, like the Act in *Gonzales*, do not facially require a court-imposed exception for the life and health of the woman." *Id.* at 604.

188. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbot, 769 F.3d 330, 331 (5th Cir. 2014).

189. *Compare Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 359–63 (4th Cir. 2002) (upholding South Carolina admitting-privileges requirement), *and Women's Health Ctr. v. Webster*, 871 F.2d 1377, 1381 (8th Cir. 1989) (upholding Missouri's admitting-privileges requirement), *with Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 799 (7th Cir. 2013) (upholding the district court's issuance of a preliminary injunction to prevent Wisconsin statute requiring admitting privileges from

denying the motion to vacate the stay, Justice Breyer noted that the question of admitting privileges was "a question, I believe, that at least four Members of this Court will wish to consider irrespective of the Fifth Circuit's ultimate decision."[190]

VI. GONE TO TEXAS: TEXAS HOUSE BILL 2 AS A MEDICAL REGULATION

Texas House Bill 2 fits comfortably within both Fifth Circuit and Supreme Court precedent on abortion and should be upheld. First, the state's enactment of both of the challenged portions of Texas House Bill 2 was reasonably related to the state's interests in regulating the practice of medicine within its own borders and protecting the health of its citizens. Second, neither of the provisions challenged in *Abbott* constitutes an undue burden under either Fifth Circuit or Supreme Court precedent. Thus, the law passes the two-pronged test applied to state abortion laws.[191] Consequently, the Fifth Circuit was correct to uphold the law as constitutional. The Supreme Court should do the same, should it decide to review the Fifth Circuit's decision.

A. Texas's Right to Regulate the Practice of Medicine

Contrary to Judge Yeakel's decision, the admitting-privileges requirement survives rational-basis review. In enjoining the law's enforcement, Judge Yeakel based his holding upon his finding that the admitting-privileges requirement was not rationally related to the state's interest in protecting the life of the fetus

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going into effect), *cert. denied*, 134 S. Ct. 2841 (2014), *and* Jackson Women's Health Org. v. Currier, 760 F.3d 448, 449, 453 (5th Cir. 2014) (recognizing that Mississippi's admitting-privileges requirement had a rational basis, but upholding a preliminary injunction to the law because it would close the only abortion clinic in the state, placing an undue burden on the women of the state). Mississippi has requested en banc review. *See* Jessica Mason Pieklo, *Mississippi Appeals Fifth Circuit Decision Blocking Admitting Privileges Requirement*, RH REALITY CHECK, Aug. 14, 2014, http://rhrealitycheck.org/article/2014/08/14/mississippi-appeals-fifth-circuit-decision-blocking-admitting-privileges-requirement [perma.cc/BCT8-CY36].

190. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. at 509 (Breyer, J., dissenting). Though the Fifth Circuit has denied en banc review, this note assumes probable future litigation in this case at the Supreme Court.

191. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

and did not improve patient care.[192] His analysis, however, ignores Texas's other independent interest—the regulation of medicine.[193] In enacting abortion regulations, states are not limited to considering only interests related to the health of the mother and the fetus, but instead retain the independent interest and right of regulating the medical profession.[194] The admitting privileges requirement can be understood and upheld as a law furthering the state's recognized interest in regulating the medical profession. By regulating physicians who perform abortions, Texas is utilizing a power it already has—the ability to exercise its historical and inherent sovereign control over the practice of medicine within the state. When exercising this right, state lawmakers are granted great deference.[195] A court will not invalidate a state law regulating medicine unless it is clearly an arbitrary regulation.[196]

The admitting-privileges requirement, which requires abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion facility, is a rational, non-arbitrary exercise of Texas's right to regulate doctors.[197] Texas is permitted to create licensing requirements for physicians. The State's power to regulate the profession of medicine also goes beyond mere licensing. Long-established precedent gives Texas the ability to create and enforce regulations regarding who performs certain

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192. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013), *aff'd in part, rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

193. *See Abbott I*, 734 F.3d at 412.

194. *Id.* at 411 (citing *Gonzales*, 550 U.S. at 157). The Fifth Circuit acknowledged that Texas has an interest in protecting both the medical profession and the life of the mother, treating them as independent interests under which a legislature could rationally enact abortion legislation. *Abbott I*, 734 F.3d at 413 (citing *Gonzales*, 550 U.S. at 157). Other state interests have been recognized as well, including: "(1) ensuring that a woman is fully informed and aware of the significance of her decision, (2) protecting minors from making decisions that they are not capable of comprehending, (3) fostering parental authority and family integrity, and (4) protecting the mutuality of the marital relationship." John L. Horan, Note, *A Jurisprudence of Doubt:* Planned Parenthood v. Casey, 26 CREIGHTON L. REV. 479, 497 (1993) (citing cases).

195. *See* Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905); Williamson v. Lee Optical of Okla., 348 U.S. 483, 487 (1955).

196. *See Jacobson*, 197 U.S. at 38–39.

197. *See Abbott I*, 734 F.3d at 412 (observing that the district court, in issuing an injunction, failed to recognize the state's interest in regulating medicine); *Abbott II*, 748 F.3d at 595 (concluding that the admitting-privileges requirement was within Texas's "prerogative to regulate the medical profession").

procedures and how those procedures are performed.[198] Texas House Bill 2 is such a regulation. The Bill limits the performance of abortion procedures to physicians who have admitting privileges at a nearby hospital. It is a limitation—on who can perform abortions as well as a limitation on how these procedures can be performed—that ensures continuity of care for the patient. Such restrictions fit well within Texas's right to regulate the medical profession.

This exercise of control is no less constitutional than limiting the fitting of eyewear to optometrists or ophthalmologists. The Supreme Court has already approved limiting the performance of abortion to physicians.[199] Further limiting the performance of the procedure to only those physicians who meet additional requirements is merely an extension of this right of the state. The Fifth Circuit, in reversing Judge Yeakel's preliminary injunction, recognized this point. It characterized the judge's decision as "but one step removed from repudiating the longstanding recognition by the Supreme Court that a State may constitutionally require that only a physician may perform an abortion."[200] Texas's right to regulate medicine does not dissipate in the abortion context. Likewise, Texas does not have to prove that this law definitively increases patient care.[201] Planned Parenthood argued, and Judge Yeakel found, that the admitting-privileges requirement was unnecessary for patient safety or care.[202] But, under the rational basis test, necessity is not the standard.[203] Courts typically defer to a state legislature's choice of restrictions on the medical profession unless those

198. *See Women's Health Ctr. v. Webster*, 871 F.2d 1377, 1381 (8th Cir. 1989) ("[I]n exercising its police powers to protect the well-being of its citizens, [the state] has undoubted authority to regulate the conditions under which surgical procedures are performed. Such legitimate state regulation of surgical procedures is not rendered unconstitutional because it is specifically applied to abortion.").

199. Mazurek v. Armstrong, 520 U.S. 968, 974 (1997) (per curiam) ("The Court of Appeals' decision is also contradicted by our repeated statements in past cases . . . that the performance of abortions may be restricted to physicians.").

200. *Abbott I*, 734 F.3d at 412 (citing *Mazurek*, 520 U.S. at 974).

201. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992) (plurality opinion); *Abbott I*, 734 F.3d at 412 (quoting *Mazurek*, 520 U.S. at 973–74).

202. Complaint, *supra* note 7, at 18; Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 899–900 (W.D. Tex. 2013), *aff'd in part, rev'd in part*, 748 F.3d 583 (5th Cir. 2014).

203. *See Abbott II*, 748 F.3d at 583, 593–94 (holding that the district court "took the wrong approach to the rational basis test"); *see also Abbott* Appellant Brief, *supra* note 183, at 30 (citing *Casey*, 505 U.S. at 878 (1992)).

regulations are arbitrary.[204] The fact that abortion is involved does not alter the state's authority or the deference due to legislative judgment.[205] As noted above, the Supreme Court has explicitly recognized that, though restricting abortion to licensed physicians is not objectively necessary, it is nonetheless a constitutional restriction on the procedure.[206] Thus, even if Texas were to concede that the admitting-privileges requirement was not objectively necessary, the requirements should still be upheld as a valid, rational regulation grounded in Texas's independent right to regulate physicians.

B. Protecting the Health of the Mother

Nonetheless, even if Texas were required to show justification beyond its right to regulate medicine for regulating abortion physicians in this way, the state could easily satisfy such a requirement.[207] The admitting privileges requirement in Texas House Bill 2 is directly linked to another of Texas's interests: protecting the health and life of the mother. The primary purpose behind the admitting-privileges requirement is to improve care for abortion patients who experience complications. Continuity of care is, and should be, a high priority in any medical procedure.[208] The abortion procedure involves many serious risks that have been scientifically documented in peer-reviewed research.[209] These dangers include

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204. *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (holding that state medical provisions become unconstitutional when they are enacted in "such an arbitrary, unreasonable manner").

205. *Abbott II*, 748 F.3d at 594 ("Nothing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test."); *see also* Gonzales v. Carhart, 550 U.S. 124, 163–64 (2007).

206. *See Casey*, 505 U.S. at 885 (1992) (plurality opinion).

207. *Abbott I*, 734 F.3d at 411; *Abbott II*, 748 F.3d at 594 ("[Texas] easily supplied a connection between the admitting-privileges rule and the desirable protection of abortion patients' health.").

208. *See Abbott II*, 748 F.3d at 595; *see also Abbott* Appellant Brief, *supra* note 183, at 4 (quoting JOINT COMM'N CTR. FOR TRANSFORMING HEALTHCARE, FACTS ABOUT THE HAND-OFF COMMUNICATIONS PROJECT 1–2, (2013), *available at* www.centerfortransforminghealthcare.org/assets/4/6/CTH_HOC_Fact_Sheet.pdf [perma.cc/Y8P3-Y7Y4] (noting that 80 percent of serious medical errors result from problems in transferring patients)).

209. Amicus Curiae Brief of Alliance Defending Freedom et al. in Support of Defendants-Appellants and Reversal of District Court at 5, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406 (2013) (No. 13-51008) [hereinafter ADF Amicus Brief] (citing J.M. Thorp Jr., M.D. et al., *Long-Term Physical &*

long-term and short-term complications resulting from the procedure.[210] Long-term risks include mental health disorders, an increased risk of breast cancer, and other serious medical concerns.[211] Short-term risks, outlined in the "A Woman's Right to Know" pamphlet that Texas requires doctors to provide to abortion patients, include uterine perforation, incomplete abortion, infections, hemorrhaging, cervical laceration, and even death.[212] Texas requires doctors to inform women of these risks before performing an abortion.[213] Women undergoing an abortion may require emergency treatment, such as a hysterectomy or other surgery.[214] Despite these documented risks, almost all abortion procedures in Texas are performed at abortion facilities that are not equipped to handle emergency complications.[215] Because this invasive procedure rarely occurs in a hospital, when complications arise, the patient must be transferred to a nearby hospital in order to receive the emergency treatment required. Additionally, if the abortion doctor does not have admitting privileges, serious delays in treatment can occur.[216] This is especially true with itinerant physicians who perform a large number of abortions in one trip and then depart from the area immediately, leaving the patient no means to contact them in the event of complications or emergency.[217] In such situations, an emergency room physician, unfamiliar with the patient's history or condition, must take over

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Psychological Health Consequences of Induced Abortion: Review of the Evidence, 58 OB/GYN Surv. 67 (2003)).

210. *Id.* at 5–6.

211. *Id.* at 5.

212. *Id.* at 6 (citing TEX. DEP'T OF STATE HEALTH SERVS., A WOMAN'S RIGHT TO KNOW, www.dshs.state.tx.us/wrtk [perma.cc/YV45-NDB3] (last updated July 9, 2013)).

213. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2013).

214. ADF Amicus Brief, *supra* note 209, at 6 (citing *A Woman's Right to Know*, *supra* note 212).

215. *Id.* at 4–5 (citing *Induced Terminations of Pregnancy Narrative*, TEX. DEP'T OF STATE HEALTH SERVS., www.dshs.state.tx.us/chs/vstat/vs10/nabort.shtm [perma.cc/DW7T-DFQP] (last updated Dec. 31, 2013)); *see also* SUSAN B. ANTHONY LIST, FACT SHEET: ABORTION INDUSTRY NEGLIGENCE NATIONWIDE 12–13, *available at* www.sba-list.org/sites/default/files/content/shared/09.11.13_updated_fact_sheet.pdf [perma.cc/99H5-75AA] (last visited Jan. 14, 2015) (documenting health issues and emergencies at Texas abortion clinics).

216. *See Abbott* Appellant Brief, *supra* note 183, at 4 (citing JOINT COMM'N CTR. FOR TRANSFORMING HEALTHCARE, *supra* note 208, at 1–2).

217. *Id.* at 5 (citing RICHARD P. KUSSEROW, ITINERANT SURGERY ii, 1989, *available at* http://oig.hhs.gov/oei/reports/oai-07-88-00850.pdf [perma.cc/W9AQ-JXWA]).

care.[218] But it is not standard for emergency rooms to provide post-operative care instead of the treating physician; the emergency physician, who may not be familiar with abortion procedures, may have difficulty diagnosing and treating abortion-specific complications.[219]

Requiring abortion doctors to have admitting privileges ensures adequate care for the patient. This requirement guarantees that a physician knowledgeable of the patient's current condition and past medical history is available to convey that information to the treating physician or, when appropriate, treat the patient himself. The State of Texas has outlined four main ways in which Texas House Bill 2 increases the quality of care for abortion patients:

> (a) [I]t provides a more thorough evaluation mechanism of physician competency which better protects patient safety; (b) it acknowledges and enables the importance of continuity of care; (c) it enhances inter-physician communication and optimizes patient information transfer and complication management; and (d) it supports the ethical duty of care for the operating physician to prevent patient abandonment.[220]

Despite these benefits, Planned Parenthood argues that its doctors will be unable to meet the admitting privileges requirement because most are traveling doctors.[221] Ironically, the problems created by these traveling doctors are the exact problems that the admitting privileges requirement seeks to solve.[222] Itinerant physicians do not form any relationship with patients and leave town immediately after performing the abortions, making them unavailable for assistance or

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218. *See* ADF Amicus Brief, *supra* note 209, at 10.

219. Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 18, 26, Planned Parenthood Se. v. Strange, 2014 WL 3809403 (M.D. Ala. Aug. 4, 2014) (No. 2:13-CV-405-MHT), Doc. 123 [hereinafter *Strange* Defendant's Brief] (citing Dr. George C. Smith, the head of the Alabama Board of Medical Examiners, that "it is standard medical practice for a physician to provide continuity of care to his or her own patients," and explaining that "[e]ven plaintiffs' doctor" admitted the benefit of "'experience in abortion to be able to diagnose complications arising from an abortion'").

220. *Abbott* Appellant Brief, *supra* note 183, at 4.

221. Complaint, *supra* note 7, at 14–15. Hospitals often require doctors to live within a certain distance of the hospital before the doctors are considered for admitting privileges. *Id.* at 19.

222. *Abbott* Appellant Brief, *supra* note 183, at 5.

consultation if the patient needs them.[223] Even the National Abortion Federation (NAF) has recognized the importance of admitting privileges and, in 2000, urged abortion patients to seek a physician who had admitting privileges at a hospital within twenty miles of the abortion facility, ten miles closer than the requirement in Texas House Bill 2.[224] In essence, this bill provides much needed protection for abortion patients against "patient abandonment."[225] The law embodies the type of "requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person" that *Roe* itself anticipated and encouraged.[226]

C. Texas's Right to Regulate the Dispensing of Drugs

Limiting the administration of chemical abortion drugs to the FDA protocol likewise survives a rational-basis review. As outlined in Part III, Section B, states are able to regulate the dispensing of drugs as part of their police power and courts are to give deference to state legislatures in reviewing these laws. Texas may "use its regulatory power to bar certain procedures and substitute others."[227] Texas House Bill 2 does so by limiting the use of chemical abortion drugs to only the protocol approved by the federal agency whose purpose is to engage in "an essential public health task by making sure that safe and effective drugs are available to improve the health of people in the United

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223. *See id.*

224. *Id.* at 3, app. B (citing NAT'L ABORTION FED'N, "HAVING AN ABORTION? YOUR GUIDE TO GOOD CARE" (2000)); *see also* H. COMM. ON THE JUDICIARY, 107TH CONG., REP. ON CHILD CUSTODY PROTECTION ACT, H.R. REP. NO.107–397, at 2 (2002) (citing pamphlet for recommendation that teens involve their parents in the abortion decision) (citing NAT'L ABORTION FED'N, "HAVING AN ABORTION? YOUR GUIDE TO GOOD CARE (2000)). Ovide Lamontagne, *Linking Guns and Babies Could Backfire on the Left*, THE FEDERALIST, Sept. 5, 2014, http://thefederalist.com/2014/09/05/linking-guns-and-babies-could-backfire-on-the-left [perma.cc/3NUP-X49D] ("[A]bortion patients searching for a doctor should find one who '[i]n the case of an emergency' can 'admit patients to a nearby hospital (no more than 20 minutes away)"). Demonstrating its commitment to providing reproductive services to indigent women, the National Abortion Federation has eliminated online access to the pamphlet and placed it behind a paywall, where it is available in a fifty–pack to members for $16 and to non-members for $20. *Having An Abortion? Your Guide to Good Care: $16.00–$20.00*, NAT'L ABORTION FED'N, http://prochoice.org/resources/having-an-abortion-your-guide-to-good-care [perma.cc/QT7R-ZUDU] (last visited Jan. 14, 2015).

225. *Abbott* Appellant Brief, *supra* note 183, at 4.

226. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

227. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

States."[228] Based on the FDA's continuous refusal to fully approve the drug, its express limitations on the use of the drug, and the possible links to death when used outside the approved protocol, Texas had more than one rational reason to implement federal policy into its own state law. Just as Oregon was able to expand the use of certain drugs for physician-assisted suicide, Texas is able to limit the use of drugs to a certain protocol.[229] In *Gonzales v. Oregon*, Oregon's drug policy directly conflicted with federal policy, but the Supreme Court held that the state, not the federal government, had the fundamental power of regulating the use and purpose of drugs.[230] Here, Texas House Bill 2 actually *implements* federal policy, thus eliminating any federalism concerns.

VII. THE LINE IN THE SAND: APPLYING THE UNDUE BURDEN TEST

Although Texas has the authority to enact Texas House Bill 2 under the state's sovereign right to regulate medicine, the Bill would still be unconstitutional under current abortion jurisprudence if it imposed an undue burden on a woman's right to an abortion.[231] Texas House Bill 2 does not unduly burden this right, however. Planned Parenthood brought a facial challenge to the law, arguing that Texas House Bill 2 unconstitutionally imposed an undue burden on a woman's right to an abortion.[232] In order to succeed, Planned Parenthood must show that the challenged portions of Texas House Bill 2 are unconstitutional in any and all circumstances.[233] Planned

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228. *About the Center for Drug Evaluation and Research*, FDA, www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER [perma.cc/4UP2-G5RA] (last updated Dec. 9, 2014); TEX. HEALTH & SAFTEY CODE ANN. § 171.063 (West 2013).

229. *See* Gonzales v. Oregon, 546 U.S. 243, 274–75 (2006).

230. *Id.*

231. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion).

232. *Abbott II*, 748 F.3d at 587.

233. *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993) (citing Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989) (O'Connor, J., concurring)) ("A facial challenge will succeed only where the plaintiff shows that there is *no* set of circumstances under which the statute would be constitutional."); *see also* U.S. v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Notably, for the sake of argument in *Abbott II*, the Fifth Circuit applied the lesser "large fraction" standard from

Parenthood cannot meet this standard because there are circumstances where the law applies but places no undue burden on a woman's right to an abortion—situations where doctors can obtain, or already have obtained, admitting privileges without a problem. For instance, numerous abortion practitioners in Dallas, Houston, San Antonio, and Austin already have admitting privileges to nearby hospitals.[234] Planned Parenthood did not even attempt to argue that their facial challenge satisfied the relevant standard—that there are no circumstances in which the law could be constitutional—because there is simply no evidence to prove such a claim.[235]

A. Passing the Purpose Test

Even setting aside this fundamental flaw in Planned Parenthood's case against Texas House Bill 2, the law remains constitutional. Texas House Bill 2 lacks either the purpose or the effect of placing an undue burden on access to abortion for at least two reasons. Moreover, Planned Parenthood failed to allege that the state has an improper purpose for enacting this law.[236] Given Texas's deep-rooted justifications for enacting such regulations on abortion, there is no reason for the courts to assume that the legislature's purposes are illegitimate, especially given the deference that courts are to accord legislatures in this analysis.[237]

Nevertheless, an abortion law is invalid if it serves "no purpose other than to make abortions more difficult."[238] Texas has at least two rational purposes for enacting this bill, however: regulating medicine and protecting the health of the mother.

Casey and still held that requirements did not impose an undue burden in even "a large fraction" of the cases. *Abbott II*, 748 F.3d at 588–89, 600.

234. *Abbott* Appellant Brief, *supra* note 183, at 25.

235. *See* Brief of Plaintiffs-Appellees at 24, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (2013) (No. 13-51008).

236. *Abbott II*, 748 F.3d at 597.

237. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam) ("[Courts should] not assume unconstitutional legislative intent even when statutes produce harmful results.").

238. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) (plurality opinion).

The presence of at least one permissible purpose cancels out any other impermissible purposes.[239]

B. Passing the Effect Test—The Admitting-Privileges Requirement

In addition to having a permissible purpose, the Bill does not have the effect of placing an undue burden on access to abortion. Planned Parenthood argues that they will not be able to comply with this law because abortion doctors are unable to obtain admitting privileges at Texas hospitals, and therefore this law makes it impossible for some abortion clinics to continue operating.[240] Accordingly, Planned Parenthood argues that some Texas women will be forced to travel great distances to obtain an abortion.[241] These claims, even if true, do not rise to the level of an undue burden. For a law to be unconstitutional, it must place an *undue* burden on women's access to abortion, not simply a burden.[242] Many inferences must be made to reach the conclusion that women will face *any* burden in obtaining an abortion. First, one must assume that current abortion doctors will not obtain the necessary admitting privileges.[243] Next, one must assume that no other doctors with admitting privileges will fill the empty positions, and that if this causes clinics to close, no other clinics will fill their void.[244] Planned Parenthood has failed to meet its burden in proving that any of these inferences are certain to happen, or, if they do become a reality, that it is the fault of the State.

The Fifth Circuit has been quick to reject claims that state abortion regulations create an undue burden.[245] In fact, there is

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239. Memorandum of Law and Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment (Redacted) at 51, Planned Parenthood Se. v. Strange, 2014 WL 3809403 (M.D. Ala. Aug. 4, 2014) (No. 2:13-CV-405-MHT-TFM), Doc. 107 (citing *Casey*, 505 U.S. at 900–01 & Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997)).

240. Complaint, *supra* note 7, at 16.

241. *Id.*

242. *See Casey*, 505 U.S. at 874; Stenberg v. Carhart, 530 U.S. 914, 914 (2000).

243. *But see Abbott* Appellant Brief, *supra* note 183, at 25 (noting that numerous abortion practitioners in Dallas, Houston, San Antonio, and Austin already have admitting privileges).

244. The plaintiffs have failed to prove this. *See id.* at 21–23 (demonstrating that the plaintiffs' alleged closure statistics lacked "science" behind their findings).

245. *See* Planned Parenthood Ass'n of Hidalgo Cnty. Tex. v. Suehs, 692 F.3d 343, 346 (5th Cir. 2012) (upholding a prohibition on the receipt of certain state funds for abortion providers); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d

little difference between Planned Parenthood's argument here and the argument that the Fifth Circuit rejected in *K.P. v. LeBlanc.*[246] There, the Louisiana law prohibited abortion providers from obtaining certain state-sponsored insurance coverage, arguably making it nearly impossible for abortion doctors to obtain the coverage that was required to limit their malpractice liability. The plaintiff argued that this reduced the availability of abortion doctors, indirectly imposing an undue burden.[247] This argument is very similar to the argument made against Texas House Bill 2. Nevertheless, the Fifth Circuit rejected this argument in *K.P.*, as it did here.[248] The Supreme Court should follow suit. In *K.P.*, the Fifth Circuit concluded that even a state regulation that made it "prohibitively difficult" for doctors to perform abortions was not an undue burden.[249] Here, Planned Parenthood claims that physicians are unwilling to commit to abortion clinics full-time because of a societal hostility towards abortion doctors that is part of the culture in Texas.[250] They also argue that those doctors who do commit to abortion full-time often do not have admitting privileges because their patients rarely go to hospitals.[251] Just as a doctor's inability to obtain insurance in Louisiana was not a burden of the state's "'own creation,'" however, any inability of physicians to obtain admitting privileges is not a burden of Texas's own creation.[252]

This is especially true when Texas law explicitly prohibits hospitals from discriminating against doctors who perform abortions when determining admitting privileges.[253] The failure to receive admitting privileges results from either a physician's lack of qualifications or an economic choice by the abortion clinics for which they work, not the culture of Texas.[254] In

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570, 584 (5th Cir. 2012) (upholding Texas's informed consent laws which in part mandate ultrasounds and a twenty-four-hour waiting period).

246. 729 F.3d 427, 440 (5th Cir. 2013).

247. *Id.* at 432–33.

248. *Id.* at 442.

249. *Id.*

250. Complaint, *supra* note 7, at 14.

251. *Id.* at 18–19.

252. *K.P.*, 729 U.S. at 442 (quoting Harris v. McRae, 448 U.S. 297, 316 (1980)).

253. *See Abbott I*, 734 F.3d at 415–16 & n.50 (recognizing that state and federal laws forbid hospitals receiving certain federal funds from using abortion as a reason to refuse admitting privileges).

254. *See Strange* Defendant's Brief, *supra* note 219, at 41–42.

actuality, "some of the features of hospital credentialing that plaintiffs believe will prevent them from complying with the Act are the same features that make staff privileges beneficial to patients."[255] For example, physicians will sometimes be denied admitting privileges because they are not competent to perform OB/GYN procedures, the same procedures that may be necessary in abortion complications.[256] Or a physician might be denied admitting privileges due to his inability to provide continuous care to patients, which is precisely one of the problems that Texas House Bill 2 aims to prevent.[257] Recognizing the value that admitting privileges have as a testimony to a physician's proficiency, some states require physicians to have admitting privileges to be considered for staff positions at state surgery centers.[258] Overall, requiring hospital admitting privileges ensures that the physician performing the abortion procedure has the credentials and competence needed to provide safe and continuous care to his patients. The fact that abortion doctors might not be able to meet the requirements needed to obtain these privileges is not a burden enacted by the state, but an inadequacy in the doctors' own qualifications. It might be true that hospitals are unwilling to grant admitting privileges to part-time, travelling physicians because they are not consistently within the community. But many abortion clinics prefer to hire part-time doctors as an economic choice—part-time doctors are simply cheaper than full-time doctors.[259] Neither the independent economic choices of abortion clinics nor a physician's failure to qualify for admitting privileges is a substantial burden created by the state.

Similarly, the possibility that some women in Texas might have to travel long distances to an abortion clinic, perhaps making it more expensive to obtain an abortion, does not rise to the level of an undue burden. The Supreme Court has explicitly held that

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255. *See id.* at 41.

256. *See id.* at 41–42.

257. *Id.* at 42.

258. *Id.* at 25 (emphasizing the testimony of the president of the Alabama Association of Ambulatory Surgery Centers, who stated, "We believe it's [] necessary whether we're required or not.") (internal citation omitted).

259. *Abortion Clinic Guide,* www.abortion.to/pg_item_judging.html [perma.cc/VW2B-T5KQ] (last visited Jan. 14, 2015) (explaining that chain abortion clinics often hire part-time doctors and hire doctors at the cheapest rate).

"[t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[260] Planned Parenthood's clinic placements in other states demonstrate the importance of this Supreme Court reasoning. Planned Parenthood's voluntary decision to locate its clinics in Georgia in such a way that some women must travel at least eighty miles to the nearest abortion clinic significantly weakens the argument that the 100 miles some Texas women might have to travel constitutes an undue burden.[261] The twenty mile difference between what some Texas women might have to travel as an indirect effect of Texas House Bill 2 and the distance that Planned Parenthood chooses to impose upon women in Georgia cannot support the claim that the Texas scenario constitutes an undue burden where the Georgia scenario does not. The Fifth Circuit recognized this when it held that "[a]n increase in travel distance of less than 150 miles for some women is not an undue burden on abortion rights."[262] Likewise, under Supreme Court precedent, the 100 miles that some women might have to travel as an indirect result of this Bill does not constitute a substantial obstacle to obtaining an abortion.[263] The Court rejected this argument in *Casey* when it upheld the twenty-four-hour waiting period, even though it would require some women to travel over 100 miles not once, but twice.[264] Because *Casey* remains good law, the admitting-privileges requirement cannot be labeled as an undue burden because of any excess travel it may cause.

C. Passing the Effect Test—The FDA Regulations Requirement

Additionally, limiting chemical abortions to the protocol approved by the FDA does not impose an undue burden. Texas has the express power to "bar certain procedures and substitute others" that it finds fitting.[265] Accordingly, under *Gonzales*, Texas may replace the current chemical abortion procedure with the

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260. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion).

261. *See Strange* Defendant's Brief, *supra* note 219, at 28.

262. *See Abbott I*, 734 F.3d at 415.

263. *See Abbott* Appellant Brief, *supra* note 183, at 17–18; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 886 (plurality opinion).

264. *Casey*, 505 U.S. at 884–87 (upholding waiting period requirement).

265. *See* Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

safer FDA-approved procedure. Under this provision of the Bill, women seeking abortions face no undue burden. Just as the partial-birth abortion act did not impose an undue burden by outlawing one abortion procedure, neither does Texas House Bill 2 impose an undue burden by regulating the manner in which chemical abortions are administered. Chemical abortion remains an available option for women. Furthermore, if women do not wish to follow FDA protocol for chemical abortions, they still have the option of surgical abortion.[266] The undue burden analysis investigates whether a woman's right to choose abortion is substantially burdened, not whether a woman is limited to a certain type of abortion.[267] Many of the arguments that Planned Parenthood asserts against the chemical abortion requirements are arguments similar to those that the Fifth Circuit has rejected when upholding other Texas abortion laws.[268] Just as having to return to the clinic twenty-four hours after an ultrasound is not an undue burden, neither is having to return to the clinic to receive a second drug. Planned Parenthood's argument that the regulations are unnecessary is also inapposite because unnecessary does not equate to an "undue burden."[269] Moreover, the chemical abortion restrictions actually protect the women that Planned Parenthood claims are unduly burdened. Requiring physician supervision and heightened health regulations will help to ensure that these women, who are at high risk for abortion complications, will receive a safe abortion.[270] Requiring that abortions must be performed under safe conditions does not constitute an undue burden, even if such safety regulations make abortion less accessible.

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266. State Defendant's Trial Brief at 39, Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, (W.D. Tex. 2013) (No. 1:13-CV-862), 2013 WL 5781470 [hereinafter *Abbott* Trial Brief].

267. *See id.*; *see also Abbott* Appellant Brief, *supra* note 183, at 36 (citing Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 515 (6th Cir. 2012)).

268. *See, e.g.*, *Abbott* Appellant Brief, *supra* note 183, at 17–18 (citing Brief for Petitioners and Cross Respondents at *10, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902) (arguing that the act at issue in *Casey* would increase costs for thousands of women who have to travel hundreds of miles for an abortion)).

269. *See Abbott* Trial Brief, *supra* note 266, at 29 (citing *Casey*, 505 U.S. at 878).

270. *See id.* at 41–42.

VIII. TEXAS FOREVER: HOW TEXAS HOUSE BILL 2 SHOULD CHANGE FUTURE ABORTION JURISPRUDENCE

Under current abortion jurisprudence, the Fifth Circuit was correct to uphold Texas House Bill 2, and the Supreme Court should affirm this decision. House Bill 2 contains rational regulations that fall within Texas's inherent power to police medicine within its borders. The Bill also passes the hurdle of the undue burden analysis. But is upholding the law enough? The Supreme Court, if it chooses to review the case, should take the opportunity to reconsider the application of the undue burden test to state laws regulating abortion.[271] First, the undue burden test has proven highly inconsistent and unworkable, as was predicted.[272] Second, and more importantly, the undue burden test grants the abortion procedure unwarranted special treatment, arbitrarily distinguishing it from other medical procedures.[273]

Eliminating the undue burden test in the abortion context would place state abortion laws on the same footing as other state medical regulations. Normally, the state's ability to regulate medicine goes unquestioned unless the state's action rises to the level of arbitrariness.[274] The state's police power is sufficient to give it the inherent authority to enact laws that touch on the health and safety of its citizens, even when not objectively

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271. *See Casey*, 505 U.S. at 985–86 (Scalia, J., dissenting). Another approach would be to overturn *Roe v. Wade*, an argument that is beyond the scope of this note, but that has been seriously made and considered. *See, e.g.* Mark E. Chopko, Webster v. Reproductive Health Services*: A Path to Constitutional Equilibrium*, 12 CAMPBELL L. REV. 181, 194 n.65 (1990); *see also* Aaron Wagner, Comment, *Texas Two-Step: Serving up Fetal Rights by Side-Stepping* Roe v. Wade *Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH L. REV. 1085, 1087–88 (2001) (noting the return of the "fetal person" argument). *Roe* held that fetuses did not have the right to life under the 14th Amendment because they were not persons. Roe v. Wade, 410 U.S. 113, 157–59 (1973). This conclusion of law has been contentious since the *Roe* decision was issued. *See, e.g.*, Wagner, *supra* at 1087 n.6 (citing legislative attempts to grant personhood rights to unborn children).

272. *Casey*, 505 U.S. at 985–86 (1992) (Scalia, J., dissenting); *see, e.g.*, Burdick, *supra* note 37, at 826.

273. *See, e.g.*, *Casey*, 505 U.S. at 878 (plurality opinion) (explaining that abortion can be regulated like any other medical procedure while also subjecting abortion regulations to the undue burden test—a test which is not applicable to any other medical procedure).

274. *See* Jacobson v. Massachusetts, 197 U.S. 11, 38–39 (1905) (upholding a mandatory vaccination law and outlining the outer limits of the police power of the state, explaining that "regulations so arbitrary and oppressive in particular cases [may] justify the interference of the courts to prevent wrong and oppression.").

necessary. State medical regulations are subjected to a mere rational basis test.[275] This is true even when the law interferes with a fundamental right, such as bodily integrity.[276] Yet when abortion is involved, the rules change. As currently interpreted, the undue burden test requires a state to have a rational basis for enacting the law and the law must not pose an "undue burden" to women's access to abortion.[277] This is a two-part test to which other medical regulations are not subjected.[278]

Fundamentally, however, no reason exists to justify this distinction between abortion and other medical procedures. States have the same interests, if not more[279], in regulating abortion as they do in regulating any other medical procedure, and abortion should not receive an extra layer of protection via the undue burden analysis. If a diabetic challenged a state regulation of dialysis centers that decreased the number of the centers or made it more difficult or expensive for him to get to a center, the regulation would survive if the state had a rational basis for such regulation. This would be true even if the regulation created a substantial obstacle for some diabetics to receive life-saving care. The same rational-basis test should be

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275. *See* Watson v. Maryland, 218 U.S. 173, 178 (1910).

276. *See* Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129, 138 (D.C. Cir. 2006) ("[E]ven 'the inherent right of every freeman to care for his own body and health in such way as to him seems best" is not 'absolute.'") (quoting *Jacobson*, 197 U.S. at 26); *see also Watson*, 218 U.S. at 178 (stating that "unreasonable and extravagant" is the limit for regulations, and regulations should be upheld unless they "unnecessarily and arbitrarily" interfere with rights); Whalen v. Roe, 429 U.S. 589, 597 (1977) (holding that legislation cannot be overturned merely because it is unnecessary, even if it touches on "individual liberty or privacy").

277. Gonzales v. Carhart, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.")

278. *See supra* Part III, Sections A–B (explaining the state's police power to regulate medicine).

279. In addition to protecting the health of the patient and maintaining the dignity of the medical profession as in all medical procedures, states have an additional regulatory interest in abortion: protecting the unborn life. Roe v. Wade, 410 U.S. 113, 154 (1973) ("As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("Abortion is a unique act . . . fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.").

applied to abortion regulations. There is no constitutional reason that a woman has a greater right to an abortion than a diabetic has to the care required to live. Therefore, the same legal analysis should apply to both rights.[280] The Supreme Court should eliminate the undue burden standard and adopt a simple rational-basis test for state abortion regulations. While Texas House Bill 2 does not pose an undue burden on access to abortion, it serves as the perfect conduit to eliminate this unnecessary step in judicial analysis. The regulations at issue in Texas House Bill 2 demonstrate why a state should have the same power to regulate abortion as it does any other medical procedure. *Planned Parenthood v. Abbott* would provide the perfect opportunity for the Supreme Court to hold that abortion does not have any exceptional status as a medical procedure, especially for purposes of constitutional analysis. If a state has a rational, non-arbitrary reason for adopting a law that regulates abortion, or any medical procedure, the law should be upheld.

IX. "HOW A COWGIRL SAYS GOODBYE": THE CONCLUSION

Texas House Bill 2 was passed in the midst of a tornado of divergent convictions. Wendy Davis, using her own personal narrative to draw on the sentiments of her listeners, stood against the bill in her pink shoes. Quickly labeled a champion of the female cause, the media adopted Davis as the voice of Texas women.[281] But Wendy Davis does not speak for all Texas women.[282] Four women in particular stand in stark contrast to the passionate demonstration of Davis. Sitting in their black robes, an almost ironic contrast to Davis's pink shoes, two all-female panels of Fifth Circuit judges applied constitutional precedent to the bill and twice ruled unanimously against

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280. This does not mean that all medical procedures must be regulated identically. *See Abbott* Trial Brief, *supra* note 266, at 25 (citing cases upholding abortion regulations that are not placed on other medical procedures, even when the regulations are more stringent than for other procedures). There are rational reasons to regulate medical procedures differently, but the constitutional analysis should be the same. *See id.*

281. Victoria DeFrancesco Soto, *How Wendy Davis Can Break up Texas' Boys Club*, MSNBC, Dec. 3, 2013, www.msnbc.com/msnbc/how-wendy-davis-can-break-texas-boys-club [perma.cc/Q4GV-S5YV] (Davis "represent[s] the interests of those not in the old boy's club—women.").

282. Ashe Schow, *Daily Beast Columnist: Wendy Davis Does Not Speak for Women*, WASH. EXAMINER, Jul. 1, 2013, www.washingtonexaminer.com/daily-beast-columnist-wendy-davis-does-not-speak-for-women/article/2532578 [perma.cc/NF59-AKWQ].

Planned Parenthood.[283] If this case reaches the Supreme Court, which is likely, the bill itself may again prove stronger than the filibuster that failed to defeat it.

283. *See Abbott I*, 734 F.3d at 419 (granting the stay); *Abbott II*, 748 F.3d at 605 (upholding the law). Two separate all-female panels upheld the law. Judges Priscilla R. Owen, Jennifer Walker Elrod, and Catharina Haynes decided the injunction. Judges Edith H. Jones, Jennifer Walker Elrod, and Catharina Haynes ruled on the merits of the law.

ONLINE CURRENCIES, REAL-WORLD CHAOS: THE STRUGGLE TO REGULATE THE RISE OF BITCOIN

BY NICOLAS WENKER*

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I. INTRODUCTION: THE EXPLOSION OF BITCOIN & BITCOIN REGULATION

> *"I'm not sure I understand [Bitcoin]. I mean, it's . . . totally surreal. I mean, who's the founder? Is it this guy in L.A.? What's going on with Mt. Gox? I mean, there's so many moving parts. . . . Let's just say I would think and hope that the regulators are paying a lot of attention to it."*
>
> - Morgan Stanley CEO James Gorman, 2014[1]

In January 2009, a mysterious figure known only as Satoshi Nakamoto quietly released the first version of "Bitcoin," a computer program he hoped would one day generate the modern world's first thriving, non-national currency. Bitcoin's creation and growth may eventually come to be regarded as one of the most fascinating and influential developments of the early twenty-first century. Many of the core elements of the Bitcoin story seem as if they belong more to a movie than to reality: an enigmatic genius whose identity remains hidden even years after he created his own currency; a new computer program that is breathtaking in both its technological complexity as well as its fundamental simplicity; a thriving Internet black market for illegal drugs and assassinations; accusations of a digital Dutch "tulip" bubble of uncontrolled speculation; industry lobbyists entangled in money laundering and child pornography scandals; and self-described cyber-libertarians and anarcho-capitalists feuding with wealthy investors and secretive Silicon-valley start-ups.

Behind these captivating elements hides a more serious legal landscape. Lawyers, regulators, courts, and elected officials are now left with the unenviable task of adapting existing financial regulations to the growth of the first "pseudo-anonymous crypto currency."[2] Bitcoin was intended by its very nature to serve as a

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1. *Opening Bell with Maria Bartiromo: Morgan Stanley CEO: Investing in Japan*, (Fox Business broadcast Mar. 10, 2014), *available at* http://video.foxbusiness.com/v/3322958232001/morgan-stanley-ceo-investing-in-japan/#sp=show-clips [perma.cc/N3C6-Q925] (at 6:01–6:24); *see also* William Alden, *Morgan Stanley Chief Calls Bitcoin 'Surreal'*, N.Y. TIMES, Mar. 10, 2014, http://nyti.ms/1glrRj3 [perma.cc/63JH-R6N2].

2. *See, e.g.*, Susan A. Berson, *Some Basic Rules for Using 'Bitcoin' as Virtual Money*, ABA JOURNAL, Jul. 1, 2013, www.abajournal.com/magazine/article/some_basic_rules_for_using_bitcoin_as_virtual_money/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly

decentralized, border-defying currency that operates independently of any governmental authority or levers of monetary policy. Forced to square this circle, regulatory authorities are confronted with difficult legal questions that sometimes produce conflicting answers: is Bitcoin a currency or an asset? Should it be regulated as a security? Should it be facilitated so as to further fuel America's booming Bitcoin industry, or should it be banned entirely as a matter of law enforcement and national security? Is it even possible for U.S. authorities to exercise control over Bitcoin? How should Bitcoin currency exchanges be regulated? The answers to these questions remain unclear, as the first nascent efforts to issue regulatory guidance and adjust existing legal frameworks have largely only begun to stream in since the start of 2014. Pressure is growing on regulators to quickly come to grips with Bitcoin's convention-defying mechanisms as institutional investors, consumers, and merchants continue to rush into the Bitcoin market by the day.

II. WHAT IS BITCOIN? THE SOFTWARE AND HARDWARE DIMENSIONS

> *"Commerce on the Internet has come to rely almost exclusively on financial institutions serving as trusted third parties to process electronic payments. . . .*
>
> *What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party."*
>
> - Satoshi Nakamoto, 2008[3]

A. The Early Foundations of Cryptocurrencies

The eventual emergence of Bitcoin can arguably be traced to the convergence of technological development and anti-

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[perma.cc/YW6D-R3H4]; *see also* DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FIN-2013-G001, APPLICATION OF FINCEN'S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013) [hereinafter FIN-2013-G0001], *available at* http://fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html [https://perma.cc/XL2C-Y699?type=image].

3. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1 (2008), *available at* https://bitcoin.org/bitcoin.pdf [perma.cc/475P-AJKD]; *see also* Leah McGrath Goodman, *The Face Behind Bitcoin*, NEWSWEEK, Mar. 6, 2014, www.newsweek.com/2014/03/14/face-behind-bitcoin-247957.html [perma.cc/WV4R-CSJ2].

government political philosophy that first occurred among some niche communities in the early 1990s. One pivotal event took place in 1992, when a retired Intel physicist named Timothy May invited a group of friends over to his home near Santa Cruz, California, to discuss issues of privacy in light of nascent Internet development.[4] May and his friends were concerned that governments around the world would increasingly move to restrict access to cryptographic tools and protocols that had proven effective at shielding digital messages and information.[5] The group saw these tools and protocols as positive developments that might lead to a loosening of government control, with May declaring, "Just as the technology of printing altered and reduced the power of medieval guilds and the social power structure, so too will cryptologic methods fundamentally alter the nature of corporations and of government interference in economic transactions."[6] Those gathered at May's house left the meeting as self-declared "cypherpunks" who believed that those who desired privacy must create it for themselves, rather than hoping that governments or corporations would provide individuals with privacy simply out of benevolence.[7]

The early ideas and philosophical values of the cypherpunks began to spur a small but technologically savvy community of libertarian-minded programmers scattered throughout the U.S. and the rest of the world. In the late 1990s, a computer scientist named Nick Szabo began developing the idea of "bit gold," which many today consider to be an almost direct precursor to Bitcoin.[8] Although not primarily concerned with the privacy dimension of digital currencies, Szabo sought to apply the idea of computer processing work to proof-of-work schemes in the real world, in which people input effort in order to output

4. Morgen E. Peck, *Bitcoin: The Cryptoanarchists' Answer to Cash*, IEEE SPECTRUM, May 30, 2012, http://spectrum.ieee.org/computing/software/bitcoin-the-cryptoanarchists-answer-to-cash [perma.cc/JG9V-B599].

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; *see also* Nick Szabo, *Liar-Resistant Government*, UNENUMERATED (May 7, 2009, 4:13 PM), http://unenumerated.blogspot.com/2009/05/liar-resistant-government.html [perma.cc/8AWZ-3X8Y] (comparing the ideas underpinning bit gold to Bitcoin's use of "a dense Byzantine fault tolerant peer-to-peer network [and] cryptographic hash chains," which ensure currency integrity); Nick Szabo, *Tech roundup 01/22/11*, UNENUMERATED (Jan. 22, 2011, 1:54 PM), http://unenumerated.blogspot.com/2011/01/tech-roundup-012211.html [perma.cc/W6Y5-JM8B] ("Bitcoin, an implementation of the bit gold idea (and another example of where the order of events is important), continues to be popular.").

valued goods.[9] Just as gold's value stemmed in part from the work that had to be expanded in order to procure it, Szabo reasoned that a sort of digital coin generated by solving difficult cryptographic equations might be able to trace its worth to the dedicated computer power needed to solve such puzzles.[10] In a network comprised of bit gold creators and users, solved equations would be sent to the rest of the community; a majority would credit the work by consensus once they verified and accepted the solution.[11] The solution would then be used as a component of the next challenge given to the network to solve, thereby creating an unending chain of new property that would verify and time-stamp the production of new coins.[12]

However, despite the innovative ideas underpinning bit gold, Szabo was unable to come up with a conceptual solution to the next unavoidable obstacle for any digital currency: the so-called "double-spending problem."[13] Because any digital currency is essentially just computer code, it is easy to reproduce via mechanisms such as copying and pasting.[14] This inevitably raises the specter of a person spending the same coin or unit of a digital currency more than once, thereby rendering the whole system unworkable.[15] E-cash systems generally avoided this problem by using cryptography technology to hand control and oversight over to central authorities, such as banks.[16] For early pioneers such as Szabo, this was an unacceptable solution that defeated the whole purpose of the enterprise.[17] Szabo refused to incorporate a controlling central authority to develop bit gold further, as he was "trying to mimic as closely as possible in cyberspace the security and trust characteristics of gold, and chief among those is that it doesn't depend on a trusted central authority."[18] Although Szabo continued to contribute to the bit gold idea until the end of 2005,[19] little development occurred in

9. Peck, *supra* note 4.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Nick Szabo, *Bit Gold*, UNENUMERATED (Dec. 29, 2005, 9:22 AM), http://classic-web.archive.org/web/20060329122942/http://unenumerated.blogspot.com/2005/12/bit-gold.html [perma.cc/T5K2-MU8W].

the field of digital currency; bit gold and similar projects failed to garner widespread support and no palatable solutions developed to address the double-spending problem.[20] The final breakthrough did not occur until 2009, when a secretive figure known only as "Satoshi Nakamoto" suddenly introduced the world to a program called Bitcoin.[21]

B. Bitcoin's Mysterious Origins

As might befit a highly anonymous, international crypto-currency, Bitcoin's founder remains shrouded in secrecy.[22] Many theories have been put forth as to Satoshi Nakamoto's identity, including that the moniker was adopted to preserve the anonymity of an early player in the cypherpunk community, that it was a pseudonym used by a group of people, that it was a cover for the NSA or another highly-sophisticated government agency, or that Nakamoto's origins will never be known because he or she has been killed since Bitcoin took off.[23] In March 2014, *Newsweek* created a huge stir when it proclaimed in its cover story that it had tracked down and unveiled the true Satoshi Nakamoto—a sixty-four-year-old Japanese American named Dorian Prentice Satoshi Nakamoto living in Temple City, California.[24] A day after the story broke, the real Satoshi Nakamoto posted "I am not Dorian Nakamoto" through an Internet message board account the Bitcoin creator has been using since the earliest days of the digital currency's development.[25]

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20. Peck, *supra* note 4.

21. *Frequently Asked Questions*, BITCOIN.ORG, https://bitcoin.org/en/faq [perma.cc/A9TK-25MA] (last visited Jan. 8, 2015) [hereinafter Bitcoin FAQ].

22. *See* Hiroko Tabuchi, *Will the Real Satoshi Nakamoto Please Stand Up?*, N.Y. TIMES DEALBOOK, Mar. 11, 2014, http://dealbook.nytimes.com/2014/03/11/will-the-real-satoshi-nakamoto-please-stand-up [perma.cc/7TKH-KYU2].

23. *See, e.g.*, *Who is Satoshi Nakamoto?*, COINDESK, www.coindesk.com/information/who-is-satoshi-nakamoto [perma.cc/Y49T-M5WY] (last updated Jan. 2, 2015); *see also* Jerin Mathew, *Bitcoin 'Conspiracy Theory' Alleges Virtual Currency is NSA or CIA Project*, INT'L BUS. TIMES, Aug. 9, 2014, www.ibtimes.co.uk/bitcoin-suspected-be-nsa-cia-project-1460439 [http://perma.cc/Y49T-M5WY]. This speculative frenzy has been fed in part by the existence of a large Bitcoin collection that has been mined by a single entity since the program's inception, but has never been spent. *See* Sergio Demian Lerner, *The Well Deserved Fortune of Satoshi Nakamoto, Bitcoin Creator, Visionary and Genius*, BITSLOG (Apr. 17, 2013, 6:32 AM), http://bitslog.wordpress.com/2013/04/17/the-well-deserved-fortune-of-satoshi-nakamoto [perma.cc/G69G-93A9].

24. Goodman, *supra* note 3.

25. Chris O'Brien, *For Dorian Nakamoto, Bitcoin Article Brings Denials, Intrigue*, L.A. TIMES, Mar. 7, 2014, www.latimes.com/business/la-fi-bitcoin-satoshi-20140308-story.html

Satoshi Nakamoto's earliest involvement with the online community of digital currency developers dates back to a short white paper published under his name in late 2008 and circulated in early 2009.[26] Nakamoto launched the first version of the Bitcoin software on January 3, 2009, and he and others who became involved with the process began producing Bitcoins by running the program on their computers.[27] Nakamoto eventually anointed Gavin Andresen as the leader and guardian of the Bitcoin community and the software's core code, at which point the founder began to withdraw from the project.[28] By early 2011, Nakamoto had stopped posting changes to the Bitcoin code and participating in conversations on the Bitcoin forum.[29] Nakamoto's conversations with Andresen came to an abrupt halt on April 26, 2011, when Andresen messaged Nakamoto saying he had accepted an invitation to speak at the CIA headquarters to answer questions and concerns regarding Bitcoin.[30] At that point, the digital currency's founder disappeared as suddenly and mysteriously as he had first entered the scene.

C. The Bitcoin Software and Nakamoto's Breakthroughs

From ordinary consumers to sophisticated financial players, many have questioned how "fake money" somehow produced on computers and servers has come to hold significant value when converted into real-world currencies or purchases. As *The Economist* noted in March 2014, "One of the funny (and telling) things about Bitcoin is that its basic technical details are sufficiently complicated that every piece on the subject must begin with some sort of explainer."[31] While a highly-detailed understanding of the Bitcoin code is limited to those with backgrounds in computer science and cryptology, the digital

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[perma.cc/4GY6-ZE4H].

26. Nakamoto, *supra* note 3.

27. *See* Joshua Davis, *The Crypto-Currency: Bitcoin and its Mysterious Inventor*, NEW YORKER, Oct. 10, 2011, www.newyorker.com/reporting/2011/10/10/111010fa_fact_davis [perma.cc/LU7F-VK59].

28. Bianca Bosker, *Gavin Andresen, Bitcoin Architect: Meet the Man Bringing You Bitcoin (And Getting Paid in It)*, HUFFINGTON POST, Apr. 16, 2013, www.huffingtonpost.com/2013/04/16/gavin-andresen-bitcoin_n_3093316.html [perma.cc/VK8A-G3AB].

29. Goodman, *supra* note 3.

30. *Id.*

31. R.A., *Free Exchange: Bitcoin: New Money*, ECONOMIST, Mar. 17, 2014, www.economist.com/blogs/freeexchange/2014/03/bitcoin [perma.cc/8MF6-V6B3] [hereinafter *New Money*].

currency ultimately operates on the basis of several fundamental concepts. A basic explanation of Bitcoin's workings—including what differentiates it from earlier efforts like bit gold—is therefore necessary in order to understand the innovative nature of Nakamoto's ideas and the rapid spread and appreciation of Bitcoin as a virtual currency.[32]

At its most basic, the Bitcoin software creates an algorithm, or mathematical puzzle, that is very difficult to solve. The puzzle can be tackled either by individual users acting alone or by "pools" of users that band together to share computing power and to decrease the risk of failed attempts.[33] Those attempting to solve the puzzle by running the Bitcoin software on their computers, dedicated servers, or specialized hardware are known as Bitcoin "miners."[34] The Bitcoin software uses the Internet to link all mining computers together in one large peer-to-peer network, meaning that every machine is connected to the system without the use of any central nexus such as a server.[35] Similar to Szabo's bit gold concept, the first miner or pool of miners to solve the assigned puzzle is rewarded by the Bitcoin program in the form of newly-generated Bitcoins (as well as a cut of recently-verified Bitcoin transactions in the form of a very small fee).[36] Everyone else who lost the race receives no Bitcoins, and a new round begins. In terms of a mining metaphor, every miner or pool of miners in the world is essentially issued a new, distinct "vein" (puzzle) every round, and only the first person or group to strike gold is rewarded for the time and effort (hence the strong pressure to join a pool so as to be on the winning team). In another nod to bit gold, the validation for a successful mining

32. The Internet and print media are awash with a plethora of pamphlets, articles, PowerPoint presentations, videos, and interactive tutorials that aim to explain how Bitcoin works. These vary greatly in length and complexity, and each approaches the subject from a different angle. Rather than referencing any one particular guide, I have opted to author my own, simplified explanation in an effort to maximize clarity and conserve space. Though my own explanation will no doubt be imperfect, it is my hope that it will nonetheless make Bitcoin's conceptual and technological underpinnings easier to grasp for a lay audience. For those interested in a basic primer, news articles on the subject often direct readers to the Bitcoin Wikipedia page as a helpful starting point. *See Bitcoin*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bitcoin [perma.cc/3M8M-84J4] (last visited Oct. 25, 2014).

33. *Getting Started*, BITCOINMINING.COM, www.bitcoinmining.com/getting-started [perma.cc/U3YP-73WU] (last visited Jan. 7, 2015).

34. *See id.*

35. Bitcoin FAQ, *supra* note 21.

36. *Id.*; *see also Comparison of Mining Pools*, WIKIPEDIA, https://en.bitcoin.it/wiki/Comparison_of_mining_pools [perma.cc/8G6G-MW9Z] (last visited Jan. 8, 2015).

effort is conducted through majority verification by the rest of the actors mining in the system.[37]

However, in addition to other improvements and innovations, Nakamoto's Bitcoin fundamentally differs from the earlier bit gold concept by introducing a new feature that solves the double-spending problem that made Szabo's idea unworkable.[38] In its most simple terms, the Bitcoin system uses the mining process not only to introduce new Bitcoins into circulation, but also to verify every single Bitcoin transaction that has ever occurred. Bitcoin therefore operates independently of any controlling central authority, because no outside agent or benevolent overseer is needed to monitor, track, and ensure the valid expenditure of Bitcoins.

This combination of the Bitcoin production mechanism with the Bitcoin transaction/verification mechanism is encapsulated in what is known as "blocks."[39] Every new transaction of X Bitcoins from Party A to Party B that has yet to be verified (and thereby processed/fulfilled) is bundled together with other as-of-yet unverified transactions and stored into a file called a block.[40] Every block that has ever been accepted by the Bitcoin system forms a part of a long, continuous record known as the block chain;[41] each approved block forms a link in a chain that traces back chronologically to the very first "Genesis block" created by Nakamoto in January 2009.[42] Because these blocks contain the records of all verified, successful Bitcoin transactions, Bitcoin's block chain effectively functions as an enormous, never-ending public ledger that details both the time and the parties of every successful Bitcoin transaction. However, this record does not contain or require any information as to the true identities of Party A or Party B, who hide behind cryptographic addresses that function as aliases for the transfer and storage of Bitcoins (albeit with the limitation that all Bitcoins owned by/stored in every alias address are publicly visible).[43] Because it is not possible to

37. *Id.*

38. *See Double-Spending*, WIKIPEDIA, https://en.bitcoin.it/wiki/Double-spending [perma.cc/RPP6-PBCM] (last visited Jan. 8, 2015).

39. *See Blocks*, WIKIPEDIA, https://en.bitcoin.it/wiki/Blocks [perma.cc/V8Z2-SCBW] (last visited Jan. 8, 2015).

40. Bitcoin FAQ, *supra* note 21.

41. *Id.*

42. *See Genesis Block*, WIKIPEDIA, https://en.bitcoin.it/wiki/Genesis_block [perma.cc/9V42-3WBJ] (last visited Jan. 8, 2015).

43. *See* Danny Bradbury, *How Anonymous is Bitcoin?*, COINDESK (June 7, 2013, 10:04

determine the owner of a Bitcoin alias/account without additional information, Bitcoin is therefore often referred to as a "pseudo-anonymous" crypto-currency.[44]

To expand on the earlier metaphor, when miners are given new "veins" to mine every round, every miner or pool is given a unique "block" that has the potential to be the next block added to the block chain.[45] Every potential block that is handed out contains not only a bundle of Bitcoins transactions waiting to be verified, but also an unknown number generated from a cryptographic hash function, which is that block's unique "hash."[46] The hash number output by the function cannot be reverted or predicted.[47] Every block also has a second number value called the "nonce," which is the part of the block that is altered by the mining process.[48]

In order for miners to verify their assigned blocks and receive their Bitcoin rewards, they have to succeed in getting the nonce value below the hash value, thereby solving the "puzzle" and producing proof-of-work.[49] In other words, mining occurs as miners in a pool leverage as much computer-processing power as possible to take "swings" at the nonce as quickly as possible in a furious race to "strike gold" by being the first mining team to get

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AM), www.coindesk.com/how-anonymous-is-bitcoin [perma.cc/KP4N-MRE6]. The exact mechanism as to how this works is incredibly complicated, and has therefore been left out of this discussion for the sake of space and clarity. In a nutshell, Bitcoin operates on a variation of a branch of mathematics known as public-key cryptography, which makes it possible for a user to be issued both a private key for account access as well as a public key that enables anonymous, public transactions. Bitcoin adds an additional layer of privacy and security by replacing the public key with a hash function of the public key, which is extremely difficult to reverse-engineer. This provides some guarantee against decryption from threats such as quantum computing and powerful cryptography-subverting organizations such as the NSA. *See* Vitalik Buterin, *Satoshi's Genius: Unexpected Ways in Which Bitcoin Dodged Some Cryptographic Bullets*, BITCOIN MAG., Oct. 28, 2013, http://bitcoinmagazine.com/7781/satoshis-genius-unexpected-ways-in-which-bitcoin-dodged-some-cryptographic-bullet [perma.cc/T7JT-E9S3].

44. *See* Bradbury, *supra* note 43.

45. *See Blockchain*, WIKIPEDIA, https://en.bitcoin.it/wiki/Block_chain [perma.cc/DG5A-8R89] (last visited Jan. 8, 2015).

46. *See* Robleh Ali, John Barrdear, Roger Clews & James Southgate, *Innovations in Payment Technologies and the Emergence of Digital Currencies*, 54 BANK OF ENG. Q. BULL., 262, 273 (2014) [hereinafter *Innovations*] *available at* www.bankofengland.co.uk/publications/Pages/quarterlybulletin/2014/qb14q3.aspx [perma.cc/4T4K-FBML]; *see also Block Hashing Algorithm*, WIKIPEDIA, https://en.bitcoin.it/wiki/Block_hashing_algorithm [perma.cc/KJQ7-UHXE] (last visited Jan. 9, 2015).

47. *Innovations*, *supra* note 46, at 273–74.

48. *Id.*; *see also Nonce*, WIKIPEDIA, https://en.bitcoin.it/wiki/Nonce [perma.cc/4M7A-BT3R] (last visited Oct. 25, 2014).

49. *Innovations*, *supra* note 46, at 273–74.

their block's nonce value below their block's hash value.[50] The first block to have its nonce value reduced below its hash value broadcasts itself to the rest of the system, which then uses the Bitcoin software to confirm the success.[51]

Once this happens, the verified block is added to the block chain, its successful miners are rewarded with Bitcoins, everyone else who had been working on their own blocks gets nothing, and a new round begins as fresh blocks are issued.[52] A new block can only be verified and added to the chain if all the transactions it contains are not already recorded in a previous block.[53] If Party A makes a purchase from Party B using X Bitcoins, Party A could theoretically quickly go and also initiate a deal with Party C by spending the same X Bitcoins. However, Party B and Party C can simply wait for the verification process to finish before providing Party A the purchased goods or services. Once the transaction with Party B clears and is memorialized in the block chain "ledger," the block chain will reject any transaction with Party C using the same X Bitcoins.[54] Because the transaction with Party C does not clear, Party C does not give out his goods or services, thereby ensuring that Party A cannot spend the same Bitcoin more than once.

In theory, Party C could provide Party A's purchase without waiting for the verification process. However, Party C typically will not do so, because he knows that there is a risk that his transaction involving X Bitcoins from Party A will be rejected by the block chain if Party A has already spent the Bitcoins with Party B, meaning that the system will not recognize the payment of X Bitcoins from Party A to Party C. Even if Party C chooses to accept the transaction without waiting for verification and gets scammed as a result, the Bitcoin system is unaffected—it still only counted the X Bitcoins as being used in a single transaction (Party A to Party B) and as always belonging to one owner at a time. Party C simply loses out by having given away something for nothing. The entire Bitcoin process is therefore based on a

50. *Id.*; *see also* Timothy Taylor, *How Does Bitcoin Work*, CONVERSABLE ECONOMIST (Sept. 25, 2014, 7:00 AM), http://conversableeconomist.blogspot.com/2014/09/how-does-bitcoin-work.html [perma.cc/HN4B-9DA5].

51. *See Innovations*, *supra* note 46, at 274; *see also* Taylor, *supra* note 50.

52. Taylor, *supra* note 50.

53. *Id.*

54. *See* Ian Jackson, *The Bitcoin Block Chain: A Living Ledger That Cannot Lie*, INSIDE BITCOINS (Sept. 29, 2014, 4:00 PM EDT), http://insidebitcoins.com/news/the-bitcoin-block-chain-a-living-ledger-that-cannot-lie/24980 [perma.cc/8P8C-GYQ5].

mechanism that addresses and overcomes the double-spending problem.

D. Consensus, Mining Power, and Hardware

While Bitcoin's solution to the double-spending quandary that stymied earlier experiments in digital currencies is impressive enough by itself, this design actually masks an even greater, more far-reaching innovation. When viewed more broadly, Nakamoto's block chain system represents a practical and theoretical breakthrough that makes it possible to decentralize services that could not previously be decentralized.[55] Bitcoin's operations resolve what is known as the Byzantine Generals' Problem, which was long thought to be an impossible dilemma for reaching consensus in distributed systems.[56] The problem is usually explained by way of a metaphor:

> N Generals have their armies camped outside a city they want to invade. They know their numbers are strong enough that if at least 1/2 of them attack at the same time they'll be victorious. But if they don't coordinate the time of attack, they'll be spread too thin and all die. They also suspect that some of the Generals might be disloyal and send fake messages. Since they can only communicate by messenger, they have no means to verify the authenticity of a message. How can such a large group reach consensus on the time of attack without trust or a central authority, especially when faced with adversaries intent on confusing them?[57]

Bitcoin solves this issue by using its mathematical proof-of-work scheme (whereby miners mathematically solve their block "puzzles," and a majority of the system then approves the block and adds it to the block chain) as evidence that a majority of the system (more than one-half) has consented to participate in the legitimate mining process.[58]

Applying the Bitcoin block chain system to the Byzantine

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55. Paul Bohm, *Bitcoin's Value is Decentralization*, PAUL BOHM'S BLOG (June 17, 2011), http://paulbohm.com/articles/bitcoins-value-is-decentralization [perma.cc/L7NR-49H8?type=image].

56. *Id.* For a list of potential non-financial uses of the block chain mechanism, see Sean G. King, *Here Are My Official Comments on the New York Department of Financial Services' Proposed Bitcoin and Virtual Currency Regulations*, WEFIVEKINGS (July 26, 2014, 12:42 PM), http://wefivekingsblog.blogspot.ch/2014/07/here-are-my-official-comments-on-new.html [perma.cc/5BK3-8WLH].

57. Bohm, *supra* note 55.

58. *Id.*

Generals' metaphor works as follows: all of the generals are assigned a mathematical problem that should take roughly ten minutes to solve with all of the generals tackling it. Once one of the generals finds a solution, he broadcasts it to all of the other generals, all of whom then begin working on a new puzzle that extends the previous solution in the chain. Each general always works on extending the longest chain of solutions. Once a chain reaches a certain length within a certain time frame, authenticity of majority consensus is validated to all the generals because it would have been impossible for the chain to reach such a length unless at least a majority of the generals had participated in its creation.

Bitcoin therefore guarantees the validity of its mining process by ensuring that a majority of users are legitimately putting in the requisite work, i.e., running the hardware and electricity needed to crunch the numbers and solve the algorithms.[59] In other words, the scarcity of computing power works as a function of "voting" for consensus on transaction/mining validation in a decentralized system.[60] The longest chain of algorithm solutions serves not only "as proof of the sequence of events witnessed [i.e., validating transactions], but proof that it came from the largest pool of CPU power. As long as a majority of CPU power is controlled by [honest users], they'll generate the longest chain and outpace attackers."[61] If an attacker wanted to cheat the system and validate false transactions by adding them to the block chain (or conversely, refuse to recognize legitimate mining successes), the attacker would need to "rig the vote" by controlling more computer power than all of the honest users/miners in the system.[62] As a digital currency, Bitcoin guards itself against this problem through the incentive scheme of mining: when the value of Bitcoin goes up and it becomes more profitable to attack the system, it likewise becomes more profitable for honest users to add more computer power and thereby invest in mining. As a result, the computational process of mining is "not wasteful at all, but an incredibly efficient way to make attacks economically unprofitable."[63]

59. *Id.*
60. *Id.*
61. Nakamoto, *supra* note 3, at 1.
62. Bohm, *supra* note 55.
63. *Id.*

This inseparably ties the Bitcoin software to the actual, real-world hardware that consumes electricity as the raw resource for generating Bitcoins. Bitcoin is designed to introduce a steady supply of Bitcoins into circulation by "minting" a set amount of new coins roughly every ten minutes, ultimately capping out at a maximum supply of 21 million Bitcoins.[64] The amount of new Bitcoins produced per block halves every four years; fifty Bitcoins were initially awarded for every block in 2009, but this value fell to twenty-five in 2013.[65] In order to keep the mining rate steady as the market value of Bitcoin increases and new miners join the system (and as existing miners add additional processing power), the software uses a difficulty metric.[66] The metric's value recalculates every 2,016 blocks to a value such that the 2,016 previous blocks would have been mined in exactly two weeks had everyone been mining at this value's difficulty.[67] This means that as more mining power is added to the system and the rate of block generation goes up, the difficulty rises to compensate—thus slowing down the rate at which blocks are added to the block chain.[68] Individual miners then need to add additional computing power to maintain the same mining rate under the harsher difficulty setting.[69]

As a result of both this rising difficulty metric and the dramatic rise in Bitcoin's value, there has been an arms race in mining hardware, making the current mining environment almost unrecognizable from its humble origins in 2009. When Bitcoin was new and mining was very easy, early participants could simply run the Bitcoin program on the CPUs that powered their home laptops or computers.[70] Miners eventually moved to running the software on graphics cards (GPUs) that were normally used for playing high-end computer games.[71] However, the increasing difficulty of mining—combined with a July 2011 collapse in the

64. Taylor, *supra* note 50; *see also* Alec Liu, *A Guide to Bitcoin Mining: Why Someone Bought a $1,500 Bitcoin Miner on eBay for $20,600*, MOTHERBOARD (Mar. 22, 2013, 9:45 AM), http://motherboard.vice.com/blog/a-guide-to-bitcoin-mining-why-someone-bought-a-1500-bitcoin-miner-on-ebay-for-20600 [perma.cc/S8BW-DYYR].

65. *Innovations*, *supra* note 46, at 266–67.

66. Liu, *supra* note 64.

67. John Kelleher, *What Is Bitcoin Mining?*, FORBES, May 8, 2014, www.forbes.com/sites/investopedia/2014/05/08/what-is-bitcoin-mining [perma.cc/92HN-2C6U].

68. Liu, *supra* note 64.

69. *Id.*

70. *Id.*

71. *Id.*

price of Bitcoins—meant that eventually the electricity required to run GPUs cost more than the profits made mining Bitcoins.[72] Miners therefore began using field-programmable gate arrays (FGPAs)—add-on cards that were more expensive than GPUs, but offered comparable mining power and used far less electricity.[73] Even FGPAs were outstripped by early 2013, as a number of vendors succeeded in designing application-specific integrated circuits (ASICs)—computer chips designed specifically for Bitcoin mining.[74] These machines sold out quickly despite the large price tag, and purchasers often paid high premiums simply to move up in the queue for backordered chips.[75]

Bitcoin mining has thus evolved from its early beginnings on the personal computers of tech geeks and dedicated libertarians to the massive, professional operations of present-day mining outfits. Even though the total number of individuals mining Bitcoin has grown continuously, much of the total processing power in the entire global Bitcoin network is now controlled by a handful of large, professional operations with the funds and access needed to purchase and power the most advanced and powerful types of mining hardware.[76]

III. BITCOIN'S FREE-MARKET INFLUENCES

> *"I think that the Internet is going to be one of the major forces for reducing the role of government. The one thing that's missing, but that will soon be developed, is a reliable e-cash, a method whereby on the Internet you can transfer funds from A to B without A knowing B or B knowing A."*
>
> - Milton Friedman, 1999[77]

A. The Roots of Bitcoin's Design

Considering that self-described libertarians, cypherpunks, and anarcho-capitalists have played such a central role in Bitcoin's

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *See* WENKER, *supra* note *, at 19–20, 57–61.
77. Steve H. Hanke, *Friedman and Hanke on Bitcoin*, CATO AT LIBERTY (Feb. 20, 2014, 2:35 PM), www.cato.org/blog/friedman-hanke-bitcoin [perma.cc/5Y9V-C9TU] (quoting Interview by John Berthoud with Milton Friedman, in San Francisco, Cal. (1999)).

programming and adoption, it should come as no surprise that the technological and conceptual underpinnings of the Bitcoin software are strongly influenced by the political and economic beliefs of free market advocates such as the Austrian School of economics.[78] As Ludwig von Mises notes in *The Theory of Money and Credit*, "It is not the state, but the common practice of all those who have dealings in the market, that creates money."[79] Contemporary critics of the Austrian School who have written on Bitcoin argue that the digital currency will fail "because money that is not issued by governments is always doomed to failure. Money is inevitably a tool of the state."[80] Under this view, "monetary relations are too closely interwoven with other economic, political and social relations to be managed well by any institution with less sway than a government."[81] By its very existence, one of Bitcoin's key goals is to validate von Mises' view that the state is not necessary to maintain a money system.[82]

Bitcoin's design also strongly resonates with core ideas propagated by Friedrich Hayek, who once proposed that the state's monopoly on legal tender should be replaced "with competing currencies offered by rival banks" or private businesses.[83] Nakamoto's white paper makes it clear that he set out to propose "a system for electronic transactions without relying on trust," designing up his currency in a way that distrusted not only central authorities such as governments and banks, but also every other user in the system.[84] Such a construct echoes Hayek's views about the realistic position of individuals inside larger social systems. Hayek wrote that Adam Smith's "chief concern" about mankind

> was not so much with what man might occasionally achieve

78. Sam Dallyn, *Bitcoin's Strength Lies in its Libertarian Status*, THE CONVERSATION (Mar. 28, 2014, 10:36 AM), http://theconversation.com/bitcoins-strength-lies-in-its-libertarian-status-24982 [perma.cc/CK9R-UU2B].

79. LUDWIG VON MISES, THE THEORY OF MONEY AND CREDIT 78 (H. E. Batson trans., New ed. 1953) (1924), *available at* https://mises.org/library/theory-money-and-credit [https://perma.cc/VVW9-7BZV].

80. Edward Hadas, *A Prediction: Bitcoin Is Doomed to Fail*, N.Y. TIMES DEALBOOK, Nov. 27, 2013, http://dealbook.nytimes.com/2013/11/27/a-prediction-bitcoin-is-doomed-to-fail [perma.cc/TCH-8FYT].

81. *Id.*

82. Dallyn, *supra* note 78.

83. Hadas, *supra* note 80; *see also* F.A. HAYEK, DENATIONALIZATION OF MONEY: THE ARGUMENT REFINED (3d ed. 1990), *available at* http://mises.org/books/denationalisation.pdf [perma.cc/J2HM-GCTW].

84. Nakamoto, *supra* note 3, at 8.

> when he was at his best but that he should have as little opportunity as possible to do harm when he was at his worst. . . . [Smith's individualism] is a social system which does not depend for its functioning on our finding good men for running it, or on all men becoming better than they now are, but which makes use of men in all their given variety and complexity, sometimes good and sometimes bad, sometimes intelligent and more often stupid.[85]

Due to both the limitations of individuals in their personal capabilities as well as their inability to comprehend the grand scale of social organization as a whole, Hayek argued that individuals should ideally be left to pursue their own self-interests within their own narrow spheres of action:

> The real question, therefore, is not whether man is, or ought to be, guided by selfish motives but whether we can allow him to be guided in his actions by those immediate consequences which he can know and care for or whether he ought to be made to do what seems appropriate to somebody else who is supposed to possess a fuller comprehension of the significance of these actions to society as a whole.[86]

Hayek contended that true individualists (early economists) were correct in understanding

> that the market as it had grown up was an effective way of making man take part in a process more complex and extended than he could comprehend and that it was through the market that he was made to contribute "to ends which were no part of his purpose."[87]

It can be argued that the decentralized consensus-building mechanism so fundamental to Bitcoin's functioning bases its core operations on similar principles. Even in the absence of a central guiding authority, the Bitcoin software does not ask or require any of its participants to altruistically oversee the integrity of the system on a grand scale. Instead, users simply pursue their own self-interests by leveraging computing power to mine for profits. The aggregate processing power of all individual miners is then employed in a proof-of-work scheme

85. Sheldon Richman, *Hayek on Individualism*, THE FREEMAN (June 15, 2012), www.fee.org/the_freeman/detail/hayek-on-individualism [perma.cc/LU5N-V9MX] (quoting and emphasizing F.A. Hayek, *Individualism: True and False*, *in* INDIVIDUALISM AND ECONOMIC ORDER 1, 14 (1948).

86. *Id.*

87. *Id.*

that ensures the success of the Bitcoin economy as a whole by simultaneously assigning value to the mining process, introducing new Bitcoins into circulation, verifying transactions of existing Bitcoins, and providing mathematical proof of decentralized consensus in a manner that overcomes the Byzantine Generals' Problem.

B. Non-fiat Cryptocurrencies as Anti-Inflationary

Bitcoin employs an additional feature that has earned it adoration from its libertarian advocates as well as further scorn from its many critics. Milton Friedman famously advocated abolishing the Federal Reserve, arguing that inflation would be better checked by an automated system that increased the money supply at a predetermined rate.[88] The Bitcoin software does exactly this by adjusting the difficulty metric to release a set number of new Bitcoins at a predetermined rate.[89] Although it was not deemed a necessity in Nakamoto's original 2008 white paper, an additional restriction was incorporated when the first version of Bitcoin was released at the start of 2009.[90]

Bitcoin incorporates a finite "money supply" that will eventually be capped once 21 million coins have entered circulation.[91] At current rates, this is expected to occur at some point within the next two decades.[92] Once mining no longer mints new Bitcoins, Bitcoin's currently tiny transaction fees will go up in order to compensate miners for continuing to lend their processing power to the transaction verification process.[93] Some observers have wondered why the 21-million-coin limit was imposed, considering the obvious downside of increased transaction fees and the Bitcoin program's other mechanisms for keeping inflation in check.[94]

Like so much about the digital currency's design, the anti-inflationary money cap appears to have been inspired by longstanding libertarian thought. Henry Hazlitt—a writer so popular among *laissez faire* and classical liberal economists that

88. *Digital Currencies: Bits and Bob*, ECONOMIST, June 16, 2011, www.economist.com/node/18836780 [perma.cc/F6WM-SSPJ].
89. *Id.*
90. *New Money*, *supra* note 31.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

Ludwig von Mises called him "our leader"[95]—argued that inflation "is perhaps the worst possible form" of taxation and persists only because "[t]he political pressure groups that have benefitted from the inflation will insist upon its continuance.[96]" Hazlitt puzzles that in spite of this

> the ardor for inflation never dies. It would seem almost as if no country is capable of profiting from the experience of another and no generation of learning from the sufferings of its forbears. Each generation and country follows the same mirage. Each grasps for the same Dead Sea fruit that turns to dust and ashes in its mouth. For it is the nature of inflation to give birth to a thousand illusions.
>
> . . . .
>
> [Inflation] throws a veil of illusion over every economic process. It confuses and deceives almost everyone, including even those who suffer by it. . . . Inflation is the opium of the people.[97]

When Nakamoto introduced Bitcoin to the online community in February 2009, he similarly argued that his new currency's appeal stemmed partly from the fact that it offered protection from the traditionally inflationary policies of state-backed currencies: "[t]he central bank must be trusted not to debase the currency, but the history of fiat currencies is full of breaches of that trust."[98]

In the years that have since followed, Nakamoto's original vision for Bitcoin's anti-inflationary destiny has clearly resonated with many of those who have come to use and champion the digital currency. In the words of Jim Harper, the former director of information policy studies at the Cato Institute, "There are types like me, libertarian gold-buggish folks [for whom] inflation is a constant worry [and who] see the cryptography in Bitcoin as insulation against inflation."[99] As one news article put it, for

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95. Jeff Riggenbach, *Mises Daily: Henry Hazlitt and the Rising Libertarian Generation*, MISES INSTITUTE (Nov. 12, 2010), http://mises.org/library/henry-hazlitt-and-rising-libertarian-generation [perma.cc/YJ8B-HEJD].

96. HENRY HAZLITT, ECONOMICS IN ONE LESSON 151, 156 (2007 ed.) (1946), *available at* http:mises.org/books/economics_in_one_lesson_hazlitt.pdf [perma.cc/NY8D-GJSA].

97. *Id.* at 152, 154.

98. Satoshi Nakamoto, *Bitcoin Open Source Implementation of P2P Currency*, P2P FOUND. (Feb. 11, 2009, 10:27 PM), http://p2pfoundation.ning.com/forum/topics/bitcoin-open-source [perma.cc/7HHK-WVPJ].

99. Adam Serwer & Dana Liebelson, *Bitcoin, Explained*, MOTHER JONES, Apr. 10, 2013, www.motherjones.com/politics/2013/04/what-is-bitcoin-explained [perma.cc/Y86R-BSLP].

"Bitcoin's libertarian disciples," the eventual limit on the supply represents "a neat way to preclude the inflationary central-bank meddling to which most currencies are prone."[100] Bitcoin's global value has indeed risen at times when citizens of inflation-prone countries such as Cyprus moved in significant numbers to trade their national currencies for the digital currency.[101] Of course, even inflation-prone countries may experience barriers to Bitcoin adoption, such as a lack of technological savvy among the population or regulatory barriers, as has been the case in Argentina.[102]

IV. LEGAL ISSUES & THE NEW WAVE OF BITCOIN REGULATION

> *"I think Bitcoin has the potential to be a very, very important development. . . . Very serious economists thought that the Internet was going to be no more important than the fax machine so I'm not willing to dismiss Bitcoin. At the same time, I do think it's important to recognize that it can't and won't flourish as a way of avoiding legal protections."*
>
> - Larry Summers, 2014[103]

A. Bitcoin, Drugs, & Money Laundering

In a 1999 interview, Milton Friedman asserted with remarkable prescience that the ability to exchange funds anonymously would soon "develop on the Internet and that will make it even easier for people using the Internet. Of course, it has its negative side. It means the gangsters, the people who are engaged in illegal transactions, will also have an easier way to carry on their business."[104] In June 2011, an article about the Silk Road titled "The Underground Website Where You Can Buy Any Drug

100. *Free Exchange: Money from Nothing*, ECONOMIST, Mar. 15, 2014, www.economist.com/news/finance-and-economics/21599053-chronic-deflation-may-keep-bitcoin-displacing-its-fiat-rivals-money [perma.cc/A7MG-HZ2C].

101. *E.g.*, David Schepp, *As Cyprus' Woes Deepen, Interest in Bitcoin Soars*, DAILYFINANCE, Mar. 28, 2013, www.dailyfinance.com/on/cyprus-bank-crisis-bitcoin-soars [perma.cc/P6G6-Z6Z5].

102. J.M.P., *Bitcoin in Argentina: If it Can't Make it There*, ECONOMIST, June 12, 2014, www.economist.com/blogs/schumpeter/2014/06/bitcoin-argentina [perma.cc/4RBB-GHRR].

103. MJ Lee & Kate Davidson, *What Larry Summers Thinks about Bitcoin—Fiscal Confidence Up Slightly Since January*, POLITICO, Feb. 25, 2014, www.politico.com/morningmoney/0214/morningmoney13103.html [perma.cc/3AA5-LTGH].

104. Hanke, *supra* note 77 (quoting Interview by John Berthoud with Milton Friedman, in San Francisco, Cal. (1999)).

Imaginable" quickly drew widespread national attention after its publication on the popular website *Gawker*.[105] Less than two weeks later, Senators Chuck Schumer and Joe Manchin sent an open letter to the U.S. Attorney General asking federal authorities to shut down Silk Road and the "untraceable peer-to-peer currency known as Bitcoins" fueling it.[106]

As discussed earlier, Bitcoin's transaction mechanism did (and still does) provide a great deal of cover for those hoping to use Bitcoin for illegal ends. However, the "untraceable" degree of anonymity the senators warned of was—perhaps not surprisingly for an open letter by politicians—a product of alarming exaggeration. A member of Bitcoin's core development team told *Gawker* the same month that, "[B]ecause all Bitcoin transactions are recorded in a public log, though the identities of all the parties are anonymous, law enforcement could use sophisticated network analysis techniques to parse the transaction flow and track down individual Bitcoin users."[107] A Drug Enforcement Administration (DEA) spokesperson asked to comment on the *Gawker* story stated that the agency was "absolutely" concerned and was "constantly evaluating and analyzing new technologies and schemes perpetrated by drug trafficking networks. While we won't confirm or deny the existence of specific investigations, DEA is well aware of these emerging threats and we will act accordingly."[108] Contrary to the political hype that quickly developed in fear of the encrypted Silk Road website and its "untraceable" Bitcoins, law enforcement would eventually find and seize not only the operator of the Silk Road, but both his personal Bitcoins (144,000) and those owned by the website (about 30,000).[109] In

105. Adrian Chen, *The Underground Website Where You Can Buy Any Drug Imaginable*, GAWKER (June 1, 2011, 4:20 PM), http://gawker.com/the-underground-website-where-you-can-buy-any-drug-imag-30818160 [perma.cc/DU3Y-557S]; *see also* Brian Patrick Eha, *Could the Silk Road Closure be Good for Bitcoin?*, Oct. 5, 2013, www.newyorker.com/business/currency/could-the-silk-road-closure-be-good-for-bitcoin [perma.cc/KG7M-ZDV2].

106. Brennon Slattery, *U.S. Senators Want to Shut Down Bitcoins, Currency of Internet Drug Trade*, PCWORLD (June 10, 2011, 1:58 PM), www.pcworld.com/article/230084/u_s_senators_want_to_shut_down_bitcoins.html [perma.cc/PF8C-JFYA].

107. *Id.*

108. Brett Wolf, *Senators Seek Crackdown on "Bitcoin" Currency*, REUTERS, June 8, 2011, www.reuters.com/article/2011/06/08/us-financial-bitcoins-idUSTRE7573T320110608 [perma.cc/7CUZ-EMR6].

109. Alex Hern, *US Government Prepares to Auction $17m of Seized Silk Road Bitcoins*, GUARDIAN, June 24, 2014, www.theguardian.com/technology/2014/jun/24/us-auction-

fact, the government seized so many Bitcoins that just the announcement that it would auction the site's 30,000 Bitcoins caused a global decline in the digital currency's price in summer 2014.[110] It should be noted, however, that even this auction did not dent the Bitcoin demand for long—all 30,000 Bitcoins (which had a market value of about $19 million at the time) were snapped up by venture capitalist Tim Draper for an undisclosed amount.[111]

The pressure placed on the DEA and other law-enforcement agencies as a result of the Silk Road hysteria sparked a period of serious investigations into the criminal dimensions of Bitcoin.[112] In January 2012, the FBI's Counterterrorism Division disseminated a cursory intelligence bulletin that explored Bitcoin's capacity to assist with illicit financial transactions.[113] This was quickly expanded upon by the Criminal and Cyber Section's first Bitcoin-related intelligence assessment in April 2012.[114] The assessment stated that cyber criminals were using Bitcoin to launder money and to make payments alongside traditional avenues, but the assessment could only collect enough information to make these claims with "low confidence"

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seized-silk-road-bitcoins [perma.cc/57AG-AS8D].

110. Daniel Cawrey, *Bitcoin Price Falls Below $600 as US Government Prepares for 30,000 BTC Selloff*, COINDESK (June 13, 2014, 3:35 AM), www.coindesk.com/bitcoin-price-falls-600-us-government-30000-btc-selloff [perma.cc/MKN6-ELUQ].

111. Sydney Ember, *Single Winner of All Bitcoins in U.S. Auction*, N.Y. TIMES DEALBOOK, July 1, 2014, http://dealbook.nytimes.com/2014/07/01/single-winner-of-all-bitcoins-in-u-s-auction/?_php=true&_type=blogs&smid=pl-share&_r=0 [perma.cc/L6ZP-HTE8]; Pete Rizzo, *Silk Road Auction Winner Tim Draper: World Should Embrace Bitcoin*, COINDESK (July 2, 2014, 11:09 PM), www.coindesk.com/silk-road-auction-winner-tim-draper-world-embrace-bitcoin [perma.cc/5SFG-UX95].

112. Intrepid readers may ask why—given the U.S. government's infamous Internet-monitoring programs and resources—federal authorities are unable to simply track the online activities of suspected criminals using Bitcoin, even if their use of the currency remains difficult to unravel. While the subject is dramatically outside the scope of this article, the short answer is that a number of identity-hiding, web-surfing tools have evolved parallel to Bitcoin's own development. Programs such as Tor make it nearly impossible to track the online identities, communications, and activities of those who use them. This relates to a phenomenon described under a confusing mix of different labels such as "Dark Net" and "Deep Web"—essentially a hidden part of the Internet that is not indexed by conventional data-gathering systems and remains almost impenetrable for governments. For more information, see Lev Grossman & Jay Newton-Small, *The Secret Web: Where Drugs, Porn and Murder Live Online*, TIME, Nov. 11, 2013, http://time.com/630/the-secret-web-where-drugs-porn-and-murder-live-online [perma.cc/WWA7-NWVY].

113. FED. BUREAU OF INVESTIGATION (FBI), (U) BITCOIN VIRTUAL CURRENCY: UNIQUE FEATURES PRESENT DISTINCT CHALLENGES FOR DETERRING ILLICIT ACTIVITY 1–3 (2012) [hereinafter FBI], *available at* www.wired.com/images_blogs/threatlevel/2012/05/Bitcoin-FBI.pdf [perma.cc/8TH5-6YFQ].

114. *Id.*

and "medium confidence," respectively.[115] However, the FBI was more assertive about Bitcoin's future criminal potential:

> Bitcoin will likely continue to attract cyber criminals who view it as a means to move or steal funds as well as a means of making donations to illicit groups. If Bitcoin stabilizes and grows in popularity, it will become an increasingly useful tool for various illegal activities beyond the cyber realm. Since Bitcoin does not have a centralized authority, law enforcement faces difficulties detecting suspicious activity, identifying users, and obtaining transaction records—problems that might attract malicious actors to Bitcoin.[116]

Despite these challenges, the assessment ended on a positive note by emphasizing that law enforcement may be able to take advantage of the nexus at which criminals convert their Bitcoins into fiat currency.[117] Because users of Bitcoin are typically forced to rely on third-party services to store their coins, initiate transactions, or conduct currency exchanges, it is possible to request any identifying information U.S.-based services have collected on their customers via subpoena.[118] Additionally, the FBI emphasized that "any third-party service that qualifies as a *money transmitter* must register as a *money services business* with the Financial Crimes Enforcement Network (FinCEN) and implement an anti-money laundering program."[119]

This statement was in reference to an interpretive guidance issued the previous month by FinCEN "to clarify the applicability of the regulations implementing the Bank Secrecy Act (BSA) to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies."[120] The guidance stated that mere users of virtual currency are not subject to FinCEN registration, reporting, or recordkeeping regulations because they do not fall under the definition of a "money services business" (MSB).[121] However, the MSB requirements *do* apply to administrators or exchanges—specifically, "money

115. *Id.* at 2.
116. *Id.*
117. *Id.* at 2, 10.
118. *Id.* at 2, 8; Kim Lachance Shandrow, *6 Bitcoin Basics for Beginners*, ENTREPRENUEUR (Mar. 3, 2014), www.entrepreneur.com/article/231920 [perma.cc/5WPH-C33J].
119. FBI, *supra* note 113, at 2.
120. FIN-2013-G001, *supra* note 2.
121. *Id.*

transmitters."[122]

Under the FinCEN guidance, any person that "provides money transmission services" or engages "in the transfer of funds" is a money transmitter.[123] "Money transmission services" are "the acceptance of currency, funds, or other value that substitutes for currency from one person *and* the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means."[124] FinCEN concluded that because the definition of a money transmitter did not differentiate between "real" currencies (fiat currencies) and convertible virtual currencies (such as Bitcoin), and because "[a]ccepting and transmitting anything of value that substitutes for currency makes a person a money transmitter," administrators or exchanges that accepted, transmitted, bought, or sold convertible virtual currencies for any reason were to be regulated as money transmitters.[125]

The effectiveness of these new requirements was not immediately clear. Because Bitcoin companies based in the United States now qualified as money transmitters under 18 U.S.C. § 1960 and the federal Bank Secrecy Act, such companies not only had to complete a free registration with FinCEN, but also had to obtain forty-seven state licenses, which can cost up to $20 million.[126] In the immediate aftermath of the guidance, technically not one American Bitcoin-related business had the proper licenses to continue operating nationwide.[127] As it stood, the guidance also created serious regulatory contradictions and effectively forced digital currencies such as Bitcoin into statutes which were inadequately prepared to handle them.[128]

In response to these problems, FinCEN issued two rulings in

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Aaron Greenspan, *Guest Post: Outtakes from the American Express Informercumentary & the Andreessen Bitcoin Circus*, FTALPHAVILLE (Mar. 26, 2014, 4:33 PM), http://ftalphaville.ft.com/2014/03/26/1812362/guest-post-outtakes-from-the-american-express-informercumentary-the-andreessen-bitcoin-circus [perma.cc/N47-9Q7D].
127. *Id.*
128. For a more detailed analysis as to the problems with the earlier FinCEN regulations, see Danton Bryans, Note, *Bitcoin and Money Laundering: Mining for an Effective Solution*, 89 IND. L.J. 441, 472 (2014) ("Bitcoin represents a disruptive financial technology that many AML and money transmitter statutes are ill prepared to deal with. . . . Because Bitcoin is a decentralized, peer-to-peer virtual currency, it makes little [sense] to regulate entities other than Bitcoin currency exchanges.").

January 2014 that further interpreted its March 2013 statements.[129] The first ruling stated that a Bitcoin miner (whether an individual or corporation) who used Bitcoin solely for his or her own purposes is not a money services business because such activities involve neither "acceptance" nor "transmission" of the currency.[130] This includes paying debts incurred earlier in the normal course of business, purchasing goods or services, and making distributions to shareholders.[131] However, Bitcoin users wishing to purchase goods or services with Bitcoins they have mined may be engaging in money transmission if they pay the Bitcoins to a third party at the direction of a seller or creditor.[132]

The second ruling addressed whether a company that occasionally invested in virtual currencies (or the production and distribution of software that facilitates such purchases) is considered to be a money transmitter under the Bank Secrecy Act.[133] The ruling stated that the "production and distribution of software, in and of itself, does not constitute acceptance and transmission of value, even if the purpose of the software is to facilitate the sale of virtual currency."[134] While the software would therefore not make a company a money transmitter, any "transfers to third parties at the behest of the [c]ompany's counterparties, creditors, or owners entitled to direct payments should be closely scrutinized, as they may constitute money transmission."[135]

The ruling cautioned that additional analysis would be necessary for FinCEN to determine a company's regulatory status and obligations if it "were to provide services to others

129. DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FIN-2014-R001, APPLICATION OF FINCEN'S REGULATIONS TO VIRTUAL CURRENCY MINING OPERATIONS (2014) [hereinafter FIN-2014-R001], *available at* www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R001.pdf [perma.cc/EZG4-2R7L]; DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FIN-2014-R002, APPLICATION OF FINCEN'S REGULATIONS TO VIRTUAL CURRENCY SOFTWARE DEVELOPMENT AND CERTAIN INVESTMENT ACTIVITY (2014) [hereinafter FIN-2014-R002], *available at* www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R002.pdf [perma.cc/XQ5E-2G29]; *see also* Joe Mont, *New FinCEN Guidance Clarifies Corporate Bitcoin Requirements*, COMPLIANCE WEEK, Feb. 4, 2014, www.complianceweek.com/new-fincen-guidance-clarifies-corporate-bitcoin-requirements/article/332667 [perma.cc/54GF-2SU7].

130. FIN-2014-R001, *supra* note 128, at 3.

131. *Id.*

132. *Id.*

133. FIN-2014-R002, *supra* note 128, at 1.

134. *Id.* at 2.

135. *Id.* at 4.

(including investment-related or brokerage services) that involved the accepting and transmitting of convertible virtual currency, or the exchange of convertible virtual currency for currency of legal tender or another convertible virtual currency . . . ."[136] Furthermore, "should the company begin to engage as a business in the exchange of virtual currency against currency of legal tender (or even against other convertible virtual currency), the Company would become a money transmitter under FinCEN's regulations."[137] This would entail all of the same strict requirements as detailed in the April 2013 guidance, including the implementation of risk-based, anti-money-laundering programs and compliance with "recordkeeping, reporting, and transaction monitoring requirements."[138]

On October 27, 2014, FinCEN issued yet another ruling to clarify whether companies offering certain Bitcoin-related services qualified as MSBs under the Bank Secrecy Act, which would require them to obtain the proper licensing.[139] The new guidance seems to suggest that Bitcoin exchanges qualify as MSBs, including exchanges that only match up buyers and sellers as well as those that do not exchange any money between parties and counterparties.[140] More surprising, the new guidance also suggests that even Bitcoin payment processing companies could fall under these regulations.[141] The guidance's seemingly broad scope has created uncertainty among Bitcoin service providers who are now left to determine whether the significant costs associated with MSB licensing requirements apply to their particular businesses.[142]

In the wake of the 2013 Silk Road closure, the U.S. Senate Committee on Homeland Security and Governmental Affairs

136. *Id.*
137. *Id.*
138. *Id.*
139. DEP'T OF THE TREASURY, FIN. CRIMES ENFORCEMENT NETWORK, FIN-2014-R012, REQUEST FOR ADMINISTRATIVE RULING ON THE APPLICATION OF FINCEN'S REGULATIONS TO A VIRTUAL CURRENCY PAYMENT SYSTEM, (2014) [hereinafter FIN-2014-R011], *available at* www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R012.pdf [perma.cc/F5AQ-TEP2].
140. Pete Rizzo, *FinCEN Rules Bitcoin Payment Processors, Exchanges are Money Transmitters*, COINDESK (Oct. 27, 2014, 10:25 PM), www.coindesk.com/fincen-rules-bitcoin-payment-processors-exchanges-money-transmitters [perma.cc/7DBY-TBQX].
141. *Id.*
142. *Id.*; *see also* Faisal Khan, *What New FinCEN Guidance Means for US Bitcoin Companies*, COINDESK (Oct. 31, 2014), www.coindesk.com/new-fincen-guidance-means-us-bitcoin-companies [perma.cc/HF2N-XTUT].

held hearings in November 2013 to investigate how federal financial regulators and law enforcement officials were now monitoring digital currencies such as Bitcoin.[143] The witnesses included a diverse range of high-ranking regulators, including Jennifer Shasky Calvery, Director of FinCEN; Mythili Raman, Acting Assistant Attorney General in the Criminal Division of the Department of Justice; and Edward W. Lowery III, Special Agent in Charge in the Criminal Investigative Division of the U.S. Secret Service.[144] The witnesses also included non-governmental testimony by figures such as Patrick Murck, General Counsel to the Bitcoin Foundation, a non-profit Bitcoin lobbying organization.[145]

The testimony was overwhelmingly positive. Speaking on the behalf of the Justice Department, Raman stated, "We are attuned to the criminal use [of Bitcoin]," but noted that "there are many legitimate uses. These virtual currencies are not in and of themselves illegal."[146] The government officials who testified all stressed that Bitcoin served legitimate purposes and that no new regulations were needed for law enforcement to police the digital currency.[147]

Despite the Silk Road closure and the reassuring testimony of the November 2013 hearings, some elected officials have made it a priority to denounce Bitcoin and continue to press for far harsher measures. In February 2014, Senator Joe Manchin, a member of the Senate Banking Committee, responded to the collapse of major Bitcoin exchange Mt. Gox by demanding federal regulators take the remarkable (and perhaps logistically impossible) step of completely banning Bitcoin in the United States.[148] Manchin sent an open letter to the Treasury Department, the Federal Reserve, and other regulators

143. *Beyond Silk Road: Potential Risks, Threats, and Promises of Virtual Currencies, Before the S. Comm. on Homeland Sec. & Gov'tal Affairs*, 113th Cong. (2013) (statement of Sen. Thomas R. Carper, Chairman, S. Comm. On Homeland Sec. & Gov'tal Affairs), *available at* www.hsgac.senate.gov/hearings/beyond-silk-road-potential-risks-threats-and-promises-of-virtual-currencies [perma.cc/L575-B3CQ].

144. *Id.* (listing witnesses).

145. *Id.*

146. Timothy B. Lee, *Here's How Bitcoin Charmed Washington*, WASH. POST, Nov. 21, 2013, www.washingtonpost.com/blogs/the-switch/wp/2013/11/21/heres-how-bitcoin-charmed-washington [perma.cc/U8XD-N847].

147. *Id.*

148. Declan McCullagh, *Sen. Manchin Demands Complete US Ban on Bitcoin*, CNET (Feb. 26, 2014, 12:02 PM), www.cnet.com/news/sen-manchin-demands-complete-us-ban-on-bitcoin [perma.cc/E7LG-WE5U].

emphasizing the dangers of Bitcoin speculation that is "highly unstable and disruptive to our economy" and Bitcoin's role in encouraging "illicit activity."[149] The letter did not pull any punches, with Senator Manchin urging "the regulators to work together, act quickly, and prohibit this dangerous currency from harming hard-working Americans.[150]

Senator Manchin's demands for an American Bitcoin ban were not well received by U.S. regulators or fellow members of Congress more open to the digital currency. Congressman Jared Polis soon responded by issuing a sarcastic parody letter calling on the Treasury to ban physical dollars: "The exchange of dollar bills, including high denomination bills, is currently unregulated and has allowed users to participate in illicit activity, while also being highly subject to forgery, theft, and loss."[151] Congressman Polis has since positioned himself as arguably the most visible face of the pro-Bitcoin cause in Congress.[152] During a Senate Banking Committee hearing that took place in the wake of Senator Manchin's letter, Federal Reserve Chair Janet Yellen told the senator that her agency simply "doesn't have authority to supervise or regulate Bitcoin in [any way]."[153] A March 2014 report by a Vice President of the Federal Reserve Bank of St. Louis concluded that "enforcing an outright ban is close to impossible."[154]

In mid-March 2014, David S. Cohen, the Treasury Department's top official in charge of combating money laundering, declared that the U.S. government has seen no "widespread" evidence that Bitcoin was being used to evade

149. Press Release, Office of Sen. Joe Manchin, Manchin Demands Federal Regulators Ban Bitcoin (Feb. 26, 2014), *available at* www.manchin.senate.gov/public/index.cfm/2014/2/manchin-demands-federal-regulators-ban-bitcoin [perma.cc/PPJ3-ZKK7].

150. *Id.*

151. Gregory Ferenstein, *Congressman Calls to Ban U.S. Dollar in Response to Plea for Bitcoin Ban*, TECHCRUNCH (Mar. 5, 2014), http://techcrunch.com/2014/03/05/congressman-calls-to-ban-u-s-dollar-in-response-to-bitcoin-ban [perma.cc/VG9G-2GNF].

152. *See* Pete Rizzo, *Jared Polis: I Will Protect Bitcoin in US Congress*, COINDESK (June 22, 2014, 12:00 AM), www.coindesk.com/jared-polis-will-protect-bitcoin-us-congress [perma.cc/3M7T-JUNZ].

153. Allie Jones, *Janet Yellen Is Bitcoin Users' New Hero*, WIRE, Feb. 27, 2014, www.thewire.com/politics/2014/02/janet-yellen-bitcoin-users-new-hero/358606 [perma.cc/ZZN7-V27D].

154. David Andolfatto, Vice President, Fed. Reserve Bank of St. Louis, Dialogue with the Fed: Bitcoin and Beyond: The Possibilities and Pitfalls of Virtual Currencies (Mar. 31, 2014), *available at* www.stlouisfed.org/dialogue-with-the-fed/assets/Bitcoin-3-31-14.pdf [perma.cc/ZC9F-HB8R].

sanctions or finance terrorism.[155] In contrast to the idea that Bitcoin should be banned entirely, Cohen remarked, "Financial transparency can help bring stability to the virtual currency market and security to its users and investors. And that is what we are trying to do through sensible, flexible and—to use a word from the tech world—scalable regulation."[156] As some commentators have pointed out, criminal detection rates for Bitcoin are likely higher than the meager "1% success rate" currently enjoyed by authorities in tracing traditional methods of money laundering.[157] However, survey data suggests that most Americans—particularly older ones—still know little about Bitcoin and would side with Senator Manchin's decision to ban it.[158] Former Attorney General Eric Holder has also stated that the Justice Department is working with regulators to monitor Bitcoin because of the virtual currency's ability to conceal illicit activity.[159] U.S. regulatory approaches towards Bitcoin may become more draconian if evidence emerges that Bitcoin has become a major tool for international networks engaged in crime or violence.

B. Protecting Bitcoin Investors & Consumers

Bitcoin has proven to be a confounding challenge for existing securities laws and those at the U.S. Securities and Exchange Commission (SEC) charged with regulating securities. Initial scholarship on Bitcoin's applicability under federal securities laws came primarily from the limited number of law students, professors, and lawyers who developed an early niche interest in what was then a still largely unknown phenomenon. In June 2011, Georgia lawyer and technology law writer John William

155. Carter Dougherty & Greg Farrell, *Treasury's Cohen Sees No Widespread Criminal Bitcoin Use*, BLOOMBERG, Mar. 18, 2014, www.bloomberg.com/news/2014-03-18/treasury-s-cohen-says-regulation-helps-virtual-currencies.html [perma.cc/SZ5A-NAW5?type=image].

156. *Id.*

157. Hass McCook, *Under the Microscope: Economic and Environmental Costs of Bitcoin Mining*, COINDESK (June 21, 2014, 11:02 AM), www.coindesk.com/microscope-economic-environmental-costs-bitcoin-mining [perma.cc/Z8LW-CQBM].

158. *See* Andrew Quentson, *Survey Says Most Americans Want to Ban Bitcoin: Highlighting Need for Education*, CRYPTOCOINSNEWS, June 20, 2014, www.cryptocoinsnews.com/news/americans-want-ban-bitcoin-new-survey-reveals-highlighting-need-education/2014/06/20 [perma.cc/HWY9-7JJP].

159. Kevin Johnson, *Holder Warns of Bitcoin Misuse, Bristles at Contempt Reminder*, USA TODAY, Apr. 8, 2014, www.usatoday.com/story/news/nation/2014/04/08/holder-bitcoin-fraud/7461571 [perma.cc/6UJW-EGT7].

Nelson began developing a legal analysis for applying federal securities regulations to Bitcoin.[160] Nelson argued that although federal securities law is "a complex area of law that grants courts and the SEC great leeway in classifying investment products as securities," nonetheless Bitcoin "in-and-of-itself is not a security that can be regulated under federal securities la[ws]."[161] Nelson gives three reasons Bitcoin is not a security: first, a security "implies an investment method or instrument that is secured against something else" (like a share of stock or a bond); second, Bitcoin is not backed up by any entity or assets and its value is entirely virtual and subjective; and third, Bitcoin is not legally considered a "currency" like fiat currencies and therefore has no guaranteed value[162]

The statutory authority for security regulations stems from the 1933 and 1934 laws that specifically enumerate types of securities, such as notes and company shares.[163] These laws pertain to general, broad categories of securities: investment contracts and "[a]nything commonly known as a security."[164] These two general categories share common characteristics, including "(1) investors investing money; (2) [a]n expectation of profits from the investment; [and] (3) substantial third-party control of the enterprise."[165] Nelson does not believe that Bitcoin falls into the broad second category of a general security because it does not meet the test established in the 1972 case *Securities & Exchange Commission v. Glenn W. Turner Enterprises, Inc.*[166] In *Glenn Turner*, the U.S. District Court of Oregon borrowed a California test for determining whether something qualified as a security: the "risk capital" test.[167] The test examined whether the investor subjected his money to the risk of a common enterprise over which he exercised no managerial control.[168]

160. John William Nelson, *Why Bitcoin Isn't a Security Under Federal Securities Law,* LEX TECHNOLOGIAE (June 26, 2011, 11:49 PM), www.lextechnologiae.com/2011/06/26/why-bitcoin-isnt-a-security-under-federal-securities-law [perma.cc/G6V9-M5EL].

161. *Id.*

162. *Id.*

163. *Id.*; Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (current version at 15 U.S.C. § 77 (2012); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (current version at 15 U.S.C. § 78 (2012).

164. Nelson, *supra* note 160.

165. *Id.*

166. 348 F. Supp. 766 (D. Or. 1972), *aff'd,* 474 F.2d 476 (9th Cir. 1973); Nelson *supra* note 160.

167. *SEC,* 348 F. Supp. at 773.

168. *Id.*

Nelson argues that the Bitcoin mining process is not based on a monetary investment, but on a computer processing investment.[169] In addition, Bitcoin does not rely on the managerial control of others—the entire system is set up in a decentralized manner that avoids managerial control from any source.[170] Nelson, therefore, concluded that Bitcoin failed to "meet the basic economic reality of a security transaction under the risk capital test created by California courts and relied on by a number of states and federal courts."[171] As a result, Nelson argued that Bitcoin is not a security under federal law.[172]

Nelson then turned to the core question: could regulators and courts nonetheless apply securities laws to Bitcoin by viewing certain uses of Bitcoin as investment schemes with some or all of the three common traits mentioned above?[173] In *SEC v. W.J. Howey Co.*, the U.S. Supreme Court held that a profit-sharing scheme involving units of a Florida citrus grove and a service contract to farm those units was an investment contract under the Securities Act of 1933 and the Securities Exchange Act of 1934.[174] The Court defined an investment contract as:

> [A] contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.[175]

Nelson argues that Bitcoin is not an investment contract under this test because it does not require direct investments of *money*, just of computing power.[176] Even assuming, arguendo, that the Bitcoin community as a whole amounted to a common enterprise, this "enterprise" is decentralized and not run by any single individual or entity.[177] In addition, Bitcoin lacks a central entity, so "[p]rofits from Bitcoin cannot be expected from the efforts of a 'promoter,' . . . [or] from third parties."[178] Nelson

169. Nelson, *supra* note 160.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. 328 U.S. 293 (1946).
175. *Id.* at 298–99.
176. Nelson, *supra* note 160.
177. *Id.*
178. *Id.*

therefore concluded that Bitcoin did not meet any of the four characteristics of an investment contract: (1) investment in (2) a common enterprise with (3) the expectation of profits from (4) the efforts of another.[179]

Because Bitcoin does not fall under either broad category of a security, Nelson asserts that Bitcoin is neither a currency nor a security under the established regulatory framework.[180] However, he does concede that securities laws might apply to exchanges that convert Bitcoins into real-world currencies.[181] Nelson could also imagine more complex scenarios being considered investment contracts, like transactions occurring on an exchange, or common economic schemes where profit might be expected based on the efforts of a third party.[182] Nelson's early work anticipated the debates that would soon emerge as observers wrestled with the ambiguity of applying a new technological innovation to the existing statutory scheme for securities. For example, a Yale Law student who had been corresponding with Nelson published a student note later in 2011 likewise arguing that Bitcoins likely did not amount to an investment contract.[183]

Bitcoin securities regulation will likely develop in pieces as regulators respond to the various operations and schemes created by Bitcoin users and investors. In July 2013, the Securities and Exchange Commission (SEC) charged Trendon T. Shavers with operating a Ponzi scheme and defrauding investors when he offered and sold Bitcoin-denominated investments totaling at least 700,000 Bitcoins.[184] Averaged across

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. Reuben Grinberg, Note, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159 (2012); *see also* Nikolei M. Kaplanov, Note, *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against Its Regulation*, 25 LOY. CONSUMER L. REV. 111 (2012) ("[B]itcoins fall within a gray area under U.S. law."); Kerry Lynn Macintosh, *How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet*, 11 HARV. J.L. & TECH. 733, 746 n.49 (1998) (noting the complexity of the issue and concluding early on that possible digital currencies were unlikely to one day be regulated as securities); Thomas Johnson, *Are Bitcoins Securities Under U.S. Law?*, BITCOIN TITAN & TRADING TITAN (2012), http://blog.bitcointitan.com/post/16995504313/are-bitcoins-securities-under-u-s-law [perma.cc/Q97Q-XV6L] (arguing that Bitcoins are not securities because they are not "an instrument commonly known as a security," an investment contract, or recognized as legal currency.).
184. Press Release, SEC, SEC Charges Texas Man With Running Bitcoin-Denominated Ponzi Scheme (July 23, 2013), *available at* www.sec.gov/News/PressRelease/Detail/PressRelease/1370539730583#.U3KjCihWCRM

the period from 2011 to 2012 when Shavers was making his offerings and sales, the worth of these 700,000 Bitcoins amounted to roughly $4.5 million ($60 million by the time of the SEC charges).[185] According to the SEC, Shavers promised investors up to 7% weekly interest based on his company's Bitcoin market arbitrage activity, saying he sold to people wanting to buy Bitcoin "off the radar" quickly or in large quantities.[186]

However, Shavers actually just took investor's Bitcoins and used them for his own personal expenses and to make his own trades on Bitcoin currency exchanges.[187] The SEC complaint stated that Shavers' solicitation and misuse of investors' Bitcoin violated the registration and anti-fraud provisions of the securities laws outlined in Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934; and the Exchange Act Rule 10(b)(5).[188] The same day it released the complaint, the SEC also issued an investor alert warning of potential virtual-currency-based Ponzi schemes that may be illegally solicited online without the required registration and accompanying regulatory oversight.[189]

The Eastern District of Texas decided the case in August 2013, holding that Shavers's transactions involving Bitcoin were investment contracts and thus securities.[190] This meant the SEC had regulatory jurisdiction and the federal courts had subject matter jurisdiction, pursuant to Sections 20 and 22 of the Securities Act of 1933 and Sections 21 and 27 of the Exchange Act of 1934.[191]

The court based its holding on three primary findings. First, it concluded that Bitcoin can be used as money:

> [Bitcoin] can be used to purchase goods or services, and as Shavers stated, used to pay for individual living expenses. The only limitation of Bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for

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[perma.cc/Z5LC-YCSK].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. SEC v. Shavers, No. 4:13–CV–416, 2013 BL 208180, at *1, *4 (E.D. Tex. Aug. 6, 2013), *available at* www.courthousenews.com/2013/08/06/Bitcoin.pdf [perma.cc/W33R-BKXB].

191. *Id.* at *4.

> conventional currencies, such as the U.S. dollar, Euro, Yen, and Yuan. Therefore, Bitcoin is a currency or form of money, and investors wishing to invest in BTCST provided an investment of money.[192]

Second, the court determined that a business trading and exchanging Bitcoins qualified as a "common enterprise" based on "the investors' collective reliance on the promot[e]r's expertise even where the promot[e]r receives only a flat fee or commission rather than a share in the profits of the venture."[193] Because investors relied on Shavers's expertise in Bitcoin markets and his connections, and because Shavers allegedly promised a substantial return on investment from his Bitcoin trades and exchanges, the court found his activities constituted a common enterprise.[194] Third, the court found that Shavers's advertisement of Bitcoin investments generated an expectation by the investors that they would derive profits from a third party.[195]

The SEC is continuing to actively investigate Bitcoin-related ventures. In June 2014, the SEC announced that it had charged the co-owner of two Bitcoin-related websites with violating Sections 5(a) and 5(c) of the Securities Act of 1933.[196] According to the SEC, Erik T. Voorhees violated federal securities laws in 2012 and 2013 by failing to register "offerings" when he went online to publish prospectuses and actively solicit investors for shares in companies called SatoshiDICE and FeedZeBirds.[197] Voorhees sold IPO shares for the websites in exchange for Bitcoins, which were later returned to SatosiDICE investors in the form of a buy-back transaction.[198] Andrew J. Ceresney, director of the SEC's Division of Enforcement, commented that, "All issuers selling securities to the public must comply with the registration provisions of the securities laws, including issuers who seek to raise funds using Bitcoin. We will continue to focus on enforcing our rules and regulations as they

192. *Id.* at *3.
193. *Id.*
194. *Id.*
195. *Id.* at *4.
196. Press Release, SEC, SEC Charges Bitcoin Entrepreneur with Offering Unregistered Securities (June 3, 2014), www.sec.gov/News/PressRelease/Detail/PressRelease/1370541972520#.U4_OmChWCRM [perma.cc/DK2Z-NJRK].
197. *Id.*
198. *Id.*

apply to digital currencies."[199] Voorhees's capacity to easily solicit funding from ordinary Bitcoin users may be in part due to the lack of publicly-traded Bitcoin companies and the resulting inability of those who do not qualify as accredited investors to invest in Bitcoin's growth through ordinary means.[200]

The development of new Bitcoin financial instruments and opportunities will also be a primary driver of government interest and oversight by the SEC and other regulatory authorities. A firm called Tera Group Inc. announced in March 2014 that it had created a derivatives framework for buying and selling swaps linked to Bitcoin that would allow investors to hedge the risks involved with trading the digital currency, a process that would require clearance from the U.S. Commodity Futures Trading Commission (CFTC).[201] The CFTC has been preparing an internal memo that examines its authority over digital currencies and explores how to use any such power to regulate the market.[202] Tera's president, Leonard Nuara, said that, "The infrastructure and regulatory protocols already exist in the conventional OTC swaps markets to support these hedging instruments. Regulatory approval is crucial to the long-term growth of the market utilizing Bitcoin."[203] Tera's Bitcoin swap is a "non-deliverable" forward "because the contract is settled in cash without the need to deliver [B]itcoin," as parties agree to make future payments to one another based on the comparative values of the U.S. dollar and Bitcoin.[204]

Tim Karpoff, a partner at Jenner & Block and former Counsel to CFTC Chairman Gary Gensler, and Israel Klein, a principal at the Podesta Group, wrote in March 2014 that, "Over time, Bitcoin derivatives markets should become deeper, more standardized, and more liquid, reducing hedging costs. . . .

199. *Id.*

200. Perianne Boring, *As Bitcoin Rallies, What Are the Best Opportunities for Investors to Get In on the Action?*, FORBES, June 4, 2014, www.forbes.com/sites/perianneboring/2014/06/04/as-bitcoin-rallies-what-are-the-best-opportunities-for-investors-to-get-in-on-the-action [perma.cc/X6Z9-7GP8].

201. Matthew Leisin & Silla Brush, *Bitcoin Swaps Near Reality as Tera Creates Legal Framework*, BLOOMBERG, Mar. 24, 2014, www.bloomberg.com/news/2014-03-24/bitcoin-swaps-near-reality-as-tera-group-forms-legal-framework.html [perma.cc/M3H9-YQEM?type=image].

202. *Id.*

203. *Id.*

204. Katy Burne, *New Derivative Guards Against Bitcoin's Price Swings*, WALL ST. J., Mar. 24, 2014, http://tabbforum.com/news/new-derivative-guards-against-bitcoin%27s-price-swings [perma.cc/H24K-BNRL].

[T]he concept and availability of the currency hedging [is] so important to Bitcoin's development."[205] If Bitcoin swaps ultimately succeed in reducing—rather than aggravating—the volatility of the Bitcoin economy, such instruments could quiet Bitcoin opponents who criticize the digital currency as a dangerous speculative bubble destined to harm investors and start-ups.

Summer 2014 yielded promising indicators that the SEC will allow the Winklevoss twins to proceed in their effort to create the first official ETF, called the Winklevoss Bitcoin Trust (COIN), which is designed to "hold Bitcoins and issue baskets of shares in exchange for deposits."[206] Investor redemptions will also be distributed in the form of Bitcoins.[207] A special focus on updating the risk section of the prospectus may help COIN clear SEC approval.[208] The emergence of ETF operations and new, Bitcoin-focused hedge funds had, by July, made 2014 a banner year for the virtual currency's move into the world of sophisticated investing.[209]

Based on the limited existing precedent, it is still not settled how, when, and whether the SEC can regulate the emerging Bitcoin economy's investment opportunities. SEC Chair Mary Jo White has said that while virtual currencies may not in and of themselves qualify as securities, any returns or interest generated by Bitcoin would likely be subject to securities regulation.[210] The SEC issued a "lengthy warning" in May 2014 cautioning investors about the risks of Bitcoin and other virtual currencies.[211] The

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205. Tim Karpoff & Israel Klein, *Guest Post: Bitcoin, Derivatives, and the IRS*, FTALPHAVILLE (Mar. 28, 2014, 4:30 PM), http://ftalphaville.ft.com/2014/03/28/1814952/guest-post-bitcoin-derivatives-and-the-irs [perma.cc/M22Q-5NBM].

206. *Bitcoin ETF Inching Closer To Reality*, FOX BUS., June 4, 2014, www.foxbusiness.com/markets/2014/06/04/bitcoin-etf-inching-closer-to-reality [perma.cc/F55V-B97V] [hereinafter *Bitcoin ETF*]; *see also* Eric Balchunas, *Bitcoin by Bitcoin, the Winklevii ETF Inches Closer to Reality*, BLOOMBERG, July 10, 2014, www.bloomberg.com/news/2014-07-10/bitcoin-by-bitcoin-the-winklevii-etf-inches-closer-to-reality.html [perma.cc/4V4W-RBL7?type=source].

207. *Bitcoin ETF*, *supra* note 206.

208. Balchunas, *supra* note 206.

209. Joon Ian Wong, *6 New Hedge Funds Seeking Bitcoin Returns*, COINDESK (July 23, 2014, 2:18 PM), www.coindesk.com/6-new-hedge-funds-seeking-bitcoin-returns [perma.cc/83SW-3K25].

210. Mark T. Williams, *Beware Of Bitcoin*, COGNOSCENTI (Dec. 5, 2013), http://cognoscenti.wbur.org/2013/12/05/bitcoin-currency-mark-t-williams [perma.cc/WA2B-GSBR].

211. Jeremy Kirk, *Bitcoin Lacks 'Credibility and Trust,' U.S. SEC Says*, PCWORLD (May 8, 2014, 5:40 AM), www.pcworld.com/article/2152660/bitcoin-lacks-credibility-and-trust-us-

warning emphasized the new innovation's lack of "an established track record of credibility and trust," and highlighted the difficulties encountered by the SEC and law-enforcement officials tasked with investigating Bitcoin-related cases.[212]

State authorities are also beginning to take pro-active positions to protect Bitcoin investors and consumers in their jurisdictions.[213] In March 2014, Benjamin M. Lawsky, New York's superintendent of financial services, announced that his office was working on a "BitLicense" for companies operating in New York that he hoped to have ready by summer.[214] Lawsky asked for proposals to help guide his plan to create regulated virtual currency exchanges and also unveiled a proposed new licensing framework for virtual currencies.[215] Although the licensing requirements exempted "merchants and consumers" that used Bitcoin "solely for the purchase or sale of goods or services," it mandated licensing for anyone engaged in "Virtual Currency Business Activity" in New York.[216] This broad definition encompassed the following activities: receiving or transmitting virtual currency; "(2) securing, storing, holding, or maintaining custody or control of Virtual Currency on behalf of others; (3) buying and selling Virtual Currency as a customer business; (4) performing retail conversion services," including the conversion or exchange of virtual currencies with other virtual currencies or with fiat currencies; and "controlling, administering, or issuing a virtual currency."[217]

The details of Lawksy's new licensing proposal came under heavy criticism almost immediately.[218] At a major Bitcoin summit

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sec-says.html [perma.cc/FY82-KA2C].

212. *Id.*

213. Daniel Cawrey, *5 US States Poised to Promote Bitcoin-Friendly Regulation*, COINDESK (Aug. 31, 2014, 11:00 AM), www.coindesk.com/5-us-states-poised-promote-bitcoin-friendly-regulation [perma.cc/A6TN-NWPC] [hereinafter *State Regulation*].

214. Rachel Abrams, *Virtual Exchange Plans Are Sought in New York*, N.Y. TIMES DEALBOOK, Mar. 11, 2014, nyti.ms/1dNocO3 [perma.cc/HE53-Y9E6].

215. *Id.*; Stan Higgins, *New York Reveals BitLicense Framework for Bitcoin Businesses*, COINDESK (July 17, 2014, 3:35 PM), www.coindesk.com/new-york-reveals-bitlicense-framework-bitcoin-businesses [perma.cc/9UWU-XCRB]; Virtual Currencies, N.Y. STATE DEPT. FIN. SERVS. (proposed July 17, 2014) (to be codified at N.Y. COMP. CODES R. & REGS. tit. 23, ch. I, pt. 200), *available at* www.dfs.ny.gov/about/press2014/pr1407171-vc.pdf [perma.cc/83QJ-7NDJ] [hereinafter NYDFS Proposed Regulations].

216. NYDFS Proposed Regulations, *supra* note 215, § 200.3.

217. *Id.* § 200.2(n).

218. Jacob Davidson, *New York Proposes Bitcoin Regulations*, MONEY, July 18, 2014, http://time.com/money/3004751/new-york-bitcoin-regulations-benjamin-lawsky [perma.cc/D322-JXRU]; Taylor Tyler, *Three Largest Chinese Bitcoin Exchanges Send Letter to Lawsky Regarding BitLicense*, COINBUZZ (Aug. 21, 2014),

that took place soon after the regulations were announced, industry figures largely blasted the licensing framework and derided it as "a scattershot approach to [regulation]."[219] Some in the Bitcoin community were furious that the new regulations appeared to force Bitcoin licensees to hold and invest their earnings in U.S. dollars, rather than allowing them to do so in the form of their earned Bitcoins (and in the case of foreign companies, even preventing them from holding their earnings in their own fiat currencies).[220] The proposed requirements also applied a "one size fits all" approach—a tech-savvy New York high school student trying to help friends and family by storing some of their savings in Bitcoins could face the same compliance burdens as a multi-million dollar Bitcoin exchange.[221]

Other critics argued that the regulations were poorly thought-out because they made it illegal to provide Bitcoin banking services unless a company was already set up and licensed as a full-scale, "normal" bank.[222] Though courts have generally been friendly to the creation of cryptographic software and have regarded it as an expression of free speech,[223] many are concerned that those coding and improving Bitcoin's open-source software would be prosecuted—as illegally "controlling, administering, or issuing a Virtual Currency"[224] —if they failed to obtain one of these new licenses.[225]

Sean G. King, a Tennessee attorney and accountant with a longtime interest in Bitcoin, found the new rules so problematic

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www.coinbuzz.com/2014/08/21/china-exchange-letter-nydfs [perma.cc/MU8S-VR47].

219. Pete Rizzo, *TNABC Day 1: Bitcoin Industry Seeks Plan of Attack for US Regulation*, COINDESK (July 20, 2014, 12:20 AM), www.coindesk.com/nabc-day-1-bitcoin-us-regulation [perma.cc/KR43-3QTD].

220. AmericanBitcoin, *By Far, THIS is the Most Damning Part of the "BitLicense.,"* REDDIT (July 19, 2014), www.reddit.com/r/Bitcoin/comments/2b53fm/by_far_this_is_the_most_damning_part_of_the [perma.cc/EC2A-HRLN?type=source].

221. Tone Vays, *Top 5 Issues with the NYSDFS BitLicense Proposal*, COINTELEGRAPH (July 24, 2014, 11:18 PM), http://cointelegraph.com/news/112141/top-5-issues-with-the-nysdfs-bitlicense-proposal [perma.cc/CF6L-YAUA].

222. Tim Worstall, *How to Stop Bitcoin Banking; Give It A BitLicense in New York*, FORBES, July 19, 2014, www.forbes.com/sites/timworstall/2014/07/19/how-to-stop-bitcoin-banking-give-it-a-bitlicense-in-new-york [perma.cc/J7KA-BTS9].

223. *See* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (holding that computer source code is protected by the First Amendment); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 449 (2d Cir. 2001) (holding that computer programs constructed from code merit First Amendment protection).

224. NYDFS Proposed Regulations, *supra* note 215, § 200.2(n)(5).

225. *See* Kyle Torpey, *Satoshi Nakamoto is a Criminal Under Proposed BitLicense Regulations*, CRYPTOCOINSNEWS, July 18, 2014, www.cryptocoinsnews.com/news/satoshi-nakamoto-criminal-proposed-bitlicense-regulations/2014/07/18 [perma.cc/9922-JKAY].

that he wrote a detailed account of all the legal and logistical problems produced by the proposed regulations.[226] Among other complaints, King argued that many of the defined terms—particularly "Virtual Currency," "Transmission," and "Virtual Currency Business Activity"—were intolerably broad and overbearing, leading to unintended consequences and restrictions that were impossible to enforce.[227] King also pointed out that the requirements of the regulations ignored the technological details of Bitcoin's block chain mechanism, making the proposed new requirements "fatally flawed" because "they seek to regulate all block[]chain technologies (and actually, as currently written, the entire Internet) from the limited perspective of a regulator of financial services in New York."[228]

Bitcoin enthusiasts were especially furious when the New York Department of Financial Services (NYDFS) announced it would not even release a Job Impacts Statement for the proposed regulation "because it is evident from the subject matter of the regulation that it will not have an adverse impact on jobs and employment opportunities in New York State."[229] This disregard for virtual currency's current and future potential only compounded the community's distrust of Lawsky, who already faced unrelated criticism in the media for being a "politically ambitious banking regulator" that runs his agency in a manner that makes New York's financial regulatory framework look "like an extortion racket."[230]

New legal frameworks are also being explored in other states.[231] In June 2014, California Governor Jerry Brown signed into law Assembly Bill 129, which grants Bitcoin and other digital currencies "legal money" status in the state.[232] Although Bitcoin's

226. King, *supra* note 56.

227. *Id.*

228. *Id.*

229. SatoFe, *NYDFS: "It is Evident from the Subject Matter of the [BitLicense Proposal] that It Will Not Have an Adverse Impact on Jobs and Employment Opportunities in New York State,"* REDDIT (July 22, 2014), www.reddit.com/r/Bitcoin/comments/2bgwfq/nydfs_it_is_evident_from_the_subject_matter_of [perma.cc/6GG5-UFME?type=source].

230. *No Way to Treat a Criminal*, ECONOMIST, July 5, 2014, www.economist.com/news/leaders/21606279-french-bank-deserved-clobbering-americas-legal-system-looks-extortion [perma.cc/E8HY-SP2R?type=source].

231. *State Regulation*, *supra* note 213.

232. Pete Rizzo, *California Governor Grants Bitcoin 'Legal Money' Status*, COINDESK (June 29, 2014, 2:20 PM), www.coindesk.com/california-governor-grants-bitcoin-legal-money-status [perma.cc/L2NH-BJ7A].

status in California will largely be determined by the rulings of state and federal regulators, there appears to be strong political will in the state to protect the digital currency industry—perhaps unsurprising, considering 40% of all U.S. Bitcoin-related jobs are currently located in California.[233] Regulators in Missouri and Iowa have issued warnings to investors to be cautious about Bitcoin and similar virtual currencies.[234] In April 2014, Texas Banking Commissioner Charles Cooper issued a memo echoing the reasoning of the IRS decision, stating, "At this point a cryptocurrency like Bitcoin is best viewed like a speculative investment, not as money."[235] As is often the case with nationally relevant matters, states will likely continue to experiment individually with the regulation of digital currencies, creating a spectrum of different postures towards Bitcoin.

C. Bitcoin & Currency Regulation—Is Bitcoin "Money" or an "Asset?"

Both in the U.S. and abroad, financial regulators have remained divided as to how to incorporate Bitcoin into traditional legal structures and policies.[236] Many such decisions have been issued in a recent rush of reaction to Bitcoin's surge in value during the fall of 2013.[237] Edmund Moy, former Director of the U.S. Mint, remarked that U.S. Bitcoin regulation is currently so fractured and internally contradictory because digital currencies span so many different areas of the law, and different regulatory agencies can "only look at [B]itcoin through the prism of what they understand."[238] Moy explains that:

> Every agency has to look at [B]itcoin from the perspective of what their agency does. So the Commodities Futures Trading Commission looks at [B]itcoin as a commodity, because it

233. *Id.*

234. Ali Najjar, *Missouri Investors Cautioned of the Risks of Bitcoin by State Secretary*, COINREPORT (Apr. 25, 2014), http://coinreport.net/missouri-bitcoin-risks-state-secretary [perma.cc/CQ82-T9DK]; *see also IID Joins in Issuing National Securities Regulatory Organization Investor Advisory on Virtual Currency*, IOWA INS. DIVISION (Apr. 30, 2014), www.iid.state.ia.us/node/8285138 [perma.cc/V8CK-XJPL].

235. Aman Batheja, *Texas Banking Chief Issues Rules for Bitcoin*, TEX. TRIB., Apr. 11, 2014, www.texastribune.org/2014/04/11/texas-banking-chief-issues-rules-bitcoin [perma.cc/TC2A-7H28].

236. Christopher Matthews, *Here Comes the Bitcoin Taxman*, TIME, Jan. 22, 2014, http://business.time.com/2014/01/22/here-comes-the-bitcoin-taxman [perma.cc/VBS8-3C7W].

237. WENKER, *supra* note *, at 34–36.

238. Stan Higgins, *Former US Mint Director: How to Save Bitcoin from the Regulators*, COINDESK (July 9, 2014, 11:35 PM), www.coindesk.com/former-us-mint-director-save-bitcoin-regulators [perma.cc/4SCF-ML6P].

> complies with all the issues that commodities applies with. The Federal Trade Commission looks at this as a bartering issue, as a trading issue; the FEC looks at it from an investment perspective; the IRS looks at it as a taxable event.[239]

The resulting rush to issue new regulations, guidance documents, and rules has produced a tangled web of conflicting terminology and interpretations. This has created a bizarre environment in which Bitcoin has become the financial equivalent of Schrödinger's Cat: it simultaneously is and is not a "currency" that functions identically to money, depending on the jurisdiction in question—or even depending on which particular regulator or judicial authority is asked within the same jurisdiction.[240] In the *Shavers* case, the Eastern District of Texas declared that Bitcoin is clearly a "currency or form of money."[241] Similarly, the federal judge presiding over the case against Silk Road founder Ross Ulbricht rejected the defense's assertion that Ulbricht could not be found guilty of money laundering because FinCEN and the IRS have refused to recognize Bitcoin as "money."[242] The judge reasoned that common sense and an understanding of Silk Road's basic operations led to the conclusion that Bitcoin functioned like money in a manner that fell within the broad domain of money laundering statutes.[243]

Without a clear global consensus among financial regulators, the U.S. has been forced to improvise its own, largely ad-hoc response to the emergence of virtual currencies like Bitcoin.[244] Of all the regulatory questions pertaining to Bitcoin's status in the U.S., none has created greater controversy and turmoil than the issue of whether it should legally be considered a "currency." The state and federal regulators that have issued statements on the matter have adopted staunch positions on both sides of the

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239. *Id.*

240. Bitgirl, *Bitcoin: Capital Asset or Currency?*, BITCOINX (Jan. 20, 2014), www.bitcoinx.com/bitcoin-capital-asset-currency [perma.cc/UF2C-5ZD8]; Lisa Winter, *Schrödinger's Cat: Explained*, IFLSCIENCE (Aug. 12, 2014), www.iflscience.com/physics/schrödinger's-cat-explained [perma.cc/C9HV-2DX7].

241. SEC v. Shavers, No. 4:13-CV-416, 2013 BL 208180, at *3 (E.D. Tex. Aug. 6, 2013), www.courthousenews.com/2013/08/06/Bitcoin.pdf [perma.cc/W33R-BKXB].

242. Andy Greenberg, *Judge Shoots Down 'Bitcoin Isn't Money' Argument in Silk Road Case*, WIRED, July 9, 2014, www.wired.com/2014/07/silkroad-bitcoin-isnt-money [perma.cc/6D3V-ULYJ].

243. *Id.*

244. For an extensive discussion of global regulatory developments, *see* WENKER, *supra* note *, at 72–75, 85–101.

debate.[245] Less than three months after National Taxpayer Advocate Nina Olson asked the IRS to issue guidance to taxpayers concerning digital currency transactions, the IRS created huge waves in March 2014 by declaring that virtual currencies such as Bitcoin were not "currencies," but "assets."[246]

This powerful assertion was curious considering that neither the tax code nor the guidance itself actually define the term "currency."[247] However, some legal experts who studied the guidance inferred that the IRS was simply limiting its conception of currency exclusively to fiat currencies accepted as legal tender in a country or jurisdiction.[248] Under the IRS ruling, Bitcoin investors are now treated like people who invest in stocks: Bitcoins held for less than a year prior to being sold are subject to a higher top tax rate (43.4%) than those held for more than a year (23.8%).[249] Investors who lost money from Bitcoin can subtract capital losses from capital gains, including subtracting up to $3,000 of capital losses from ordinary income per year.[250]

Furthermore, those who directly mine their own Bitcoins are now required to report their earnings as taxable income, attributing the worth of any new Bitcoin (or more realistically, any new slice of a Bitcoin earned as part of a mining pool) to Bitcoin's value at the day of mining.[251] Bitcoin mining operations that are a part of a business must also pay payroll taxes.[252] The ruling took effect immediately, covering both past as well as future transactions and tax liabilities.[253] In order to ease the transition, the IRS noted that it might offer relief or exemptions for Bitcoin transactions made prior to the announcement so

245. *See, e.g.*, Alyssa Edes, *As Bitcoin Grows, (Some) Regulators Rush to Keep Up*, BETA BOSTON (Mar. 30, 2014), http://betaboston.com/news/2014/03/30/as-bitcoin-grows-some-regulators-rush-to-keep-up [perma.cc/JRG7-3CPC].

246. Richard Rubin & Carter Dougherty, *Bitcoin Is Property, Not Currency, in Tax System: IRS*, BLOOMBERG, Mar. 25, 2014, www.bloomberg.com/news/2014-03-25/bitcoin-is-property-not-currency-in-tax-system-irs-says.html [perma.cc/Z2HE-CKAE?type=source]; *see also* IRS, IRS VIRTUAL CURRENCY GUIDANCE: VIRTUAL CURRENCY IS TREATED AS PROPERTY FOR U.S. FEDERAL TAX PURPOSES; GENERAL RULES FOR PROPERTY TRANSACTIONS APPLY, IR-2014-36 (2014), *available at* www.irs.gov/uac/Newsroom/IRS-Virtual-Currency-Guidance [perma.cc/BU38-MDJV].

247. Victor Fleischer, *Taxes Won't Kill Bitcoin, but Tax Reporting Might*, N.Y. TIMES DEALBOOK, Mar. 26, 2014, http://nyti.ms/1g0P5KU [perma.cc/Y2BB-73FG].

248. *Id.*

249. Rubin & Dougherty, *supra* note 246.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

long as "reasonable cause" could be shown for underpayment or failure to file.[254] The IRS's aggressive and comprehensive assertion of authority over Bitcoin mining, use, and investment seemed designed to address earlier fears among elected officials and legal experts that Bitcoin could become a major new avenue of tax evasion.[255] Bitcoin's libertarian-minded supporters often do little to help the tax evasion stigma—one prominent Bitcoin evangelist is currently attempting to set up a service that would allow individuals around the world to use Bitcoins to purchase passports that would make them citizens of a tax haven island nation.[256]

The IRS notice generated huge attention among Bitcoin users and observers.[257] Senator Tom Carper praised the guidance, which he believes "provides clarity for taxpayers who want to ensure that they're doing the right thing and playing by the rules when utilizing Bitcoin and other digital currencies."[258] Steven Englander, the chief foreign exchange strategist for Citigroup, declared that the decision ended "a couple of Bitcoin mythologies," including the persistent idea among some of its users that Bitcoin could continue to operate outside of the financial system and conduct significant transactions anonymously.[259] Englander asserted that the notice created "a real fork in the road between the Bitcoin as an asset and Bitcoin as a transactions medium."[260]

University of San Diego law professor Victor Fleischer argued that the guidance was necessary "to prevent whipsaw. In the absence of guidance, taxpayers holding Bitcoins for investment purposes might report capital gains if they appreciate, but

254. *Id.*

255. Lauren French, *Bitcoin: Tax Haven of the Future*, POLITICO, Aug. 10, 2013, www.politico.com/story/2013/08/bitcoin-tax-haven-95420.html [perma.cc/QJ5S-27Q5].

256. Jason Clenfield & Pavel Alpeyev, *'Bitcoin Jesus' Promises a Virtual Paradise*, WASH. POST, June 20, 2014, www.washingtonpost.com/business/bitcoin-jesus-promises-a-virtual-paradise/2014/06/19/c050eb38-f59a-11e3-a606-946fd632f9f1_story.html [perma.cc/58H9-P6WT].

257. *E.g.* Ali Najjar, *Bitcoin Foundation Reacts to IRS Bitcoin Ruling*, COINREPORT (Mar. 26, 2014), https://coinreport.net/irs-bitcoin-ruling-regulations [perma.cc/3Z54-WWQ7]; *see also* Alex Wilhelm, *Bitcoin Slips in the Wake of the IRS's Tax Decision*, TECHCRUNCH (Mar. 30, 2014), http://techcrunch.com/2014/03/30/bitcoin-slips-in-the-wake-of-the-irss-tax-decision [perma.cc/KG2U-7JUL].

258. Rachel Abrams, *I.R.S. Takes a Position on Bitcoin: It's Property*, N.Y. TIMES DealBook, Mar. 25, 2014, http://nyti.ms/1hnpRaE [perma.cc/P6SJ-88F8].

259. *Bitcoin at a 'Fork in the Road,' Analyst Says*, N.Y. TIMES DEALBOOK, Mar. 28, 2014, http://nyti.ms/1eZROZ9 [perma.cc/78PN-843E].

260. *Id.*

ordinary losses if they depreciate. The I.R.S. guidance requires taxpayers to use one method or the other, depending on their trade or business."[261] Fleischer concluded that Bitcoin's ability to live or die under the new requirements depends on the willingness of its users to adapt to the same regulatory realities faced by those using non-digital, fiat currencies: "Bitcoin cannot thrive in the underground economy alone, and unless its users pay taxes like other grown-ups, the I.R.S. guidance virtually ensures that it will be a passing fad."[262]

The IRS guidance creates both logistical and existential challenges to Bitcoin's continued survival. Despite generally praising the guidance, University of Florida law professor Omri Marian criticized the announcement for leaving some basic questions unanswered.[263] Importantly, the guidance does not specify how taxpayers are to accurately calculate fair market value, given that there is no central authority, that there are numerous exchanges listing different prices, and that the price of Bitcoin can vary by the minute.[264] As Marian noted, "Today for example [the price of Bitcoin] varied by $20. Does it mean I have to use the same exchange each time or do I need to pick the highest price for gains and lowest price for losses?"[265] Furthermore, the guidance did not clarify how it would prevent tax evasion considering the identity-shielding cryptography and the international character of the Bitcoin system.[266]

Even more importantly, the guidance could threaten Bitcoin's fundamental economic workings. Soon after the guidance was released, Georgetown Law professor Adam J. Levitin wrote that Bitcoin could no longer function as a digital currency because taxing it as property destroyed its fungibility—one Bitcoin can no longer be exchanged for a different Bitcoin.[267] For something to function as "money," it must be able to serve as 1) a store of value; 2) a medium of exchange; and 3) a unit of account.[268] In

261. Fleischer, *supra* note 247.

262. *Id.*

263. Lauren French, *Say Goodbye to Tax-Free Bitcoins in the U.S.*, POLITICO, Mar. 25, 2014, www.politico.com/story/2014/03/tax-free-bitcoins-united-states-105015.html [perma.cc/JYN4-YHPH].

264. *Id.*

265. *Id.*

266. *Id.*

267. Adam Levitin, *Bitcoin Tax Ruling*, CREDIT SLIPS (Mar. 26, 2014, 9:56 AM), www.creditslips.org/creditslips/2014/03/bitcoin-tax-ruling.html [perma.cc/XH7V-RRQG].

268. Robinson Meyer, *Why Bitcoin Can No Longer Work as a Virtual Currency, in 1*

order to meet the third test, in addition to being divisible and verifiable, the money has to be fungible.[269] Livitin claimed that this was no longer the case for Bitcoin because two Bitcoins are now not interchangeable in the way that two $10 bills are.[270] Under the guidance, Livitin argues that:

> The price at which a particular Bitcoin was acquired (and this is traceable) determines the capital gains on that particular Bitcoin when spent. If I spend Bitcoin A, which I bought at $10, but is now worth $400, I've got a very different tax treatment than if I spend Bitcoin B, which I bought at $390. (Poor Satoshi—he's got a lot more capital gains than most[.] . . .) This means Bitcoins are not fungible, and that makes it unworkable as a currency. If I have to figure out which particular Bitcoin in my wallet I want to spend and what the tax treatment will be, Bitcoin just doesn't work as a commercial medium of exchange.[271]

However, this dilemma may not be as clear-cut as Livitin believes. In response to the law professor's article, *Forbes* contributor Tim Worstall wrote that he disagreed with Livitin's logic despite describing himself as a Bitcoin skeptic.[272] Worstall argued that Bitcoins are still fungible in how they are *spent*, just not in how they are *earned*.[273] If one Bitcoin is worth $20, all of a person's Bitcoins will always purchase $20 worth of goods and services.[274] Worstall concluded:

> Each and every Bitcoin will, at the moment I spend it, purchase me exactly and only 1 Bitcoin's worth of goods. So Bitcoin is entirely fungible when it's being spent. It isn't fungible as to where and how and at what price I earned it, this is true, but then the same also isn't true about our $20 bill.[275]

Bitcoin's technological character may allow private services in the free market to address the practical issues that Livitin argued would effectively destroy Bitcoin as a medium of exchange. Barry

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Paragraph, ATLANTIC, Mar. 26, 2014, www.theatlantic.com/technology/archive/2014/03/why-bitcoin-can-no-longer-work-as-a-virtual-currency-in-1-paragraph/359648 [perma.cc/L6QS-TX8X].

269. *Id.*

270. Levitin, supra note 267.

271. *Id.*

272. Tim Worstall, *The Taxation of Bitcoin Won't Mean That Bitcoin Fails as a Currency*, FORBES, Mar. 28, 2014, www.forbes.com/sites/timworstall/2014/03/28/the-taxation-of-bitcoin-wont-mean-that-bitcoin-fails-as-a-currency [perma.cc/L6QS-TX8X].

273. *Id.*

274. *See id.*

275. *Id.*

Silbert, the chief executive of the online marketplace SecondMarket, told the *New York Times*, "I can assure you that there are a number of companies that have come up with software to automate this entire process."[276] Overall, Silbert claimed, "From a tax perspective, this is really the best possible outcome."[277] The same article also quoted Ajay Vinze, Associate Dean at Arizona State University's business school, as declaring, "[Bitcoin]'s getting legitimacy, which it didn't have previously. [The ruling] puts Bitcoin on a track to becoming a true financial asset."[278] Entrepreneurs have already released new services that allow Bitcoin users to calculate their tax liabilities under the guidance.[279]

However, Bitcoin's feasibility as a medium of exchange may nonetheless be challenged once the digital currency's increasing popularity pushes it to confront existing commercial law under the Uniform Commercial Code (UCC). The UCC is a "comprehensive code addressing most aspects of commercial law" that has been adopted in various forms across all fifty states and is "generally viewed as one of the most important developments in American law."[280] In the spring of 2014, concern began to grow among some legal scholars due to uncertainty about how Bitcoin transactions should be treated under a commercial law framework not designed to handle cryptocurrencies.[281] Bitcoin is difficult to classify as a type of property under the UCC because it acts "as a store of value and a financial medium for the exchange of goods and services," despite its intangible nature.[282] Although commercial law experts have only recently begun to explore Bitcoin's applicability under the UCC, some have ventured that Bitcoins "are likely a 'general

276. Abrams, supra note 258.

277. *Id.*

278. *Id.*

279. Kashmir Hill, *The Bitcoin Taxman Cometh: Calculating How Much Crypto-Investors Owe IRS Could Be Easy*, FORBES, Mar. 25, 2014, www.forbes.com/sites/kashmirhill/2014/03/25/bitcoin-taxman-cometh-this-start-up-wants-to-help-crypto-investors-pay-the-irs [perma.cc/A5GW-PTNJ].

280. *Uniform Commercial Code (UCC)*, DUKE L., https://law.duke.edu/lib/researchguides/ucc [perma.cc/5HJ9-SZK9].

281. Robert N. Gilbert et al., *Bitcoin and Other Cryptocurrencies: Regulatory and Commercial Law Concerns*, COM. L. (Apr. 29, 2014, 1:22 PM), http://ucclaw.blogspot.com [perma.cc/67FQ-88VP]; *see also* Jeffrey I. Snyder, *Secured Lender Protection Limited When Bitcoin is Collateral*, FIN. & RESTRUCTURING BLOG (June 19, 2014), www.financeandrestructuringblog.com/2014/06/secured-lender-protection-when-bitcoin-is-collateral [perma.cc/44PP-3QSF].

282. Gilbert *supra* note 281.

intangible' or 'payment intangible' for purposes of Article 9 of the Uniform Commercial Code (UCC), as adopted in most jurisdictions."[283]

Article 9 governs security interests in personal (movable and intangible) property, rather than land and buildings.[284] For example, a bakery might obtain a loan from a bank that is secured by the bakery's "inventory, goods, equipment, accounts, and general intangibles."[285] Such a loan would effectively grant the bank an Article 9 security interest in all of the bakery's non-real estate property, also known as a "blanket lien."[286] Under such an arrangement, Bitcoins held by the bakery might be included under the loan as collateral.[287] "UCC section 9-315(a)(1) provides that the bank's security interest 'continue in collateral notwithstanding . . . disposition thereof unless the security party authorized the disposition free of the security interest.'"[288]

It can therefore be argued that the bank's security interest attaches to the Bitcoins and continues to encumber them even after the bakery has spent the Bitcoins (such as by using the Bitcoins to purchase flour from a supplier).[289] UCC section 9-325 would cause the bank's security interest to remain with the Bitcoins even through subsequent transfers, meaning that remote transferees of the digital currency would be taking ownership of the Bitcoins subject to the bank's security interest, so long as the bank took the necessary steps to perfect its security interest.[290] In theory, if the bank failed to pay its debts, this would allow the bank to seize the Bitcoins as collateral.[291] In fact, "because secured lenders sometimes take blanket security interests in all of a debtor's property, including general intangibles, many banks and financial institutions may already hold security interests in a debtor's [B]itcoins without realizing it."[292] If Bitcoins are encompassed by UCC Article 9's definition

283. *Id.*
284. Bob Lawless, *Is UCC Article 9 the Achilles Heel of Bitcoin?*, CREDIT SLIPS (Mar. 10, 2014, 8:17 PM), www.creditslips.org/creditslips/2014/03/is-ucc-article-9-the-achilles-heel-of-bitcoin.html [perma.cc/LYX9-ZUA6].
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. Gilbert, *supra* note 281.

of general intangible property, "[t]he possibility of another party with superior property interest in a [B]itcoin would seem to substantially dampen [the Bitcoins'] utility as a medium of exchange."[293]

As might be expected, UCC section 9–332 ensures that money can be transferred free of preexisting security interests so as to allow it to function as a viable means of exchange.[294] Bitcoin proponents would naturally respond that regulators such as the IRS are wrong to categorize Bitcoins as assets and that Bitcoin should be treated like any other form of money under the UCC. Unfortunately this is currently unlikely to be the case under commercial law, as the UCC's existing definition of "money" under section 1–201(b)(24) specifically states that it must be a "medium of exchange currently authorized or adopted by a domestic or foreign government."[295] It therefore appears that Bitcoin's current status under standard commercial law is uncertain at best and detrimental at worst. Solving Bitcoin's difficulties as a medium of exchange under the UCC appears to require one of three hypothetical solutions: revising the UCC definition of money, convincing the U.S. or a foreign jurisdiction to officially authorize or adopt Bitcoin as a recognized medium of exchange, or hoping that courts generally become willing to apply UCC legal "outs" for Bitcoin collateral (such as the "equitable principles" directive for resolving debtors' comingled accounts).[296]

In addition to the challenges commercial law poses for borrowers that hope to keep using Bitcoin, creditors are also under pressure because it is currently quite difficult to properly secure an interest in a borrower's Bitcoins. Under the UCC, a creditor in a commercial transaction normally perfects a security interest by securing "control" over a debtor's deposit account through a deposit-account control agreement signed by the debtor, the debtor's bank, and the creditor.[297] However, because Bitcoin exchanges might not be recognized as "banks" under federal banking laws, Bitcoins held in an exchange would not

293. Lawless, *supra* note 284.
294. *Id.*
295. *Id.*
296. *Id.*
297. Pamela J. Martinson & Christopher P. Masterson, *The Hazards of Lending to Bitcoin Users*, AM. BANKER, Jan. 2, 2014, www.americanbanker.com/bankthink/the-hazards-of-lending-to-bitcoin-users-1064622-1.html [perma.cc/JHL6-SKEN].

qualify as "deposit accounts" under the UCC, but rather as "payment intangibles."[298] This requires a creditor to undergo the less preferred route of filing a UCC–1 financing statement with the appropriate state authority in order to secure an interest in the Bitcoins.[299]

Unlike creditors with control agreements, creditors relying on a UCC-1 lack the advance agreement with the debtor's "bank" that allows the creditor to quickly remove funds from the debtor's account if needed.[300] Removing funds from a payment platform account such as a Bitcoin exchange through a UCC-1 is therefore a lengthier, more expensive, and more uncertain process than exercising control agreements over the actual bank deposit accounts of debtors.[301] Combined with the general anonymity and volatility of the digital currency, there are good reasons why creditors may prefer to have nothing to do with borrowers' Bitcoins.[302] Credit agreements are slowly beginning to incorporate covenants that prohibit borrowers from using or accepting Bitcoins (or even operating Bitcoin accounts).[303] Credit agreements and diligence questionnaires are also starting to include representations and warranties requiring that the borrowing party does not use or accept Bitcoins.[304] Because such restrictions obviously dampen Bitcoin's applicability as a widely-used medium of exchange operating with the same ease as fiat money, any new regulations that apply traditional banking laws and procedures to Bitcoin exchanges might at least help popularize Bitcoin as a mainstream and feasible currency.

It is also unclear to what extent Bitcoin may be regulated by the more peripheral segments of America's currency framework, if such laws even apply at all. For example, a Congressional Research Service Report concluded in December 2013 that no federal counterfeiting criminal statutes "appl[y] expressly to a currency that exists only on the Internet and in computers in a

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*; *see also* Jonathan W. Riley, *Heads I Win, Tails You Lose? Bitcoin as Collateral is Not a Good Bet*, LENDING L. REP., Jan. 14, 2014, www.lendinglawreport.com/2014/01/articles/collateral/heads-i-win-tails-you-lose-bitcoin-as-collateral-is-not-a-good-bet [perma.cc/A6SW-U9SS].
303. Martinson & Masterson, *supra* note 297.
304. *Id.*

digital form."[305] The report came to a similar conclusion regarding the Stamp Payments Act of 1862, which essentially makes it a crime to substitute or proxy any item or obligation for lawful money in very small transactions (less than $1).[306] According to the report, while "there are some arguments that could be made" as to why the Act should apply to Bitcoins, "[i]t does not seem likely that a currency that has no physicality would be held to be covered by this statute even though it circulates on the internet on a worldwide basis and is used for some payments of less than $1."[307] Likewise, the Electronic Fund Transfer Act (EFTA), which establishes a framework for the electronic transfer of money, is "limited in such a way that it appears not to be applicable to a digital currency in transactions involving no depository institution."[308]

The report did warn, however, that it is possible that the CFTC might decide either that Bitcoin falls within its broad definition of a "commodity" (which includes "all other goods and articles") or that Bitcoins should be regulated under CFTC foreign exchange regulations (as the applicable Commodity Exchange Act does not actually define "foreign currency" or "foreign exchange").[309] The report also briefly mentioned a theoretical concern that Bitcoin could give rise to complications for the International Monetary Fund (IMF), which may be forced to defend the "traditional currency of one of its members from a speculative attack" linked to virtual currencies.[310]

Finally, the question of whether Bitcoin qualifies as a form of "currency" or "money" has also arisen in the context of campaign contributions. In November 2013, the Federal Election Commission (FEC) issued a draft proposal that would treat Bitcoin donations to a campaign as "in-kind" contributions (like a stock or bond), rather than as currency.[311] The FEC concluded that "[b]ecause Bitcoins are neither the currency of

305. CRAIG K. ELWELL ET AL., CONG. RESEARCH SERV., R43339, BITCOIN: QUESTIONS, ANSWERS, AND ANALYSIS OF LEGAL ISSUES 12 (2014), *available at* http://fas.org/sgp/crs/misc/R43339.pdf [perma.cc/UWH8-QSW7].

306. *Id.*

307. *Id.*

308. *Id.* at 13.

309. *Id.* at 16.

310. *Id.* at 17; *see also* Nicholas A. Plassaras, *Regulating Digital Currencies: Bringing Bitcoin Within the Reach of the IMF*, 14 CHI. J. INT'L L. 377 (2013).

311. Byron Tau, *FEC Poised to Allow Bitcoin Campaign Donations*, POLITICO, Nov. 7, 2013, www.politico.com/story/2013/11/bitcoin-campaign-donations-draft-rule-99566.html [perma.cc/4FGQ-5BS2].

any country nor negotiable instruments, Bitcoins are not 'money' under commission regulations."[312] As a result, "a political committee that receives Bitcoin contributions may not treat them as monetary contributions."[313]

Responding to a request from a political action committee (PAC), the FEC revised its interpretation several months later in May 2014.[314] The commissioners unanimously approved an advisory opinion that defined Bitcoins as "money or anything of value."[315] PACs can now accept Bitcoins and either liquidate them immediately or choose to keep them as investments like stocks and bonds.[316] PACs can now also buy Bitcoins on the open market, but are forced to liquidate them into U.S. currency before spending them.[317] Despite the bipartisan nature of the move, ideological differences among the commissioners created a split of opinion as to the impact of the advisory opinion.[318] Commissioner Ellen Weintraub, a Democratic appointee, said she and others decided to approve the PAC's request because it had only requested the ability to accept Bitcoin donations of up to $100 per person per cycle.[319] According to Weintraub, "The $100 limit was really important to us. We have to balance a desire to accommodate innovation, which is a good thing, with a concern that we continue to protect transparency in the system and ensure that foreign money doesn't seep in."[320]

However, FEC Chairman Lee Goodman, a Republican appointee, publicly disagreed with Weintraub by arguing that the language of the advisory opinion simply treats Bitcoin donations as in-kind contributions, not as official currency.[321] Goodman argued that, as a result, no limits now apply save the standard federal caps on all forms of accepted donations.[322] These caps limit individuals to contributions of $2,600 per candidate per

312. *Id.*
313. *Id.*
314. Nick Corasaniti, *Election Commission Votes to Allow Bitcoin Donations*, N.Y. TIMES, May 8, 2014, http://nyti.ms/1itvusz [perma.cc/4FGQ-5BS2].
315. *Id.*
316. *Id.*
317. *Id.*
318. Matea Gold, *Federal Election Commission Approves Bitcoin Donations to Political Committees*, WASH. POST, May 8, 2014, www.washingtonpost.com/blogs/post-politics/wp/2014/05/08/federal-election-commission-approves-bitcoin-donations-to-political-committees [perma.cc/AJ9K-9VZT].
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*

election and $5,000 to a PAC.[323] The caps also allow individuals and corporations to give unlimited sums to so-called "super PACs."[324]

The FEC's decision came in the wake of a primary election season in which a number of candidates across the country from both parties had already begun accepting Bitcoin donations, despite the legal ambiguity.[325] Arguably the most well-known of these, Texas gubernatorial candidate Greg Abbott, had announced the month prior to the decision that his campaign would take Bitcoins.[326] Matt Hirsch, Abbot's communications director, told *The New York Times*, "Something as innovative as Bitcoins is an opportunity for us to continue this focus [on cutting-edge tools], particularly given the fact that it embodies free market principles, which Texans are very fond of."[327] Oakland mayoral candidate Bryan Parker likewise praised Bitcoin as "democratic currency" that showcases a candidate's openness to innovation.[328] Political-strategy firms from both sides of the aisle are now assisting campaigns in setting up Bitcoin integration for their pre-existing contribution systems.[329] The FEC's decision has particularly garnered attention in libertarian-minded states like New Hampshire, where enthusiasm is growing among local candidates interested in adopting virtual currency technology for the upcoming election cycle.[330] There are also candidates for the national legislature in both the U.S. and Europe who are now running campaigns that only accept donations submitted in the form of Bitcoins.[331] An increased willingness by politicians to accept Bitcoins when running for office may further expand the influence of Bitcoin's burgeoning

323. *Id.*

324. *Id.*

325. *See* Pat Jack & Grant Bourque, *Bitcoin Candidates Campaign Donations Roundup*, BITPOLITIC (Oct. 3, 2014), http://bitpolitic.com/list-of-all-bitcoin-candidates [perma.cc/WB8U-TXQ3].

326. Corasaniti, *supra* note 314.

327. *Id.*

328. *Id.*

329. *Id.*

330. Ian DeMartino, *Bitcoin Will Be "Part of the Election Cycle This Year"—Jeremy Almond Interview*, COINTELEGRAPH (July 25, 2014, 10:57 AM), http://cointelegraph.com/news/112143/bitcoin-will-be-part-of-the-election-cycle-this-year-paystand-interview [perma.cc/X68Z-5NHT].

331. Stan Higgins, *Congressional Candidate to Fund Campaign Entirely with Bitcoin*, COINDESK (July 12, 2014), www.coindesk.com/candidate-disavows-dollar-bitcoin-only-donations [perma.cc/ADP8-JYU8]; Tanaya Macheel, *Swedish Parliamentary Candidate to Raise Bitcoin-Only Campaign Funds*, COINDESK (July 12, 2014), www.coindesk.com/swedish-parliamentary-candidate-raise-bitcoin-only-campaign-funds [perma.cc/7JFS-6V99].

political lobby.

The upheaval created by Bitcoin in the technological, economic, public, and regulatory spheres will continue to spur both chaos and innovation long into the 21st century. Bitcoin and regulators are currently entwined in a mutually-aggravating ying-and-yang cycle—just as Bitcoin's rapid development and unpredictable potential can cause unforeseen difficulties for existing regulatory frameworks, the sudden issuance of new decisions by U.S. or foreign regulators can cause Bitcoin's price and volume to spike or crash almost overnight. As the wave of new regulations, clarifications, and restrictions enacted in the first half of 2014 has demonstrated, it can often be difficult to predict where the digital currency will be in three months or even three weeks—much less three years. Only one thing is for certain: the technology and decentralization introduced by Bitcoin have created pandemonium for the financial world and those charged with regulating it. Even if Bitcoin does not remain the dominant digital currency, regulators the world over will soon be forced to accept the rude reality that Satoshi Nakamoto's software has opened the financial equivalent of Pandora's Box—now that global crypto-currencies exist, there is no turning back.


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