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ARTICLES

BOOK REVIEWS

NOTES

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THE CONSENSUS CONSTITUTION

Justin Driver*

An ascendant view within constitutional law contends that the Supreme Court almost inevitably interprets the Constitution in a manner that reflects the "consensus" beliefs of the American public. Given that many of the Constitution's key provisions contain indeterminate language, this view claims that Supreme Court Justices imbue those phrases with the prevailing sentiments of the times. This increasingly influential approach—one that is articulated by some of the most prominent voices within modern legal academia—aims to correct what it deems a romantic myth regarding the Court's ability to protect minority rights.

This Article challenges the ascendant view by identifying and critiquing the defining features of what it labels "consensus constitutionalism." Despite being grounded in history, consensus constitutionalism reveals no familiarity with a defining debate that flourished among American historians that stretches back to the 1950s—a debate that resulted in conflict-based history supplanting its consensus-based counterpart. Consensus constitutionalism offers an unsatisfying understanding of history, as it obscures the deep cleavages that often divide Americans regarding constitutional questions. Consensus constitutionalism also offers an unsatisfying understanding of law, as it invites a foreordained conception of constitutional decisionmaking and an anemic notion of the Court's countermajoritarian capabilities. Reexamining Brown v. Board of Education *and* Loving v. Virginia, *this Article provides an alternate approach to exploring legal history—contested constitutionalism—which honors the significance of both ideological conflict and the Court's countermajoritarian capacities.*

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Introduction

Fifteen years ago, Professor Michael Klarman issued a clarion call urging his fellow law professors to examine the Supreme Court's twentieth-century constitutional decisions from an external vantage point.[1] In contrast to scholarship that analyzes doctrinal developments in hermetic isolation, the "external perspective" places judicial decisions within their larger social and political context.[2] Although externalists long ago succeeded in illuminating some nineteenth-century constitutional decisions,[3] Klarman lamented what he perceived as the method's near abandonment regarding constitutional decisions of more recent vintage.[4] In Klarman's assessment, legal academics—besotted by the Warren Court's landmark decisions—rejected externalism because they were dedicated to advancing the wrongheaded notion that the Court possessed a robust capacity for issuing decisions that protect marginalized groups. "It is my belief that the myth of the Court as countermajoritarian savior is largely responsible for this gap in the literature," Klarman contended.[5] "It is time for constitutional historians to explode that myth, to identify and describe the parameters within which judicial review actually operates, and to create a richer and more credible account of the twentieth century's civil rights and civil liberties revolutions."[6]

In many respects, it would appear that legal academia has heeded Klarman's call. External examinations of twentieth-century constitutional law, though never as neglected as Klarman suggested,[7] now constitute nothing less than a dominant mode of understanding Supreme Court decisionmaking. Indeed, many of the most distinguished professors writing today view modern constitutional law through the external lens.[8]

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1. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 67 (1996).

2. *Id.* at 66–67.

3. *See id.* at 66 (citing DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971)).

4. *Id.* at 66.

5. *Id.* at 67.

6. *Id.*

7. The Court's shifting response to New Deal legislation—perhaps the most closely examined period of twentieth-century constitutional law—has often been attributed to external forces. Many scholars have suggested that President Franklin D. Roosevelt's outside political pressure played a role in Justice Owen Roberts's "switch in time." *See, e.g.*, William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* ESSAYS ON THE NEW DEAL 69, 69–95 (Harold M. Hollingsworth & William F. Holmes eds., 1969). Professor Barry Cushman's account of this period is revisionist precisely because it seeks to understand the Court's response to the New Deal from an internal, law-based perspective rather than an external, politics-based perspective. *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 206–07, 257–61 (1994).

8. *See infra* notes 79–83 and accompanying text.

In other respects, though, the clarion call has not yet been answered—or even fully heard. Though Klarman sought "a richer and more credible account" of constitutional decisions from the last century,[9] the leading scholarship employing externalism is notable for neither its richness nor its credibility. Today's external legal history is marred by what this Article labels "consensus constitutionalism," the claim that the Supreme Court interprets the Constitution in a manner that reflects the "consensus" views of the American public. This view is exemplified in recent major works by prominent legal academics including Klarman,[10] Barry Friedman,[11] Jeffrey Rosen,[12] and Cass Sunstein.[13] Those scholars—with their fixations on societal "consensus"—paint American legal history with a disfiguringly broad brush, obscuring the deep divisions that typify public response to constitutional questions.

This consensus school of constitutional interpretation results in scholarship with two primary deficiencies. First, it makes for bad history. Second, it makes for worse law.

The flight to consensus among law professors during the last decade eerily echoes a movement to consensus among history professors that began in the wake of World War II. In reaction to what they asserted was an overemphasis on the role that conflict played in prior examinations of the past, a group of scholars led by Richard Hofstadter contended that historical inquiries should instead focus upon American commonality.[14] The search among historians for unity rather than division burned incandescent during the 1950s, but its heyday proved brief. In 1959, historian John Higham wrote a devastating article deriding the "consensus school" of American history for its homogeneous conception of the past, a conception that elided the profound disagreements that have shaped the nation's history.[15] Higham's article succeeded in restoring conflict to its central place in historical interpretation, ultimately convincing even the founder of consensus-based history of the school's severe methodological limitations.[16]

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9. Klarman, *supra* note 1, at 67.

10. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

11. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

12. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

13. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009).

14. *See infra* text accompanying notes 27–30.

15. *See* John Higham, *The Cult of the "American Consensus": Homogenizing Our History*, 27 COMMENT. 93, 94 (1959) ("[C]urrent scholarship is carrying out a massive grading operation to smooth over America's social convulsions.").

16. *See infra* text accompanying notes 60–72.

Although consensus constitutionalists (to varying extents) ground their scholarship in historical matters, their work bears no trace of the central debate that roiled history departments for many years. That debate among historians would seem to contain essential lessons regarding the potential pitfalls of external legal history, and it generated conclusions that are perfectly adverse to the way that law professors invoke "consensus" today. Part I reviews that debate in some detail because many modern legal academics either never learned its lessons or once knew but have now forgotten them.

The regrettable consequences of consensus-based scholarship are, moreover, of even greater significance for law than they were for history. The consensus school of constitutional interpretation suffers from three central analytical shortcomings, addressed in Part II. First, consensus constitutionalism often misconceives the American people as fundamentally united when ideological divisions in fact pervade society. Second, consensus constitutionalism's notion that the Court's decisions reflect the zeitgeist leads to the misguided impression that judicial decisions are inevitable, meaning that the Court's composition is largely irrelevant. Third, if the Justices accept consensus constitutionalism's warning about the dangers of the Court outpacing public opinion, the theory contains distressing normative implications regarding the Court's ability to clash with majority preferences.

Simply because the execution of externalism has thus far been wanting, however, does not mean that the underlying methodology should be jettisoned altogether. To the contrary, this Article in Part III proposes an external methodology called "contested constitutionalism." This alternate externalist approach observes that the Court's interpretation of our founding document typically arises in the face of ideological conflict, not ideological consensus. Rather than only abstractly exploring this concept, this Article illustrates how contested constitutionalism plays out in practice by providing a revised account of the Court's role in recognizing black Americans as full citizens during the 1950s and 1960s. When the Court decided *Brown v. Board of Education*,[17] the racial attitudes of Americans revealed greater complexity and inner conflict (both regionally and racially) than the consensus-constitutionalist narrative generally allows. Drawing upon the Court's decision invalidating prohibitions on interracial marriage in *Loving v. Virginia*,[18] this Article contends, against the consensus-constitutionalist account, that the Court has historically played a significant role in protecting minority interests—and further argues that it could (and should) do so again if it ultimately addresses a claim involving same-sex marriage.[19] Although no societal consensus currently exists regarding same-sex marriage, it is easy

17. 347 U.S. 483 (1954).
18. 388 U.S. 1 (1967).
19. *See infra* section III(B)(2).

to overlook that a much smaller percentage of Americans approved of interracial marriage when the Court decided *Loving* than now approve of same-sex marriage.

Given that consensus constitutionalism offers a distorted view of *Brown* and *Loving*, it stands to reason that contested constitutionalism would similarly enhance our understanding of many constitutional decisions that have received less scholarly attention. Accordingly, this Article concludes by challenging scholars to employ contested constitutionalism to explore the full range of American legal history in all of its nuance, complexity, and ambiguity.

I. The Rise and Fall of Consensus-Based History

A. The Rise

In December 1947, as the book that would become known as *The American Political Tradition* underwent final revision, Richard Hofstadter received a disconcerting letter from his publisher.[20] Alfred A. Knopf, the legendary founder of the eponymous publishing house, suggested that the thirty-one-year-old Columbia University historian should compose an introduction designed to link the various chapters offering reassessments of historical figures that formed the book's core.[21] "We want, as far as possible, to get away from the idea that it is just a collection of essays," Knopf explained.[22] "I feel that the introduction is . . . very important."[23] This letter, Hofstadter would later reveal, invited him to undertake precisely the task that he had hoped to avoid: positing a unified theory of American history.[24] Despite his trepidation, Hofstadter recognized Knopf's request as reasonable. "And so I hazarded my six-page introduction," Hofstadter recalled years later, "which has probably made as much trouble for me as any other passage of comparable length."[25] Although this claim sounds somewhat overwrought, Hofstadter errs, if anything, on the side of understatement.

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20. DAVID S. BROWN, RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY 50–51 (2006). At that time, Hofstadter's book was known in-house as *Men and Ideas in American Politics*. *Id.* at 51.

21. *Id.*

22. *Id.* (internal quotation marks omitted).

23. *Id.* (internal quotation marks omitted).

24. Hofstadter later noted:

> I suppose that this had been exactly the challenge I had been trying to evade, since I was in a period of intellectual transition and had sense enough to know that I had not arrived at a point in my life at which I was either learned or settled enough to be ready to put together a synthetic statement about the meaning of the American political tradition.

RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT xxii (1973 ed. 1985) (1948).

25. *Id.*

Indeed, over time, *The American Political Tradition*'s six introductory pages would be understood as nothing less than the opening salvo in one of the defining historical debates that occurred during the latter half of the twentieth century.[26]

Hofstadter's introduction asserted that U.S. historians had, for at least a generation, placed excessive emphasis on the role that conflict played in shaping American society. Hofstadter charged that, as a result of the Progressive historians' obsession with conflict, historians had misunderstood Americans as being defined more by their differences than by their commonalities.[27] Where the Progressives saw division, Hofstadter saw unity. "The following studies in the ideology of American statesmanship have convinced me of the need for a reinterpretation of our political traditions which emphasizes the common climate of American opinion," Hofstadter wrote.[28] "The existence of such a climate of opinion has been much obscured by the tendency to place political conflict in the foreground of history."[29] Whatever their superficial differences, Hofstadter contended that Americans shared a common set of beliefs—a mindset that served to avert any potential for fundamental strife. "The fierceness of the political struggles has often been misleading," Hofstadter suggested, because "the range of vision embraced by the primary contestants in the major parties has always been bounded by the horizons of property and enterprise."[30] In Hofstadter's estimation, American dissidents (such as they are) do not wish to overthrow the economic system; they want only a larger piece of it.

Extending his claim of fundamental commonality beyond the economic and political realms, Hofstadter further suggested that Americans held a united set of cultural views. "Above and beyond temporary and local conflicts there has been a common ground, a unity of cultural and political tradition, upon which American civilization has stood," Hofstadter wrote.[31] "That culture has been intensely nationalistic and for the most part isolationist; it has been fiercely individualistic and capitalistic."[32] Given that

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26. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 332–521 (1988) (examining historiographical trends sparked by the dispute over consensus history); BERNARD STERNSHER, CONSENSUS, CONFLICT, AND AMERICAN HISTORIANS *passim* (1975) (detailing the wide-ranging debate over consensus- and conflict-based theories of history); Carl Degler, Book Review, 76 J. AM. HIST. 892, 893 (1989) (noting that in the wake of the consensus–conflict debate "[t]he eruption of black, ethnic, women's, and public history put an end, at least for the foreseeable future, to the dream of a unitary history"); David Oshinsky, *The Humpty Dumpty of Scholarship*, N.Y. TIMES, Aug. 26, 2000, at B9 (examining the continuing legacy of the consensus–conflict debate).

27. *See* HOFSTADTER, *supra* note 24, at xxix–xxxi (lamenting the focus on conflict in American history and the resulting neglect of significant commonalities).

28. *Id.* at xxix.

29. *Id.*

30. *Id.* at xxx.

31. *Id.* at xxxii.

32. *Id.*

ordinary Americans contemplated a menu of severely constrained options, it is far from surprising that Hofstadter viewed their political leaders as generally following suit:

> The range of ideas . . . which practical politicians can conveniently believe in is normally limited by the climate of opinion that sustains their culture. They differ, sometimes bitterly, over current issues, but they also share a general framework of ideas which makes it possible for them to co-operate when the campaigns are over.[33]

Underscoring his argument's breadth, Hofstadter observed expansively that this insight "can profitably be extended to the rest of American history."[34]

Knopf issued *The American Political Tradition* in the fall of 1948 to glowing reviews and, eventually, to surprisingly brisk sales.[35] Before his death in 1970 at the age of fifty-four, Hofstadter wrote several extremely important (and extremely marketable) books, leading him to be saluted by Eric Foner, among many others, as "the finest historian of his generation."[36] Yet it is *The American Political Tradition*, perhaps aided by its hastily composed introduction, that Hofstadter biographer David S. Brown plausibly claims has "earned a singular position in the annals of professional historical writing," and enabled its author to "succeed[] Charles Beard as the most influential and intellectually significant American historian of his time."[37]

B. The Fall

Not everyone applauded the succession. In February 1959, slightly more than a decade after Hofstadter assumed Beard's mantle, John Higham wrote a critical essay in *Commentary* magazine called *The Cult of the "American Consensus": Homogenizing Our History*.[38] Higham portrayed the preceding five decades of U.S. historical scholarship as a narrative of decline. Before the fall, Higham wrote, "[a]n earlier generation of historians

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33. *Id.* at xxxi.

34. *Id.* at xxxii.

35. BROWN, *supra* note 20, at 145–46; *see, e.g.*, Gerald W. Johnson, *Some Tenants of the White House*, N.Y. TIMES, Sept. 19, 1948, at BR1 (book review) (describing the work as "shrewd, bold, honest—and, on occasion, brilliantly illuminating"); Arthur R. Kooker, Book Review, 18 PAC. HIST. REV. 253, 253 (1949) (stating the work "stamps [Hofstadter] as one of the brilliant young scholars of our generation").

36. Eric Foner, *The Education of Richard Hofstadter*, NATION, May 4, 1992, at 597. *See also* Daniel Walker Howe & Peter Elliott Finn, *Richard Hofstadter: The Ironies of an American Historian*, 43 PAC. HIST. REV. 1, 1 (1974) ("In his originality of thought, pervasiveness of influence, felicity of expression, and range of interests, he had few if any equals in his profession. Indeed, he was probably the most prominent member of a distinguished generation of American historians."); Arthur Schlesinger Jr., *The Ferocious Strains in Our National Past: American Violence*, N.Y. TIMES, Oct. 25, 1970, at BR10 (calling Hofstadter "the most distinguished American historian of his generation").

37. BROWN, *supra* note 20, at 50. Foner concurs that the book "propelled [Hofstadter] to the very forefront of his profession." Foner, *supra* note 36, at 600.

38. Higham, *supra* note 15.

. . . nurtured in a restless atmosphere of reform, had painted America in the bold hues of conflict."[39] When historical interpretation flourished, Higham contended: "It was East vs. West . . . ; farmers vs. businessmen . . . ; city vs. country; property rights vs. human rights; Hamiltonianism vs. Jeffersonianism. These lines of cleavage were charted continuously from the Colonial period to the present."[40]

Higham lamented that modern historians, rather than identifying the conflict that divided the nation, emphasized the consensus that united it. "Instead of two traditions or sections or classes deployed against one another all along the line of national development," Higham contended, "we are told that America in the largest sense has had one unified culture. Classes have turned into myths, sections have lost their solidarity, ideologies have vaporized into climates of opinion."[41] Higham blamed domestic conservatism following World War II for the "deadening effect on the historian's ability to take a conflict of ideas seriously," as "[e]ither he disbelieves in the conflict itself (Americans having been pretty much of one mind), or he trivializes it into a set of psychological adjustments to institutional change."[42] Understanding American history as devoid of significant conflict caused historians to see a "placid, unexciting past" inhabited by a people that were "above all—remarkably homogeneous."[43] This new, dreadfully wrong turn in American history, Higham wrote, required society to "pay a cruel price in dispensing with [the Progressive historians'] deeper values: an appreciation of the crusading spirit, a responsiveness to indignation, a sense of injustice."[44]

The principal targets of Higham's critique were two monographs written in the mid-1950s,[45] Louis Hartz's *The Liberal Tradition in America*[46] and Daniel J. Boorstin's *The Genius of American Politics*.[47] Somewhat surprisingly, Higham's essay addressed Hofstadter's work only briefly—almost incidentally. Instead of invoking *The American Political Tradition*, moreover, Higham criticized Hofstadter's latest publication, *The Age of Reform*.[48] That book, Higham suggested, fueled the modern historical trend of depicting social movements not as mounting challenges to the prevailing order but instead as efforts to achieve mere restoration, principally motivated

39. *Id.* at 94.
40. *Id.*
41. *Id.* at 95.
42. *Id.* at 100.
43. *Id.* at 94.
44. *Id.* at 100.
45. *Id.* at 95–96.
46. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (2d ed. 1991).
47. DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1958).
48. RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

by nostalgia for a bygone era.[49] Higham contended that Hofstadter "presents Populism in the 1890's and Progressivism in the early 20th century not as mighty upheavals but as archaic efforts to recapture the past."[50] Despite *The Age of Reform*'s espousal of a generally consensus-oriented approach to history, Higham may have spared Hofstadter from more sustained (and withering) scrutiny because the book at least succeeded in "recogniz[ing] fairly radical changes in the recent past" regarding the "elements of social revolution in the New Deal."[51]

Whatever the explanation for Higham leveling the consensus charge at Hofstadter somewhat halfheartedly, later historians would hurl it with considerably more vigor.[52] Over the years, Hofstadter's admirers have repeatedly—and tirelessly—attempted to beat back the consensus label on his behalf. In 1973, Christopher Lasch, a former graduate student of Hofstadter's and a major intellectual figure in his own right,[53] wrote an introduction to a new edition of *The American Political Tradition*, which mainly sought to refute the idea that the book should be understood as an exercise in consensus history.[54] Although conceding that "Hofstadter undoubtedly helped to prepare the way for the consensus theorists of the 1950's," Lasch asserted that the book "had nothing in common with the celebration of American 'pragmatism'" and viewed widespread agreement within the nation "as a form of intellectual bankruptcy."[55] By 1989, however, Lasch sought to shift the battle to different terrain by arguing not so much that Hofstadter did not practice consensus history, but that the significance of the

49. Higham, *supra* note 15, at 94 ("We have learned that the Jacksonians yearned nostalgically to restore the stable simplicity of a bygone age, and that the Populists were rural businessmen deluded by a similar pastoral mythology.").

50. *Id.* at 94–95.

51. *Id.* at 94.

52. *See* BROWN, *supra* note 20, at 50.

53. *See* ERIC MILLER, HOPE IN A SCATTERING TIME: A LIFE OF CHRISTOPHER LASCH (2010) (analyzing Lasch's intellectual contributions, including—perhaps most significantly—*The Culture of Narcissism*).

54. Christopher Lasch, *Foreword* to HOFSTADTER, *supra* note 24, at x–xii.

55. *Id.* at xii. Historians echoed Lasch's defense of Hofstadter in the mid-1970s. *See also* Howe & Finn, *supra* note 36, at 2 ("To be sure, Hofstadter thought there was an identifiable mainstream of American life and that it was best described as middle-class capitalism. He devoted most of his professional efforts to studying movements he felt were within this consensus. However, he did not celebrate the virtues of the tradition he identified."); Harry N. Scheiber, *A Keen Sense of History and the Need to Act: Reflections on Richard Hofstadter and* The American Political Tradition, 2 REV. AM. HIST. 445, 451 (1974) ("Far from admiring or extolling consensus, Hofstadter reserves for it his most chilling and occasionally contemptuous rhetoric."). More than thirty years later, historians continue to defend Hofstadter. *See* David Greenberg, *Richard Hofstadter Reconsidered*, RARITAN, Fall 2007, at 144, 149 (rejecting Higham's grouping of Hofstadter with Hartz, Boorstin, and Clinton Rossiter, and contending that "[a] cursory reading makes plain that Hofstadter was lamenting the narrow boundaries of the political culture").

consensus–conflict debate itself had been sorely overblown, amounting to little more than academic intramural squabbling.[56]

C. *The Fallout*

Scholarly disputes seldom yield an undisputed victor. But in the conflict–consensus dispute, it quickly became clear that only the conflict-based historians could plausibly assert victory.[57] And Higham was far from shy in so asserting. "The vogue of this quest for national definition proved devastatingly brief," Higham wrote in 1979.[58] "In a few years of the early and midsixties what was called 'consensus' history suddenly lost credibility. The entire conceptual foundation on which it rested crumbled away. As an analytic construct, national character was largely repudiated in all of the social sciences in which it had flourished."[59]

Perhaps no testimony better illustrates consensus history's demise than the words of Hofstadter himself. Toward the end of his career, Hofstadter acknowledged (however tersely) that with respect to the fight over consensus he got better than he gave. Hofstadter seized *The American Political Tradition*'s publication in Hebrew in 1967 to write a preface that sought to distance his work from other scholars in the consensus school, making public a stance that he had long adopted in private.[60] The debate over consensus

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56. Christopher Lasch, *Consensus: An Academic Question?*, 76 J. AM. HIST. 457, 458 (1989) ("[T]he controversy about 'consensus' has always struck me as artificial and unimportant—one of those nondebates that academic historians invent for their own amusement, for the making and breaking of academic reputations."); *cf.* Alan Brinkley, *Richard Hofstadter's* The Age of Reform*: A Reconsideration*, 13 REVS. AM. HIST. 462, 476 (1985) ("Critics of modern historiography have spent a large and perhaps inordinate amount of time and energy arguing over whether Hofstadter was truly a member of the 'consensus school' that came to dominate historical writing in the 1950s.").

57. *See* Nicholas Lemann, *The New American Consensus: Government of, by and for the Comfortable*, N.Y. TIMES, Nov. 1, 1998, 37, 70 (Magazine) ("The consensus school in American history, such as it was, lay in ruins within a few years of the publication of Higham's devastating article.").

58. John Higham, *Introduction* to NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY, at xii (John Higham & Paul K. Conkin eds., 1979); *see also* John Higham, *Changing Paradigms: The Collapse of Consensus History*, 76 J. AM. HIST. 460, 464 (1989) ("The flight from consensus was so precipitous as to suggest that the paradigm was not only fragile and incomplete but that it somehow invited its own destruction.").

59. Higham, *Introduction* to NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY, *supra* note 58, at xii.

60. *See* BROWN, *supra* note 20, at 50 (noting that Hofstadter "privately much resisted" his title as a consensus historian). The preface to the Hebrew edition also attempted to contextualize *The American Political Tradition*'s by then infamous six-page introduction:

> This book was not written in order to establish some single overarching theory about American politics or American political leadership, but rather to make a number of interpretive and critical comments on certain political figures on whom I had done some special work or who particularly captured my interest. Circumstances, however, made it seem in the end somewhat more ambitious than it had been meant to be, and these had to do mainly with changes suggested by the publisher as it moved toward

history, Hofstadter wrote, "has been very awkward for me, in the sense that it has linked me with other historians with whom I have significant differences, and because I have some serious misgivings of my own about what is known as consensus history."[61] After mounting an extremely narrow defense of consensus as "only an assertion about the frame or the configuration of history and not about what goes on in the picture," Hofstadter sharply criticized the blinkered history that stems from overemphasizing national cohesion.[62] "Americans may not have quarreled over profound ideological matters, as these are formulated in the history of political thought, but they quarreled consistently enough over issues that had real pith and moment," Hofstadter wrote. "And their unappeasable conflicts finally brought them in 1861 to one of the momentous and tragic political failures in modern history."[63] But such conflict, Hofstadter emphasized, was far from confined to the Civil War. "Even in more tranquil phases of our history, an obsessive fixation on the elements of consensus that do undoubtedly exist strips the story of the drama and the interest it has."[64]

With the publication of *The Progressive Historians* in 1968,[65] Hofstadter offered a still more critical assessment of consensus history. Acknowledging that the notion of consensus has "intrinsic limitations *as history*," Hofstadter suggested that historians would do well to contemplate the series of questions that sociologists and political scientists have posed regarding the boundaries of consensus:

> Who is excluded from the consensus? Who refuses to enter it? To what extent are the alleged consensual ideas of the American system—its preconceptions, for instance, about basic political rights—actually shared by the mass public? (So far as the masses are concerned, what we call consensus is often little more than apathy.)[66]

Historians, Hofstadter suggested, need not search particularly hard to find meaningful conflict throughout American history.[67] Referencing various societal tumults ranging from the American Revolution through the upheaval of the 1960s, Hofstadter stated, "Surely these episodes evoke a record of significant conflict to which we cannot expect to do justice if we write our history in terms of the question whether or not Americans were disagreeing

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publication. My original title, which was less demanding and more faithful to the random and unsystematic character of my intentions, was *Men and Ideas in American Politics*.

HOFSTADTER, *supra* note 24, at xxi–xxii.

61. *Id.* at xxiii.

62. *Id.* at xxiv.

63. *Id.*

64. *Id.*

65. RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS (1968).

66. *Id.* at 452–53.

67. *Id.* at 458–59.

with John Locke."[68] The Civil War, Hofstadter again observed, posed a particularly awkward fit for historians dedicated to advancing consensus.[69] "In the face of [the 1860s] political collapse," Hofstadter wrote, "what does it matter if Professor Hartz reassures us that, because the Southern states were simply adhering to their own view of the Constitution which they incorporated into the Confederate constitution, the Civil War does not represent a real failure of the American consensus?"[70]

The most striking feature of the debate regarding consensus-based history versus conflict-based history is the limited ground on which the debate occurred. After a brief period, the real action in the debate centered not on which framework made for better history, but whether the charge of consensus—once leveled—proved warranted. Hofstadter and his defenders resisted the charge so intently for so long because to admit to embracing consensus history was to confess to practicing an inferior mode of historical inquiry. Few serious historians trained in the United States would today contend that consensus, as opposed to conflict, offers the superior lens with which to examine the American past. Regrettably, the widespread embrace of conflict within the history department has yet to migrate across campus to

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68. *Id.* at 459.

69. *Id.* at 460–62. Notably, Higham's classic essay suggested that consensus historians underplayed the Civil War precisely because the facts were so desperately inconvenient: "Among earlier crises, the Civil War alone has resisted somewhat the flattening process. Yet a significant decline has occurred in the number of important contributions to Civil War history from professional scholars. One is tempted to conclude that disturbances which cannot be minimized must be neglected." Higham, *supra* note 15, at 95.

70. HOFSTADTER, *supra* note 65, at 461. Here, Hofstadter echoes the critique of J.R. Pole, who wrote of Hartz's claim regarding the alleged consensus that undergirded the Civil War: "At this point consensus may be thought to have lost its usefulness. Might one not as well suggest that the French Wars of Religion do not represent a real religious cleavage because both Catholics and Huguenots avowed their faith in the Christian religion?" J.R. Pole, *The American Past: Is It Still Usable?*, 1 J. AM. STUD. 63, 75 (1967).

Was Hofstadter being unduly self-critical by acknowledging the affinity of at least some of his work with consensus history? The core of the case for Hofstadter's defenders, as described above, hinges on the contention that Hofstadter expressed contempt, rather than admiration, for the consensus that he identified. *See, e.g.*, Scheiber, *supra* note 55, at 451. This claim is true so far as it goes, but it does not get Hofstadter completely off the consensus hook. After all, Hartz too criticized the consensus that he described in *The Liberal Tradition*, a point that Higham himself made in his initial essay. Higham, *supra* note 15, at 96. Why should Hofstadter be pardoned when Hartz is hanged? Hofstadter loyalists can at best make out a claim that he—and Hartz, for that matter—practiced a less troubling form of consensus history than the celebratory form practiced most prominently by Boorstin. *See* Greenberg, *supra* note 55, at 149–50 (explaining that, in contrast to Boorstin and company, Hofstadter's writings are not "expressions of gratitude for the absence in this country of the class strife and instability that wracked Europe"). The principal problem with consensus history, however, was not whether its adherents cheered or booed the notion of an undivided nation. Rather, the problem with consensus history stemmed from the inaccurate identification of consensus in the first instance. After a relatively brief infatuation with consensus following World War II, U.S. historians returned to the emphasis on conflict because they concluded that the Progressives' mode of historical interpretation provided a more discerning lens with which to view the American past.

the law school.[71] As a result, too much of the leading scholarship on American constitutional history written by law professors inaccurately portrays the Supreme Court as interpreting the Constitution in a manner that articulates the consensus ideals of the American people.[72]

II. Consensus Constitutionalism in Legal Scholarship

More than five decades after John Higham identified and criticized the consensus school of American historians, the use of consensus as an explanatory device has become virtually extinct—at least among historians. Among law professors, however, consensus-driven historical interpretation not only exists but is flourishing, as many distinguished scholars currently writing legal history examine the past through consensus-tinted spectacles. These scholars contend that, throughout Supreme Court history, the Justices have read the Constitution so as to reflect Americans' consensus views.

Although the move toward consensus seems an especially awkward fit for constitutional law, today's consensus constitutionalism nevertheless flows from the same scholarly wellspring as the consensus history of the 1950s. Both groups of scholars write out of an effort to correct what they regard as the interpretive excesses of their predecessors. Hofstadter made plain in *The Progressive Historians* that his historical approach emphasized consensus because of the previous generation's emphasis on conflict.[73] Prior

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71. I do not mean to suggest, of course, that no law professors demonstrate an awareness of the consensus–conflict debate. One particularly apposite example of such awareness appears in Professor G. Edward White's anguished preface to the second edition of his overtly Hofstadter-inspired volume, *The American Judicial Tradition*:

> In the first edition I disclaimed any particular approach to historiographical issues. In particular, I indicated that my delineation of a 'tradition' of American appellate judging should not be taken as evidence of a 'consensus' approach to history. In retrospect, I think the institutional emphasis of the chapter subtitles may undermine that claim. I do want to say, however, that at the time of the first edition the connection between 'consensus history' and an institutionally oriented approach to appellate judging was not clear in my mind, so that if I held a 'consensus' perspective it was unconscious. That, of course, does not make the perspective any less significant: indeed, it now seems to me that I was more imprisoned by the structures of Process Jurisprudence, with its emphasis on the relative competence of various institutional decisionmakers in American society, than I would have cared to admit.

G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES xxii (3d ed. 2007). This preface, which White penned in 1988, reveals how large the consensus–conflict debate loomed decades after it began.

72. This instance is far from the first time that history's lessons have failed to make the journey to law schools. For important examinations of the sometimes awkward relationship between law and history, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917 (1999); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

73. HOFSTADTER, *supra* note 65, at 439.

historians "had pushed polarized conflict as a principle of historical interpretation so far that one could go no further in that direction without risking self-caricature," Hofstadter wrote.[74] "The pendulum had to swing in the opposite direction: if we were to have any new insight into American history, it began to appear that we had to circumvent the emphasis on conflict and look at the American past from another angle."[75]

In a similar vein, consensus constitutionalists writing today view their work as counteracting the excessive faith in the Supreme Court's ability to protect minority rights that once flourished in legal academia. According to this assessment, many legal scholars—basking in the reflected glory of the Warren Court's great liberal decisions—permitted themselves to be swept up in the wrongheaded belief that the Court can actually protect minorities from majorities. "The romantic image of the Court as countermajoritarian savior is shattered by historical reality," Klarman has explained.[76] Klarman has gone so far as to contend that legal scholars rely upon the myth that the Court can protect minority rights as a "psychological" crutch, which supports "our need to be comforted in the face of a terrifying reality: majorities can and do perpetrate many awful deeds."[77] Consensus constitutionalists portray their work as throwing the cold water of reality onto overheated and even delusional conceptions of judicial capacity. "The decisions of the justices on the meaning of the Constitution must be ratified by the American people," Friedman writes. "That's just the way it is."[78] Klarman has explained that "[m]ajority rule can be a scary thing," and that "[w]hile one can appreciate the psychological imperative for believing in the Court's countermajoritarian heroics, the historical record plainly suggests that such a view is chimerical."[79]

Despite the similarities, at least two significant analytical differences distinguish the views of Higham's consensus historians from the views of the scholars identified here as consensus constitutionalists. First, the two sets of consensus scholars differ on the question of American ideological dynamism. Whereas consensus historians emphasized that Americans shared a constant set of foundational beliefs, consensus constitutionalists note that Americans have repeatedly altered their conceptions and preferences. For the historians,

74. *Id.*

75. *Id.*

76. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U.L. REV. 145, 161 (1998); *accord* ROSEN, *supra* note 12, at 6 ("[M]ajoritarian scholars have argued that there's no need to worry about judges thwarting the will of the people, because the vision of antidemocratic courts protecting vulnerable minorities against tyrannical majorities is, in some sense, a romantic myth.").

77. Klarman, *supra* note 1, at 19.

78. FRIEDMAN, *supra* note 11, at 381.

79. Klarman, *supra* note 1, at 23–24.

Americans held an identifiable and static mindset.[80] For the law professors, Americans subscribe less to a mindset than to a particular set of views, and that particular set of views can (and has) undergone significant revision over time.[81]

This first difference leads to a second, which involves the additional work that the term *consensus* performs for consensus constitutionalists. For these legal scholars, *consensus* describes not only a mindset, but also a process of constitutional interpretation. Thus, consensus constitutionalists believe that, when the American people reach extremely broad agreement on a particular issue, the Supreme Court will almost inevitably issue an opinion in accordance with that extremely broad agreement.[82] The Court's opinion may slightly precede or slightly follow the crystallization of consensus, but the Court resists articulating public consensus only at its own peril.

A. Identifying Consensus Constitutionalism

Unlike consensus historians writing during the 1950s, who did not generally invoke the term *consensus* in describing American unity, consensus constitutionalists repeatedly avail themselves of that term—and of the undergirding ideology. For consensus constitutionalists, the notion of consensus does not, moreover, act as a marginal phenomenon. Rather, consensus acts as the central analytical device, as it encapsulates their core theory of how Supreme Court Justices interpret the Constitution.[83] When American citizens have reached (or, alternatively, are poised to reach) consensus regarding a particular issue, Supreme Court Justices amplify that consensus through constitutional interpretation. This process occurs, according to consensus legal scholars, because many of the most important provisions in the Constitution contain indeterminacy. The Fifth Amendment's demand for "due process of law," the Eighth Amendment's prohibition on "cruel and unusual punishments," and the Fourteenth Amendment's requirement of "equal

80. *See* Higham, *supra* note 15, at 95 ("[W]e are told [by consensus historians] that America in the largest sense has had one unified culture.").

81. *See, e.g.*, ROSEN, *supra* note 12, at 3–4 (identifying parallels between the development of Supreme Court doctrine and changes in public opinion); SUNSTEIN, *supra* note 13, at 4–5 (arguing that an array of Supreme Court antidiscrimination decisions reflect endorsement of advancements in popular thinking).

82. For nineteenth-century scholarly adumbrations of this view regarding the public's influence on law, see DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY ch. 11 (forthcoming 2011 Cambridge University Press) (manuscript on file with the author) (observing that several leading American legal scholars during the late nineteenth century believed that "evolving custom is the ultimate basis for constitutional law" and that "[w]hen evolving custom advances beyond existing law . . . the law must change").

83. As the text above states, I am principally concerned with identifying and critiquing the core theory that unites consensus constitutionalism. The group of scholars identified here as subscribing to this school sometimes strike slightly different notes of emphasis and include minor qualifications of their overarching theory. Although I periodically address these modest differences and qualifications, I primarily address the main lines of their analyses.

protection"—to name only a few phrases—all demand considerable interpretive work. Supreme Court Justices give content to the document's indeterminate phrases by (both consciously and unconsciously) ascertaining the consensus views of their fellow citizens, and then imposing that view through their decisions.

Klarman's *From Jim Crow to Civil Rights* contains an early and particularly lucid expression of the consensus-constitutionalist thesis. The passage, which arrives toward the book's conclusion, merits quoting at length:

> Most of the Court's race decisions considered in this book imposed a national consensus on a handful of southern outliers. Reading dominant public opinion into the Constitution is a natural temptation for any interpreter. When people strongly favor a particular policy about which the Constitution offers no determinate guidance, they are understandably inclined to construe the document to support that policy. Because the justices broadly reflect society, if most people feel strongly about a particular policy, it is likely that most justices will as well. They will then face the same temptation to constitutionalize the position that they support as a policy matter.[84]

The "tendency to constitutionalize consensus and suppress outliers," according to Klarman, is far from limited to the Court's decisions regarding race.[85] Rather, in a sweeping manner reminiscent of Hofstadter's expansive and ill-fated introduction,[86] Klarman contends the trend can be broadened to explain wide swaths of constitutional law. "This book argues that because constitutional law is generally quite indeterminate," Klarman explains, "constitutional interpretation almost inevitably reflects the broader social and political context of the times . . . . In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally reflect broader social attitudes."[87]

Other consensus constitutionalists similarly invoke the term *consensus* and the accompanying understanding of how the Court functions. Friedman embraces the consensus framework in the conclusion to *The Will of the People* to explain the Court's increased commitment to racial equality during the twentieth century:

> Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to popular will. The justices in *Brown v. Board of Education* argued they were protecting

84. KLARMAN, *supra* note 10, at 453.

85. *Id.* at 453–54.

86. *See supra* text accompanying notes 20–26.

87. KLARMAN, *supra* note 10, at 5–6.

> constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement.[88]

Sunstein's *A Constitution of Many Minds* also embraces consensus as a crucial dynamic in explaining how the Supreme Court operates. "[T]he Court is much more tightly connected to public consensus than we often acknowledge," Sunstein explains.[89] "Those who like popular constitutionalism, or who believe that most people are likely to be right, should be comforted to find that when the Court innovates, it almost always does so in a way that is responsive to a widely held social judgment, or one that is clearly emerging."[90] Finally, related to Sunstein's last point, Rosen's *The Most Democratic Branch* cautions the Supreme Court about "trying to anticipate a constitutional consensus that has not yet occurred."[91]

Consensus constitutionalists repeatedly emphasize that Supreme Court Justices are products of the times in which they live. In an effort to explain why the Court generally imposes consensus ideals upon the nation, Sunstein contends that "[p]erhaps [the] most important" explanation is that "members of the Court are part of the society whose constitution they interpret."[92] Friedman has similarly claimed, "Like all the other segments of society, courts simply are, *and will remain*, participants in American political life."[93] Klarman, who appropriately (but too intermittently) observes that Justices are drawn from an elite strata of society,[94] nevertheless suggests that the significance of the judiciary being composed of elites is likely trumped by the nation's overall social milieu. "Though the culturally elite values of the justices open space for them to deviate from popular opinion in their constitutional interpretations," Klarman writes, "that space is limited. The fact that the justices live in the same historical moment and share the same

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88. FRIEDMAN, *supra* note 11, at 381.

89. SUNSTEIN, *supra* note 13, at 142.

90. *Id.* Even that supposedly staunch defender of minority rights—the Warren Court—can, in Sunstein's estimation, be more accurately understood as an articulator of national consensus: "For all its aggressiveness, the Warren Court can itself be seen, most of the time, as reflecting rather than spurring social change." *Id.* Sunstein does, to his credit, acknowledge that no consensus exists in at least some constitutional cases. "If there is a consensus within the relevant community on a question of law, or on a question that bears on the right answer to a question of law, then judges should pay attention to that consensus," Sunstein explains. *Id.* at 176. "But in hard constitutional cases, a consensus will be rare, and judges will in any case be unlikely to want to rule in a way that rejects it." *Id.* Sunstein's book—taken as a whole—seems to contend that such hard constitutional cases seldom arise.

91. ROSEN, *supra* note 12, at 200.

92. SUNSTEIN, *supra* note 13, at 142. Sunstein continues: "They are unlikely to interpret that constitution in a way that society as a whole finds abhorrent or incomprehensible." *Id.*

93. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993).

94. *See* KLARMAN, *supra* note 10, at 452 (contending that *Brown* may have been decided when it was because racially egalitarian views were more widespread among elites in 1954 than among the nation as a whole); *id.* at 6 (noting that, at the beginning of the twenty-first century, "most justices continue to regard . . . prayer [in public schools] as unconstitutional, even though 60–70 percent of Americans disagree").

culture as the general population is probably more important to their constitutional interpretations than the fact that they occupy a distinct socioeconomic subculture."[95]

Viewing the Justices alongside their fellow citizens leads consensus constitutionalists to a rare gesture toward the significance of constitutional text: "We the People."[96] As its title suggests, Friedman's *The Will of the People* strikes the populist chord with particular force. "Ultimately, it is the people (and the people alone) who must decide what the Constitution means," Friedman writes.[97] "Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."[98] In a similar vein, Rosen contends, "The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people."[99] Even in the absence of judicial review, Sunstein contends that popular views shape modern constitutional understandings.[100] The prevailing conception of executive power in the field of national security, Sunstein writes, "is a product of judgments of a variety of persons and institutions and, in an important sense, of We the People."[101]

Friedman advances an unusually hardy version of the claim that society controls constitutional interpretation. Although the Court may—as a formal matter—issue judicial decisions, Friedman contends that the American people will eventually, through an ongoing dialogue with the Court, conjure the constitutional interpretations that they favor. "The magic of the dialogic system of determining constitutional meaning . . . is that it works whether the judges rule properly or not—precisely because everything important happens after they render their decision," Friedman explains.[102] "What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*."[103] Friedman views this process of constitutional interpretation as an iterative one, where the people ultimately will have their way: "It is through the process of judicial responsiveness to public opinion that the meaning of the

95. *Id.* at 452.

96. U.S. CONST. pmbl.

97. FRIEDMAN, *supra* note 11, at 367.

98. *Id.* at 367–68. Friedman's book brims with such sentiments. Consider only one more: "The American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only so long as the justices' decisions remained within the mainstream of popular understanding." *Id.* at 196.

99. ROSEN, *supra* note 12, at 210.

100. SUNSTEIN, *supra* note 13, at 4.

101. *Id.*

102. FRIEDMAN, *supra* note 11, at 382.

103. *Id.*

Constitution takes shape. The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public."[104] Klarman possesses a similar—though less extravagant—understanding of the close connection between the views of the American people and Supreme Court decisions. "[I]f the Court's constitutional interpretations have always been influenced by the social and political contexts of the times in which they were rendered, perhaps it is impossible for them not to be," Klarman writes.[105] "If that is so, then arguing against the inevitable seems pointless."[106]

The people's constitutional views, according to the consensus constitutionalists, can generally be obtained by examining public opinion. "In the modern era," Friedman explains, "the supposed tension between popular opinion and judicial review seems to have evaporated."[107] Although the meaning of "public opinion" has changed dramatically over time,[108] consensus constitutionalists appear to use that term interchangeably with polling data.[109] "[T]he Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup poll," Friedman writes.[110] For his part, Klarman favors the phrase "dominant public opinion" to Friedman's unmodified version: "Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist."[111] When facing "dominant public opinion," Klarman contends Supreme Court Justices are powerless to act. "The justices reflect dominant public opinion too much for them to protect truly oppressed groups."[112]

Consensus constitutionalists use strikingly similar language to describe the judicial role. The Supreme Court not only identifies "consensus,"[113] but

104. *Id.* at 383.

105. KLARMAN, *supra* note 10, at 449.

106. *Id.*

107. FRIEDMAN, *supra* note 11, at 15.

108. *See* William E. Forbath, *The Will of the People?–Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1195–1202 (2010) (tracing the varied meanings that the term "public opinion" has assumed).

109. Consensus constitutionalists sometimes express qualms about using polling data to indicate the people's will. FRIEDMAN, *supra* note 11, at 17; ROSEN, *supra* note 12, at 9; SUNSTEIN, *supra* note 13, at 211. These qualms are brushed aside, however, as consensus constitutionalism often places considerable weight upon polls to support its points.

110. FRIEDMAN, *supra* note 11, at 14; *see also* ROSEN, *supra* note 12, at 109 ("[A]n opinion along these lines would have been consistent with public opinion: in May, 2003, 60 percent of respondents in a Gallup poll said homosexual conduct between consenting adults should be legal.").

111. KLARMAN, *supra* note 10, at 449.

112. *Id.*

113. *E.g.*, FRIEDMAN, *supra* note 11, at 149, 381; KLARMAN, *supra* note 10, at 124, 146, 310, 453; ROSEN, *supra* note 12, at 13, 15, 41, 42, 89, 109, 124, 142, 196, 203; SUNSTEIN, *supra* note 13, at 142, 176.

it then takes that consensus and brings state "outliers"[114] into line with "national values."[115] Justices who wish to avoid "defiance"[116] of their rulings and to preserve the Court's "legitimacy"[117] steadfastly issue decisions consonant with "public opinion."[118] Some consensus constitutionalists suggest, moreover, that judicial decisionmaking amounts to the *ratification* of popular views. Friedman contends that Supreme Court decisions "serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution."[119] Sunstein makes the same point: "The authority of the national government is a product of democratic processes, not of the federal judiciary; the Court's role has been largely to ratify what citizens and their representatives have done."[120]

Before critiquing consensus constitutionalism, it should prove helpful to explain briefly how that concept differs from two prominent, somewhat related ideas regarding the judicial function. Consensus constitutionalists sometimes invoke political scientist Robert Dahl's classic work on the Supreme Court.[121] Admittedly, consensus constitutionalists and Dahl are united in believing that the Court should not be viewed in utter isolation from the American public. Along three axes, however, consensus constitutionalism meaningfully departs from the Dahlian perspective. First, where consensus constitutionalism is predicated upon the views of the American people, Dahl's theory primarily addressed a narrower class of "the political elite."[122] Dahl made clear when he suggested the Court cannot long

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114. *E.g.*, FRIEDMAN, *supra* note 11, at 260, 286; KLARMAN, *supra* note 10, at 85, 124, 137, 236, 458–59; ROSEN, *supra* note 12, at 13, 124, 203.

115. *E.g.*, FRIEDMAN, *supra* note 11, at 273. *See also* KLARMAN, *supra* note 10, at 124 (discussing "national norms"); SUNSTEIN, *supra* note 13, at 167, 177 (discussing "social values").

116. *E.g.*, FRIEDMAN, *supra* note 11, at 61, 377; KLARMAN, *supra* note 10, at 210, 314, 317, 320, 358; ROSEN, *supra* note 12, at 24, 42.

117. *E.g.*, FRIEDMAN, *supra* note 11, at 330, 377; ROSEN, *supra* note 12, at xii, xiii, 8, 13–16, 31, 185, 199, 210.

118. *E.g.*, FRIEDMAN, *supra* note 11, at 123, 230, 250, 287, 295, 374–76; KLARMAN, *supra* note 10, at 6, 16, 21, 37, 39, 129, 140, 232, 264, 447, 450; ROSEN, *supra* note 12, at xii, 20, 55, 83, 107, 109, 202; SUNSTEIN, *supra* note 13, at 142–44, 167, 211–12.

119. FRIEDMAN, *supra* note 11, at 16; *see also id.* at 381 (contending that the Justices' constitutional decisions "must be ratified by the American people").

120. SUNSTEIN, *supra* note 13, at 4.

121. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For consensus-constitutionalist invocations of Dahl, see FRIEDMAN, *supra* note 11, at 260; ROSEN, *supra* note 12, at 6.

122. *See* Dahl, *supra* note 121, at 291 (voicing skepticism that the Supreme Court selection process yields "justices [who] would long hold to norms of Right or Justice substantially at odds with the rest of the political elite"). It is this emphasis on the role of governing elites that prevents Lucas A. Powe Jr.'s constitutional history from being included in the consensus camp. Although Friedman and Powe both issued one-volume histories of the Supreme Court within a few months of each other in 2009, the titles of the two works go a long way toward appreciating the considerable differences between the aims of the two scholars. Where Friedman's *The Will of the People* reveals its avowedly populist approach, Powe's *The Supreme Court and the American Elite, 1789-2008* reveals its effort to chronicle not the American people as a whole, but instead a particularly

resist the dominant views of "lawmaking majorities" that he used that term to indicate "a majority of those voting in the House and Senate, together with the president."[123] Second, where consensus constitutionalism advances a weak conception of the Court's ability to resist majority preferences, Dahl's assessment of judicial capacity can be seen—at least compared to consensus constitutionalism's—as potent.[124] "The Supreme Court is not ... simply an *agent* of the [governing] alliance," Dahl wrote.[125] "It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution."[126] Dahl further suggested that the Court may play an effective policymaking role when its views do not clash with the norms of elected officials: "[A]t very great risk to its legitimacy powers, the Court can intervene in such cases and may even succeed in establishing policy. Probably in such cases it can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership ...."[127] Third, where consensus constitutionalism understands the Court to articulate the views of an American consensus, Dahl noted the role of "conflict" in judicial decisionmaking.[128]

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influential subset of the population. Powe's earlier constitutional history has also explicitly sought to chronicle elite views of governing coalitions, rather than the views of American citizens in their entirety. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS xv (2000) ("I hope to eschew the law professor's traditional Court-centered focus and instead place the Court where it belongs as one of the three co-equal branches of government, influencing and influenced by American politics and its cultural and intellectual currents."). Powe's analysis occasionally struck the chords of consensus constitutionalism, but such occasions do not make up his scholarship's analytical core.

123. Dahl, *supra* note 121, at 284; *see id.* at 283–84 (expressing skepticism about the wisdom of extrapolating from lawmaking majorities to a national majority).

124. Dahl's view of judicial capacity, it bears mentioning, is potent *only* in a comparative sense. *See id.* at 293 ("By itself, the Court is almost powerless to affect the course of national policy."). Although Gerald Rosenberg's *The Hollow Hope* surely influenced the thin conception of judicial capacity espoused by consensus constitutionalists, his work is largely distinct from the school of thought under review. Rather than portraying the Court as an institution that translates the People's views into law, Rosenberg—perhaps due to his training as a political scientist—viewed the Supreme Court principally as a branch of government. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 71 (1991) ("Only when Congress and the executive branch acted in tandem with the courts did change occur .... In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.").

For an argument that Rosenberg and Klarman both afford insufficient credit to law's transformative power, see generally David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994).

125. Dahl, *supra* note 121, at 293.

126. *Id.*

127. *Id.* at 294. For a recent empirical study exploring congressional restraints on Supreme Court decisionmaking, see Jeffrey A. Segal, Chad Westerland, Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011).

128. *See* Dahl, *supra* note 121, at 294 (contending that the Court is no exception to the rule that "policy ... is the outcome of conflict, bargaining, and agreement among minorities").

It also merits exploring how consensus constitutionalism parts company with popular constitutionalism.[129] Consensus scholars believe that ordinary people play a role in constitutional interpretation, but that this role is indirect. For consensus constitutionalists, Justices continue to be charged with interpreting the document—at least in the first instance. Thus, American legal history reveals, in Professor Friedman's phrase, a type of "*mediated* popular constitutionalism."[130] The decisions that result from mediated popular constitutionalism effectively remove some of the thorns from the phenomenon that Alexander Bickel famously dubbed the "counter-majoritarian difficulty."[131] Unadulterated popular constitutionalists, in sharp contrast to their mediated cousins, principally advocate that everyday people should *directly* interpret the Constitution's text.[132] Popular constitutionalists would, consequently, draw little solace from having Justices perform the work that citizens should perform for themselves.[133]

B. Critiquing Consensus Constitutionalism

Three central problems undermine the consensus constitutionalists' claim that the Supreme Court interprets the Constitution in a manner that re-

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129. The leading scholarly accounts of popular constitutionalism are: LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); and MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). For important critiques of the movement, see generally Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005); L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEXAS L. REV. 855 (2005) (both reviewing KRAMER, *supra*).

130. *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2610–13 (2003) (emphasis added) (contending that courts consider popular beliefs in resolving constitutional disputes).

131. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (Yale Univ. Press 2d ed. 1986) (1962). Professor Bickel, sounding much like today's consensus constitutionalists, stated that one function of judicial review is to "declar[e] an existing national consensus; that it is to enforce as law only the most widely shared values, so widely shared that they can be said to have the assent of something like Calhoun's concurrent majorities." *Id.* at 239. Notably, Bickel—like Dahl—espoused a comparatively broad understanding of the Court's ability to shape public opinion. "The Court is a leader of opinion, not a mere register of it," Bickel wrote. *Id.* Here, too, it is important to understand that Bickel's notion of the Court's ability to resist majority preference is broad only in comparison to his intellectual heirs; indeed, Bickel contended that the Court "must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed." *Id.*

132. *See, e.g.*, KRAMER, *supra* note 129, at 247 ("The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means.").

133. It also bears mentioning that popular constitutionalists often emphasize societal conflict between elites and nonelites. *See* Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 655 (2005) (reviewing KRAMER, *supra* note 129) ("As Kramer sees it, American constitutional history is riven by this conflict between the legal aristocracy and popular democracy.").

flects the views of the American people. First, the claim often imputes a unity of thought to American society that conceals the deep cleavages that exist among citizens regarding many constitutional questions. Second, the claim mistakenly portrays Supreme Court Justices (and the opinions they issue) as being almost inevitably in step with the citizens they help to govern. Third, the claim encourages Justices to believe that it is nearly impossible for the Court to protect rights that only a minority of citizens favors and, thus, to behave in a generally conservative fashion—lest they get too far out in front of the American people.

1. America, United.—Consensus constitutionalists insist that the Supreme Court be understood and evaluated in a historically contextualized manner. In this sense, their scholarship converges with one of the more important developments to have occurred in the field of history during the last five decades: the move toward social history. Instead of viewing the past as a series of events shaped singularly by "Great Men," historians have increasingly written works that attempt to chronicle the lives of ordinary citizens.[134] In language that can be understood to speak for the consensus school more broadly, Friedman explains: "Typically, histories of the Supreme Court focus on the justices and their decisions. Here, however, the chief protagonists are the American people."[135] But consensus constitutionalists clash with much modern historical writing because they replace an excessive emphasis on individuals with an excessive emphasis on a too often undifferentiated collective. Although consensus constitutionalists claim that the people exercise firm control over constitutional interpretation, the people simultaneously may want many different things—and sometimes they may not know what they want.

When the Court interprets the Constitution, it does not typically articulate popular consensus, if for no other reason than because doing so is typically not an option. A national consensus (even loosely defined) is simply nonexistent on many constitutional questions that reach the Court. From the nation's founding, Americans have held competing and contradictory conceptions of what the Constitution permits and what the Constitution requires.[136] "[T]he practical crisis of a legal order comes when

134. Prominent examples of social history abound. *See, e.g.*, JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972); STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985).

135. FRIEDMAN, *supra* note 11, at 16.

136. *See* Sanford Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 40 (listing examples of groups and issues where disputes exist regarding the "conceptions of justice," including: masters and slaves; the military during World War II and Japanese-Americans; and abortion).

fundamentally different values are asserted within the political realm, so that one person's notion of justice is perceived as manifest tyranny by someone else," Sanford Levinson explained in 1977, noting that "[t]he lack of common interest between master and slave is obvious."[137] Such fundamental disputes are far from limited to the past. But consensus constitutionalism risks transforming America's motto—*e pluribus unum*—from an aspiration into a statement of fact. "Our present reiteration of the need for the rule of law is eloquent testimony to our yearning for a genuine national community," Levinson explained.[138] "[W]e mistake it at our peril, however, if we regard it as a reality."[139] Instead of articulating consensus, then, the Supreme Court is—to put the point bluntly—in the business of selecting winners and losers.[140] And it is misleading to pretend that we are all (or even nearly all) on the same team.

The notion of constitutional consensus also suggests that the American people have dedicated time to contemplating a particular question and have resolved their feelings about the question in a definitive manner. Friedman strikes this note with considerable force, contending that "as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people."[141] That may well accurately characterize what occurs on occasion, but citizens surely do not approach many constitutional questions (even on salient issues) in that manner.[142] People often feel ambivalent about how a particular question should be resolved, and may even articulate one view but conduct their lives in a manner inconsistent with that view. "How does one isolate and discover a consensus on a question so abstruse as the existence of a fundamental right?" Louis Jaffe queried more than forty years ago. "The public may value a right and yet not believe it to be fundamental . . . . There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it."[143] Apart from ambivalence, moreover, many people surely experience apathy regarding how constitutional questions should be resolved. As Jaffe inquired: "[I]n many cases will it not be true that there has been no general thinking on the issue?"[144]

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137. *Id.*

138. *Id.* at 41.

139. *Id.*

140. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978) (contending that judicial decisionmaking "inescapably" calls for "taking sides").

141. FRIEDMAN, *supra* note 11, at 14.

142. Consensus constitutionalists observe intermittently that the Supreme Court possesses greater leeway to resist the public's preferences on issues of low salience. *See, e.g.*, FRIEDMAN, *supra* note 11, at 377; SUNSTEIN, *supra* note 13, at 179.

143. Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967).

144. *Id.*

Even within their own framework, conflict within society should receive greater emphasis than consensus legal scholars generally allow. After all, the very fact that what constitutes the consensus view changes over time means that there are periods of transition, with some people clinging to the old notion and other people rallying to what will become the new notion.[145] Such periods must, in some measure, be characterized by dissent and tumult and disagreement. One prevailing orthodoxy does not simply yield overnight to a different prevailing orthodoxy. Rather, the transitional process is often prolonged and combative, as individuals seldom cast aside deeply held beliefs without at least some measure of struggle. The consensus constitutionalists, however, generally avoid depicting this transitional reality. In their depiction, American citizens often appear to drift effortlessly en masse from one consensus to another consensus. While certainly not every single American is onboard with the consensus, the vessel contains just about everyone who is decent and thoughtful. Those who are not onboard, moreover, are dismissed as retrograde outliers. But even those outliers can be accommodated within the consensus framework by including them as part of an "emerging national consensus."[146]

An "emerging national consensus," however, is another way of putting a concept that might more accurately be characterized as a "nonexistent national consensus." If it has yet to emerge, after all, there is no consensus. Concededly, it is often possible to make fairly accurate assessments regarding which way the political and demographic winds are blowing, perhaps especially so if the contested issue elicits a stark generational divide.[147] Yet it is important not to assume that such trends will ultimately materialize in the form of an actual consensus.[148] Even after consensus has theoretically emerged, it merits emphasizing that consensus can—at least on occasion—erode. When the Court was in the midst of deciding *Roe v. Wade*,[149] for instance, Justice Harry Blackmun clipped a *Washington Post* article that discussed a June 1972 poll revealing that support for abortion rights stood at

145. *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 5–9 (1962) (analyzing the cyclical nature of paradigm shifts in scientific thought).

146. KLARMAN, *supra* note 10, at 310.

147. *See, e.g.*, Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 218 (2005) (noting the generational divide in public opinion on same-sex marriage and suggesting that this may ultimately lead to a decline in opposition to such marriage).

148. In encouraging Justices to exercise great caution before vindicating rights, Professor Rosen accounts for the possibility of Justices misreading the tea leaves. *See* ROSEN, *supra* note 12, at 200 ("[J]udges are often inept at constitutional futurology, and the backlashes that wrong guesses tend to provoke may delay the constitutional transformation the judges are attempting to predict. For this reason, if judges are inclined to anticipate the future, they should confine themselves to gentle nudges rather than dramatic shoves.").

149. 410 U.S. 113 (1973).

a then-unprecedented high of 64 percent.[150] In May 2010, however, a Gallup poll revealed that for the second straight year slightly more Americans categorized themselves as "pro-life" than as "pro-choice."[151] A similar erosion of what appeared to be an emerging consensus occurred five decades ago when opposition to the death penalty seemed to be crystallizing into consensus. In 1960, *Time* magazine headlined a piece that appeared to capture the prevailing sentiment: "Capital Punishment: A Fading Practice."[152] Some half a century later, it is now apparent that capital punishment's fade—assuming that it is, in fact, fading—is an unusually prolonged one.[153] This history suggests, then, that although it is occasionally possible to read the political and demographic winds, those winds sometimes swirl.

The notion of an "emerging national consensus" also exposes that consensus constitutionalists sometimes seem to espouse what amounts to a trickle-down theory of ideology. After elite members of society subscribe to a particular notion, consensus scholars suggest that it will not be long before that notion becomes accepted by people with less wealth and less education.[154] But there is no reason to believe that the views of elites necessarily must descend the class and educational ladders. It may well come closer to the mark to suggest that elites sometimes resemble more a class unto themselves than the shape of things to come.[155]

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150. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 91 (2005).

151. *See* Lydia Saad, *The New Normal on Abortion*, GALLUP (May 14, 2010), http://www.gallup.com/poll/128036/New-Normal-Abortion-Americans-Pro-Life.aspx (noting that 47 percent of respondents were "pro-life" and 45 percent of respondents were "pro-choice").

152. *Capital Punishment: A Fading Practice*, TIME, Mar. 21, 1960, at 19, *available at* http://www.time.com/time/magazine/article/0,9171,894775,00.html.

153. *See* Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEXAS L. REV. 353, 355, 360–65 (2010) (observing that, in the nearly six decades since the Advisory Committee to the Model Penal Code Project voted to recommend abolishing the death penalty in 1951, capital punishment has decreased but has not yet been eliminated).

154. *See* KLARMAN, *supra* note 10, at 308–10 (asserting that the *Brown* Justices and the rest of the cultural elite were more opposed to segregation than the general public, but that they were "part of the larger culture and inhabit[ed] the same historical moment" on the way toward a general societal opposition to segregation).

155. College graduates, for instance, have long approved of the Supreme Court's decisions regarding school prayer in higher percentages than people lacking college degrees. *See* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 71 tbl.3.2, 76 (Nathaniel Persily et al. eds., 2008).

The Court's two avowed originalists have—albeit with very different aims than my own—repeatedly pressed the point that the Court serves as a mouthpiece for elite views. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780–81 (2007) (Thomas, J., concurring) ("[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories."); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . ."). For a similar caution against elitism in the academic literature, see generally Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767 (1998).

Understanding widespread societal views to *influence* Supreme Court decisions is, of course, an unobjectionable statement. Although it is tempting to think that judges simply do what they think is "correct" in the cases before them, they do not live in isolation from society. At least some of what shapes a judge's conception of the "correct" decision stems from prevailing societal notions.[156] But the word *influence* does not fully capture the role that consensus constitutionalists assign to the people in constitutional interpretation. Rather than judicial opinions merely being *influenced* by the times and by society, it comes closer to the mark to say that consensus constitutionalists understand judicial opinions to be virtually *controlled* by them. For his part, Friedman makes clear his view of society's controlling role in constitutional interpretation by suggesting that the Court's initial decision is irrelevant to the matter's ultimate resolution; all that matters is that the Court places the item on the national agenda for the people to decide.[157]

Although other consensus constitutionalists do not adopt such an absolutist position, they too seem to credit society's control of constitutional interpretation. Consider, for instance, Klarman's assessment of the Supreme Court's performance during the period between World War I and World War II: "One cannot say whether the Supreme Court's race decisions of the interwar period were ahead of or behind the pace of extralegal change, but they certainly were not far out of step in either direction. As the racial attitudes of the country began to change, so did those of the justices."[158] Klarman's assessment of *Shelley v. Kraemer*[159] further underscores the way in which he views Supreme Court decisions as inextricably connected to popular sentiment. "*Shelley* was decided in the same year that a national civil rights consciousness crystallized," Klarman writes.[160] Klarman observes that the Court declined to review racially restrictive covenants in

156. To take an obvious example, imagine that a party filed a lawsuit in 1869 contending that the newly ratified Fourteenth Amendment's Equal Protection Clause provided a federal right to same-sex marriage. It seems safe to believe that such a claim would have been incomprehensible to the Justices serving on the Supreme Court during Reconstruction, and would have been dismissed in short order. In this hypothetical, a judicial decision denying a same-sex marriage claim in 1869 would have been influenced by its times. Probing a little deeper, however, it becomes apparent that *all* judicial opinions are influenced by the times in which they are decided. Should the Court entertain a same-sex marriage claim in the coming years (as appears likely), would it really be persuasive to suggest that a reasoned opinion either denying the claim or validating the claim was not influenced by the times?

157. *See* FRIEDMAN, *supra* note 11, at 382–83 (referring to "[t]he magic of the dialogic system"). Neil Siegel has suggested that this aspect of Friedman's worldview amounts to "a kind of Coase Theorem for constitutional theory: regardless of the way the Court interprets the Constitution and initially assigns constitutional entitlements, Americans will eventually bargain their way towards an interpretation that reflects their considered judgment as a people." Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. (forthcoming).

158. KLARMAN, *supra* note 10, at 169.

159. 334 U.S. 1 (1948).

160. KLARMAN, *supra* note 10, at 215.

1945, but just three years later the Court issued a unanimous decision prohibiting judges from giving effect to such agreements.[161] "Rarely have the justices changed their minds about an issue so swiftly and unanimously. But then, rarely has public opinion on any issue changed as rapidly as public opinion on race did in the postwar years."[162]

Friedman's account of the Supreme Court's two decisions involving anti-sodomy statutes offers a particularly arresting account of the seemingly inextricable link between societal views and judicial views:

> Gay rights, which raised so much ire among some conservatives (particularly the religious right) was a screamingly evident case of the Court's running right along the tracks of popular opinion . . . . Prior to *Bowers v. Hardwick*, the 1986 decision denying gay claims, gay organizations had been making headway against societal discrimination. Then, amid the general conservatism of Ronald Reagan's 1980s, gay activism engendered its own backlash. Anita Bryant, previously famous as the advertising personality for the orange juice industry, launched the first successful repeal of a gay rights ordinance . . . . *Bowers* also was decided at the height of public hysteria about the AIDS epidemic. While polls from 1977 to 2003 showed a steady increase in public willingness to accept the decriminalization of sodomy, data collected right around the time that *Bowers* was decided revealed a sharp reversal in this trend, with only 33 percent of the country supporting legalization.[163]

Meanwhile, by the time that the Supreme Court decided *Lawrence v. Texas*[164] in 2003, Friedman notes public opinion had become considerably more critical of criminalizing sodomy.[165]

There is little reason to believe, though, that Court decisions are so closely tied to such fleeting blips of polling data. *Bowers*,[166] it is worth recalling, was decided by a Court divided 5–4. Justice Lewis F. Powell Jr., one of the Justices in the majority, famously agonized over his decision in the case and publicly announced in 1990 that he regretted upholding the anti-sodomy provision.[167] It seems absurd even to intimate that Powell's vote in *Bowers* was motivated more by the public's response to AIDS, say, than by Powell's (mistaken) belief that he had never met a gay person.[168] On the

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161. *Id.*

162. *Id.*

163. FRIEDMAN, *supra* note 11, at 359.

164. 539 U.S. 558 (2003).

165. *See* FRIEDMAN, *supra* note 11, at 359–60 (describing political, social, and judicial developments that illustrated increasing acceptance of gays and lesbians).

166. Bowers v. Hardwick, 478 U.S. 186 (1986).

167. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530, 537 (Fordham Univ. Press 2001) (1994) (recounting that Justice Powell struggled intensely with his decision in *Bowers*).

168. *Id.* at 521.

strongest understanding of this societally mandated view, Justice Kennedy's statement for the Court in *Lawrence* that *Bowers* "was not correct when it was decided" comes close to being a non sequitur.[169] Calling a Court decision wrong on the day that it was decided is, for consensus constitutionalists, not wholly dissimilar from calling the clouds wrong for raining. Ill-conceived judicial opinions, like days of stormy weather, are not to be criticized; they are to be endured.

Friedman's take on *Bowers* is illuminating because it demonstrates the way consensus constitutionalism can comfortably accommodate many cases, regardless of how they are decided. If the Court had—as was a distinct possibility[170]—invalidated the anti-sodomy statute in *Bowers*, it is easy to envision a consensus constitutionalist attributing the decision to an emerging national consensus regarding the impermissibility of treating homosexuals as second-class citizens. Consensus constitutionalism, then, is sometimes marred by a nonfalsifiable approach that prevents assessment of the theory's validity.[171]

2. The Inevitability of Judicial Decisions.—Given that the consensus-based approach to legal history is predicated on understanding Justices to march along with society at large, it is not surprising that they also view judicial decisions as seemingly inevitable. Consensus constitutionalists come dangerously close to viewing Supreme Court decisions as being somehow foreordained by the zeitgeist. On this telling, in order to know what the Court will decide on a given constitutional question, one needs to know only the views of the American people. But consensus constitutionalism's emphasis on judicial inevitability makes for an unsatisfying approach to history because it examines the past through the wrong end of the telescope. Judicial decisions are a good deal more contingent and indeterminate than consensus constitutionalism allows, and judges have a considerably wider

169. *Lawrence*, 539 U.S. at 578.

170. Klarman, it is worth noting, has suggested that had the Supreme Court invalidated anti-sodomy statutes in 1986, the decision would not have been countermajoritarian. *See* Klarman, *supra* note 1, at 11 (referencing opinion polls that suggested half of the country would have supported a contrary result in *Bowers*).

171. *See* MARK TUSHNET, WHY THE CONSTITUTION MATTERS 105–06 (2010) ("If the Court invalidates an unpopular policy, it's simply acting against an outlier. If it invalidates a popular one, it's simply doing what the nation's elites want . . . . There's nothing you can't explain in this way."). Rendering theories incapable of being disproven is a commonplace practice within legal academia. For a critique of one such instance in the race-relations arena, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 104 NW. U.L. REV. (forthcoming 2011) (contending that the validity of the interest-convergence thesis cannot be assessed in light of its identification of "contradiction closing" cases).

range of viable options open to them than consensus constitutionalism admits.[172]

Although consensus constitutionalists view themselves as being more attuned to history than other constitutional scholars, they too often advance an overly determined conception of judicial possibilities that existed in a particular historical moment. Instead of contemplating and explicating the *range of potential opinions* that the Court could have issued at a particular time, Justices are presented as having only one practical route in deciding a given case—which is no decision at all. That consensus constitutionalism even gestures toward history is heartening. But it would be more desirable still if historically minded legal scholars sought to capture the choices alongside the constraints that pervade Supreme Court decisionmaking.

Because consensus constitutionalists view Court decisions as being principally driven by the values of the American people, they underemphasize the role played by judicial personnel in shaping constitutional understandings. Though liberals today express concern about the current Court,[173] Friedman, for instance, suggests that they need not worry: "[T]he long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line."[174] This quotation vividly captures how consensus constitutionalism understands society to place extremely tight parameters upon the Court's ability to resist popular preferences.[175]

Sunstein's account of *District of Columbia v. Heller*[176] illustrates how consensus constitutionalists permit societal explanations for judicial decisions to overshadow explanations involving the Court's composition. In determining that the Second Amendment protects an individual's—as distinct from a militia's—right to possess firearms three years ago, Sunstein contends:

> [T]he Court was greatly influenced by the social setting in which it operated, where that judgment already had broad public support. In recent years, there has come to be a general social understanding that the Second Amendment does protect at least some kind of individual right; and that understanding greatly affects American politics.[177]

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172. *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010) (qualifying Professor Friedman's statement that the Court stays within the "mainstream of public opinion" by noting that "the mainstream of opinion can be a broad current, encompassing a range of controversial viewpoints").

173. *See, e.g.*, ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010).

174. FRIEDMAN, *supra* note 11, at 369.

175. *See id.* at 378 ("The Supreme Court decides few enough cases, and the decisions are of sufficient import, that interested eyes always are watching the docket.").

176. 128 S. Ct. 2783 (2008).

177. SUNSTEIN, *supra* note 13, at 5.

Rather than attributing *Heller* to five Republican-appointed Justices, Sunstein contends that the Court issued the decision in light of a public consensus regarding firearms: "The Supreme Court's ruling in favor of an individual's right to bear arms for military purposes was not really a statement on behalf of the Constitution, as it was written by those long dead; it was based on judgments that are now widespread among the living."[178] Although Sunstein does not cite any corroborating polling data, a 2008 *USA Today* poll verifies that a large percentage of Americans favored the right conferred by the Court in *Heller*.[179] Seventy-three percent of respondents contended that the Second Amendment protects an individual right; just 20 percent of respondents understood the Second Amendment to confer a right only to militias.[180]

Was *Heller* motivated principally by "a general social understanding" and "judgments that are now widespread among the living"? Or, instead, was *Heller* motivated principally by an ideological commitment to firearm ownership that has emerged to become a part of orthodoxy in elite conservative legal circles? Finding greater explanatory force in the second explanation would at least have the virtue of helping to explain *Heller* being decided 5–4, with the five Justices in the majority all adhering to Federalist Society precepts more often than each of the four dissenting Justices.[181] Consensus constitutionalism, with its emphasis on the zeitgeist and its disregard for judicial ideology, has difficulty accounting for such a voting pattern. If a magic genie granted an advocate of firearm control a single wish, would it be wiser to use the wish to: (a) change the minds of 150 million Americans on the meaning of the Second Amendment, or (b) replace a single conservative Justice in the *Heller* majority with a judge of one's choosing? It seems quite probable that the second option would be the prudent course if the goal were to have the Court uphold the District of

178. *Id.*

179. Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY (Feb. 26, 2008), http://www.usatoday.com/news/washington/2008-02-26-guns-cover_N.htm.

180. *Id.* But even this overwhelming disparity in public opinion may not mean, as Sunstein suggests, that "a general social understanding" exists regarding the Second Amendment's meaning. Indeed, recent law review issues teem with evidence belying this alleged "general social understanding." *See, e.g.*, David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1295 (2009) (disagreeing with *Heller* on the Second Amendment's meaning). Public opinion percentages—even overwhelmingly large percentages—can be misleading. This is so, in part, because polls seldom measure the intensity of the beliefs they quantify. In other words, people may not only disagree with *Heller*'s interpretation of the Second Amendment, but many of them may disagree vehemently.

181. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) ("Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.").

Columbia's firearms ordinance.[182] None of the foregoing should be taken as discounting the role that social movements may play in influencing constitutional interpretation.[183] It is, however, to suggest that legal scholars should not attempt to understand outcomes in Supreme Court cases primarily by examining the attitudes of 300 million Americans toward constitutional questions when they can get a better read by paying attention to the attitudes of just nine.[184]

Consensus constitutionalists also adopt an exceedingly thin conception of the field of law itself. Indeed, the triumphant manner in which some consensus scholars trumpet the democratic influence upon constitutional interpretation makes it tempting to lose sight of the fact that the consensus school seems to believe that law is simply politics by another name.[185] A Justice's job does not, of course, involve merely applying existing law to new facts in order to derive legal conclusions. To the contrary, judging often calls for the exercise of judgment—especially when dealing with the Constitution's open-ended clauses. Acknowledging this reality, however, does not mean believing that constitutional interpretation is divorced from text, precedent, and principle, or that political considerations alone give content to law's indeterminate provisions. When judges hear cases, in other words, they do not fly by the seats of their robes and allow themselves invariably to get swept up in whatever happens to be the moment's prevailing mood. Among other tasks, Justices examine constitutional text and structure, parse prior cases, contemplate historical practices, and think about the conse-

182. "Quite probable" does not, of course, mean "certain," as many members in good standing on the legal left have come around to the view that the Second Amendment protects an individual right. *See, e.g.*, Adam Liptak, *A Liberal Case for Gun Rights Helps Sway Federal Judiciary*, N.Y. TIMES, May 6, 2007, at A1 (analyzing liberal support for individual Second Amendment rights and including Akhil Amar, Sanford Levinson, and Laurence Tribe among "leading liberal constitutional scholars" espousing that belief).

183. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–93 (2008) (arguing that the decision in *Heller* was based on "understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism" as opposed to originalism).

184. Nothing here, of course, should be taken as contending that the Justices can be understood in utter isolation from the cultures (legal and otherwise) that produced them and that they in turn produce. *Cf.* Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (analyzing the interrelated nature of law and culture). Indeed, the appointment of a Justice can usefully be understood as an instance where a particular political regime attempts to transform its views into law. *See* TUSHNET, *supra* note 129, at 106–12; Balkin & Levinson, *supra* note 181, at 1068.

185. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 125 (2009) (observing that the "belief that constitutional law is not really law at all, but politics, is also becoming more explicit in the work of some constitutional scholars"); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 977 (2005) ("Contemporary critics of judicial review . . . view constitutional questions not as legal questions but as political ones.").

quences of ruling in a particular manner.[186] But to contend that constitutional interpretation in all but the most straightforward cases contains virtually no craft or content is to revive a peculiar form of a practice that was once labeled "trashing."[187]

Consensus constitutionalism's assertion that Justices are products of their times, moreover, leads to a distorted understanding of judicial capacity. On a superficial level, of course, this statement is completely unobjectionable. On another level, though, this notion seems to border on the tautological. What, precisely, would it mean to have a Justice who was not a product of the times in which he or she lived? Can a Justice actually be produced by another time?[188] The very questions sound like nothing so much as a conceit from a science-fiction film. By this statement, the consensus constitutionalists must mean a good deal more than that Justices do not possess the ability to travel across time. Yes, Justices' conceptions of law and morality are surely influenced by the times in which they live. But American society contains a widely diverging range of opinions on many questions at any particular time. Members of the same society and even members of the same class can and do hold radically competing conceptions regarding what is good for society. After all, despite being drawn from an elite subset of American society, Supreme Court Justices articulate a relatively broad array of viewpoints. Consensus constitutionalists have, in sum, too often depicted Justices as operating in more ideologically constrained societal circumstances than actually existed during their careers.[189]

The emphasis on contextual limitations that consensus constitutionalists generally espouse also spurs them to evaluate Justices—and the opinions they write—in a manner that is, above all, nonjudgmental.[190] In contrast to legal scholars who praise judicial decisions that they like and condemn judi-

186. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying the modalities of "constitutional argument").

187. *See generally* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

188. There may be no stronger rebuttal to these rhetorical questions than the very existence of Justice David Hackett Souter. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 43 (2007) (noting that Souter "had the habits of a gentleman from another century. During the day, he would leave the lights off in his office and maneuver his chair around the room, reading briefs by the sun.").

189. *See* Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1629 (1986) (criticizing Schmidt for not "judging the justices in a broader context that would have placed higher demands upon their conduct").

190. Among consensus constitutionalists, Sunstein's book affords the most room for judges at least to contemplate undercutting majority preferences. *See, e.g.*, SUNSTEIN, *supra* note 13, at 215 ("Of course judges are not going to rule in a social vacuum; they live in the world. But those who live in the world sometimes do best if they ask, with some seriousness, whether a challenged practice really is justified, not whether most people like it."); *id.* at x ("In many areas of constitutional law, judges should pay respectful attention to the considered judgments of their fellow citizens. But in some of the hardest cases, again in the domain of equality, the judgments of We the People are a product of confusion or bias."). The general thrust of the book, alas, counsels against that tack.

cial decisions that they dislike, consensus constitutionalists often adopt the pose of neutral arbiters. It makes little sense either to applaud or to boo judicial decisions and their authors, after all, if these decisions simply reflect the times in which they were issued. It may feel gratifying to attack the moral shortcomings of prior generations when that immorality appears in the form of legal doctrine, but such attacks make for shoddy history if they are leveled without regard to the historical context in which those decisions are issued. As Klarman explains in his book's introduction:

> One implication of this perspective on constitutional interpretation is that the justices are unlikely to be either heroes or villains. Judges who generally reflect popular opinion are unlikely to have the inclination [to issue countermajoritarian decisions], and they may well lack the capacity, to defend minority rights from majoritarian invasion.[191]

Klarman subscribes to this theory so ardently that he seriously contemplated calling his book *Neither Hero Nor Villain*, rather than *From Jim Crow to Civil Rights*.[192]

Klarman has contended that railing against anticanonical cases constitutes not merely cheap moralizing but a dangerous form of self-delusion. He has decried what he regards as the "pervasive tendency to reflect upon constitutional issues in light of today's deeply-ingrained assumptions and social context, rather than seriously endeavoring to reconstruct the past horizons of those judges actually charged with resolving constitutional disputes."[193] Instead of dismissing *Plessy v. Ferguson*[194] as "a product of racist judging,"[195] he contends that constitutional scholars should instead stress that the decision was a product of its times. "Background social, political, economic, and ideological forces created a climate within which judicial invalidation of a railway segregation law would have been dramatically countermajoritarian, and indeed virtually unthinkable," Klarman suggests.[196] "The *Plessy* decision was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from a nation that would have expected precisely that result from its Supreme Court."[197] Deploying similar analysis, Klarman

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191. KLARMAN, *supra* note 10, at 6.

192. *See* Michael Klarman, *Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century* (Univ. of Va. Sch. of Law Legal Studies Working Papers Series, Working Paper No. 99-3a, 1999), *available at* http://ssrn.com/abstract=169262.

193. Klarman, *supra* note 1, at 31.

194. 163 U.S. 537 (1896).

195. Klarman, *supra* note 1, at 26.

196. *Id.*

197. *Id.* at 26–27 ("How can a ruling that could not realistically have come out the other way be 'a grave mistake,' 'ridiculous and shameful,' or 'a catastrophe'?").

contends *Korematsu v. United States*[198] logically springs from the 1940s era in which it was decided.[199]

In neither *Plessy* nor *Korematsu* was, in Klarman's estimation, "a contrary outcome realistically possible. Only by ignoring the background historical context of these decisions can we delude ourselves into thinking otherwise."[200] Whatever the truth of the aphorism that people who do not know history are doomed to repeat it,[201] Klarman believes that historical knowledge does nothing to inoculate people from the doom of repetition. Klarman has criticized the pervasive belief among the legally sophisticated that U.S. citizens have learned a valuable and lasting lesson from the Court's widely maligned decision in *Korematsu*. "We pride ourselves on believing that the Japanese-American exclusion and internment could not take place today, even under similar wartime exigencies, and that if it somehow did the Court would rightly strike it down," Klarman wrote.[202] Klarman expressed deep skepticism regarding the proposition that the United States had learned anything that would not prove ephemeral in the face of national trauma. "But this interpretation of *Korematsu* seems quite dubious," Klarman continued.[203] "Only by ignoring the context in which the military exclusion order and the executive decree authorizing it were issued can we confidently conclude that a 'right-thinking' Supreme Court would have invalidated it."[204]

Viewing the legal question presented in *Korematsu* as resulting in the inevitable validation of the detention program represents a kind of legal fatalism. That case, it merits emphasizing, was decided by a 6–3 margin.[205] If a legal position can garner three votes at the Supreme Court, it does not seem beyond the realm of the possible that two additional Justices could have voted to invalidate the program.[206] *Korematsu*'s three dissenting Justices, moreover, did not offer milquetoast critiques of the U.S. military policy and the Court's decision upholding that policy. Rather, the dissenting Justices critiqued the program in language that sounds stirring to contemporary ears. Justice Murphy's dissenting opinion, for instance, expressed the ideas of a

198. 323 U.S. 214 (1944).

199. *See* KLARMAN, *supra* note 10, at 449; Klarman, *supra* note 1, at 28–29.

200. Klarman, *supra* note 1, at 31.

201. *See* GEORGE SANTAYANA, THE LIFE OF REASON 82 (Prometheus Books 1998) (1905) ("Those who cannot remember the past are condemned to repeat it.").

202. Klarman, *supra* note 1, at 28.

203. *Id.*

204. *Id.*

205. Korematsu v. United States, 323 U.S. 214, 225–33 (1944) (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting).

206. Klarman notes the existence of *Korematsu*'s three dissenters, but only to suggest that the number would have been smaller had the case been decided earlier. Klarman, *supra* note 1, at 29 ("[T]he pressure for internment was so great in early 1942 that one might plausibly question whether there would have been as many as three dissenters on the Court had *Korematsu* been decided while the outcome of the war was still genuinely in doubt, rather than in December 1944.").

modern racial egalitarian in excoriating the program as "fall[ing] into the ugly abyss of racism."[207] In a similar vein, Justice Roberts referred to the "so-called Relocation Centers" as "a euphemism for concentration camps."[208]

Consensus constitutionalism is admirable to the extent that it can be understood as encouraging legal scholars to distinguish hindsight-driven judicial criticisms from judicial criticisms that faithfully recreate a given time's constraints. But its adherents err by inaccurately diminishing the range of historical possibilities that exist at a particular historical moment and by discounting the very real value that stems from maintaining an anti-canon of despised cases in constitutional law.[209] When legal scholars and the public criticize decisions from the past (even if they do so in a somewhat ahistorical fashion), they endeavor to shape and improve the nation's constitutional future. Law professors signal to their students, and simultaneously remind themselves, that some judicial decisions are so wrongheaded that they merit scorn and condemnation. A similar process unfolds on the national stage when nominees to the Court and Senators serving on the Judiciary Committee inveigh against the evils of *Korematsu*.[210] Excoriating judicial decisions, then, can serve a valuable purpose—one that should not be discarded quite so readily.

Even assuming that some of the vituperation directed at anticanonical cases contains an element of "presentism,"[211] such criticism inculcates the indispensable lesson that historical assessments unfold (and change) over the course of decades. This lesson encourages law students, some of whom will one day become judges and even Justices, to take the long view. Chief Justice Warren's otherwise honorable legacy is stained by his participation in the exclusion of Japanese citizens while he served as California's attorney general during World War II.[212] The way in which United States Senators roundly vilify *Korematsu* during confirmation hearings instills in not only the

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207. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

208. *Id.* at 230 (Roberts, J., dissenting).

209. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998) ("The construction of an academic theory canon is accompanied by the formation of an 'anti-canon' of cases that any theory worth its salt must show are wrongly decided."); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) ("Constitutional law . . . has not only a canon composed of the most revered constitutional texts but also an anti-canon composed of the most reviled ones. *Lochner* and *Plessy* are anti-canonical cases.").

210. *See* Adam Liptak, *Path to Court: Speak Capably But Say Little*, N.Y. TIMES, July 12, 2009, at A1 ("Here is the basic script: the nominee is expected to praise Brown . . . and deplore cases like Dred Scott . . . and Korematsu . . . .").

211. *See* V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 992 n.191 (2009) (defining presentism as "the tendency to look at the past through contemporary eyes").

212. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998) (surveying Chief Justice Warren's discriminatory actions against Japanese citizens).

nominee, but the public at large, the lesson that race-based banishment clashes with the nation's modern constitutional values.[213] The point here is not to contend that a program of ethnic exclusion of U.S. citizens could *never* occur after *Korematsu*. (Such a contention would, in any event, veer too close toward the inevitable view of history that I seek to challenge.) The ritualized condemnation of *Korematsu*, however, may well reduce the likelihood that such an exclusionary program will recur. It is certainly plausible that a desire to avoid reenacting the shameful wartime exclusionary practices that received validation in *Korematsu* motivated President George W. Bush's speech that he delivered on September 20, 2001, just nine days after the terrorist attacks.[214] In that speech, of course, President Bush repeatedly emphasized the need to avoid viewing an entire race or an entire religion as the enemy of the United States.[215]

3. Normative Implications.—Consensus constitutionalists internally divide upon whether their work should be read as exclusively describing historical developments or whether it also contains normative implications. Rosen and Sunstein, for their parts, have made clear that Supreme Court Justices not only do (as a descriptive matter) generally follow consensus in their constitutional interpretations, but that they should (as a normative matter) almost always be applauded for doing so. Friedman and Klarman, in contrast, frame their arguments as occupying only the descriptive realm and eschew drawing normative conclusions. If Justices receive the dire message about judicial capacity that Friedman and Klarman send, however, their arguments, too, could be understood as containing normative implications.

Neither Rosen nor Sunstein buries the contention that it is, on the whole, desirable for the Court to constitutionalize consensus. "My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible," Rosen writes.[216] In his conclusion, Rosen puts the point categorically: "The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people."[217] Sunstein likewise suggests that judges should generally exhibit great caution about

213. *See Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 209–10 (1993) (statement of Sen. Paul Simon, Sen. Comm. on the Judiciary) (criticizing the Court's deference to public opinion in that "tragic decision").

214. *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4.

215. *Id.* ("The enemy of America is not our many Muslim friends. It is not our many Arab friends. Our enemy is a radical network of terrorists and every government that supports them.").

216. ROSEN, *supra* note 12, at 13.

217. *Id.* at 210.

issuing potentially divisive rulings. "In unusual but important cases, judges are likely to have enough information to know whether outrage will exist and have significant effects, and in such cases they should hesitate before imposing their view on the nation," Sunstein writes.[218]

Friedman and Klarman purport merely to describe—rather than to assess normatively—historical trends in constitutional interpretation. Friedman poses an open-ended question toward the end of his volume:

> What we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations. Is the Court even capable of standing up for constitutional rights when they are jeopardized by the majority?[219]

In the concluding chapter of *From Jim Crow to Civil Rights*, Klarman similarly disclaims drawing prescriptive lessons from the nearly 450 pages of preceding history that chronicles some seven decades of constitutional history. "Whether social and political context *should* play such a large role in constitutional interpretation is beyond the scope of this book," Klarman writes.[220]

The division between the descriptive and the normative, however, cannot be maintained quite as tidily as Friedman and Klarman would have it. The two scholars contend that the Court is nearly powerless to protect minority viewpoints and admonish that judges who attempt to offer such protection will likely succeed only in inflicting damage upon the judiciary and may even retard the very cause that they wish to advance. "It simply is the case that the judiciary's capacity to give the Constitution meaning, to protect minority rights, always has been limited by popular support for those

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218. SUNSTEIN, *supra* note 13, at 164. Sunstein writes this sentence in the context of discussing how "Justice Bentham" might resolve cases before him. There is no reason to believe, however, that Justice Bentham's views on this score deviate appreciably from Sunstein's. Indeed, earlier in the book, Sunstein (undoubtedly speaking for Sunstein) writes: "I conclude that in unusual but important cases, judges should indeed hesitate if many people disagree with their initial inclinations." *Id.* at 15.

Sunstein has long been on record as suggesting that he believes that law professors, unlike historians, write history with a normative slant. *See* Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995) (suggesting that rather than merely "uncovering the 'facts,' . . . constitutional lawyers, unlike ordinary historians, should attempt *to make the best constructive sense out of historical events associated with the Constitution*"); *id.* at 605 ("The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future.").

219. FRIEDMAN, *supra* note 11, at 373.

220. KLARMAN, *supra* note 10, at 449. Klarman's scholarly work often disavows normative implications. *See, e.g.*, Klarman, *supra* note 1, at 24 ("For present purposes, though, the key point is positive, not normative. . . .").

decisions," Friedman explains.[221] Commentators who worry that judicial review will stifle democratic preferences and commentators who hold out hope that judicial review will protect minorities share an "underlying assumption" that is "deeply problematic": "that the judiciary even has the *capacity* of running contrary to the will of the majority."[222] Klarman contends, "The justices are too much products of their time and place to launch social revolutions. And, even if they had the inclination to do so, their capacity to coerce change is too heavily constrained."[223] He further explains: "Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist."[224] A Supreme Court Justice who heeded the historical warnings of consensus constitutionalism would surely be less willing to protect minority rights, given that doing so would almost certainly constitute a quixotic effort. At least to the judge's ear, then, the purportedly descriptive assumes a distinctly normative ring.

The work of Friedman and Klarman also seems to contain not-so-subtle normative warnings regarding the dangers of judges getting too far out in front of the public. Friedman writes:

> The most telling reason why the justices might care about public opinion, though, is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.[225]

It seems difficult to believe that Justices reading this language and taking it seriously would not experience great apprehension about issuing decisions they suspect will prove unpopular. Few Justices welcome the opportunity to bring "bad things" upon themselves and the institution they serve. Klarman, commendably, avoids such menacing language. But one lesson of Klarman's famed "backlash" thesis suggests that the Court may succeed in (temporarily,

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221. FRIEDMAN, *supra* note 11, at 380–81.

222. *Id.* at 370; *see id.* ("To the extent that the judges have had freedom to act, it has been because the American people have given it to them. Judicial power exists at popular dispensation.").

223. KLARMAN, *supra* note 10, at 468.

224. *Id.* at 449.

225. FRIEDMAN, *supra* note 11, at 375; *see also id.* at 376 (invoking the political science terminology of "anticipated reaction," Friedman suggests that "[t]he justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message.").

at least) harming groups it seeks to help.[226] Accepting Klarman's account, reasonable Justices could conclude that the wisest way to aid an oppressed minority would be to refrain from issuing countermajoritarian decisions and allow society to proceed at its own majoritarian pace. Justices can perhaps help minorities mainly, in other words, by simply getting out of the way.

By portraying American history in a manner that underplays significant and substantial conflict, consensus constitutionalists make it appear that Justices generally lack the desire (and may well lack the capacity) to issue opinions that clash with popular preferences. In its boldest articulation, this theory views the Court as merely bringing a few outliers into line with the national mainstream. Consequently, judicial opinions that have in actuality required selecting sides in hotly contested arenas—decisions, that is, that required some measure of courage—are rendered easy. Consensus constitutionalism's tendency to emphasize ideological homogeneity, where ideological diversity actually reigned, has the potential effect of imbuing Justices with an inaccurately high conception of the threshold of societal agreement that is necessary to issue a decision protecting minority rights. As a result, if current Justices heed the lesson that consensus constitutionalism purports to teach, they may prove reluctant to issue decisions protecting minority rights on divisive questions—even if they believe that the decision can be legitimately grounded in constitutional law.

Consensus constitutionalists, thus, offer an anemic notion of the judiciary's capacity to protect minority rights against the majority's will. Indeed, they suggest that scholars who believe that the Court plays a significant role in checking majority preferences are misguided at best and delusional at worst. But at the risk of being labeled both a hopeless "romantic" and "psychological[ly]" weak,[227] it requires observing that consensus constitutionalism offers an unduly bleak assessment of the Court's ability to protect rights favored by only a minority of Americans.[228] History emphatically does not reveal that the Court invariably follows in the direction that the public would lead. Instead, modern history suggests the Court acts with some frequency as a countermajoritarian force in American society.

Although this Article does not present the occasion to mount an expansive defense of the claim that courts have often protected disfavored groups, it bears mention here that the Court not only has offered protection to

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226. *See* KLARMAN, *supra* note 10, at 385–442; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85–149 (1994); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (all arguing that *Brown* encouraged southern politicians to espouse hardline views opposing racial desegregation and eliminated the political space available for racial moderates).

227. Klarman, *supra* note 1, at 6, 23–24.

228. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) ("In our view the pendulum has swung too far, from excessive confidence in courts to excessive despair.").

minorities, but that it has done so in cases that are of high salience to the American people. In a forthcoming work, I intend to defend at length the claim that the Court has in fact offered minorities a "haven[] of refuge."[229] Two brief examples from the Court's recent decisions will need to suffice for present purposes. First, the Court served as a plainly countermajoritarian entity when it decided *Boumediene v. Bush* three years ago.[230] Indeed, public opinion polling found that only 34 percent of Americans thought that noncitizen terrorism suspects being held in Guantanamo Bay should be permitted to use the civilian court system to challenge their detention and 61 percent thought that they should not be permitted to do so.[231] Even assuming that terrorism has somewhat declined among Americans' priorities since September 2001,[232] the legal protection afforded suspected terrorists remains a topic capable of evoking intense reactions.[233] Second, on the heels of *Boumediene*, the Supreme Court in *Kennedy v. Louisiana* invalidated the imposition of capital punishment upon defendants who rape (but do not kill) a minor.[234] A poll taken after the decision revealed that only 38 percent of respondents opposed capital punishment for rapists of children, and 55 percent favored the death penalty in such cases.[235] *Kennedy* attained its high degree of salience both because of its sensational subject matter and because Barack Obama and John McCain denounced it during a closely followed presidential campaign. Even after the Court decided *Kennedy*, moreover, it became clear that the Court and the parties had overlooked that in 2006 Congress revised the Uniform Code of Military Justice to render military personnel convicted of raping a child eligible for capital punishment.[236] Yet no sustained public outcry greeted either *Kennedy* or the Court's refusal to reconsider its decision in light of a congressional statute passed just two years prior that permitted the very punishment that *Kennedy* forbade.

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229. Justin Driver, The Supreme Court as Haven of Refuge (unpublished manuscript) (on file with author). Justice Black first characterized courts as "havens of refuge" in his opinion for the Court in *Chambers v. Florida*. 309 U.S. 227, 241 (1940). Klarman has expressly suggested that courts do not serve this function. *See* Klarman, *supra* note 1, at 17–18 ("[T]he Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.").

230. 553 U.S. 723 (2008).

231. John Cohen, *Behind the Numbers: SCOTUS Gitmo Ruling*, WASH. POST (June 17, 2008), http://voices.washingtonpost.com/behind-the-numbers/2008/06/scotus_gitmo_ruling.html.

232. *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 26 (2006) ("Americans' relative concern about terrorism has plummeted to levels far below those that existed in the very first months after September 11.").

233. *See* Jack Goldsmith, Op-Ed., *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 9, 2010, at A17 (lambasting efforts to try terrorists in civilian courts and arguing that the United States should rely exclusively on military detention).

234. 554 U.S. 407 (2008).

235. *American Voters Oppose Same-Sex Marriage*, QUINNIPIAC UNIV. (July 17, 2008), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

236. Pub. L. No. 109-163, § 552(b), 119 Stat. 3136, 3263 (2006).

Although the centrality of *Brown v. Board of Education* is certainly understandable within the narratives of consensus scholars, that case may well occupy an excessive amount of space in the nation's constitutional consciousness.[237] Even acknowledging that the Court failed to eliminate America's race problem during the 1950s, that acknowledgment provides scant guidance regarding whether the Court can affect change in other, less charged contexts.[238] The effort to achieve school desegregation involved many moving parts and required compliance from many actors—including judges, school board officials, parents, and children. Judicial decisions generally have a considerably lower degree of difficulty to execute successfully than was involved in *Brown*. Contemplate, for example, how much easier it was to implement *Miranda v. Arizona*, another controversial decision of the Warren Court, which called for compliance principally from police officers.[239] Consider, too, how many fewer actors would need to comply in order to effectuate a hypothetical Court decision invalidating capital punishment. Believing that the Court could not unilaterally eliminate black subordination—perhaps this nation's most deep-seated social issue—does not require believing that the Court is powerless to shape society regarding less intractable problems. In other words, using *Brown* to derive conclusions about law's capacity for change has only slightly less to recommend it than using cancer to derive conclusions about medicine's capacity for healing.[240]

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237. Yes, this Article may well, alas, be regarded as part of the problem rather than part of the solution on this score. *See infra* subpart III(A).

238. Klarman's book betrays considerable inconsistency in explaining how broadly the conclusions it reaches should be understood to extend beyond the racial sphere. In the introduction, as discussed above, Klarman offers a sweeping statement regarding the book's extensive applicability. *See* KLARMAN, *supra* note 10, at 5–6 ("This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times . . . . In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally reflect broader social attitudes."). The book's conclusion—which moves beyond race cases to incorporate discussions of, *inter alia*, *Pierce v. Society of Sisters*, *Griswold v. Connecticut*, *Miranda v. Arizona*, *Roe v. Wade*, *Furman v. Georgia*, and the Hawaii Supreme Court's gay marriage decision from 1993—appears to embrace the seemingly boundless applicability of the consensus constitutionalist framework. At least one sentence in the book's conclusion, however, seems to undercut the wisdom of extending the book's insights beyond the racial realm. *See id.* at 463 ("This lesson may not be applicable outside of the race context, as few social reform movements in the United States confront regimes that are as totalitarian as was Jim Crow Mississippi."). Yet, this caution against extrapolating from race arrives at the very end of a paragraph that contains an extremely broad topic sentence. *See id.* ("One lesson to draw from this history regarding the consequences of Court decisions is ironic: Litigation is unlikely to help those most desperately in need."). Taken as a whole, the book militates toward broad applicability.

239. 384 U.S. 436 (1966).

240. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 71 n.246 (1997) (observing that, although judicially prompted reforms generally have less practical impact than case law may suggest, certain judicial directives and rules are easier than others for official actors to sidestep).

One of the oddities of consensus constitutionalism is the way it tends to treat the judicial capacity for protecting minority rights as static rather than dynamic. It seems relatively uncontroversial to venture that the modern Supreme Court possesses a good deal more power as an institution than, say, the fledgling outfit that John Marshall joined as Chief Justice in 1801.[241] In a similar regard, today's Court possesses considerably more institutional power to protect minority rights than the Court of 1950, before it had issued many landmark and widely hailed decisions that are (accurately or inaccurately) broadly understood to protect minorities.[242] Although consensus constitutionalists sometimes acknowledge that the Court enjoys diffuse support,[243] they underemphasize that today's Court should—given its enhanced status in American life—enjoy a greater ability to protect minority rights than it possessed before it issued those landmark decisions. Even if the consensus constitutionalists believe that the Court's ability to protect minorities remains quite limited, they would do well to underscore that it holds much greater capacity than it once did.[244]

Consensus constitutionalists, to be clear, do not insist that the Court has *never* played a countermajoritarian role. They generally acknowledge two instances where the Court has decided cases in a manner that flatly contravenes the wishes of clear majorities: its invalidation of flag-burning statutes in *Texas v. Johnson*,[245] and its limitation of the role that religion plays in public schools in cases like *Lee v. Weisman*.[246] Consensus constitutionalists seek to explain these instances of the Court's countermajoritarian conduct primarily by noting that, though large majorities of the American public disagree with these decisions, elite Americans generally believe that they were

241. The enhanced status of the modern Supreme Court forms a major theme of how at least one current Justice assesses that institution's history. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 22–72 (2010) (noting how the Court's decision in *Worcester v. Georgia*, 31 U.S. 515 (1832), was essentially disregarded, but then chronicling the Court's ensuing reputational ascent during the twentieth century).

242. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 74 (1980) (crediting the Warren Court with "clearing the channels of political change" and correcting discrimination against minorities).

243. *See, e.g.*, FRIEDMAN, *supra* note 11, at 379; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2635 (2003).

244. Among consensus constitutionalists, Professor Friedman addresses the Court's increased status most prominently. When doing so, however, he quickly notes that the People keep the Court on an extremely tight leash:

> In a sense, today's critics of judicial supremacy are right: the Supreme Court does exercise more power than it once did. In another sense, though, they could not be more wrong. The Court has this power only because, over time, the American people have decided to cede it to the justices. The grant of power is conditional and could be withdrawn at any time. The tools of popular control have not dissipated; they simply have not been needed.

FRIEDMAN, *supra* note 11, at 14.

245. 491 U.S. 397 (1989).

246. 505 U.S. 577 (1992).

correctly decided.[247] Given that the Justices are drawn from the elite, consensus scholars contend that it is not especially surprising that they interpret the Constitution in a manner that imposes the consensus views of their class upon the nation.[248]

This class-based explanation, however, cannot possibly bear the weight that consensus constitutionalists place upon it. It seems strikingly odd that if the Justices are in fact merely imposing their class views in the form of constitutional interpretation that these cases should be decided by such razor-thin margins. Both *Johnson* and *Weisman*, after all, were 5–4 decisions.[249] Viewing the Justices as class representatives, then, would seem to require believing that some Justices either are traitors to their class (to put the point cynically) or are more closely attuned to the democratic ethos (to put the point benignly). Even though two changes in Court personnel meant that only seven Justices played a role in resolving both *Johnson* and *Weisman*, three of those Justices switched sides in the cases. Justice O'Connor and Justice Stevens went from being democrats in *Johnson* to being elitists in *Weisman*, and Justice Scalia made the journey in reverse.[250] A narrative could perhaps be concocted to explain each Justice's vote in the cases, but it seems clear that such a narrative would exceed the explanatory power of class and perhaps even exceed the explanatory power of biography.

It also merits emphasizing that these two cases involved neither arcane areas of law nor witnessed the Court assist groups that were on the verge of winning victories in the legislative arena. First, it would be difficult to imagine two cases having greater public salience than *Johnson* and *Weisman*. Few matters arouse greater passion among the American public than patriotism and God. Second, *Johnson* and *Weisman* did not involve the Court stepping in to protect something that could be characterized as an "emerging national consensus." Indeed, *Johnson* invalidated flag-burning statutes in an overwhelming 48 states,[251] and *Weisman* invalidated prayer at public-school graduations—an extremely widespread practice.[252] If the Court is capable of offering protection to minorities in such sensitive areas in the face of

247. *See* FRIEDMAN, *supra* note 11, at 378 ("If a justice is in tune with his peer group, and his peers have elite views not shared by most of the country, the justice will seem to be going his own way."); KLARMAN, *supra* note 10, at 6 (qualifying the notion that judges reflect broader social attitudes by observing that judges are members of an elite subculture); ROSEN, *supra* note 12, at 169 (acknowledging that some of the Court's school-prayer decisions are difficult to understand on majoritarian terms); SUNSTEIN, *supra* note 13, at 10 (stating that federal judges "tend to come from a small segment of a society, limited to lawyers and usually part of a wealthy elite").

248. *See, e.g.*, KLARMAN, *supra* note 10, at 210–11 (contending that the elite subculture's disavowal of Jim Crow contributed to the Court's desegregation opinions).

249. *Weisman*, 505 U.S. at 579; *Johnson*, 491 U.S. at 398.

250. *Compare Johnson*, 491 U.S. at 398, *with Weisman*, 505 U.S. at 579.

251. *See Johnson*, 491 U.S. at 429 (Rehnquist, C.J., dissenting) ("[T]he laws of 48 of the 50 States . . . make criminal the public burning of the flag.").

252. *Weisman*, 505 U.S. at 635–36 (Scalia, J., dissenting).

vigorous opposition, it seems appropriate to wonder whether the Court's countermajoritarian capacity is not considerably more formidable than consensus constitutionalism allows.

Consensus constitutionalists also too often express an excessively narrow conception of the Court's ability to withstand attacks upon its legitimacy. "If the Court engenders widespread resistance," Friedman writes, "it threatens its legitimacy; even lower levels of defiance eat away at its credibility."[253] Rosen contends, "Paradoxically, the courts, often derided as the least democratic branch of government, have maintained their legitimacy over time when they have been more rather than less democratic in their constitutional views."[254] Although Sunstein acknowledges that the Court may be "unduly sensitive to the risk to its own authority" and allows that "[j]udicial self-preservation should be only a small part of the picture," he nevertheless suggests, "If the Court is concerned about its own place in the constitutional order, and wants to maintain its legitimacy and power, it might take account of outrage as a method of self-preservation."[255]

Contrary to consensus constitutionalism, however, judicial decisions that generate some initial public "defiance" and "outrage" may serve to enhance rather than to diminish the Court's authority. If after a period of open disagreement with a judicial decision much of the public comes to accept (or even to applaud) the decision, the Court's reputational authority may increase—a development that could well enable it to issue subsequent opinions that promote a constitutional vision that most Americans have yet to adopt.[256] In terms of the social optimum, the number of judicial decisions generating defiance will be greater than zero.[257] Too much public defiance of judicial orders could surely imperil the Court's ability to govern, but consensus constitutionalism tends to presume that defiance is something to be avoided at all costs. In this spirit, Rosen asserts that the Court may "have an opportunity to enforce a constitutional principle that neither the president nor Congress are willing enthusiastically to embrace *as long as there is no danger of active resistance.*"[258] But the "no danger" standard has dangers of its own.

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253. FRIEDMAN, *supra* note 11, at 377.

254. ROSEN, *supra* note 12, at xiii.

255. SUNSTEIN, *supra* note 13, at 153.

256. This dynamic helps to explain the public celebration of the Court's decision in *Brown*. That decision became the most celebrated constitutional decision in Supreme Court history not despite massive resistance, but because of it. *See supra* text accompanying note 88.

257. *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1010–11 (2008) (commending the clarifying power of interbranch conflicts); *see also* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1122-28 (2011) (exploring the potential of "separation-of-powers multiplicity").

258. ROSEN, *supra* note 12, at 200 (emphasis added).

Any message to the contrary has the potential to act as an extremely conservatizing force on the judiciary. Judges who subscribe to the consensus theory of constitutional interpretation may not be intimately familiar with the degree of divisiveness surrounding many judicial controversies of yesteryear. Judges are likely, however, to be acutely aware of the intense feelings stirred by today's divisive issues. Moreover, current controversies are generally portrayed as morally complicated issues upon which reasonable minds can differ. To the extent that Supreme Court Justices internalize the tenets of consensus constitutionalism (and there is at least some evidence that they have),[259] they will move ever more meekly to protect minority rights than their predecessors.

In reaction to what they regard as the romantic myth of the Court as countermajoritarian protector of the downtrodden, the consensus constitutionalists (and many other members of the legal left besides) appear to have accepted the notion that courts simply cannot protect minority rights.[260] Whereas liberals once erred in thinking that courts could do everything, they now err in thinking that courts can do just about nothing. Liberals should concededly not direct *all* of their hopes for societal advancement at the courts,[261] but neither should they believe that the judiciary

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259. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (2003) ("[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus."). Discussing one of the most controversial cases decided by the Court, then-Judge Ginsburg wrote:

> *Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985).

In a forthcoming work, I identify some of the various doctrinal areas—including capital punishment, substantive due process, and obscenity—in which the Court expressly understands itself to be imposing consensus on the nation through constitutional interpretation. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) (identifying the existence of a "national consensus" against the death penalty for minors); Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (examining state practices to observe "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); Roth v. United States, 354 U.S. 476, 489 (1957) (requiring courts to contemplate "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"). I then criticize that methodology as degrading the judicial function. *See* Justin Driver, Courting Consensus (unpublished manuscript) (on file with author).

260. *See* ROSEN, *supra* note 12, at 15 ("[J]udges have tended to maintain their legitimacy and independence in the past by deferring to the constitutional views of the American people . . . [and] they should continue to do so in the future.").

261. *See* BARACK OBAMA, THE AUDACITY OF HOPE 83 (2006) ("Still, I wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy."); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U.

cannot play a significant role in facilitating that advancement. By emphasizing judicial fragility and minimizing judicial capacity, consensus constitutionalism has the regrettable consequence of recommending that Justices delay recognizing rights of minorities that they believe are constitutionally grounded.

III. The Contested Constitution

This Part aims to supplant consensus constitutionalism with contested constitutionalism. Instead of misleadingly overemphasizing the role that (a generally nonexistent) national consensus plays in Supreme Court decisionmaking, constitutional history that provides an external perspective on the judiciary should instead depict more fully and accurately the wide range of viewpoints and often-clashing ideological perspectives that citizens hold in the United States. Using the term *consensus* to describe the ideas of some 300 million Americans on a particular constitutional question typically elides more than it exposes.

Contrary to the assertions of consensus constitutionalism, the meaning of the Constitution usually emerges not from consensus but from contestation—an ideological conflict that has occurred throughout American history regarding what the nation's foundational document permits and requires. Externalists, who are committed to the idea that everyday people influence constitutional interpretation, should emphasize that Justices do not interpret constitutional meaning by waiting for consensus to materialize and then articulating that consensus viewpoint. Instead, they decide cases in the often cacophonous context that typifies life within the United States, where the People are neither of one mind nor of one voice. Constitutional conflict, moreover, unfolds not only between (and among) various groups of citizens, but within individual citizens themselves. Indeed, contested constitutionalism reveals that even a single person can be of many minds on a particular constitutional question.

Contested constitutionalism does not, of course, suggest that the Court invariably—or even generally—sides with the downtrodden members of society. Such a claim would be absurd. In the pages that follow, however, this Article does argue that the Court has issued countermajoritarian decisions more frequently than is commonly appreciated today. In so doing, I intend to acknowledge what I regard as the constitutive relationship of legal scholarship to Supreme Court decisionmaking. If law professors wish the Court to have the capacity to resist majority preferences and protect minority interests, they should tout the instances when the Court has done so rather than attempt to sweep them under the nation's jurisprudential rug.

PA. J. CONST. L. (forthcoming 2011) ("The revolution will not be litigated, just as it will not be televised, and everyone should know that by now.").

But even if the Court had never in its history issued a decision that clashed with majoritarian political preferences, contested constitutionalism would nonetheless offer a superior framework to understand American legal history than its consensus-based counterpart. That is so because legal history attuned to ideological contest more accurately captures the public's relationship to questions of constitutional law. Contested constitutionalism encourages legal scholars to explore and to communicate the profound disagreements and deep cleavages that exist alongside the Supreme Court's resolution of constitutional questions. Where consensus constitutionalism minimizes those disagreements and cleavages, contested constitutionalism deems them essential to comprehending American constitutional history in its full complexity.[262]

This Part attempts to restore the role of ideological contestation to its central place in constitutional interpretation by making two principal points. First, this Part illustrates the rich diversity of thought that existed within the United States regarding race in the 1950s and 1960s. *Brown*, far from articulating a consensus viewpoint or even the view of an emerging consensus, was decided in a context where apathy characterized the racial attitudes of the overwhelming majority of citizens. Second, in the context of two claims regarding marriage, this Part argues that the Court has in fact advanced racial equality when doing so was not supported by prevailing attitudes (when it

262. Some exemplary work by legal scholars has examined history through the lens of what this Article refers to as contested constitutionalism. *See, e.g.*, Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 U. PA. L. REV. 1913, 1970 (2003) ("Rather than suggesting that African American communities held a uniform and easily discernable point of view on *Brown*, this narrative demonstrates that African Americans held many points of view about the proper approach to achieving educational equality over time."); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (examining constitutional development over decades as an arena of contest, and tracing alternate, reform-minded interpretations of constitutional meaning for economic life, as that meaning is initially fashioned by social movements, reformers, and scholars, and then reworked and embraced by lawmakers, and, ultimately, courts); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1236 (1989) ("[T]he language of law in America is best conceived as a tradition of discourse with divergent and conflicting strands."); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1612 (2001) (observing that during the mid-twentieth century, "'civil rights' did not refer to a unified, coherent category; the content of the term was open, changing, and contradictory, carrying resonances of the past as well as of several possible contending futures"); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 272 (2005) (emphasizing "the conflicting objectives and perceptions of black lawyers in the era of segregation"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006) ("Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.").

For an argument extolling the virtues of conflict and disagreement in the statutory context, see Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 48–58 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html.

validated the right to interracial marriage[263]) and that it could do so in the immediate future (should it hear a case regarding same-sex marriage) without unduly imperiling its legitimacy.

A. Restoring Conflict and Complexity to Brown

Consensus constitutionalists view the Court's involvement in the quest for racial equality during the mid-twentieth century as the imposition of national norms on regional outliers. Friedman suggests that, although remedying the legal subordination of blacks ranked low among the nation's priorities for a long time, eventually a national consensus prevailed regarding racial egalitarianism.[264] "Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to the popular will," Friedman explains.[265] "The justices in *Brown v. Board of Education* argued they were protecting constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement."[266] Similarly, in a truly remarkable passage, Klarman's *From Jim Crow to Civil Rights* frames the Court's 1954 decision as the codification of "an emerging national consensus" regarding race:

> By the early 1950s, powerful political, economic, social, and ideological forces for progressive racial change had made judicial invalidation of segregation conceivable. Slightly more than half of the nation supported *Brown* from the day it was decided. Thus, *Brown is not an example of the Court's resistance to majoritarian sentiment, but rather of its conversion of an emerging national consensus into a constitutional command.* By 1954, the long-term trend against Jim Crow was clear. Justices observed that segregation was "gradually disappearing" and that it was "marked for early extinction." They understood that *Brown* was working with, not against, the current of history.[267]

Elsewhere, Klarman has offered perhaps the pithiest articulation of the consensus school's understanding of *Brown*: "It thus became increasingly difficult for one region (the South) to maintain social practices or traditions (de jure forms of Jim Crow) that deviated significantly from those of the nation as a whole."[268]

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263. Loving v. Virginia, 388 U.S. 1 (1967).

264. FRIEDMAN, *supra* note 11, at 381.

265. *Id.*

266. *Id.*

267. KLARMAN, *supra* note 10, at 310 (emphasis added) (footnote omitted). Writing eight years after the Court decided *Brown*, Professor Bickel also understood the decision to stem from an emerging consensus on racial equality. *See* BICKEL, *supra* note 131, at 241 ("Even as of 1954, national consensus on the racial problem was immanent.").

268. Klarman, *supra* note 1, at 34.

Sunstein offers a particularly aggressive version of the claim that national consensus produced *Brown*, suggesting that white Americans had lost their taste for racial discrimination well before the Court got around to invalidating segregation in public schools. The Court, Sunstein notes,

> is never acting in a social vacuum. Often it is endorsing, fairly late, a judgment that has long attracted widespread social support from many minds. The ban on racial discrimination, signaled above all by the Court's invalidation of school segregation, attracted strong support in the nation long before the Court acted.[269]

Sunstein further contends: "*Brown* was issued by the Supreme Court, not by the American public as a whole. But even so, . . . [b]y 1954, the American public was no longer committed to racial segregation, and there can be little doubt that most of the nation and its leaders rejected it."[270]

1. Racial Attitudes During the Brown *Era.*—The consensus reading of *Brown*, which is now commonly understood to offer the leading scholarly account of the decision,[271] provides a myopic view of a deeply conflicted historical context and the judiciary's role in mediating that conflict. An approach to understanding *Brown* steeped in contested constitutionalism requires exploring the racial attitudes of white northerners, white southerners, and black citizens with greater subtlety and nuance than the consensus constitutionalists' account generally provides. The following analysis represents an effort to illustrate the way in which Justices who are deciding cases typically confront a nation better characterized by conflict than by consensus. Portraying these conflicts—conflicts that occur between, among, and even within the nation's regions, groups, and individuals—provides a richer understanding of American legal history.

a. White Northerners.—Consensus constitutionalism too often gives the sorely mistaken impression that racial attitudes among white northerners during the 1950s were generally the product of a racially enlightened worldview. It likely comes closer to the truth to say that many white northerners simply did not dedicate much time to contemplating the treatment of their fellow black citizens. Among northern whites, the predominant reaction to black subordination might be more accurately characterized as apathy

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269. SUNSTEIN, *supra* note 13, at 4. *But see* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 205 (2010) (contending that, in the fight against Jim Crow, the "law took the lead, defending the equal rights of African-Americans long before Americans had come to a consensus about racial matters").

270. SUNSTEIN, *supra* note 13, at 41.

271. *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 904 n.194 (2009) ("The definitive account of the background and aftermath of *Brown* . . . is Klarman, *From Jim Crow to Civil Rights* . . . ."). Strauss also suggests that when the Court decided *Brown* "[a] national consensus against segregation had been building for a generation." *Id.* at 904.

rather than as enmity.[272] Indeed, consensus constitutionalism generally obscures the wide range of racial opinion among northern whites when *Brown* was decided. On this score, Heman Sweatt, who would become the first black student to attend the University of Texas School of Law, noted the conflicting opinions regarding race that existed among people outside of the South. "[A]s far as attitudes regarding the problem of segregated education are involved, unanimity of opinion does not exist anywhere," Sweatt explained.[273] "Very assuredly, I did not find such a state at Michigan University during my study there toward the master's degree."[274]

i. Polling.[275]—Sweatt's assessment is supported by polling data suggesting that even after *Brown* most whites did not experience a moral awakening to racial injustice. The results of a January 1956 poll revealed that, when asked whether most blacks in the United States were being treated fairly or unfairly, 63 percent of respondents indicated that the treatment of blacks was fair, and just 32 percent stated that blacks were treated unfairly.[276] A poll published in *Scientific American* in December 1956, which also asked whether most blacks were being treated fairly, revealed no sharp regional disagreement.[277] Where the December 1956 poll found that 69 percent of the white public contended that most blacks were being treated fairly, 65 percent

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272. Klarman's book does not wholly ignore the lack of resolve associated with white northerners' support for *Brown*. When Klarman mentions this matter, however, the brief discussion risks overstating that support. Klarman writes: "*Brown* increased the salience of the segregation issue, and in 1954 many Americans, if forced to take a position, could only be integrationists. Yet, endorsing a position and being strongly committed to it are very different things." KLARMAN, *supra* note 10, at 366. As the ensuing discussion will make clear, it seems doubtful that many white northerners in the mid-1950s truly earned the appellation "integrationist." By "being strongly committed" to *Brown*, moreover, Klarman means that individuals supported "the use of federal troops to enforce it, or cutting off federal education funds to districts that defied it, or breaking a southern filibuster in the Senate over legislation to implement it." *Id.* at 365. Establishing such an extraordinarily high threshold for evincing a "strong[] commit[ment]" to *Brown*, and then noting that northern whites fell short of it, obscures precisely how anemic white northerners' integrationist commitments were during the 1950s—even as a concept in the abstract. It is regrettable that Klarman does not dedicate more time to exploring the shallowness of white northerners' pro-*Brown* sentiment, as that phenomenon undermines the notion that the Court in *Brown* articulated a consensus or an emerging consensus.

273. Heman Marion Sweatt, *Why I Want to Attend the University of Texas*, TEXAS RANGER, Sept. 1947, at 20, 40.

274. *Id.*

275. I harbor serious reservations about the ability of polling data to capture the full complexity of Americans' views of constitutional questions. One of the principal weaknesses of much polling data is its failure to even attempt to capture the *intensity* that individuals attach to their responses. In addition, polling data often probes respondents' policy preferences rather than their constitutional views. *See infra* note 409 and accompanying text. Nevertheless, given that polling data composes such an important device in the consensus constitutionalists' tool kit, it seems appropriate to dedicate some time to exploring how—even using a preferred methodology of consensus constitutionalists—contested constitutionalism more accurately captures the dynamic on the ground.

276. Hazel Gaudet Erskine, *The Polls: Race Relations*, 26 PUB. OPINION Q. 137, 139 (1962).

277. Herbert H. Hyman & Paul B. Sheatsley, *Attitudes Toward Desegregation*, SCI. AM., Dec. 1956, at 35, 39.

of white northerners agreed with the sentiment (in comparison to 79 percent of white southerners).[278] The willingness of northern whites to accept the treatment of blacks as second-class citizens proved surprisingly stable, even after the inception of the direct-action phase of the civil rights movement. Indeed, a study conducted in 1963 among only northern whites found that 51 percent thought American blacks were treated about right, 38 percent thought they were treated insufficiently well, and an astounding 11 percent thought that blacks were treated excessively well.[279] When Gallup asked the open-ended question of whether any group was being treated unfairly in the United States in 1963, an overwhelming 80 percent said no.[280] Although 5 percent indicated blacks were being treated unfairly, 4 percent indicated that whites were unfairly treated.[281]

The decidedly limited commitment to racial equality on the part of white northerners after *Brown* can perhaps best be glimpsed by comparing their attitudes with white southerners in subsequent years. In September 1956, when asked whether black students and white students should attend the same schools, 60 percent of white northerners indicated that they should attend the same schools.[282] By comparison, in mid-1965, 55 percent of white southerners responded that students should attend integrated schools.[283] Few people today, of course, would contend that the white South had resolved its profound racial problems as early as mid-1965, a time that precedes even the Voting Rights Act's passage.[284] Yet given the similarity in poll responses, it is extremely difficult to reconcile the vision of racially enlightened northern whites during the mid-1950s with the suggestion of racially backward southern whites during the mid-1960s.[285]

Polling data has also captured the way in which support for affirmatively achieving racial integration among many white northerners was connected to the understanding that they were commenting on a distinctly southern phenomenon. As the authors of a comprehensive volume analyzing changes in racial attitudes over time have noted, "Support for federal desegregation efforts was high in the early 1960s, especially among more educated Northern whites, because attention was focused on ending *de jure*

278. *Id.* at 39.

279. Stewart Alsop & Oliver Quayle, *What Northerners Really Think of Negroes*, SATURDAY EVENING POST, Sept. 7, 1963, at 17, 20.

280. ROSENBERG, *supra* note 124, at 129.

281. *Id.*

282. *See* Paul B. Sheatsley, *White Attitudes Toward the Negro*, 95 DAEDALUS 217, 219 chart 1 (1966).

283. *Id.* at 235.

284. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (codified on August 6, 1965).

285. This point may also serve as a cautionary tale regarding polling data's limitations.

segregation in the South."[286] During the early 1960s, the media had largely framed the issue of federal involvement as a necessary tool to control obstreperous southern whites who were dedicated to defying the Supreme Court.[287] When the efforts to integrate schools expanded beyond the South, however, many northerners rapidly retreated from their expansive support for racial desegregation: "Northern support began to erode at the beginning of the 1970s, when attention shifted to altering *de facto* segregation in the North, especially but not only through court-ordered busing."[288] During this period, the northern commitment to extolling the principle of integration in the abstract increased, even as the northern commitment to seeing integration in practice plummeted.[289] The chasm between rhetoric and reality is, of course, a sadly familiar tradition in American history.

It is also important to understand that a failure to register objection to school integration should not be mistaken for a desire among northern white adults to have their children attend integrated schools. In 1963—a full nine years after *Brown* and just one year before the passage of the celebrated 1964 Civil Rights Act—a study asked northern white adults the following: "Suppose you yourself had school-age children, other things being equal, would you prefer that they went to [an] integrated school, all white, or would it make no difference to you?"[290] Although 41 percent responded that the racial composition of the school would make no difference, 42 percent of white northerners responded that they would prefer an "all white" school.[291] A mere 17 percent of white northerners expressed a preference for an "integrated" school.[292]

ii. Social Histories.—Recent works by historians Thomas Sugrue,[293] Martha Biondi,[294] and Jeff Wiltse[295] helpfully complicate the over-simplified idea that a racially enlightened North was utterly distinct from a

286. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 127 (rev. ed. 1997).

287. *Id.*

288. *Id.*

289. *Id.* at 126 fig.3.8; *see also id.* at 192 ("[T]here is noticeably less support for the implementation of principles than for principles as such."); Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream*, *in* CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II 31, 31–55 (John Higham ed., 1997) (describing the persistent disparity between the embrace of racial integration in principle and the failure to implement true integration in practice).

290. Alsop & Quayle, *supra* note 279, at 20.

291. *Id.*

292. *Id.*

293. THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008).

294. MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003).

295. JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA (2007).

racially unenlightened South. Sugrue's sardonically titled *Sweet Land of Liberty* shifts the traditional frame of the civil rights movement from the South to the North, emphasizing that cities like Chicago, Detroit, and Newark witnessed struggles for racial equality that have been misleadingly omitted from the conventional civil rights narrative.[296] Although many people know that movement martyrs James Chaney, Michael Schwerner, and Andrew Goodman were abducted from Philadelphia, Mississippi,[297] Sugrue insists that too few students of civil rights history understand the mid-twentieth century events that prompted many blacks to refer derisively to Philadelphia, Pennsylvania, as "Up South."[298] As this nickname may implicitly suggest (given its identification of the South as the touchstone for black subordination), black citizens did in fact enjoy less constrained racial lives in the North than they did in the South.[299] Nevertheless, as Sugrue repeatedly underscores, allowing that the South was, in some meaningful sense, racially "worse" than the North hardly suggests that northern race relations were unblemished by racism.[300] "Less bad," in other words, does not mean "good."

Sugrue also details the way in which *Brown* sparked racial reactions among white northerners. Sugrue notes that, contrary to popular belief, some towns in northern states (including York, Carlisle, and Steelton, Pennsylvania) continued to operate officially segregated schools for a brief period even after the Court issued *Brown* in 1954.[301] Apart from official segregation, moreover, Sugrue reconstructs the way in which many white northerners rationalized the all-white schools their children attended as somehow meaningfully distinct from the all-white schools that existed in the South: "'There is, of course, no official segregation in the city,' noted a *New York Times* columnist in 1957. 'It is illegal.' Using the passive voice, thus making the process of segregation seem the inevitable consequence of impersonal forces beyond control, he argued that segregation 'is caused by the residential pattern.'"[302] Where the South engaged in Massive Resistance,[303] the North, thus, engaged in a phenomenon that might be dubbed "Passive

296. *See* SUGRUE, *supra* note 293, at xiv, 325 (opining that the exclusion of the North from accounts of the civil rights struggle, or its "selective inclusion" as a foil to the South, ignores the history of racial conflict in the North, as illustrated by violent, and sometimes deadly, "clashes between young black men and the police" in the cities of Chicago, Detroit, and Newark).

297. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 553 (1996).

298. SUGRUE, *supra* note 293, at xiv, xxi.

299. *Id.* at 256.

300. *See id.* at 257 ("Despite improvements in the aggregate, the economic reality for most northern blacks was starkly unequal.").

301. *Id.* at 183.

302. *Id.*

303. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (Louisiana paperback ed. 1999) (1969).

Resistance."[304] Southerners actively segregated their schools, according to the Passive Resistance mindset, but in the North, well, schools were not so much segregated as they were non-integrated in light of racially distinct neighborhoods—a phenomenon that arose by sheer happenstance. "Whites could deny responsibility for racial segregation, for their choices about where to live and where to send their children to school were individualized and ostensibly race-neutral," Sugrue writes.[305] "The logical conclusion of this line of reasoning was that it was the natural order of things that the vast majority of whites lived in all-white communities and that blacks were confined to segregated neighborhoods and mostly minority schools."[306] This rationalization, as Sugrue notes, was designed to remove any notion of wrongdoing from the North's racial equation: "Like lived with like, birds of a feather flocked together. No one was at fault."[307]

Where Sugrue offers a panoramic vision of the civil rights struggle throughout the urban North after World War II, Biondi's *To Stand and Fight* provides an in-depth examination of that struggle in one particular locale: New York City. Biondi notes that, although racially segregated public schools were deemed unconstitutional throughout New York State in 1938, education officials facilitated racial segregation long after that theoretical expiration date.[308] Among other techniques designed to maintain racially defined schools, New York City Board of Education officials redrew school attendance lines, located new schools in strategic sites, and bused white students in order to avoid them attending nearby black schools.[309] Biondi recalls how Kenneth Clark, a City College professor who provided expert testimony that the Court relied upon in *Brown*, delivered a speech at an Urban League dinner shortly after the Court issued its decision where he stated that segregated schools existed in New York just as surely as they existed in the Deep South.[310] Biondi explains, "Civil rights activists like Clark knew that comparisons between northern and southern racism tended to unnerve northern white leaders."[311] Clark's speech proved no exception.

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304. I use this term in a somewhat different fashion than Professor Cho has used it. *See* Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 824 (2005) (using the term "passive resistance" to describe the efforts of "affirmative action advocates . . . [who] mounted a quiet, behind-the-scenes resistance to the parts of the [*Bakke*] decision they did not like").

305. SUGRUE, *supra* note 293, at 184.

306. *Id.*

307. *Id.*

308. BIONDI, *supra* note 294, at 241.

309. *Id.* at 241–42.

310. *Id.* at 246; *cf.* Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 110–11 (2004) (noting that the Kenneth Clark doll experiments relied upon in *Brown* revealed in fact that black students in the North need not be racially segregated in order to internalize feelings of racial inferiority).

311. BIONDI, *supra* note 294, at 246.

Hewing to the northern white establishment's party line, the Board of Education President, who attended the Urban League dinner, rejected all responsibility for school segregation, and the school superintendent subsequently called segregation in Harlem "accidental" and even "natural."[312] Biondi concludes by suggesting that, even assuming that "de facto segregation" constitutes a sensible term, it has questionable applicability to New York City because governmental entities consistently engendered segregation in the education, employment, and residential realms.[313]

The complex attitudes among northern whites toward black equality can also be more fully ascertained by examining leisure activities during the *Brown* era. Although many barrels of ink have been spilled about the quest for racial integration in the educational context,[314] social historians have only recently begun to flesh out how racial interactions unfolded (and, more to the point, did not unfold) in other, nonschool arenas. Jeff Wiltse's historical exploration of the community swimming pool as a locus for disputes about public space highlights the notion that many northern whites, halfhearted approval of *Brown* notwithstanding, steadfastly avoided interactions with blacks.[315] Wiltse notes that racial lines began to harden at swimming pools in the North beginning in the 1920s, as the Great Migration witnessed significant numbers of blacks living outside of the South for the first time.[316] Although racial rhetoric among white northerners became more liberal following World War II, Wiltse observes, the "integration" of public swimming pools in the North during the 1940s and 1950s typically meant that municipal pools went from all white to all black.[317] White swimmers, in turn, generally fled to the all-white oases provided by private pools or ceased swimming altogether.[318]

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312. *Id.* at 246–47.

313. *Id.* at 285.

314. *See, e.g.*, DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2010).

315. WILTSE, *supra* note 295, at 157 (discussing how "[d]esegregation did not really integrate [Baltimore's] municipal pools").

316. *Id.* at 3–4.

317. *Id.* at 159 ("In large cities, desegregation transferred use of some pools from white swimmers to black but rarely led to meaningful interracial swimming.").

318. *Id.* at 205 ("Between 1950 and 1970, millions of Americans chose to stop swimming at municipal pools. This represented a mass abandonment of public space and was caused most directly by racial desegregation."); *id.* at 159 ("When one-pool communities kept their desegregated pools open, many whites retreated to private pools or simply stopped swimming.").

The racial dynamic of swimming pools in the North sheds considerable light upon the extraordinarily shallow commitment to black equality that many northern whites held at the time of *Brown*. At least as a theoretical matter, one could imagine swimming pools being considerably easier to integrate than public schools. It seems distinctly possible, for instance, that parents would be a good deal less emotionally invested in where their children swam compared to where their children learned.[319] Moreover, achieving integrated municipal swimming pools should have been comparatively less weighed down by residential segregation and bureaucracy (i.e., pupil assignment). Despite the comparatively lower barriers to racial integration in the context of swimming, however, neither public pools nor public schools witnessed much in the way of meaningful and sustained cross-racial interactions. In both venues, then, it seems that a commitment to integration among white northerners in the hypothetical vanished in the actual.

iii. A New Map.—Consensus constitutionalists often note that seventeen states enforced racially segregated educational facilities and that an additional four states permitted, but did not require, localities to adopt racial segregation.[320] These twenty-one racially retrograde states, it is understood, are trumped by the remaining twenty-seven states, which had not enacted state laws either requiring or permitting Jim Crow.[321] Thus, in its crudest articulation, the consensus constitutionalist account of *Brown* might be reduced to a mathematical formula: $27 > 21$ = school desegregation.

Although this view contains undeniable appeal at first blush, that era's racial realities contained greater complexity than is captured by the vulgar tallying of state racial policies. Consensus constitutionalism generally disregards the racial compositions of the various states that existed in 1950s America. As a result, it attributes a sense of racial injustice about black inequality to many northern whites who, to the extent they thought about race at all, likely viewed America's racial situation more as an abstraction than a reality. The twenty-seven states that consensus constitutionalists cite as embodying the nation's supposed racially egalitarian values at the time of *Brown* had—on the whole—dramatically lower percentages of black residents than the states that had legally segregated schools. Nineteen of the twenty-seven non-Jim Crow states, more than two-thirds, had fewer than 2.8

319. But fears of miscegenation, of course, pervaded both contexts. *See* WILTSE, *supra* note 295, *passim*; PATTERSON, *supra* note 314, at 6 ("For many whites, the very idea of desegregated schools prompted the ugliest imaginable images of racial mixing.").

320. *See, e.g.*, KLARMAN, *supra* note 10, at 311 (pointing out that "*Brown* was not inevitable in 1954, when seventeen states and the District of Columbia still segregated their schools and four more states permitted local communities to adopt segregation at their discretion").

321. Alaska and Hawaii, it must be remembered, did not gain admission to the United States until 1959. Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959); Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958).

percent black residents, according to the 1950 census.[322] Twelve of those nineteen states, moreover, had fewer than 1 percent black residents.[323] And six of those twelve states had fewer than 0.2 percent black residents.[324] Conversely, every state featuring what could be considered a substantial black percentage of the population required schoolchildren to be segregated by law. Thirteen states, in other words, had black populations greater than 10 percent in 1950,[325] and all thirteen of those states featured Jim Crow schools.[326] This more textured understanding of state reaction to *Brown* complicates the racially egalitarian views that consensus constitutionalism implicitly attributes to residents of states that had an infinitesimal percentage of black residents.

What, precisely, would it mean for a white person to express racially egalitarian views regarding school placement living in 1950s Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, or Wisconsin? Those states all had black populations of fewer than 1 percent.[327] Anti-black sentiment appears to have been most widespread where blacks composed a large percentage of the population.[328] The notion that white attitudes about school integration were driven in large part by the surrounding racial realities finds at least some support in polling data. In 1959, five years after *Brown*, Gallup asked white parents in the North whether they would object to, *inter alia*, having their children attend "a school where a few of the children are colored," and whether they would object if it were a school "where more than half of the children are colored."[329] Predictably, an overwhelming 92 percent of white northern parents expressed no objection to sending their children to school with a small number of black students, and just 7 percent objected.[330] In answering the question about the school where black students outnumbered white students, however, 58 percent of white northern parents expressed objection, and just 35 percent expressed no objection.[331] These responses

322. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, POPULATION, BY RACE, STATES: 1930–1950, at 30 tbl.27 (1960) [hereinafter STATISTICAL ABSTRACT BY RACE].

323. *Id.*

324. *Id.*

325. *See id.*

326. *See id.*

327. *Id.*

328. *See* V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 5 (1949) (contending that white antipathy toward blacks was strongest in areas with a large percentage of black residents).

329. *Mixed Schools: How Northern Parents Feel*, U.S. NEWS AND WORLD REPORT, Mar. 23, 1959, at 12.

330. *Id.*

331. *Id.* In response to a question of whether they would object to sending their child to a school "where one half of the children are colored," 34 percent of northern white parents objected, and 63 percent registered no objection. *Id.*

help to reveal the profound limitations of even an abstract commitment to racial egalitarianism among northern whites.

Had there been larger concentrations of blacks spread throughout the country during the *Brown* era, it is certainly possible that the Court's decision would have been greeted with even less enthusiasm. Shortly after the Court issued *Brown*, a white southerner who supported racial integration memorably pressed precisely this point in an interview with Robert Penn Warren. "It's not a question of being Southern," he explained.[332] "You put the same number of Yankee liberals in [a predominantly black] county and in a week they'd be behaving the same way [as Southern racists]. Living with something and talking about it are two very different things, and living with something is always the slow way."[333]

b. White Southerners.—In today's popular imagination, white southerners during the age of the civil rights movement are widely understood to have been virtually uniform in their intense opposition to racial equality in general and to *Brown* in particular.[334] Professor Klarman's work—most significantly, the backlash thesis[335]—should be commended for helping to complicate this misleading narrative. By emphasizing that *Brown* eliminated the political space available to southern racial moderates and, thus, incentivized politicians in the South to adopt unyielding pro-segregation poses, Klarman acknowledges that not all white southerners held identical racial attitudes.[336] In a similar vein, Klarman often admirably recognizes that the various states in the South had varying racial climates, instead of treating the region as an undifferentiated mass.[337]

For all its considerable strengths, though, two matters blemish Klarman's depiction of racial attitudes among white southerners. First, Klarman principally focuses his attention on the views of white southern politicians rather than on the views of ordinary white southerners.[338] There

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332. ROBERT PENN WARREN, SEGREGATION: THE INNER CONFLICT IN THE SOUTH 26–27 (1956).

333. *Id.* at 27.

334. This notion enjoys a lengthy history. Melvin M. Tumin, *Readiness and Resistance to Desegregation: A Social Portrait of the Hard Core*, 36 SOC. FORCES 256, 256 (1958) ("It is a popular notion that the South is a homogenous unit so far as its attitudes toward desegregation are concerned.").

335. *See supra* note 226.

336. *See id.*

337. *See, e.g.*, KLARMAN, *supra* note 10, at 348 ("The eleven states of the former Confederacy responded to *Brown* very differently from the border states."); *id.* at 400 ("Florida, Texas, and Tennessee, states that had never fully embraced massive resistance, further distanced themselves from it in 1958–1959.").

338. This shortcoming is most pronounced in Klarman's two articles from 1994 laying out the backlash thesis. *See supra* note 226. Though the treatment in *From Jim Crow to Civil Rights* makes strides along this dimension, it, too, concentrates too heavily upon the actions of politicians.

is, of course, some relationship (almost certainly a strong one) between those two sets of views. But by concentrating his attention inordinately upon the racial radicalization of white southern politicians, Klarman accords pride of place to the massive resistance coalition and, consequently, underplays those who dissented. Second, even when he looks beyond politicians and characterizes the racial attitudes of white southerners themselves, Klarman would do well to avoid phrasing that diminishes the avowed willingness of some white southerners to follow *Brown*. In noting that one of the features that made the Court's progressive race-based decisions difficult to implement was that many people who rejected the decisions were geographically concentrated, Klarman writes, "Virtually all white southerners disagreed with *Brown*, and opponents of other race decisions . . . were likewise concentrated in the South."[339] Similarly, when Klarman assesses the causes of white southern opposition to *Brown*, he writes: "Perhaps most important, the desire of nearly all whites to preserve segregation if possible virtually ensured an attempt at massive resistance."[340]

Although it is certainly true that white southerners during the 1950s and 1960s expressed more widespread hostility to *Brown* than their northern counterparts, accounts of this era should more consistently highlight the multiplicity of southern white racial attitudes. It is important to note that a nontrivial number of white southerners during the *Brown* era evinced—at least as measured by the standards of the time—relatively egalitarian racial thoughts. In the mid-1950s, for instance, Lewis Killian and John Haer conducted a sociological examination of the attitudes of white adults in Tallahassee, Florida, toward school desegregation.[341] Although Killian and Haer conceded that "[i]t would be extremely unrealistic to contend that . . . any large portion of the southern white population has been in favor of public school desegregation," they also steadfastly insisted, "[i]t would be equally unrealistic to assert that those spokesmen who declare, 'The South will never stand for desegregation,' accurately reflect the sentiments of the great majority of white southerners, even though the voices raised to contradict them seem weak and few."[342]

Killian and Haer proceeded to enumerate a taxonomy of four general approaches to *Brown* among white southerners: (1) accepters, who agreed

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See KLARMAN, *supra* note 10, at 385 ("My claim is that *Brown* radicalized southern politics, as voters elected candidates who espoused extreme segregationist positions.").

339. KLARMAN, *supra* note 10, at 461.

340. *Id.* at 409. Klarman's book seems to reveal some internal tension regarding even the approximate percentages of white southerners who wished to follow *Brown*. Two sentences after declaring that "the desire of nearly all whites [was] to preserve segregation," he allows that "many white southerners were prepared to comply with *Brown*, and a few actually agreed with it . . . ." *Id.* Reconciling those two assertions is not easy.

341. Lewis M. Killian & John L. Haer, *Variables Related to Attitudes Regarding School Desegregation Among White Southerners*, 21 SOCIOMETRY 159, 159–64 (1958).

342. *Id.*

with *Brown* and thought that the decision should be followed; (2) compliers, who disagreed with *Brown*, but thought that it should nevertheless be followed; (3) delayers, who disagreed with *Brown* and thought that all legal means should be attempted to evade the decision; and (4) resisters, who disagreed with *Brown* and thought that the decision should never be enforced, even if such an approach clashed with the law.[343] The poll yielded 13 percent accepters, 12 percent compliers, 57 percent delayers, and 17 percent resisters.[344] The most striking differences in background characteristics among the four groups could, predictably, be found between accepters and resisters. "College graduates are over-represented among [a]ccepters, while people with less than 12 years of schooling (high school) are over-represented among [r]esisters," Killian and Haer wrote.[345] "These types differ significantly in occupation and in age, with [a]ccepters tending to be professional or managerial persons, concentrated in the age group 20–29, and [r]esisters tending to be manual and service workers, concentrated in the age bracket above 50 years."[346]

A nationwide poll conducted in 1956 supports the idea that a range of reaction among white southerners to the notion of school desegregation could be detected well beyond the Florida panhandle.[347] Southern supporters of school desegregation possessed, moreover, similar demographic characteristics to the Tallahassee accepters.[348] Although the 1956 poll indicated that only 14 percent of white southerners approved of school desegregation, education and youth were positively correlated with an increased willingness to approve of the decision.[349] College-educated white southerners, 28 percent of whom thought that whites and blacks should attend the same schools, were twice as likely to accept school desegregation as compared to the general population of southern whites.[350] Although the effect of youth on views regarding desegregation was not as pronounced as the effect of education, 19 percent of white southerners between twenty-one and twenty-four years old approved of school desegregation.[351]

Social historians have recently begun to confound the overly uniform depiction of southern white racial attitudes during the post-World War II era. Jason Sokol's *There Goes My Everything* captures the deep ambivalence and

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343. *Id.* at 160.

344. *Id.* at 161.

345. *Id.*

346. *Id.*

347. Hyman & Sheatsley, *supra* note 277, at 36.

348. *Id.* at 36, 38.

349. *Id.*

350. *Id.* at 36. Just 5 percent of white southerners who attained only a grammar-school education supported interracial education, according to the poll. *Id.*

351. *Id.* at 38. Just 10 percent of white southerners older than sixty-four approved of *Brown*. *Id.*

sense of bewilderment that beset many southern whites during the civil rights movement. "Most white southerners identified neither with the civil rights movement nor with its violent resisters," Sokol explains. "They were fearful, silent, and often inert."[352] Sokol highlights how ordinary southern whites were—as a result of *Brown*, the civil rights movement, and the accompanying racial upheaval—forced to contemplate the subordination of blacks, a phenomenon that had not previously demanded much sustained thought.[353] Sokol understands, of course, that the overwhelming majority of white southerners opposed racially integrated education during the post-*Brown* era, and that some expressed that opposition with considerable intensity.[354] Nevertheless, Sokol insists that we remember that at least some white southerners immediately accepted *Brown*'s legitimacy, and that many more harbored deeply conflicting feelings about the decision.[355] Simply because every member of the mob who gathered to oppose the desegregation of Little Rock Central High School in 1957 was white does not mean that all white people were hardliners on the question of racial integration. Legal history would do well to consistently highlight the wide array of southern white attitudes regarding race.

c. African-Americans.—A contested-constitutionalist approach to understanding the rich set of reactions to *Brown* also requires emphasizing that black people did not, contrary to popular perception, universally embrace the decision calling for school desegregation.[356] A poll conducted by the American Institute of Public Opinion in February 1956, for instance, revealed that a mere 53 percent of black southerners approved of *Brown*.[357]

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352. JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975, at 4 (2006).

353. *Id.*; *see also* Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1 ("Segregation was a fact about my universe; it seemed no more 'right' or 'wrong' than the placement of the planets in the solar system. It simply was.").

354. SOKOL, *supra* note 352, at 149 (describing white riots and hangings in effigy in response to judicially enforced integration of the University of Georgia as late as 1961).

355. *Id.* at 115.

356. Though Klarman's book cites a Gallup poll conducted in 1955 that revealed modest levels of black support for *Brown*, *see* KLARMAN, *supra* note 10, at 352, the book dedicates surprisingly little attention to misgivings among blacks regarding the wisdom of pursuing school desegregation.

357. Erskine, *supra* note 276, at 140. More than one-third (36 percent) of black southerners disapproved of the decision, and 11 percent expressed no opinion. *Id.*

Notably, another AIPO poll conducted in November 1957—approximately twenty-one months later—found that a higher percentage of black southerners (69 percent) registered approval of *Brown* and a much lower percentage of black southerners (13 percent) expressed disapproval. *Id.* The percentage of black southerners expressing no opinion of the decision increased to 18 percent. *Id.* Do these strikingly different results mean that the February 1956 poll somehow failed to gauge the accurate level of pro-*Brown* sentiment among blacks in the South? It seems improbable. Rather, the volatile poll results likely stem from the cataclysmic events that surrounded the integration of Little Rock Central High School in September 1957. Those events, which dominated

Although it is tempting to think that many black respondents may have publicly dissembled to poll takers when they were in fact privately exultant, that thought is compromised by the fact that black respondents expressed a good deal more enthusiasm for other racially egalitarian policies. Indeed, another poll also taken in 1956 revealed that more than 80 percent of southern blacks approved of an Interstate Commerce Commission decision invalidating Jim Crow transportation laws.[358]

The precise reasons leading black southerners to disapprove of *Brown* are surely complex. Despite that complexity, however, it remains well worth contemplating at some length what may have motivated so many black southerners—the very people who were believed to be the most immediate beneficiaries of *Brown*—to express disapproval of that decision. Historian James T. Patterson has noted the decidedly mixed reaction to *Brown* among blacks and offered potential reasons why some blacks may have expressed wariness. "Some of those who said that they disapproved of *Brown* had no great wish to have their children mix with white people," Patterson wrote. "Others suspected that desegregation would force them to assimilate into white culture. Still others, proud of their schools, worried about the impact of the decision on black educators."[359] More recently, Stuart Buck has noted that the all-black school—whatever its considerable shortcomings—"was the most important institution in the black community, next to the church."[360] Some black citizens during the mid-1950s doubtlessly understood that the destruction of Jim Crow also augured the destruction of that institution.[361] An additional reason for blacks' circumspection regarding *Brown* may have stemmed from anticipating that merely because blacks and whites would—eventually—attend the same schools did not necessarily mean that they would attend the same classes.[362] In 1955, Zora Neale Hurston articulated the southern black resistance to *Brown* that stemmed from racial pride. "The whole matter revolves around the self-respect of my people," Hurston wrote.

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the national news, had the effect of making *Brown* tangible and may have (in the minds of more black southerners) equated expressing disapproval of the decision with a belief in white supremacy.

358. *Id.* at 144. Professor Gerald Rosenberg has noted the discrepancies among black southerners' attitudes toward desegregating schools and railcars. *See* ROSENBERG, *supra* note 124, at 132.

359. PATTERSON, *supra* note 314, at xxvi.

360. STUART BUCK, ACTING WHITE: THE IRONIC LEGACY OF DESEGREGATION 58 (2010).

361. *See id.* at 73 (quoting William Mansel Long of Tuscumbia, Alabama as saying: "The Supreme Court decision of 1954 didn't give us school integration in Tuscumbia, it gave us school elimination. It eliminated the black schools and forced the black children to go to the white school.").

362. *See id.* at 116–24 (analyzing the racial dimensions of "tracking," i.e., sorting students by perceived academic ability).

"How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them?"[363]

Prominent black citizens, both before and after *Brown*, repeatedly warned of the dangers of prioritizing school integration in the quest for racial equality. In 1935, nearly two decades before the Court decided *Brown*, W.E.B. Du Bois contended that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education."[364] Du Bois further cautioned that "[a] mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad."[365] Even Martin Luther King, Jr.—for many, the very embodiment of the hope for an integrated society[366]—is reported to have privately expressed much the same sentiment in a 1959 conversation with a teacher from an all-black high school in Montgomery, Alabama.[367] "I favor integration on buses and in all areas of public accommodation and travel. I am for equality. However, I think integration in our public schools is different," said King, who had studied in both segregated and integrated school environments.[368] "In that setting, you are dealing with one of the most important assets of an individual—the mind," King contended. "White people view black people as inferior. A large percentage of them have a very low opinion of our race. People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls."[369]

As the dispute about implementing *Brown* turned from combating segregation to achieving integration, black citizens retained deep divisions. In 1976, Derrick Bell contended that the black community divided sharply regarding the wisdom of civil rights attorneys' identifying racial integration, rather than excellence in education, as the ultimate goal.[370] Bell suggested that blacks were principally divided by economic class regarding the value of integration, with some blacks favoring excellent schools (whatever their

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363. Zora Neale Hurston, *Court Order Can't Make Races Mix*, ORLANDO SENTINEL, Aug. 11, 1955, *reprinted in* FOLKLORE, MEMOIRS, AND OTHER WRITING 956 (Cheryl A. Wall ed., 1995).

364. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

365. *Id.*

366. *See* Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 601 (2008) (noting that King "offered the most stirring and ambitious vision of integration for this nation, beyond anything that the nation achieved even at the height of judicially-monitored school desegregation").

367. Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, § 7, at 8 (book review).

368. *Id.* For an account of King's educational background, see DAVID L. LEWIS, KING: A BIOGRAPHY (1978).

369. Freedman, *supra* note 367.

370. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

racial composition), and more affluent blacks valorizing racial integration.[371] In a detailed exploration of the quest for integration in Atlanta, Georgia during the early 1970s, however, Tomiko Brown-Nagin usefully interrogated Bell's narrative.[372] Brown-Nagin found that black Atlantans' divisions regarding integration also occurred within economic classes: "Working-class clients did not uniformly oppose racial-balance orders, and school integration was not advocated and imposed by a unified group of middle-class decision makers from outside of the city."[373] To the contrary, Brown-Nagin contended that middle-class blacks in fact opposed school desegregation in order "to protect black middle-class employment interests and to preserve a select group of segregated, but highly regarded, schools that catered to the children of Atlanta's African American elite."[374] Whatever the precise explanation for anti-*Brown* sentiment among black southerners, historical accounts attendant to contested constitutional values should explore the varied responses to the decision and its aftermath in their full complexity.

2. Against Inevitability.—The notion that the Court in *Brown* "conver[ted] . . . an emerging national consensus into a constitutional command" betrays a vivid instance of the backward-looking historical inevitability that mars much of consensus constitutionalism.[375] Indeed, despite the analytical shortcomings of historical approaches predicated on inevitability, Klarman has nevertheless characterized progress on the racial front as "inevitable," contending that racial reform in America after 1945 would have certainly occurred even had the judiciary abstained from resolving the race question.[376] "[A] variety of deep-seated social, political, and economic forces . . . would have undermined Jim Crow regardless of Supreme Court intervention," Klarman wrote.[377] These forces, Klarman suggested, "were propelling the nation ineluctably toward greater racial equality."[378] Although he has softened some of his initial counterintuitive claims regarding *Brown* since they appeared in print,[379] Klarman continues to hold fast to the

371. *See id.* at 489–92.

372. *See* Brown-Nagin, *supra* note 262, at 1925 ("[T]he historical record supports a correlation between remedial preferences and class that is significantly different from, and indeed in some ways the opposite of, that supposed by Bell.").

373. *Id.* at 1925–26.

374. *Id.* at 1926.

375. KLARMAN, *supra* note 10, at 310.

376. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, *supra* note 226, at 10 ("[R]acial change in America was inevitable owing to a variety of deep-seated social, political, and economic forces.").

377. *Id.*

378. Klarman, *supra* note 1, at 20.

379. *See* David J. Garrow, *"Happy" Birthday,* Brown v. Board of Education*?:* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 716 (2004)

inevitability thesis. As he writes in the concluding paragraph of *From Jim Crow to Civil Rights*, "[W]hile *Brown* did play a role in shaping both the civil rights movement and the violent response it received from southern whites, deep background forces ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do."[380]

Contested constitutionalism, unlike its consensus-based counterpart, generally attempts to steer clear of deeming historical developments "inevitable" or "ineluctable." Such terminology fails to convey the way in which events involving human beings often defy prediction. Instead of inevitability, constitutional history grounded in contest and conflict emphasizes the contingency of historical developments. The emphasis on contingency has the virtue of not only making for richer historical understanding but also of more accurately recreating the world that judges contemplate when they decide cases. As discussed above, judges cannot know with certainty whether something that seems to be a growing trend will harden into a broadly held norm or whether a budding notion will prove to be of merely passing fancy.

Given that consensus constitutionalists vigilantly criticize scholars who deride Court decisions by viewing them with modern eyes,[381] it is genuinely confounding that they fall into the inevitability trap. When the subject matter principally involves black citizens, moreover, historians should be particularly reluctant to invoke ideas of "inevitability." After all, the story of blacks within the United States is not one of steady progress, with each decade's racial climate representing an improvement upon the preceding one. Following World War II, as consensus constitutionalists note, the times certainly appeared ripe for a sustained period of strides toward racial equality.[382] Yet the times also appeared ripe for such a sustained period immediately following the Civil War.[383] That moment, alas, proved ephemeral.[384]

Without the Court's invalidation of Jim Crow, of course, it is impossible to know for certain whether demands for formal racial equality would have been heeded. Rather than depicting judicial intervention as either irrelevant or "almost perverse" in its effect on the nation's inevitable embrace of racial

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(book review) (describing how Klarman's book, unlike an earlier article, allowed that *Brown* did in fact meaningfully inspire blacks to challenge Jim Crow).

380. KLARMAN, *supra* note 10, at 468.

381. *See supra* text accompanying notes 170–73.

382. *See* FRIEDMAN, *supra* note 11, at 243 ("Racial attitudes in the nation were undergoing a substantial transformation by the 1940s. Much of this had to do with the Second World War."); KLARMAN, *supra* note 10, at 173–74 ("By the 1940s, long-term forces for racial change that had antedated World War II—urbanization, industrialization, the Great Migration, and educational advancement—were producing significant results. The war magnified these forces.").

383. *See* JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

384. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 28–29 (2d rev. ed. 1966).

egalitarianism,[385] it comes closer to the mark to acknowledge that the Court provided advocates of racial equality with a powerful rhetorical and moral weapon.[386] Without Court intervention, in other words, it would have been impossible in 1955 for a twenty-six-year-old Martin Luther King, Jr. to claim as the freshly anointed head of the Montgomery Improvement Association, "If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong."[387] Without Court intervention, it would have been impossible in 1963 for President John F. Kennedy to claim that, with respect to civil rights, "[w]e are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution."[388] It seems dubious, then, that in the sphere of racial inequality the Court's intervention did not meaningfully alter and shape the historical developments that followed in its wake.[389]

B. Countermajoritarian Capabilities, Past and Future

1. Interracial Marriage.—In exploring the Court's involvement with race cases during the period immediately following *Brown*, consensus constitutionalists often note that the Court encountered an (unwanted) opportunity to eliminate prohibitions on interracial marriage in 1955. In *Naim v. Naim*, the Virginia Supreme Court upheld a state statute forbidding white citizens from marrying a person of another race.[390] The Court sought to rid itself of *Naim* (which came to the court as an appeal rather than as a petition for certiorari) as quietly as possible. The Justices dodged *Naim* not because they thought that Jim Crow marriage laws were legally or logically

385. Klarman, Brown, *Racial Change and the Civil Rights Movement*, *supra* note 226, at 76.

386. Klarman has not advocated a consistent line on whether *Brown* made a direct, positive difference in the fight for racial equality. Initially, he cast grave doubt regarding *Brown*'s inspirational importance for the civil rights movement. *See id.* at 84. Toward the end of *From Jim Crow to Civil Rights*, however, Klarman reversed course and allowed that the decision "plainly inspired blacks," as it "furthered the hope and the conviction that fundamental racial change was possible." KLARMAN, *supra* note 10, at 463. Professor Garrow took early notice of Klarman's evolution on this point. *See* Garrow, *supra* note 379, at 716.

387. Martin Luther King, Jr., Speech at Holt Street Baptist Church, Montgomery, Alabama (Dec. 5, 1955), *reprinted in* EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS—A READER AND GUIDE 44, 45 (C. Carson et al. eds., 1987). For an examination of King's significance for constitutional thought more broadly, see Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

388. Robert E. Gilbert, *John F. Kennedy and Civil Rights for Black Americans*, 12 PRESIDENTIAL STUD. Q. 386, 396 (1982).

389. For analysis of *Brown*'s tangible impact on the bus boycott in Montgomery, Alabama, see Garrow, *supra* note 379, at 717.

390. 87 S.E.2d 749, 756 (Va. 1955).

distinct from Jim Crow education laws.[391] Instead, the Court feared that invalidating anti-miscegenation laws so closely on the heels of *Brown* would compromise the validity of the school desegregation decisions because opposition to interracial marriage was so widespread.[392] As Klarman has noted, "[O]pinion polls in the 1950s revealed that over 90 percent of whites, even outside the South, opposed interracial marriage."[393]

Consensus constitutionalism suggests that the Court wisely decided to bide its time in resolving the anti-miscegenation issue rather than rushing headlong into a fight that it could not win. Legal scholars have debated for decades whether the Court's evasion of *Naim* can be justified on prudential grounds, even if it cannot be so justified on strictly jurisprudential grounds. Where Alexander Bickel defended judicial evasiveness (at least in certain circumstances), Gerald Gunther famously skewered Bickel for encouraging the Court to be one hundred percent principled, but only twenty percent of the time.[394] Although the contours of the Bickel–Gunther debate are familiar, what has remained severely underexplored is the often unstated assumption underlying consensus constitutionalism's support for the nondecision in *Naim*: the Court waited to strike down prohibitions on interracial marriage until national sentiment demanded such a decision. This assumption, as it turns out, demands revisiting.

Sunstein details the Bickel–Gunther dispute at length and makes clear that he believes that Bickel gets the better of the argument.[395] Sunstein also contends that the Court's strong suspicion that an anti-miscegenation decision would generate outrage "helps to explain the view that the Court was right not to invalidate the ban on racial intermarriage in the 1950s" when it evaded the issue in *Naim*.[396] Friedman's book comes closest to articulating what generally remains implied among consensus constitutionalists.[397] In his

391. *See* KLARMAN, *supra* note 10, at 321–22 (identifying the Court's central concern as the practical problem of addressing the heated issue of anti-miscegenation laws so soon after *Brown*).

392. *Id.*

393. *Id.* at 321.

394. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

395. *See* SUNSTEIN, *supra* note 13, at 127–39 (concluding that, while Bickel's theory neglects some important considerations, Gunther's view is oversimplified).

396. *Id.* at 164.

397. Consensus constitutionalism often simply omits addressing *Loving* altogether. It is somewhat perplexing that Klarman's book, which begins chronicling Court decisions involving race toward the end of the nineteenth century, stops just shy of addressing the Court's decision in *Loving*, widely deemed one of the most significant decisions involving racial equality during the twentieth century. *See, e.g.*, Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1447 (2004) ("*Loving* marked the crystallization . . . of the antisubordination principle . . . ."). When Klarman has mentioned *Loving* in law review writings, he has tended to do so only in passing—and in a way that is consistent with the consensus constitutionalist framework. *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 485–86 (2005) ("At some point, the Court is likely to constitutionalize a newly emerging consensus and invalidate bans on same-sex

discussion of race during the 1960s, Friedman writes, "Finally, the Court mustered the wherewithal to face the one racial issue it had feared to confront amid all the controversy . . . ."[398] Recounting the history of *Naim*, Friedman notes, "Mixed marriage was a sensitive issue throughout the country . . . . It was only in 1967, some thirteen years after *Brown* and well after passage of the Civil Rights Act, that the Court finally struck down such laws as unconstitutional, in the aptly named case *Loving v. Virginia*."[399] Friedman's narrative, consistent with the conventional understanding within legal circles more broadly,[400] suggests that by the time the Court decided *Loving* the "controvers[ial]" and "sensitive" feelings regarding interracial marriage had dwindled.[401] National values embraced racial egalitarianism in the mid-1960s (as demonstrated by adoption of the 1964 Civil Rights Act), Friedman intimates, and those values then included approval of (and certainly not widespread disapproval of) interracial marriage.

The racial environment in which the Court decided *Loving*, however, was far more disapproving of interracial marriage than the consensus constitutionalist narrative would suggest. Whites had, it concededly appears, become more accepting of such unions since the 1950s when, as Klarman notes, a Gallup poll indicated that more than 9 out of 10 expressed disapproval.[402] Yet white racial enlightenment on this score remained extremely limited, even in the late 1960s. A Gallup poll conducted in 1968—one year after *Loving*—revealed that 3 out of 4 whites continued to disapprove of interracial marriages.[403] The nationwide response (i.e., all races rather than only whites) was not much different, with 73 percent registering disapproval and just 20 percent indicating approval.[404] Not only was there an absence of consensus voicing approval of interracial marriage in 1968, national consensus—to the extent that one existed—affirmatively *disapproved* of the practice. It is certainly true that only sixteen states had laws on the books that *Loving* upended,[405] but that is not because citizens in

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marriage, much as the Justices struck down restrictions on interracial marriage in *Loving v. Virginia* (1967) after the civil rights movement had rendered anachronistic that last formal vestige of Jim Crow.").

398. FRIEDMAN, *supra* note 11, at 249.

399. *Id.* at 249–50.

400. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in The Twentieth Century*, 100 MICH. L. REV. 2062, 2286 (2002) (claiming that "it took half a generation, and a sea change in our culture, for the Court to get from *Brown* to *Loving*").

401. FRIEDMAN, *supra* note 11, at 249–50.

402. *See* KLARMAN, *supra* note 10, at 321.

403. *See* Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx (noting that—among whites respondents to interracial marriage in 1968—75 percent disapproved, and just 17 percent approved).

404. *Id.*

405. Loving v. Virginia, 388 U.S. 1, 6 (1967).

the remaining thirty-four states generally thought that race was irrelevant to marital considerations. A clear majority of Americans thought that race was exceedingly relevant to marital considerations, and had no compunction about expressing this notion to pollsters. It is important to note that as late as 1994, Gallup found that only 48 percent of Americans expressed approval of interracial marriage.[406] The first year that Gallup registered a majority approving of interracial marriage occurred in 1997.[407]

That the overwhelming majority of Americans disapproved of interracial marriage when the Court issued *Loving* in 1967 reveals a couple of different things. First, it undercuts the idea that the Court possesses virtually no power to extend protection to minorities who are not held in high esteem by a majority or a near majority of the populace. Approval of interracial marriage at the time of *Loving* was a decidedly minority phenomenon. Second, the decision helps to underscore the very real stakes that are raised by adhering to the slogan that *the courts should not get out too far in front of the people.*[408]

The American public's widespread disapproval of interracial marriage during the 1960s also offers a particularly stark caution against the way that consensus constitutionalism sometimes draws upon public opinion. It is important to emphasize that the public opinion polls that consensus constitutionalists cite do not always expressly ask respondents for a view regarding whether a program is legal or constitutional, but instead ask merely for a policy preference.[409] At least some evidence suggests that, in the minds of many Americans, the sphere of policy, on the one hand, and the sphere of legality, on the other, may not be coextensive.[410] In the context of interracial

406. *See* Carroll, *supra* note 403 (noting that 37 percent of respondents disapproved of interracial marriage and 15 percent expressed no opinion).

407. *Id.* In 1997, the approval percentage for interracial marriage increased to 64 percent. *Id.*

408. *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1081 (2004) ("*Lawrence* and *Romer* undid most of the pluralism damage of *Hardwick*—but without making the mistake of getting too far ahead of the country.").

409. For example, in analyzing the Court's decisions regarding affirmative action at the University of Michigan, Friedman cites a poll conducted in 2003 by the Pew Research Center to show a shift in public attitudes on the issue of affirmative action between 1995 and 2003. FRIEDMAN, *supra* note 11, at 361. The poll cited by Friedman, however, did not question the constitutionality of affirmative action, but instead asked, "In order to overcome past discrimination, do you favor or oppose affirmative action programs. . . ?" News Release, Pew Research Ctr. for the People & the Press, Conflicted Views of Affirmative Action 1 (May 14, 2003), *available at* http://peoplepress.org/reports/display.php3?ReportID=184.

410. A recent divergence of views regarding policy preference, on the one hand, and legality, on the other, arose during the controversy surrounding the plan to build a mosque and Islamic cultural center in Manhattan, close to the site of the terrorist attacks that occurred on September 11, 2001. Although a poll conducted in August 2010 revealed that only 30 percent of respondents indicated that the building's proposed location was "appropriate," more than 60 percent of respondents agreed that "the Muslim group has the right to build a mosque there." FOX News Poll 1 (Aug. 13, 2010), *available at* http://www.foxnews.com/projects/pdf/081310_MosquePoll.pdf.

marriage, for example, the percentage of people who expressed *disapproval* of interracial marriages has exceeded the percentage of people who suggested that interracial marriages should be *illegal* since at least the 1960s.[411] In 1968, when Gallup found that 75 percent of whites "disapprove[d]" of interracial marriage, the University of Chicago's National Opinion Research Center found that 56 percent of whites thought "there should be laws against" it.[412] It is far from astonishing, though, that consensus constitutionalists do not generally highlight the difference between polling questions inquiring about policy views and questions inquiring about legal views.[413] Much of their view of constitutional interpretation, after all, nearly insists upon eliding the distinction between what people (including judges) desire as a first-order preference and what they believe the law requires.

2. Same-Sex Marriage.—The Court's decision in *Loving* leads to the constitutional question of same-sex marriage. To state only the most obvious connection, both matters involve two people who wish to wed each other, but are prohibited from doing so because of tradition and the attendant deep ob-

411. Gallup's poll asked respondents whether they "approve[d] or disapprove[d]" of interracial marriage. Carroll, *supra* note 403. National Opinion Research Center's poll asked respondents whether "there should be laws against" interracial marriage. SCHUMAN ET AL., *supra* note 286, at 108 tbl.3.1B.

412. *See* Carroll, *supra*, note 403; SCHUMAN ET AL., *supra* note 286, at 106–08 tbl.3.1B. Intriguingly, another Gallup poll found on March 10, 1965 that a bare majority of the nation approved anti-miscegenation laws, 48 percent to 46 percent. *See* Hazel Erskine, *The Polls: Interracial Socializing*, 37 PUB. OPINION Q. 283, 292 (1973). It bears mentioning, however, that the polling question's phrasing may have overstated the opposition to anti-miscegenation laws. The question stated: "*Some states* have laws making it a crime for a white person and a Negro to marry. Do you approve or disapprove of such laws?" *Id.* (emphasis added). One need not have been an especially keen student of current affairs in 1965 to realize that "some states" effectively meant states in the South. And many nonsouthern respondents—and not a few southern respondents—would have wanted to be understood as rejecting that region's racial recalcitrance. Indeed, given that the poll was taken just days after Bloody Sunday occurred in Selma, Alabama, it is telling that more respondents nevertheless approved than disapproved of such laws. Rather than evincing racial egalitarianism, it seems plausible many respondents who disapproved of "some states'" laws were evincing anti-antiegalitarianism. *Cf.* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

In all events, as the above analysis of post-*Brown* northern racial attitudes suggested, it seems incorrect to understand this 1965 poll to indicate a widespread desire for equality regarding love across racial lines. In August 1967, shortly after the Court issued *Loving*, a Harris poll asked: "As far as your own personal feelings go, would you be personally concerned or not if your own teenage child dated a Negro?" Erskine, *supra*, at 289. Ninety percent of white respondents indicated that they would be concerned. It seems safe to believe, then, that when Chief Justice Earl Warren in *Loving* excoriated justifications for Virginia's anti-miscegenation laws as amounting to "White Supremacy," 388 U.S. at 7, he was not articulating the consensus views of American society.

413. Rosen notes the difficulty of using polling about policy preferences as a proxy for legal views. *See* ROSEN, *supra* note 12, at 9 ("Polls are hardly a reliable indicator, since polls seldom ask people what they think about constitutional issues, as opposed to policy issues . . . ."). Having duly noted the difficulty, however, his argument nevertheless often draws upon such polling.

jections of many individuals who wish to continue that tradition. Mildred Loving, the black woman who married a white man in the case bearing her name, observed this very connection when she announced her support of gay marriage in 2007.[414] Where tradition once held that a person may marry only a person of the same race, tradition today generally holds that a person must not marry a person of the same sex.[415]

Apart from the substantive issue of whether such analogies are doctrinally legitimate, *Loving* raises the question of when an oppressed group should seek to have the judiciary confer recognition upon a contested right. This very timing question was, of course, debated intensely in 2009 after a legal team, led by David Boies and Theodore Olson, the erstwhile antagonists from *Bush v. Gore*, filed a lawsuit in a federal district court in California.[416] Many advocates of gay equality contended that, while they shared the lawsuit's goal, it was simply "premature" to request judicial relief.[417] Evincing an unmistakable manifestation of consensus constitutionalism, Human Rights Campaign and Lambda Legal, along with other organizations supportive of same-sex marriage, issued a press release asserting, "The history is pretty clear: the U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states."[418] After all, voters in California had only months earlier effectively reversed a California Supreme Court decision that conferred the right to gay marriage.[419] But the individuals who claimed that it was simply too early to push for the federal recognition of same-sex marriage may prove unwisely and unnecessarily beholden to the consensus-constitutionalist mindset.

Recent statements about gay marriage from two of today's most distinguished legal thinkers acutely display the difficulty of gauging contemporaneous views regarding a hotly contested question. In the context of Court decisions vindicating gay rights, Sunstein suggests that such decisions have not "come as bolts from the blue."[420] Instead, Sunstein

414. Mildred Loving, *Loving for All* (June 12, 2007), http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving-statement.pdf; *see also* Susan Dominus, *The Color of Love*, N.Y. TIMES, Dec. 28, 2008, (Magazine), at 21 (chronicling Mildred Loving's process of embracing gay marriage).

415. I use the word "generally" here because five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) along with Washington, D.C., currently issue marriage licenses to same-sex couples. Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A20.

416. Jesse McKinley, Bush v. Gore *Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1.

417. *See id.* at A15 (quoting one Lambda Legal official as saying, "We think it[']s risky and premature.").

418. Press Release, Am. Civil Liberties Union et al., Make Change, Not Lawsuits 3 (May 27, 2009), *available at* http://www.aclu.org/files/pdfs/lgbt/make_change_20090527.pdf.

419. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). The California Supreme Court upheld Proposition 8 in *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009).

420. SUNSTEIN, *supra* note 13, at 4.

contends that these cases, such as *Romer v. Evans*[421] and *Lawrence v. Texas*,[422]

> emerged from a social context in which such discrimination seems increasingly difficult to defend—in which We the People have been coming, in fits and starts, to think that gays and lesbians should not be put in jail for consensual relationship[s], and that discrimination against them, at least by government, is hard to defend.[423]

He also suggests that same-sex marriage is a modern analogue to *Naim* where "consequentialist considerations . . . justify a degree of judicial hesitation."[424] Regarding the next frontier for gay equality in the federal judiciary, Sunstein sounds a note of caution: "If the Court ever does conclude that states cannot ban same-sex marriage, it will only be after much of the public has already done so."[425] Last year, Judge Richard A. Posner similarly wrote, "Until homosexual marriage becomes as uncontroversial in most states as racial intermarriage had become by 1967, the Court will, in all likelihood, stay its hand."[426]

The statements of Sunstein and Posner possess an intuitive appeal, as few issues seem more hot-button and divisive in modern America than gay marriage. These statements, however, may betray serious misapprehensions. Polling data reveals that, Sunstein's intimation notwithstanding, "much of the public" had already concluded that states should—as a matter of law—no longer ban same-sex marriage by the time that he wrote that statement. Although the responses to different polls regarding gay marriage demonstrate volatility, a CNN poll taken in 2009 revealed that 45 percent of respondents thought that the Constitution conferred a right to gay marriage while 54 percent of respondents thought no such right existed.[427] These findings, moreover, are hardly aberrant. Indeed, a Gallup poll taken in 2007 revealed that 46 percent of respondents thought that the law should permit same-sex couples to marry and 53 percent thought that the law should not permit them to do so.[428] Most recently, a CNN poll taken in August 2010 found that 52

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421. 517 U.S. 620 (1996).

422. 539 U.S. 558 (2003).

423. SUNSTEIN, *supra* note 13, at 4–5.

424. *Id.* at 164.

425. *Id.* at 5. *See* Eskridge, *supra* note 408, at 1081 ("If most Americans believe that gay people are . . . not qualified for the elevated status of civil marriage, the judiciary not only cannot, but ought not, impose same-sex marriage on the hesitant body politic.").

426. Richard A. Posner, *The Race Against Race*, THE NEW REPUBLIC (Jan. 29, 2010), http://www.tnr.com/book/review/the-race-against-race.

427. CNN/Opinion Research Corp. Poll 3 (Aug. 11, 2011), *available at* http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a.pdf.

428. Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP (May 29, 2007), http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx (reporting data for the Gallup Poll for May 10–13, 2007). Since 2007, this poll has found that support for gay marriage has somewhat eroded. The poll taken in May 2009 revealed that 40 percent of respondents thought that such marriages should be so recognized and 57 percent thought that the law should not

percent of respondents indicated that gays and lesbians "should have a constitutional right to get married and have their marriage recognized by law as valid."[429]

Transitioning from law and toward approval—an issue Judge Posner gestured toward by addressing the "[]controversial" nature of same-sex marriage—precious little data exists on this question. Polling questions about gay marriage, for whatever reason, are almost invariably phrased in terms of legal views rather than policy preferences. The available polling reveals, though, that same-sex marriage (at least when considered on a national basis) has long garnered more approval and less disapproval than interracial marriage had when the Court decided *Loving* in 1967. A Quinnipiac University poll measured low support, finding that only 36 percent of respondents supported gay marriage and 55 percent opposed gay marriage.[430] But even these results reveal that gay marriage enjoys broader support and less opposition than interracial marriage enjoyed even post-*Loving*.[431] These surveys do not, of course, tell the whole story regarding the likelihood of public acceptance.[432] But neither can they be ignored in wrestling with the question of whether the moment is ripe to have the Court resolve the same-sex marriage question.

If the Lovings and their attorneys had been driven by polling data on interracial marriage when they initially filed their lawsuit in 1963,[433] it seems highly implausible that they would have decided to contest Virginia's anti-miscegenation provision. Indeed, approximately two weeks before they filed, *Newsweek* ran an article that featured polling results demonstrating that overwhelming disapproval of interracial relationships was a *national*

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recognize these unions. Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP (May 27, 2009), http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx. But, one year later, in May 2010, respondents indicating gay marriages should be recognized had increased to 44 percent; 53 percent said that such unions should not be recognized. *See* Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Values and Beliefs*, GALLUP (May 24, 2010), *available at* http://www.gallup.com/poll/128297/Gay-Marriage-May-2010.aspx.

429. CNN/Opinion Research Corp. Poll, *supra* note 427, at 3.

430. Quinnipiac Univ. Poll (July 17, 2008), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

431. Recall that in 1968 just 20 percent of Americans approved such unions and 73 percent disapproved. *See* Carroll, *supra* note 403.

432. Perhaps the most important consideration that is excluded from this data is the *intensity* of support and opposition. A 2009 NBC News/Wall Street Journal poll measured the intensity of respondent sentiments regarding the right to enter into same-sex marriage and found that among the categories—"strongly oppose," "somewhat oppose," "somewhat favor," and "strongly favor"—the largest group (40 percent) formed the "strongly oppose" camp. "Strongly favor" was the second largest group, but well behind at 26 percent. NBC News/Wall Street Journal Survey 23 (Oct. 2009), *available at* http://online.wsj.com/public/resources/documents/wsjnbc-10272009.pdf.

433. 388 U.S. at 3.

phenomenon.[434] "The closest that whites came to unanimity on any racial question was over the issue of interracial dating, which many view as the prelude to intermarriage," *Newsweek* observed. "Ninety per cent of all whites throughout the country said they would be concerned if their teen-ager dated a Negro. The percentage is 97 in the South. Elsewhere the figure falls no lower than 88 per cent."[435] In 1963, it seems clear, the Lovings did not have consensus on their side. But perhaps fueled by a "romantic" belief in both their love and—not incidentally—in the Court that would decide their fate, the Lovings decided to file a lawsuit anyway. Just because a view of the Court may be romantic, in other words, does not make it foolish.

Yet, even if one subscribes to the notion that the Court requires approval from approximately 50 percent of the public or greater to issue a particular outcome, it is extremely doubtful that an individual who wishes to have a legal claim vindicated would be well-advised to wait until after polls register the requisite level of support before simply *filing* suit. Lawsuits often take a number of years to make their way to the Court, and it is certainly possible that public opinion polling at the time of filing that reflects merely nascent support will have surpassed the majority level of public support by the time that the Court makes a decision.[436] Consensus, at least of the watered-down variety that consensus constitutionalists often cite, may sometimes materialize right before our very eyes.

Despite the widespread idea that it is vital for a consensus to emerge on the question of same-sex marriage before filing a federal lawsuit, ample reason exists to believe that those supporting expanded marital rights permitted a prudent length of time to elapse before raising the contested legal question. The period of time that is required to elapse between a potential legal victory that is thought initially by some to be unfathomable and the time that actual victory is secured can be shockingly short.[437] *Brown* and *Loving*, it is worth remembering, were decided only thirteen years apart. *Loving*, moreover, may actually stop the clock three years too late from the point when the Court first applied the racially egalitarian principle to matters of sexual intimacy. In *McLaughlin v. Florida*, decided in 1964, the Court invalidated a statute that criminalized cross-racial cohabitation with members

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434. *How Whites Feel About Negroes: A Painful American Dilemma*, NEWSWEEK, Oct. 21, 1963, at 44.

435. *Id.* at 49. The accompanying article featured a quotation from a San Diego, California resident stating: "Shaking hands is OK, but kissing—no thanks." *Id.* Similarly, the article quoted a Pennsylvania resident stating: "I don't like to touch [blacks]. It just makes me squeamish. I know I shouldn't be that way, but it still bothers me." *Id.* at 50.

436. There is never any guarantee, of course, that public approval will continue to expand rather than shrink. *See supra* text accompanying notes 150–51.

437. Intriguingly, Professor Sunstein has observed that "norm entrepreneurs" can, under the right circumstances, help to facilitate dramatic societal transformations in surprisingly short order. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929–30 (1996) (identifying the end of South African apartheid as such an instance).

of the opposite sex, a ruling that doctrinally made *Loving*'s result nearly axiomatic.[438] Adopting *McLaughlin* rather than *Loving* as the relevant endpoint, then, reduces the period of time between *Brown* and the Court's expressed willingness to extend racial egalitarianism to sexual intercourse—a ruling that would have supposedly been unimaginably incendiary had it been issued at the time of *Naim*—to a mere ten years.[439]

If contemporary suits seeking same-sex marriage are akin to *McLaughlin* and *Loving*, what judicial opinion serves as the *Brown* of the gay rights movement? In other words, what is the appropriate time from which to start the clock running? The conventional view, at least in this instance, seems to be the correct one, meaning *Lawrence v. Texas* serves as the equivalent of *Brown*.[440] *Lawrence*, like *Brown*, was widely understood as placing the fundamental issue of full formal equality squarely on the table—something that *Romer* did not achieve.[441] Thus, *Lawrence* elicited intense opposition among some people who derided the decision as illegitimate not so much because they thought that sodomy should be prosecuted, but because they feared that the decision would lead to same-sex marriage.[442] Although *Romer* surely received a hostile reception in certain quarters,[443] its reception paled in comparison to *Lawrence*'s.[444]

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438. 379 U.S. 184, 196 (1964). *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 272 (2003) (contending that *Loving* "was practically a foregone conclusion, especially since, in *McLaughlin v. Florida* (1964), the Court had already invalidated a Florida statute that criminalized interracial fornication").

439. *See* Posner, *supra* note 426, at 4 (noting the at least somewhat mysterious phenomenon by which *Loving*, rather than *McLaughlin*, is the celebrated breakthrough); *see also* Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1167 (2006) ("*McLaughlin v. Florida* gets short shrift in standard historical accounts of the legal regulation of race, sexuality, and interracial intimacy. These accounts usually crest not at *McLaughlin* but rather at *Loving v. Virginia*.").

440. *See, e.g.*, E.J. Graff, *The High Court Finally Gets It Right*, BOSTON GLOBE, June 29, 2003, at D11 (contending that "*Lawrence* is our *Brown v. Board of Education*").

441. In *Romer v. Evans*, the Court invalidated Colorado's effort to prohibit state entities from deeming gays a protected class. 517 U.S. 620, 635–36 (1996). Viewing *Romer* as the *Brown* of gay rights is intriguing not least because doing so would mean that it has already been fifteen years since the nation has contemplated full gay equality, two years longer than the gap between *Brown* and *Loving*. But *Romer* bears a closer resemblance to some of the cases that chipped away at the edifice of Jim Crow that preceded *Brown*. *See, e.g.*, McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637, 640–42 (1950); Sweatt v. Painter, 339 U.S. 629, 635–36 (1950).

442. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at N8.

443. *See* 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

444. *See* Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1 ("Groups representing the socially conservative side of the Republican Party reacted to the decision with alarm and fury."); Kershaw, *supra* note 442 (quoting Professor William Rubenstein as stating "'The right wing is really galvanized by this [decision], throwing down the barricades.'").

Nearly eight years have now elapsed since the Court decided *Lawrence*. On August 4, 2010, Judge Vaughn Walker issued a decision validating the right to gay marriage in *Perry v. Schwarzenegger*, the first federal case raising the issue.[445] Given the lengthy period of appeals and deliberation that accompany most decisions that end up in the Court, and *Perry*'s unusual procedural quirks, it seems plausible that the Court will not decide any same-sex marriage case before approximately 2013.[446] If the Court decided that case or a similar case at that time, the period between *Lawrence* and a decision from the Court would match the period between *Brown* and *McLaughlin*. Two years from now may be too soon for anything resembling consensus to emerge on a divisive question like same-sex marriage. History reveals, however, that it will not be too soon for the Court to recognize that right without unduly imperiling either its own legitimacy or the quest for gay equality.

The point here is not to suggest that, on the tenth anniversary of a Court decision that confers a measure of legitimacy upon a widely-reviled group, magical dust sweeps the nation making it safe for further legal advancement. It is merely to contend that the Court possesses considerably more leeway than the consensus rubric often seems to permit—at least from a forward-looking vantage point. In the event that the Supreme Court should use *Perry* as a vehicle to validate a right to same-sex marriage, it seems plausible that consensus constitutionalists would incorporate the decision into their worldview by attributing it to "an emerging national consensus" regarding marital equality. In reality, though, the decision would more accurately be understood as arising from a deeply contested constitutional landscape. In other words, the decision would constitute judicial business as usual.

Conclusion

In 1968, toward the end of the last book that he would write, Richard Hofstadter offered an incisive (and, almost certainly, self-critical) appraisal of recent developments in his field. Hofstadter wrote:

> If there is a single way of characterizing what has happened in our historical writing since the 1950's, it must be, I believe, the rediscovery of complexity in American history: an engaging and moving simplicity, accessible to the casual reader of history, has given way to a new awareness of the multiplicity of forces. To those who

445. *See* 704 F. Supp. 2d 921 (N.D. Cal. 2010).

446. The federal cases decided by Judge Tauro in July 2010 involving challenges to the Defense of Marriage Act (DOMA) raise—at least potentially—a narrower set of issues than those raised by lawsuits directly challenging state prohibitions on same-sex marriage. *See generally* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (holding that DOMA violated the equal protection principles embodied in the Fifth Amendment); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (holding that DOMA exceeded Congress's power under the Spending Clause and violated the Tenth Amendment).

> find things most interesting when they are simple, American history must have come to seem less interesting in our time; but to those who relish complexity, it has taken on a new fascination.[447]

More than four decades after Hofstadter wrote those words, historians continue to embrace the complex rather than the simple.

Legal academia's external examination of Supreme Court history, in contrast, remains enthralled with simplicity. Law professors should disavow the casual manner in which they invoke consensus and the notion of an emerging national consensus to explain constitutional legal history. Consensus constitutionalism too often obscures the ideological disagreements and even the ideological uncertainty that undergird lawsuits resolved by the Court. Rather than altogether abandoning external inquiries into Court decisions, however, law professors might instead reexamine twentieth-century constitutional history with an alternate external prism, one that places conflict, not consensus, at the analytical center. This Article has employed contested constitutionalism to revise our understanding of *Brown* and *Loving*, two of the most closely examined constitutional decisions throughout the Court's entire existence. Going forward, more legal scholars might contemplate applying contested constitutionalism to provide a richer historical account of many significant events in American legal history.

Yet, important as enriching our historical understanding of Supreme Court decisionmaking is, contested constitutionalism involves considerably more than improving history books. Despite concerns about the supposedly growing chasm between the work of judges and the work of scholars,[448] the manner in which prominent law professors understand and explain the Court's history and its ability to protect minority rights has a way of seeping into the broader intellectual culture. Ultimately, those understandings and explanations exert influence upon how judges perform their jobs. Contested constitutionalism, with its insistence that the Court has in fact often issued decisions that challenge prevailing sentiments, seeks to preserve the Court's countermajoritarian capabilities.

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447. HOFSTADTER, *supra* note 65, at 442.

448. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

The Signaling Function of Religious Speech in Domestic Counterterrorism

Aziz Z. Huq*

A wave of attempted domestic terrorism attacks in 2009 and 2010 has sharpened attention to the threat of domestic-source terrorism inspired or directed by al Qaeda. Seeking to preempt that terror, governments face an information problem. They must separate signals of terrorism risk from potentially overwhelming background noise and persuade juries or fact finders that those signals warrant coercive action. Selection of accurate signals of terrorism danger in the information-poor circumstances of domestic counterterrorism is arguably a central challenge today for law enforcement tasked with preventing further terrorist attacks. To an underappreciated extent, governments have used religious speech as a proxy for terrorism risk in order to resolve this signaling problem. This Article analyzes the legal and policy significance of state reliance upon religious speech as a predictor of terrorism risk. Constitutional doctrine under the Religion Clauses does recognize interests implicated by the signaling function of religious speech. Yet analysis suggests that such doctrinal protection is fragile. Symptomatic of a wider inflexibility of pre-9/11 constitutional doctrine, this doctrinal protection shows little capacity for responsive change. The absence of constitutional barriers, however, does not mean government should persist in relying on religious speech as a signal. Rather, analysis of counterterrorism policy concerns suggests another path. Institutional considerations and an emerging social science literature on terrorism suggest that religious speech is ill suited to the signaling role it now plays. Instead, empirical social science on terrorism points to the epistemic superiority of a different signal: the close associations of a terrorism suspect. The Article concludes by examining the constitutionality of such a signal and elaborating ways that insight from the new social science of terrorism can be realized without compromising important individual interests.

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I. Introduction

Since the September 11, 2001 terrorist attacks, law enforcement agencies in the United States and Europe have strived to anticipate and to intervene early against alleged terrorist conspiracies.[1] Governments focus investigative or regulatory resources on a point substantially before the occurrence of violence, sometimes before clear evidence demonstrates violence to be imminent. This preemptive approach, however, creates an informational problem for governments. They must act without the factual predicates that typically flag criminal violence. Governments, that is, often

1. *See, e.g.*, Memorandum from Att'y Gen. John Ashcroft to Heads of Department Components (Nov. 8, 2001), http://www.justice.gov/opa/pr/2001/November/01_ag_580.htm (announcing that the Justice Department "must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators").

lack reliable signals of the intention to commit or abet violence and must instead identify new signals of dangerousness to serve as proxies for overt evidence of a terrorist threat. Selection of accurate signals of terrorism danger in the information-poor circumstances of domestic counterterrorism is arguably the central challenge for law enforcement tasked with prevention of further terrorist attacks on American soil. The task has taken on new urgency after a wave of domestic-source terrorism incidents in late 2009 and early 2010.[2] Those attempts prompted the White House in the May 2010 National Security Strategy to "underscore[] the threat to the United States and our interests posed by individuals radicalized at home."[3]

My aim in this Article is to evaluate one proxy that governments use as a solution to this signaling problem. Religious speech has to an underappreciated extent[4] become for law enforcement in both the United States and the United Kingdom a signal to identify high-risk terrorist threats. Consider the following examples:[5]

- Federal law enforcement officers arrest a Pakistani immigrant recently returned from what might have been training in a foreign terrorist camp. Unable to prove that the suspect in fact received training, the Government charges him with a "material support" offense[6] in relation to a planned future attack. To show the suspect's intent to commit this future attack, the Government relies on an Arabic note found in his wallet at the time of arrest that reads, "Oh Allah, we place you at their throats, and we seek refuge in you from their evil." The jury convicts.[7]
- Immigration officials refuse entry to a religious scholar—whose sermons and scholarship, they believe, implicitly condone

2. These include the decision of a Somali-American to travel back to Somalia and become the first American suicide bomber; the July 2009 arrest of seven Muslims in North Carolina; the September 2009 arrest of Afghan-born Najibullah Zazi based on allegations that he intended to complete an attack on the New York subway system; the November 5, 2009 shooting spree by Army psychiatrist Major Nidal Hasan at Fort Hood, TX, which left thirteen dead; the December 2009 arrest of Pakistani-American David Headley and others in connection with the 2008 Mumbai attacks; the Christmas Day 2009 attempt by Nigerian Umar Farouk Abdulmutallab to detonate explosives on board Detroit-bound Northwest Air, flight 253; the May 1, 2010 attempt by Pakistani-born American citizen Faisal Shahzad to explode a car bomb in New York's Times Square; and the June 5, 2010 arrest of two New Jersey men allegedly on their way to fight in Somalia. *See generally* Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEXAS L. REV. 1715, 1716 & n.8 (2010) (recognizing the "ascendancy of homegrown terrorism" and discussing the examples listed above as well as others).

3. WHITE HOUSE, NATIONAL SECURITY STRATEGY 19 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

4. *See, e.g.*, Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1419 n.22 (2002) (explicitly declining, in an important article about post-9/11 profiling, to address religious profiling); *infra* subpart II(B).

5. *See infra* Part II.

6. For the various "material support" criminal offenses, see 18 U.S.C. §§ 2339A–2339C (2006).

7. Amy Waldman, *Prophetic Justice*, ATLANTIC MONTHLY, Oct. 2006, at 82.

antidemocratic violence—for fear that he will win converts while a visiting professor at a major university. The scholar is unable to enter the country.[8]

- Days after the September 11 attacks, an imam in a Virginia mosque gives a sermon to a select core group of male congregants, praising resistance to injustice against Muslims. Two of his listeners decide to go to Afghanistan to fight the U.S. forces deployed there. Based on their decision and the contents of his sermon, the imam is charged and convicted on federal conspiracy and incitement charges.[9]

In each of these cases, law enforcement has not had unequivocal evidence of an intention to commit acts of violence. Instead, it has leaned on religious speech or doctrine as a proxy for a suspect's intention to violate the law in the future or to encourage others to violate the law. In this fashion, religious speech plays a signaling function in the course of domestic counterterrorism focused on minority Muslim communities.[10] Attention to the religious speech of these communities is a consequence of al Qaeda's explicitly religious justifications for the September 11 attacks and its subsequent appeals for support grounded in religious solidarity.[11] This attention means immigration officials, prosecutors, and juries are scrutinizing doctrinal intricacies, previously the domain of the devout and scholastic, to discern who among a minority religious or ethnic community poses a terrorist threat.

But is such reliance constitutional? The Religion Clauses of the First Amendment seem, at least on their face, to restrain the government's reliance on such proxies.[12] And even if constitutional, is reliance on religious speech as a signal in the domestic counterterrorism context wise? Under what circumstances does religious speech function as an effective signal of and proxy for the intention to commit terrorist violence? How best is the signaling problem in domestic counterterrorism resolved?

This Article evaluates government reliance on religious speech as a signal in counterterrorism through the lenses of constitutional law and

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8. Pamela Constable, *Divisive Scholar Draws Parallels Between Islam and Democracy*, WASH. POST, Apr. 11, 2007, at B6.

9. Jerry Markon, *Va. Muslim Spiritual Leader Gets Life*, WASH. POST, July 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071301596.html.

10. Predictably, the costs of post-9/11 counterterrorism law enforcement have landed disproportionately on Muslim-American communities. Aziz Huq, *The New Counterterrorism: Investigating Terror, Investigating Muslims*, *in* LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN AN AGE OF TERROR 167, 182 (Richard C. Leone & Greg Anrig, Jr. eds., 2007).

11. *See generally* MARY HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR 7–14 (2006) (summarizing al Qaeda's putative theological justifications for the September 11 attacks); MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 104–05, 109 (Bruce Lawrence ed., 2005).

12. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

counterterrorism policy. Consider first the constitutional question. The government's use of religious speech as a signal of terrorism risk indirectly casts a shadow on the exercise of religious liberties. When the government declares in the context of a criminal investigation or trial that a religious phrase or doctrine will be treated as evidence of terrorist intent, it creates a nontrivial incentive on the part of a suspect's co-religionists not to use that phrase or doctrine. Use of religious speech as a signal thus interposes the government, albeit obliquely, into the ongoing confessional life of a religious community in a way that can change the terms of doctrinal and spiritual practice. The Supreme Court has recognized a religious community's interest in *epistemic autonomy*—a communal freedom to hold and to revise religious views. But doctrinal protection of this epistemic autonomy is fragile. It supplies inadequate resources to resist post-9/11 pressures. This is symptomatic of a wider trend: the failure of pre-9/11 constitutional doctrine to respond to new ways in which constitutional rights are compromised as government confronts a new kind of terrorism threat.

But that does not mean the government should persist in relying on religious speech as a signal. Rather, institutional considerations and an emerging social science literature concerning the etiology of terrorism suggest that religious speech is ill suited to the signaling role it now plays. In institutional terms, government is ill equipped to make judgments about the meaning of religious speech. The error rate in state interpretations of religious speech will hence be high. More importantly, recent empirical social science research concerning the origins and predicates of terrorism suggests that variance in religious speech does not correlate with the risk of terrorist violence. This empirical and social science work suggests the superiority of a different signal: the close associations of a suspect. Terrorism's emergence is regularly associated with the presence of insular groups that break off from the cultural or subcultural mainstream to form their own discrete ethical and normative subcultures. Identification of these insular groups, and not some search for particular kinds of religiosity, provides some guidance as to the likely incidence of terrorist violence.

I compare religious speech and close associations by applying tools developed in the economics literature to solve signaling problems. Economic analysis of signaling problems shows that a signal is effective when "the cost of the signal is negatively correlated with the unseen characteristic that is [sought]."[13] (Consider, for example, the function of education in the job market: Provided the cost of education is inversely related to productivity, education levels can signal a potential employee's productivity to employers

13. Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434, 437 (2002); *see also* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 100–07 (2005).

even if education itself does not increase marginal productivity.)[14] Applying this framework to the terrorism context suggests that law enforcement should not rely on religious speech as a signal and instead should develop strategies to disaggregate the insular and close-knit groups in which terrorism emerges from a wider religious or ethnic cohort.[15]

This Article has two supplemental goals. First, it aims to prompt more empirically informed dialogue about the evolution of counterterrorism practice and legal doctrine. It seems likely that the first wave of counterterrorism policies adopted after 9/11, many under tight time and informational constraints, included suboptimal practices as a result of policy makers' bounded rationality and imperfect information. Possible welfare gains are to be found in updating and improving those policies.[16] Yet despite the switch of administrations in the White House, the course of federal counterterrorism policy has been characterized by more continuity than change.[17] Second, the September 11 attacks catalyzed new investments in social science and empirical work on the causes and consequences of terrorism.[18] Yet this empirical literature is rarely invoked in the legal academy's debates on security policy. This is a needless loss.

Part II of the Article introduces the problem by describing criminal and immigration proceedings in which government has acted preemptively by relying on religious speech. Part III turns to the religious liberty issues under the First Amendment. It contends that the constitutional interests at stake are largely "underenforced."[19] Part IV examines the policy dimensions of reliance on religious speech as a signal, drawing on recent empirical work to query how religious speech correlates with the incidence of terrorism and then proposes association as an alternative.

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14. Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 361–68 (1973).

15. A similar analysis has been applied to the problem of airport screening to suggest that reliance on visible attributes is suboptimal. Atin Basuchoudhary & Laura Razzolini, *Hiding in Plain Sight—Using Signals to Detect Terrorists*, 128 PUB. CHOICE 245, 254 (2006). The present analysis extends that basic framework to a different context.

16. *But see* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 33–34 (2007) (opining that the political process generally prevents liberal democratic governments from adopting policies that unnecessarily restrict liberty).

17. *See* Peter Baker, *Obama's War Over Terror*, N.Y. TIMES, Jan. 17, 2010 (Magazine), at 33 (observing that during his first year in office President Obama "has adopted the bulk of the counterterrorism strategy he found on his desk when he arrived in the Oval Office, a strategy already moderated from the earliest days after Sept. 11, 2001").

18. *See, e.g.*, SUBCOMM. ON SOC., BEHAVIORAL & ECON. SCIS., NAT'L SCI. & TECH. COUNCIL, COMBATING TERRORISM: RESEARCH PRIORITIES IN THE SOCIAL, BEHAVIORAL AND ECONOMIC SCIENCES 6 (2006) (chronicling the formation of the Task Force on Anti-Terrorism Research and Development in the aftermath of the September 11 attacks).

19. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (explaining that "underenforced" constitutional norms occur in "those situations in which the [Supreme Court], because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries").

II. Religious Speech and Doctrine as a Signal in Counterterrorism

Religious speech and doctrine play an increasingly significant, if underappreciated, role in domestic counterterrorism enforcement in the United States and elsewhere thanks to a post-9/11 shift to preemptive policing strategies. This Part explores the causes of that trend and sets forth examples of religious speech's use as a signal in criminal law, immigration, and other enforcement actions in the United States and the United Kingdom.

A. Preemptive Domestic Counterterrorism Strategies

Terrorist attacks have potentially catastrophic consequences. Unlike the policing of burglary, murder, or fraud, a counterterrorism policing strategy wholly reliant on interdicting past offenders likely will be suboptimal. And for most governments, "prosecution of completed terrorist acts [alone] is not deemed sufficient."[20] As a result, numerous governments have adopted a preemptive approach to terrorist interdiction since 9/11 that is aimed at the early stages of terrorist conspiracies. At the same time, they have invested more resources in domestic counterterrorism policing.[21] Because terrorism often lacks many of the overt antecedent acts associated with quotidian crime, and because a suspect's preparatory conduct may be evidence of terrorism only in hindsight,[22] law enforcement must identify and deploy new signals of terrorist intent to sort threats from the general population.

Governments overtly adopted a preemptive approach soon after 9/11. In November 2001, then-Attorney General John Ashcroft announced that the U.S. Department of Justice "must shift its primary focus from investigating and prosecuting past crimes to identifying threats of future terrorist acts, preventing them from happening, and punishing would-be perpetrators."[23]

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20. Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1, 18 (2005).

21. *See, e.g.*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL TERRORISM ENFORCEMENT IN THE UNITED STATES DURING THE FIVE YEARS SINCE THE 9/11/01 ATTACKS (2006), http://trac.syr.edu/tracreports/terrorism/169/ ("In the twelve months immediately after 9/11, the prosecution of individuals the government classified as international terrorists surged sharply higher than in the previous year."); Press Release, Dep't of Justice, Fact Sheet: Department of Justice Anti-Terrorism Efforts Since Sept. 11, 2001 (Sept. 5, 2006), http://www.justice.gov/opa/pr/2006/September/06_opa_590.html (outlining the various measures taken by the Department of Justice to combat domestic terrorism since 9/11, including prosecuting and convicting more terrorists, increasing border security funding, and restructuring the FBI to eliminate more terrorist threats). More recent data suggests that criminal justice resources have been deployed in a more "efficient" manner. CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD, at i (2010).

22. Consider the purchase of box cutters by the 9/11 hijackers. Serge Schmemman, *US Attacked: President Vows to Exact Punishment for 'Evil,'* N.Y. TIMES, Sept. 12, 2001, at A1.

23. Memorandum from Att'y Gen. John Ashcroft, *supra* note 1; *see also* Paul J. McNulty, Deputy Att'y Gen., Prepared Remarks at the American Enterprise Institute (May 24, 2006), *available at* http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html ("And, in

The Justice Department now leans on inchoate or "precursor" offenses such as the material support statutes that allow for prosecution long before an act of terrorism is imminent.[24] The federal government also supplements criminal prosecution with regulatory complements. Immigration regulation, with its relaxed procedural constraints and more expansive substantive reach, also supplies the government with tools to act in the absence of clear evidence of imminent violence.[25]

The trend toward preemptive strategies has been accelerated by growing concern about terrorism that originates at home rather than abroad. The September 11 attacks originated overseas.[26] But other recent terrorist attacks, first in Europe and then in the United States, have had domestic origins.[27] As a result, governments on both sides of the Atlantic have placed special emphasis on the need to identify and eliminate domestic "sleeper cells."[28] Since the early 1990s, the British government has monitored al Qaeda efforts to recruit within the United Kingdom and to establish a domestic network.[29] British counterterrorism strategy singles out local Muslim communities as places where radicalization and recruitment to terrorism occur.[30] And even before the July 2005 attacks on London buses and trains, British media

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deciding whether to prosecute, we will not wait to see what can become of risks. The death and destruction of September 11, 2001, mandate a transformed and preventative approach.").

24. For surveys of the use of material support and related criminal offenses as preemptive tools, see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1101–03 (2008), and Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 446–92 (2007). Applications of one section of the material support statute, 18 U.S.C. § 2339B (2006), were upheld against constitutional challenge in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010).

25. *See generally* Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 398–423 (2007) (surveying the function of immigration law in counterterrorism strategy).

26. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 155 (2004) [hereinafter 9/11 COMMISSION REPORT].

27. *See, e.g.*, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, at 13 (2006) [hereinafter REPORT ON LONDON BOMBINGS], *available at* http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf (asserting that the perpetrators of the bombings in London grew up on the outskirts of Leeds in West Yorkshire).

28. *See Intelligence Reform: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 89 (2007) [hereinafter *Intelligence Reform Hearing*] (statement of Charles E. Allen, Assistant Secretary for Intelligence and Analysis, Chief Intelligence Officer, Department of Homeland Security) (describing new focus on "domestic terrorists" including "Islamic extremists (Sunni and Shia)"). In 2002, federal authorities identified a suspected sleeper cell in Lakawanna, New York, leading to high-profile arrests and convictions. DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR, at xiii, 198–205 (2007).

29. *See* U.K. HOME DEP'T, THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM 28 (2009) [hereinafter U.K. STRATEGY] ("By the early nineties some propagandists for Egyptian and other organisations had settled in London. . . . Al Qa'ida recruited people from the UK and established a network here.").

30. *Id.* at 15.

sounded regular alarms about the possibility that residents of the United Kingdom might commit acts of terrorism.[31]

In the United States, federal officials also took seriously the risk of "homegrown" terrorism after 9/11, albeit later than in the United Kingdom. In January 2007, for example, a Homeland Security official told a House of Representatives committee that domestic "radicalization challenges" had prompted the creation of a new unit in the Department of Homeland Security "focused exclusively on radicalization in the Homeland."[32] In May 2009, the Senate Homeland Security Committee held a hearing on "Violent Islamist Extremism: al-Shabaab Recruitment in America," exploring terrorist recruitment among Minneapolis's Somali-American population. According to FBI testimony, government surveillance and analysis had found Minneapolis to be a site of "an active and deliberate attempt to recruit individuals . . . to travel to Somalia to fight or train on behalf of [the Somali Islamist movement]."[33] This prompted law enforcement "concern[]" that a U.S. national recruited in Minnesota might return from fighting overseas "to conduct attacks inside the United States."[34] The concern escalated after a series of domestic-source terrorism incidents in late 2009 and early 2010.[35] In May 2010, Deputy National Security Advisor for Homeland Security and Counterterrorism John Brennan warned that "an increasing number of

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31. *See, e.g.*, *Don't Point*, ECONOMIST, Jan. 8, 2005, at 51 (discussing the intensified fears regarding a terrorist attack in Britain); Daniel McGrory, *The New Enemy Within*, TIMES (U.K.), Dec. 6, 2003, at 19 (discussing the typical British-born sleepers that are recruited into Islamic terror groups); Martin Bright & Jason Burke, *Is There an Enemy Within?*, OBSERVER (U.K.), Feb. 27, 2005, http://www.guardian.co.uk/uk/2005/feb/27/terrorism.september11 (reporting fears among government and security officials that "the threat from British Muslim extremists is now at least as great as that from foreign terrorists"); Philip Johnston, *Home-Grown Fundamentalists Pose a Threat to Britain, Too*, TELEGRAPH (U.K.), May 2, 2003, http://www.telegraph.co.uk/comment/personal-view/3590781/Home-grown-fundamentalists-pose-a-threat-to-Britain-too.html (discussing the involvement of two British Muslims in a suicide bomb attack in Israel); Raymond Whitaker et al., *Special Report: Terror in Britain: The Terror Timebomb*, INDEP. (U.K.), Apr. 4, 2004, *available at* 2004 WLNR 10582926 (chronicling the efforts of Islamist extremists to recruit disaffected young British Muslims).

32. *Hearing Before the H. Permanent Select Intelligence Comm.*, 110th Cong. (2007) (written testimony of Charles E. Allen, Assistant Secretary for Intelligence and Analysis, Chief Intelligence Officer, Department of Homeland Security) (on file with author).

33. *Violent Islamist Extremism—2009: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 101 (2009) (statement of Philip Mudd, Associate Executive Assistant Director, FBI).

34. *Id.*

35. *See, e.g.*, James C. McKinley, Jr., *Major Held in Fort Hood Rampage Is Charged with 13 Counts of Murder*, N.Y. TIMES, Nov. 13, 2009, at A14 (reporting the charging of Major Nidal Malik Hasan, who espoused "beliefs that America's wars in Iraq and Afghanistan were wars against all Muslims," with thirteen counts of murder after he opened fire at Fort Hood); William K. Rashbaum, *2 Men Seized at J.F.K., Accused of Plotting Jihad*, N.Y. TIMES, June 7, 2010, at A1 (reporting the arrest of two men who were seeking to "join[] an Islamic extremist group to kill American troops"); Andrea Elliott et al., *For Times Sq. Suspect, Long Roots of Discontent*, N.Y. TIMES, May 15, 2010, http://www.nytimes.com/2010/05/16/nyregion/16suspect.html (reporting on Faisal Shahzad, the man accused of planting a car bomb in Times Square).

individuals here in the United States [have] become captivated by extremist activities or causes."[36] This caution took official form in the 2010 National Security Strategy, which stated that "recent incidences of violent extremists in the United States" demonstrate "the threat to the United States and our interests posed by individuals radicalized at home."[37]

It is the rising concerns about domestic terrorism and the demand for prophylaxis and prevention of terrorism attacks that in tandem push law enforcement toward novel investigation and prosecution strategies. Prosecutors must establish culpability for serious criminal offenses even though they have fewer overt acts with which to work. In doing so, they face a serious information deficit. Downstream, prosecutors also have fewer reliable indicators of guilt upon which to build a case. Sorting for individuals who present a danger will be consistently more difficult at both the investigative and prosecution stages. And it is to remedy this informational deficit that law enforcement and prosecutors turn to religious speech as a signal of terrorist risk.

B. Criminal Prosecutions and Religious Speech

In April 2006, a jury convicted Hamid Hayat, a Californian of Pakistani descent, of material support for terrorism.[38] Federal prosecutors had charged Hayat with one count of providing material support for a transnational terrorist act and three counts of making willful, false statements related to a journey in 2003 or 2004 to Pakistan, allegedly to "receive jihadist training."[39] Yet Hayat had committed no act of violence. And scant evidence demonstrated his intent to commit a future act of violence, which was an element of the material support offense.[40] While he had confessed to having visited a training camp in Pakistan, it was unclear whether he had stayed long enough to receive training.[41] His confession was "vague and even contradictory."[42] On the material support charge, the prosecution's remaining evidence was

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36. *Obama's New Security Strategy Stresses Diplomacy*, BBC NEWS, May 27, 2010, http://www.bbc.co.uk/news/10169144.

37. WHITE HOUSE, *supra* note 3, at 19.

38. Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. TIMES, May 1, 2006, at B1; *see also* Government's Trial Memorandum at 2–5, United States v. Hayat, No. S-05-240 (E.D. Cal. Feb. 14, 2006) [hereinafter *Hayat* Trial Memo] (listing the counts).

39. *Hayat* Trial Memo, *supra* note 38, at 2–5. Hayat's father Umer Hayat was also charged with two counts of making false, material statements. *Id.* at 5. The charges against him were later dropped. Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. TIMES, Apr. 27, 2007, at A1.

40. *See* Tempest, *supra* note 38 (noting that the prosecution "had no direct evidence").

41. *See* John Diaz, *The Phantom Terrorist Camp*, SFGATE.COM, Sept. 16, 2007, http://articles.sfgate.com/2007-09-16/opinion/17260704_1_terrorist-camp-fbi-headquarters-hamid-hayat (noting that "the prosecution offered no direct evidence to corroborate Hayat's admission of attending a terrorist training camp" and that Hayat's admissions of having attended the camp "were rife with bizarre details and contradictions").

42. Tempest, *supra* note 38.

equivocal.[43] Unsurprisingly, Hayat's intention to commit future terrorism emerged as key for a successful prosecution.[44]

To prove Hayat's *mens rea*, the prosecution relied on an Arabic-language prayer found in Hayat's wallet at the time of his arrest.[45] The prosecution labeled this "the throat note."[46] Initially, the prosecution translated the Arabic text as, "Lord, let us be at their throats, and we ask you to give us refuge from their evil."[47] When the defense objected to this translation, negotiations resulted in the note being admitted into evidence translated as "Oh Allah, we place you at their throats, and we seek refuge in you from their evil."[48]

To demonstrate that the throat note was evidence of Hayat's *mens rea*, the U.S. Attorney proffered expert testimony from Professor Khaleel Mohammed, a professor of religious studies at San Diego State University.[49] Mohammed conceded that he did not know Hayat.[50] He also conceded that he did not know how Hayat understood the throat note because Hayat himself had exercised his Fifth Amendment right not to testify.[51] But, Mohammed insisted, the throat note could be read in only one way. It was a prayer "used by Muslim fanatics and extremists that consider themselves to be in a state of war with the rest of the world or their own government."[52] Mohammed, that is, offered a categorical reading of the note applicable to anyone sharing a particular religious identity.[53] Summarizing its case, the

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43. Principally, the State relied on an "irresolute" confession with "scant and fuzzy" details of the terrorist acts Hayat was to aid. Waldman, *supra* note 7, at 82–83; *accord* Diaz, *supra* note 41.

44. *See Hayat* Trial Memo, *supra* note 38, at 16 (describing the necessary *mens rea* as whether "the defendant knew or intended that the material support and resources were to be used in preparation for or in carrying out a violation of 18 U.S.C. § 2332b, which prohibits acts of terrorism transcending national boundaries").

45. *See* Waldman, *supra* note 7, at 83 ("[T]he prosecution cited [the note] as 'probative evidence' that Hayat had 'the requisite jihadist intent' . . . .").

46. *Hayat* Trial Memo, *supra* note 38, at 34.

47. *Id.*

48. *Id.*; *see also* Denny Walsh, *Witness Is Pressed on Hayat Prayer*, SACRAMENTO BEE, Mar. 16, 2006, http://www.sacbee.com/2006/03/16/6552/witness-is-pressed-on-hayat-prayer.html.

49. Waldman, *supra* note 7, at 89.

50. Walsh, *supra* note 48.

51. Stephen Magagnini, *Closing Phase Begins Today in Lodi Terror Case*, SACRAMENTO BEE, Apr. 12, 2006, http://www.sacbee.com/2006/04/12/6580/closing-phase-begins-today-in.html; *see also* Mark Araz, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at 1 (noting that Hayat did not testify).

52. Walsh, *supra* note 48. Mohammed also testified that "the supplication would be carried by a holy warrior ready to fight the enemies of Islam. He suggested that the throat is 'the most vulnerable spot' for a 'mortal wound,' and added, 'You are asking God to be your champion.'" Demian Bulwa, *Trial Focuses on Notation: Warrior's Creed or Simple Prayer*, SFGATE.COM, Mar. 15, 2006, http://articles.sfgate.com/2006-03-15/bay-area/17284650_1_lodi-man-fbi-agents-umer-hayat.

53. Offered for the purposes of one case, Mohammed's interpretation by definition claims a wider applicability. Defense lawyers found several religious experts who disagreed with

prosecution invoked the throat note to show that Hayat had "a jihadi heart and a jihadi mind"[54] and also as evidence that "Hayat attended a jihadist training camp" with "the requisite jihadist intent."[55] The throat note and other religious speech in Hayat's possession swung the jury toward conviction.[56] Indeed, the jury foreman subsequently explained that the throat note and related expert testimony had been "quite critical."[57]

Hayat's case is not unique. Criminal prosecutions of a New York-based group of thirteen alleged militants led by an Egyptian sheikh, Omar Abdul-Rahman, in the early 1990s also relied on the sheikh's sermons as evidence of his involvement in a terrorist conspiracy.[58] The 2004 material support prosecution of Idaho webmaster Sami al-Hussayen hinged on evidence of religious dogma on the websites the defendant had maintained, which was used in an effort to show his *mens rea*.[59] One journalist observing the trial later evaluated the Government's case by saying that "it seemed as if the government wanted to put the religion of Islam in the dock."[60] After a jury reached a hung verdict in the 2007 trial of Narseal Baptiste and six others based on their alleged conspiracy to attack the Sears Tower, the Government signaled its renewed commitment to the case by reaching for evidence of the defendants' religious views to demonstrate their violent intent for a retrial.[61] Similarly, in the 2008 retrial of the Holy Land Foundation on terrorist-financing charges, prosecutors thought to introduce expert evidence "that repeated use of traditional Muslim greetings can be a sign of unity with terrorists" to establish the defendant's intent.[62]

Mohammed's interpretation, but all proved "reluctant" to testify. Waldman, *supra* note 7, at 89–90. These experts may have been unwilling to irk a potential future employer—the federal government.

54. *Id.* at 82.

55. *Hayat* Trial Memo, *supra* note 38, at 35.

56. *See* Waldman, *supra* note 7, at 92 (explaining that the jury "conclud[ed] that the evidence suggesting that Hayat would act—the scrapbook, the prayer, and so on—was stronger than the evidence that he would not").

57. *Id.* at 90.

58. Robert L. Jackson, *Case Against Muslim Cleric Could Blow Up in Prosecutors' Faces*, L.A. TIMES, Sept. 28, 1994, at A5; James C. McKinley Jr., *Sheik's Talk at Issue in Trial*, N.Y. TIMES, Mar. 1, 1995, at B2.

59. *See* PAUL M. BARRETT, AMERICAN ISLAM: THE STRUGGLE FOR THE SOUL OF A RELIGION 248–49 (2007) (describing the material that al-Hussayen allegedly disseminated over the Internet); Timothy Egan, *Computer Student on Trial over Muslim Web Site Work*, N.Y. TIMES, Apr. 27, 2004, at A16; Maureen O'Hagan, *A Terrorism Case that Went Awry*, SEATTLE TIMES, Nov. 22, 2004, http://seattletimes.nwsource.com/html/localnews/2002097570_sami22m.html.

60. BARRETT, *supra* note 59, at 244.

61. *See, e.g.*, Curt Anderson, *Defense Fears Terrorism Retrial Won't Be Fair to 6 Defendants*, DAILY J., Jan. 3, 2008, *available at* http://www.daily-journal.com/archives/dj/display.php?id=411128 (noting prosecutors' intention to introduce evidence to portray the ringleader of the plot as a "Muslim fanatic").

62. Jason Trahan, *Lawyers Tangle About Greetings*, DALL. MORNING NEWS, Sept. 25, 2008, at 1B. The prosecution did not go forward with this strategy.

In each of these cases, prosecutors sought to use the criminal law preemptively. In each case, lacking the necessary evidence of overt acts, U.S. Attorneys turned to religious speech as a proxy for criminal intent. These prosecutions relied on the assumption that religious speech could supply an accurate signal of an intention to commit acts of terrorism. But these criminal trials, which in any event comprise only a fraction of a criminal justice system dominated by plea bargaining, likely represent only a portion of the total number of cases in which the government relies on religious speech. The incidence of religious speech at the prosecution stage as a signal of criminal intent is suggestive of a greater reliance on the same kind of evidence upstream—in investigations. Even setting aside those investigations that do not end in charges, many terrorism investigations (perhaps a majority) end in "pretextual" charges, from wire fraud to immigration crimes.[63] Such charges are unconnected with terrorism but form the possible basis for a less costly type of punitive action.[64] In those cases, the state's upstream reliance on religious speech for singling out a suspect is never revealed. At the very least, therefore, any estimation of the use of religious speech as a signal in counterterrorism that relies on reported trials is likely to yield an undercount, and probably a substantial one.

Religious speech can play a second function in criminal prosecutions. It can also be the *actus reus* for a terrorism offense. One example is a case that arose in Virginia soon after 9/11. On the evening of September 11, 2001, an imam named Ali al-Timimi and his circle of followers met at the storefront Dar al Arqam Center in Falls Church, Virginia:

> At the meeting, Al-Timimi stated that the September 11 attacks were justified and that the end of time battle had begun. He said that America was at war with Islam, and that the attendees should leave the United States. The preferred option was to heed the call of Mullah Omar, leader of the Taliban, to participate in the defense of Muslims in Afghanistan and fight against United States troops that were expected to invade in pursuit of Al-Qaeda.[65]

Based on that speech al-Timimi was prosecuted on several inchoate offense and solicitation counts.[66] In addition to the September 11 speech, the prosecution invoked a February 2003 sermon in which al-Timimi spoke of the crash of the U.S. space shuttle *Columbia* as an omen of the imminent end

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63. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 622 (2005) (explaining the charging of suspected terrorists with lesser offenses including immigration violations, identity theft, visa fraud, and money laundering).

64. *Cf.* Harry Litman, *Pretextual Prosecutions*, 92 GEO. L.J. 1135, 1175–76 (2004) (defending the practice of pretextual charges); Richman & Stuntz, *supra* note 63, at 584–87 (explaining pretextual charges).

65. United States v. Khan, 309 F. Supp. 2d 789, 810 (E.D. Va. 2004).

66. McCormack, *supra* note 20, at 1 & n.1.

of the West's domination of the Muslim world.[67] In an opening statement, the prosecutor focused on the content of the sermons, asserting that "[the] case [was] about what Al-Timimi told the young men who respected him, who revered him . . . who loved him, and most of all, who listened to him."[68] Al-Timimi was convicted on ten counts of inducing or soliciting others to commit various crimes related to his disciples' overseas travel to aid the Taliban.[69] Evidence of his *actus reus* largely comprised his sermons.[70] These statements, the jury concluded, had a predictable effect on his codefendants, such that al-Timimi could be held criminally liable.[71]

Al-Timimi's case shows how religious speech or dogma can be a basis for solicitation or aiding-and-abetting charges. Moreover, it suggests that such prosecutions can rely on ambiguous religious statements that require interpretation. It is plausible to posit slightly different factual circumstances in which a prosecutor would want to move forward but would have to rely on speech with less substantial overt links to terrorism.

The same trend is visible in other countries. The United Kingdom has enacted laws aimed at "changing the environment in which the extremists and those radicalising others can operate"[72] by criminalizing speech that often will be framed with religious terminology. Section 1 of the Terrorism Act 2006 criminalizes publications where the publisher "intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism."[73] This "encouragement of terrorism" prohibition reaches "statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism" and also "every statement which . . . *glorifies* the commission or preparation (whether in the past, in the future, or generally) of such acts or offences."[74] The offense "implement[s] the requirements of Article 5 of the Council of Europe Convention on the Prevention of Terrorism," which requires state parties to criminalize "'public provocation to commit a terrorist offense.'"[75] Another provision in the 2006 Terrorism Act criminalizes "[d]issemination of terrorist publications," including circulating, selling, lending, or offering for sale or loan, any

67. Milton Viorst, *The Education of Ali al-Timimi*, ATLANTIC MONTHLY, June 2006, at 69, 78.

68. *Id.*

69. McCormack, *supra* note 20, at 1 & n.1; Jerry Markon, *Muslim Leader Is Found Guilty*, WASH. POST, Apr. 27, 2005, at A1.

70. *See* McCormack, *supra* note 20, at 2 (explaining that the acts resulting in al-Timimi's convictions primarily involved only speaking with and advising others).

71. *See* Markon, *supra* note 69 (describing prosecutorial arguments that al-Timimi's words were intended to cause violence and the subsequent guilty verdict imposed by the jury).

72. U.K. STRATEGY, *supra* note 29, at 12.

73. Terrorism Act, 2006, c. 11, § 1(2)(b)(i).

74. *Id.* § 1(3) (emphasis added).

75. TERRORISM ACT 2006: EXPLANATORY NOTES ¶ 20, at 4 (2006).

publication intended to be "direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism."[76]

Prosecutions under these provisions have been few, far between, and poorly documented.[77] In one high-profile case, an imam named Abu Izzadeen was arrested for glorifying terrorism.[78] While that charge was dropped, he was convicted of inciting terrorism overseas and fundraising for terrorism under the Terrorism Act 2000.[79] In another case, a woman defendant who called herself the "lyrical terrorist" was convicted under a different statutory terrorism offense of possession of "a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism."[80] While the information at issue included materials with practical implications for planning a terrorist act,[81] her trial was characterized by discussion of quasi-religious poems that she had written seemingly in praise of terrorist actions. It is not implausible to think the quasi-religious poetry introduced at trial played a role in her conviction by demonstrating her *mens rea*.[82]

C. Regulatory Actions Based on Religious Speech

Criminal prosecution is not the only way to disrupt or disperse a terrorist conspiracy. Governments also use noncriminal regulatory regimes such as immigration law, financial regulation, and legal proscriptions of certain groups. Like their criminal counterparts, these regulatory actions can turn on religious speech.

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76. Terrorism Act 2006, §§ 2(1)(a), 2(2).

77. According to a U.K. government audit of counterterrorism actions, there have been such actions. *See* LORD CARLILE OF BERRIEW Q.C., REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND OF PART I OF THE TERRORISM ACT 2006, at 56 (2008) ("There have been successful prosecutions brought under the section [criminalizing the glorification of terrorism], and others are pending."); CROWN PROSECUTION SERV., VIOLENT EXTREMISM AND RELATED CRIMINAL OFFENCES § 5, http://www.cps.gov.uk/publications/prosecution/violent_extremism.html (describing some successful antiterrorism prosecutions but none under the antiglorification laws).

78. But there have been some arrests. *See, e.g.*, Sean O'Neill & Stewart Tendler, *Islamist Radical who Heckled Reid Is Arrested over 'Glorifying of Terrorism,'* TIMES (U.K.), Feb. 9, 2007, at 2; Stephen Wright et al., *Hate Preacher who Praised Bombers Is Among Six Arrested*, DAILY MAIL (U.K.), Apr. 25, 2007, at 20.

79. Sean O'Neill, *Muslim Faces Prison over Terror Speeches*, TIMES (U.K.), Apr. 18, 2008, at 21.

80. *See* R v. Malik, [2008] EWCA (Crim) 1450 (Eng.); *see also* S. Chehani Ekaratne, *Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism*, 23 HARV. HUM. RTS. J. 205, 216–17 (2010) (describing the Malik case).

81. *See* Haroon Siddique, *'Lyrical Terrorist' Convicted over Hate Records*, GUARDIAN (U.K.), Nov. 8, 2007, http://www.guardian.co.uk/uk/2007/nov/08/terrorism.world (describing the documents found in Malik's possession).

82. The conviction was later overturned. Lee Glendinning, *'Lyrical Terrorist' Has Conviction Quashed*, GUARDIAN (U.K.), June 17, 2008, http://www.guardian.co.uk/uk/2008/jun/17/uksecurity.ukcrime.

American immigration law has long allowed exclusion and deportation on ideological grounds.[83] As a result, immigration law is an attractive prophylactic tool for government when a terrorism prosecution would otherwise be unavailable. Further, when prosecutors are unable to secure a conviction, the government can use immigration powers to achieve the prosecution's interdiction goal at a lower cost.[84] Increasing overlap between the substantive grounds for deportation and the content of the criminal law during the past three decades, moreover, has enlarged the substitutability of deportation for criminal sanctions.[85]

Amendments to federal immigration law since 1999 expanded terrorism-related removal grounds and facilitated enforcement actions based on religious expression.[86] Section 411 of the October 2001 USA PATRIOT Act authorized the government to deny admission to any alien who had used a "position of prominence within any country to endorse or espouse terrorist activity" or to "persuade others to support terrorist activity or a terrorist organization."[87] A 2005 amendment enlarged the scope of this provision to include circumstances in which the Attorney General has a reasonable basis to believe an individual is engaged in, *or likely to engage in*, terrorist activity or that the individual endorses or espouses terrorist activity.[88] This amendment empowers immigration officials to make predictive judgments about individuals based on inferences drawn from the individuals' religious beliefs or statements. Under an earlier iteration of the provision, the Department of Homeland Security revoked in 2004 a visa granted to Swiss theologian Tariq Ramadan, telling journalists that Ramadan had "'used a position of

83. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, allowed, *inter alia*, the exclusion of any alien "affiliated with groups that advocate World Communism or totalitarian dictatorship." *Cf.* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 164–67 (2003) (describing litigation in which the Immigration and Nationality Act, also known as the McCarran–Walter Act, was struck down).

84. In at least one case, a failed prosecution has been followed *seriatim* by an immigration action. *See, e.g.*, Elaine Silvestrini, *ICE Puts Chill on Megahed Acquittal*, TAMPA BAY ONLINE, Apr. 12, 2009, http://www2.tbo.com/content/2009/apr/12/na-ice-puts-chill-on-megahed-acquittal/ (noting the use of immigration law to deport Sami al-Hussayen after the failed prosecution of him).

85. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006) (describing an "increasing overlap between criminal and immigration law").

86. For an overview of relevant changes in the immigration statute, see Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 647–48 (2006). At the same time, judicial scrutiny of immigration law's workings has diminished. In 1999, the Supreme Court held that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

87. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 346.

88. REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 302, 306–07 (codified as amended at 8 U.S.C. § 1182(a)(3)(B)(i) (2006)).

prominence . . . to endorse or espouse terrorist activity.'"[89] Ramadan's critics outside government also cited his doctrinal writings to justify the exclusion decision.[90]

In the United Kingdom, immigration authorities scrutinize foreign imams' religious views before admitting them into the country.[91] In November 2003, British immigration authorities detained a senior Deobandi cleric, Yusuf Motala, and questioned him extensively about "the curricula of his seminaries, his views on aspects of Islam and alleged connections with jihadist groups."[92] Under rules promulgated in the aftermath of the July 2005 London bus and subway bombings, British authorities have the power to deport those who "foment, justify or glorify" terrorism.[93] After the attacks, deportation proceedings were initiated against a Jamaican imam, Abdullah el-Faisal, who influenced one of the July 2005 suicide bombers by arguing after September 2001 that "the Koran justified attacks on non-Muslims."[94] In August 2005, then-Home Secretary Charles Clarke also banned Syrian-born cleric Omar Bakri Mohammed from returning to the United Kingdom on the ground that "his presence is not conducive to the public good."[95] The same month, the government published a list of "Unacceptable Behaviours" that, if committed, could lead to exclusion or deportation. Items on this list include "public speaking including preaching; running [an extremist] website," and

89. Pamela Constable, *Divisive Scholar Draws Parallels Between Islam and Democracy*, WASH. POST, Apr. 11, 2007, at B6; *see also* ACLU, THE EXCLUDED: IDEOLOGICAL EXCLUSION AND THE WAR OF IDEAS 11 (2007), *available at* http://www.aclu.org/files/pdfs/safefree/the_excluded_report.pdf (noting that Ramadan's exclusion had initially been justified by the government on the ground that he "endorsed or espoused terrorism"). Ramadan's exclusion was later justified under a different statutory provision. *See* Olivier Guitta, *The State Dept. Was Right*, WEEKLY STANDARD, Oct. 16, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/800naxnt.asp ("[T]he State Department denied a visa to Muslim scholar Tariq Ramadan on the grounds that he had contributed around 600 euros to a French charity classified as a terrorist organization . . . .").

90. *See* Guitta, *supra* note 89 ("Ramadan holds out Islam as the solution to all the problems of Muslim youth . . . ."). Ramadan himself attributed the exclusion to political differences. *See* Tariq Ramadan, Op-Ed., *Why I'm Banned in the USA*, WASH. POST, Oct. 1, 2006, at B1 ("I am increasingly convinced that the Bush administration has barred me for a much simpler reason: It doesn't care for my political views."). Ramadan was subsequently admitted into and entered the United States. *See* Am. Acad. Religion v. Napolitano, 573 F.3d 115, 134–39 (2d Cir. 2009) (vacating and remanding the initial refusal based on a possible procedural flaw in the consular decision); Kirk Semple, *At Last Allowed, Muslim Scholar Visits*, N.Y. TIMES, Apr. 8, 2010, at A29.

91. Jonathan Birt, *Good Imam, Bad Imam: Civic Religion and National Integration in Britain Post-9/11*, 96 MUSLIM WORLD 687, 694–95 (2006).

92. *Id.* at 698.

93. Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U. NEW S. WALES L.J. 868, 870 (2005).

94. Alan Cowell, *Britain Deports Man Accused of Ties to Attacker in '05 Bombing*, N.Y. TIMES, May 26, 2007, at A7.

95. Alan Travis et al., *Clarke Uses 'Personal Power' to Ban Bakri from UK*, GUARDIAN (U.K.), Aug. 13, 2005, http://www.guardian.co.uk/politics/2005/aug/13/terrorism.syria?INTCMP=SRCH.

expressing viewpoints that "foster hatred which might lead to inter-community violence in the UK."[96] Enforcement of such rules means that government officials have to make decisions about what kinds of religious speech will "foster" hatred or "foment" violence. In so doing, they must make judgments about how a community of co-religionists will likely interpret religious speech or doctrine. This plunges officials into the heart of contested questions of religious epistemology.

The British government has also introduced a scheme of organization proscription on ideological grounds. After the July 2005 attacks, the British Parliament enacted legislation allowing the proscription of domestic organizations engaged in "unlawful glorification of the commission or preparation (whether in the past, *in the future or generally*) of acts of terrorism," and organizations "associated with statements containing any such glorification."[97] After the publication of cartoons caricaturing religious figures by the Danish newspaper *Jyllens-Posten* in September 2005, the British government outlawed two organizations—al Ghurabaa and al Firquat un-Nassjiyah (also known as the Saved Sect)—that organized protests at which individual protesters waved death threats against the cartoonists.[98] On issuing the bans, the Home Office explained that both groups had "disseminate[d] materials that glorify acts of terrorism."[99]

D. Conclusion

Pressure to interdict terrorist conspiracies at a safe time and distance before their completion and a growing concern about homegrown plots create new challenges for law enforcement in both the United States and the United Kingdom. The most pressing challenge is the informational asymmetry that characterizes many terrorism prosecutions.[100] Prosecutors bridge this gap by relying on religious speech. It is also plausible to suppose that religious speech serves a signaling function at an investigative stage. Not all

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96. COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY 12 (2006), *available at* http://www.iwar.org.uk/homesec/resources/uk-threat-level/uk-counterterrorism-strategy.pdf.

97. Terrorism Act, 2006, c. 11, § 21 (emphasis added). In the same provision, glorification is defined to "include[] any form of praise or celebration." *Id.*; *cf.* Saul, *supra* note 93, at 879 (describing a similar scheme introduced by the Howard government in Australia).

98. Press Release, Home Office, Home Office to Ban Terror Groups (July 17, 2006), *available at* http://press.homeoffice.gov.uk/press-releases/ban-terror-groups; *see also* Ian Cobain et al., *Reborn Extremist Sect Had Key Role in London Protest*, GUARDIAN (U.K.), Feb. 11, 2006, at 14; Neil McKay, *How the Fire Spread*, SUNDAY HERALD, Feb. 12, 2006, at 37 (describing the groups' role in the cartoon controversy); Alan Travis, *Reid Uses New Laws to Ban Two Islamist Groups for 'Glorifying Terrorism,'* GUARDIAN (U.K.), July 18, 2006, at 9 (reporting on the ban).

99. U.K. HOME OFFICE, PROSCRIBED TERRORIST GROUPS 2–3, 6 (2010), *available at* http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary.

100. *See supra* subpart II(A).

enforcement actions will end, however, in criminal prosecutions that rely on religious speech. Hence, looking at prosecutions alone to determine the extent of state reliance on religious speech likely yields an undercount.

A caveat is warranted here. The phenomenon described here—reliance on religious speech as a signal in counterterrorism—is not the same as the practice of discriminatory policing based on racial or religious identity. My narrow claim here is that law enforcement entities have addressed the uniquely difficult problem of informational asymmetry in terrorism investigations by turning to religious speech as a plausible signal of and proxy for terrorist intent. That claim does not in any way rest on the distinct and different proposition that law enforcement entities in the United States or the United Kingdom operate on the basis of invidious biases.[101] But nor should I be taken to imply an *absence* of animus. For the purposes of this Article, I am rather concerned with how the information-poor environment in which terrorist entities such as al Qaeda operate pushes law enforcement to use religious speech as a signal, or proxy, for unlawful intentions.

III. Constitutional Implications of the Use of Religious Speech as a Counterterrorism Signal

This Part focuses on the central question of constitutional law raised by the policies described in Part II: Under existing U.S. constitutional doctrine, does law enforcement reliance on religious speech as a signal in counterterrorism work violate the First Amendment and in particular its Religion Clauses? First Amendment doctrine recognizes the possibility of two harms from reliance on religious speech as a signal in counterterrorism enforcement. First, individuals may experience a chilling effect on speech and association. Second, religious communities may be burdened by constraints on their autonomy to debate and cultivate unique, distinctive religious views. This Part focuses on the second harm, which involves the epistemic autonomy of religious communities. I argue that current constitutional doctrine provides no constraining mechanism or remedy in response to those harms. In Lawrence Sager's phrasing, the constitutional norms in play here are "underenforced," so that "only a small part of the universe of plausible claims . . . is seriously considered by the federal courts."[102] I first briefly describe two harms and then focus on the doctrinal protection of the epistemic autonomy interest. I conclude that the formal doctrine offers few protective resources for this species of religious liberty interest.

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101. *See, e.g.*, Kevin R. Johnson, *How Racial Profiling Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1035–36 (2010) (analyzing the "[r]esurgence" of racial profiling in counterterrorism, based largely on law enforcement's biases against individuals who appear to be Arab).

102. Sager, *supra* note 19, at 1216.

A. How Does the Signaling Function of Religious Speech Harm First Amendment Interests?

Government use of religious speech as a signal in domestic counterterrorism impinges on First Amendment interests in two ways. One implicates individual interests; the other concerns a collective interest of religious communities in epistemic autonomy, i.e., the freedom to define and revise faith understandings and doctrine without interference by the state.

First, government's reliance on religious speech directly affects individuals. By relying on religious speech as a basis for discerning private actors who merit punishment, government raises the public cost of using religious speech (i.e., by increasing the possibility of being targeted for investigation on the basis of that speech). Hence, it creates an incentive to use nonreligious speech. Reliance on religious speech as a signal has the potential as a result to chill individuals' constitutionally protected speech. Because that speech concerns matters at the core of many individuals' understanding of their identity, a chilling effect will impinge on "individual autonomy understood as the practical power to choose one's ends"[103] that is at the heart of some conceptions of the speech and association components of the First Amendment.

An additional stigmatic harm might be imagined. It is plausible that government reliance on religious speech in counterterrorism also could inflict "pervasive dignitary and stigmatic harms"[104] on individuals by sending the message that members of a minority religious group are "presumptively disloyal and unworthy of empathy"[105] and by "discrediting [its members'] participation in civil culture" through claims framed in religious terms.[106]

Yet if the constitutional significance of religious speech's signaling function were exhausted by its impact upon individuals targeted for enforcement actions, then the constitutional costs would seem to be few. No general rule bars the government from using speech as evidence of either *actus reus* or *mens rea* of a criminal offense.[107] A religious element in speech, the

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103. Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 178 (2003).

104. Murad Hussein, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 926 (2008).

105. *Id.* at 938.

106. *Id.*

107. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); KENT GREENAWALT, SPEECH, CRIME & THE USES OF LANGUAGE 79–126 (1989) (discussing agreements to commit crimes, criminal threats, and inducements to crime). *But see* Dennis v. United States, 341 U.S. 494, 581–91 (1951) (Douglas, J., dissenting) (expressing doubt that speech should be treated as an *actus reus*).

Supreme Court has instructed, does not change this analysis.[108] Any infringement of religious liberty would be an incidental byproduct of an otherwise legitimate enforcement action that triggers no free exercise concern. Further, reliance on religious speech as a signal in domestic counterterrorism entails no outright ban or direct burden on speech, no viewpoint-based distinction, and no content-based regulation.[109] The individual constitutional interests burdened by the use of religious speech as a counterterrorism signal thus seem at least tolerable given the magnitude of the countervailing state interest.

But the second harm to First Amendment interests, while more unusual, raises complex questions with potentially greater normative heft. This second harm sounds in the Religion Clauses rather than the free speech part of the First Amendment. It is more unusual because the affected interest (in epistemic autonomy) belongs to groups, rather than individuals, and is linked less directly to governmental reliance on religious speech. The interest at stake here is the shared, collective interest that a religious community has in determining the content and direction of its religious beliefs without interference by the government. Call this the interest that a religious community has in epistemic autonomy.

Religious communities have a collective interest in epistemic autonomy. This encompasses control over the form and content of canonical religious texts such as the Bible, a point of considerable controversy in the history of American schooling.[110] It entails the right of a religious community to form and revise collective understandings of its own faith, free of state interference. And it may reach the right of minority communities to protect their children from the perceived corrupting influences of public education.[111] Epistemic autonomy, while somewhat conceptually elusive,

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108. *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 109 (1952) ("Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.").

109. *Cf.* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (upholding basic rights of the press to prevail over a statute supposedly permitting prior restraint); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (recognizing content-based regulations of speech as "presumptively invalid").

110. Catholics and Protestants in the United States have long clashed over the proper translation of the Bible. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299–300 (2001). Even the text of the Ten Commandments is subject to debate. *See* Van Orden v. Perry, 545 U.S. 677, 717–18 (2005) (Stevens, J., dissenting) ("There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance.").

111. For Catholic concerns along these lines, see Sarah Barrington Gordon, *"Free" Religion and "Captive" Schools: Protestants, Catholics, and Education, 1945–1965*, 56 DEPAUL L. REV. 1177, 1183 (2007). For Evangelical concerns, see Stanley Fish, *Children and the First Amendment*, 29 CONN. L. REV. 883, 886–88 (1997) (chronicling the case of Mozert v. Hawkins, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), in which an Evangelical Christian mother

has in other words been a central battlefield for religious liberty in the American twentieth century.

State reliance on religious speech as a signal in domestic counterterrorism imperils the epistemic autonomy of certain religious communities. When the government, in the course of a criminal or immigration proceeding, takes sides about the meaning of a religious text, or when it takes a position about the entailments of some religious doctrine for practical political action, it places a thumb on the scales of internal debate within the religious community. It may in effect endorse one side's claims over another's in a way that affects doctrinal development and changes the social meaning of a religious term.[112] Or by indicating that some dogma or ideas will be treated as almost per se evidence of illegal intentions—as the prayer on Hayat's throat note was—the government may close off possible avenues of debate. In so intervening, the state is of course not claiming an authoritative power to resolve hermeneutical disputes. Rather, the state is distorting the free evolution of religious thought within a community by changing the costs and benefits of certain doctrinal moves.

An illustration may be helpful here. Consider again the reception of Hamid Hayat's trial and conviction among his co-religionists in California. Hayat's trial was closely followed by his co-religionists. According to one Sacramento-based Muslim community activist, "[t]he entire Muslim community in Lodi is watching [the legal proceedings]."[113] After having followed Hayat's trial and conviction, Muslims in Southern California knew that federal law enforcement authorities treated the throat note prayer as evidence of violent intent. As a result, they had a *pro tanto* reason not to use that prayer, whether or not they accepted the Government's interpretation of it as an endorsement of violence. Indeed that prayer is also commonly worn in the form of a talisman to ward off daily misfortune.[114] (The Government's trial witness, in other words, erred seriously in his reading.)[115]

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sued to prevent her child from being made to read a textbook that exposed readers to a variety of religious beliefs).

112. *Cf.* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) ("Any society or social context has what I call here social meanings—the semiotic content attached to various actions, or inactions, or statuses, within a particular context.").

113. Carolyn Marshall, *24-Year Term for Californian in Terrorism Training Case*, N.Y. TIMES, Sept. 11, 2007, at A20.

114. *See* Waldman, *supra* note 7, at 90 (noting the jury foreman's skepticism of the testimony of a University of Oregon professor "who had testified that Pakistanis commonly carry a [Muslim talisman called a] tawiz to ward off evil, much the way Jews place a mezuzah outside their door").

115. The prosecution's specific interpretation of the throat note was at a minimum highly questionable. According to several experts, it was in fact "a traditional supplication . . . reported to have been said by the Prophet [Mohammad] when he feared harm from a group of people." *Id.* In her excellent reporting on the trial, Amy Waldman sought views from two experts (Bernard Haykel and Ingrid Mattson) and a Pakistani *New York Times* reporter based in Islamabad and consulted published and online collections of traditional Islamic prayers. All confirmed that the prosecution's interpretation was incorrect.

Notwithstanding this error, and without claiming power to issue an authoritative interpretation, the state had signaled strongly to Hayat's co-religionists that the prayer would be deemed evidence of violent intent.

Another illustration—where the Government did not err in its interpretation—is the Virginia case.[116] When the federal government used al-Timimi's sermons as evidence of his dangerousness, his conviction catalyzed changes to the way that Muslims in Northern Virginia self-identified and expressed their identity. According to one account, al-Timimi's arrest and conviction seeded a "sense of beleaguerment among many Muslims in the Washington area . . . particularly" among groups close to al-Timimi's mosque, disarming them in ongoing doctrinal fights with competing sectarian factions.[117] A Muslim community activist from that area told a journalist, "In the past, people would say, 'I'm Salafi' [al-Timimi's denomination]. Now, I never encounter people who say that."[118] That is, the lesson of the al-Timimi trial for Virginia Muslims was that to call oneself a "Salafi" was to invite government scrutiny and possibly worse. The al-Timimi case suggests that a religious community can be affected by the government's use of religious speech as a signal whether or not the interpretation is erroneous.

B. Constitutional Protection of Religious Epistemic Autonomy

The U.S. Supreme Court has recognized the epistemic autonomy interest of religious communities in two strands of often-overlooked precedent. In those lines of cases, the Supreme Court has interpreted the Religion Clauses of the First Amendment to shelter a religious community's interest in defining and revising its own understanding of dogma and doctrine and in fashioning its own normative commitments and epistemic criteria. But these cases are now dated. Religion Clause doctrine has shifted. Even though precedent on epistemic autonomy has not formally been revisited, the question may fairly be asked: Do these precedents still imply judicial protection for religious communities' free normative development? Or are they outmoded outliers of another era, yielding little comfort or shelter from contemporary pressures on First Amendment values?

1. The Protection of Epistemic Autonomy Under the Religion Clauses.—The two lines of Religion Clause precedent both arise out of disputed dispositions of religious institutions' property after a schism had ruptured an originally unitary church. Both lines of cases rely upon Establishment Clause and also Free Exercise Clause concerns.

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116. *See supra* notes 65–71 and accompanying text.

117. Caryle Murphy, *For Conservative Muslims, Goal of Isolation a Challenge*, WASH. POST, Sept. 5, 2006, at A1.

118. *Id.*

In the first set of cases, the Court cautioned against inquiries into the fidelity of one side or another to original church doctrine. It did so in terms anticipating and prefiguring a later Establishment Clause rule against state "endorsement" of certain religious positions.[119] This anti-endorsement strand of religious epistemic autonomy emerged first in nineteenth-century case law concerning church property division. A clear prohibition on state endorsement of religious orthodoxy emerged only after 1950.

In the 1871 case *Watson v. Jones*,[120] the Court intimated a concern for epistemic autonomy when it delineated a three-part framework for resolving disputes about the disposition of church property.[121] First, if a case involved an express trust that stipulated fidelity to church doctrine, that trust would be enforced.[122] Second, in cases concerned with independent congregations that lacked hierarchal arrangements, "the rights of such bodies . . . [would] be determined by the ordinary principles which govern voluntary associations."[123] Finally, the Court explained that in cases involving hierarchical churches, the decision of the "highest of . . . church judicatories" would be respected.[124] Sounding constitutional overtones, the Court explained that these three options protected "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property."[125]

Yet within a year of *Watson*, the Court was meddling again in the internal affairs of religious bodies. It first cautioned that judicial respect for churches' internal decision making would be obtained only if a church

119. The idea of endorsement was first suggested by Justice O'Connor and later picked up by other Justices. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (asking whether the state had impermissibly "sen[t] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community"); *see also* Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989) (engaging in an endorsement analysis based on Justice O'Connor's concurrence in *Lynch*). Justice O'Connor later explained that the endorsement analysis is applied from the perspective of a "reasonable observer." Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring).

120. 80 U.S. (13 Wall.) 679 (1871).

121. *Id.* at 722–28.

122. *Id.* at 722.

123. *Id.* at 725.

124. *Id.* at 727; *see also* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 263–65 (2006) (discussing the Court's grouping of questions concerning the rights to church properties into three categories, including a category for when a congregation is subordinate to a larger church organization); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1847–52 (1998) (describing *Watson* comprehensively).

125. *Watson*, 80 U.S. at 728.

abided by its own procedures.[126] In 1929, the Court identified three exceptions to *Watson* for "fraud, collusion, or arbitrariness."[127] In practical effect, these exceptions invited lower tribunals to interrogate churches' internal decision making based on allegations that a decision was "arbitrary" or inconsistent without guidance as to how that standard would be applied to the peculiar context of religious associations. The invitation was not ignored.[128]

Only after World War II did the Court revisit its conflicting instructions. In cases decided in 1952 and 1960, the Court created a zone of decisional autonomy for ecclesiastical bodies. In those cases, it held that neither New York's legislature nor its courts could displace the governing body of the Russian Orthodox Church based on allegations that the latter had fallen under Soviet control.[129] In 1969, the Court invalidated a Georgia state court decision because the state tribunal had relied on a state law rule that church property remained in the trust of a larger ecclesiastical entity provided that the entity did not "depart substantially from prior doctrine."[130] Recognizing the potential collision between arbitrariness review and desire to show respect for the unpredictable pathways of religious thinking, the Court opted for the latter. In 1976, the Court held that courts could not review ecclesiastical authorities' decisions to determine whether they were "arbitrary."[131] The Court rested this judgment on the perceived risk that state intervention might "inhibit[] the free development of religious doctrine" by placing a thumb on the scales of doctrinal debate.[132]

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126. *See, e.g.*, Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 140 (1872) (holding that a majority rule would be followed for congregational churches provided that the majority "adhere to the organization and to the doctrines" of the church).

127. Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16–17 (1929).

128. *See, e.g.*, Brundage v. Deardorf, 55 F. 839, 847–48 (C.C.N.D. Ohio 1893) (stating that only "a bona fide decision" of an ecclesiastical tribunal would be recognized); Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1119 n.32 (1965) (collecting cases).

129. For legislatures, see *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 120–21 (1952) ("Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls."). For courts, see *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190, 190–91 (1960) (per curiam) (holding that a state court could not deny a "right conferred under canon law").

130. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969). Akin to the arbitrariness exception, the "departure-from-doctrine" rule invited judicial scrutiny into church doctrine. *Id.*

131. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712–16 (1976). While courts can still inquire into "fraud" or "collusion," the continuing validity of these exceptions to the general rule of noninquiry into church decision making is uncertain. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1397 (1981) (citing cases where state courts relying on fraud exceptions were reversed and commenting that such exceptions do not fit the Court's broad rationale).

132. *Mary Elizabeth Blue Hull*, 393 U.S. at 449.

Like the endorsement test subsequently to be developed by Justice O'Connor, the final version of this rule aimed at barring the state from "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[133] Whereas the church property cases concerned the play of factions *within* a religious community, Justice O'Connor's endorsement test focused on the interaction of religious minorities *with the larger society*. Both church-property cases and the endorsement rule, nevertheless, have the purpose and effect of keeping the state clear of intramural sectarian disputes and preserving a communal right to religious self-determination.

The second relevant line of cases under the Religion Clauses prohibits judicial inquiry into religious doctrine. Again, this line of cases anticipates an idea in later Establishment Clause jurisprudence—the "entanglement" test.[134] This "anti-entanglement" rule differs from the anti-endorsement strand of church-property case law because it concerns the method and not the consequence of judicial inquiry.[135] That is, it does not speak to the results or effects of state action. Rather it limits the *manner* in which the state—a court or another decision maker—may resolve a dispute linked to the epistemic life of a religious community.

This second line of precedent also emerged out of church-property disputes.[136] In 1969, the Court had invalidated the Georgia state law rule that a general church held a local church's property in implicit trust "on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches."[137] In the course of its decision, the Court observed that this test forced "[a] court . . . of necessity [to] make its own interpretation of the meaning of church doctrine" by "assessing the relative significance to the religion of the tenets."[138] No constitutionally permissible space obtained, in the Court's opinion, for courts

133. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860–61 (2005) (describing a showing of government purpose to favor one religion over another or adherence to religion generally as a message to nonadherents that they are outsiders); *supra* note 119.

134. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 615–23 (1971) (applying the entanglement test); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

135. For instance, the Court has expressed concern that a tax regulation requiring the IRS to differentiate "secular" from "religious" benefits *might* lead to entangling inquiries. Hernandez v. Comm'r, 490 U.S. 680, 694 (1989).

136. Entanglement captures at least three different concerns: excessive state aid, excessive surveillance, and the fostering of divisive political competition on religious lines. Laycock, *supra* note 131, at 1392–94.

137. *Mary Elizabeth Blue Hull*, 393 U.S. at 443.

138. *Id.* at 450.

to engage in the "interpretation of particular church doctrines and the importance of those doctrines to the religion."[139]

Seven years later, the Court elaborated on that hint. In a 1976 decision, the Court squarely prohibited "detailed review" of ecclesiastical decision making in the course of determining whether a decision was "arbitrary."[140] In language colored by a concern for religious institutions' epistemic autonomy, the Court cautioned that the First Amendment "commits exclusively to the highest ecclesiastical tribunals'" resolution of "quintessentially religious controversies."[141] Both cases tracked concerns expressed in other Establishment Clause case law about "[t]he prospect of church and state litigating in court about what does or does not have religious meaning."[142] That concern was one elaborated and generalized in the anti-entanglement test for Establishment Clause violations set forth in *Lemon v. Kurtzman*.[143] Epistemic autonomy protection, that is, prefigured the general contours of Religion Clause jurisprudence in more ways than one.

2. The Erosion of Epistemic Autonomy.—These two lines of cases date largely from the Warren and early Burger courts. But the Court's view of the Religion Clauses has changed dramatically since then.[144] The changes have undermined the intellectual foundations of case law protecting epistemic autonomy.[145]

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139. *Id.* Justice Brennan referred opaquely to the First Amendment as a source for this rule, citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). *Id.* at 449.

140. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 718 (1976).

141. *Id.* at 720. *Mary Elizabeth Blue Hull* and *Serbian Eastern Orthodox* were subsequently confirmed in *Jones v. Wolf*, 443 U.S. 595, 602–06 (1979). *See also* Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (per curiam) (dismissing an appeal because "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine").

142. New York v. Cathedral Acad., 434 U.S. 125, 133 (1977).

143. *See* 403 U.S. 602, 612–13 (1971) (stating that "[a] law may be one 'respecting' the [establishment of religion] while falling short of its total realization" because the concern is to avoid "foster[ing] an 'excessive government entanglement with religion'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970))).

144. *See* Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 146 (2004) ("In a brief decade and a half, we have moved from expansive readings of both of the religious clauses to narrow readings of the Free Exercise Clause and of very important aspects of the Establishment Clause.").

145. I assume here the widely shared view of constitutional doctrine as implementing the Constitution's values through a sequence of judicially crafted doctrinal rules that respond to institutional limitations and changing circumstances. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) ("[A] surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as . . . a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . . ."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996) ("[O]ur written constitution has . . . become part of an evolutionary common law system, and the common law . . . provides the best way to understand the practices of American constitutional law.").

In its interpretation of both the Free Exercise and Establishment Clauses, the Court has veered away from treating religion and religious disputation as exceptional human activities that are unique and beyond the proper purview of state authority. It has also increasingly resisted the idea that religion warrants separate and special treatment. Instead it has moved toward a view of religion as singular only because it is historically vulnerable to invidious discrimination.[146] As a result, the Court typically finds no Religion Clause violation unless religious persons or beliefs are facially singled out for discriminatory treatment.[147] Disparate-effect claims, by contrast, have not fared well. The emphasis on formal equality leaves less room for concepts of separation or concerns about epistemic autonomy.

The landmark case of *Employment Division v. Smith*[148] transformed the Free Exercise Clause's protection from a right against laws that burden religious liberty to a rule against facial discrimination.[149] In *Smith* the Court held that neutral laws of general applicability are valid under the Free Exercise Clause regardless of their burden on religious liberty.[150] In practical effect, *Smith* established a weak equality rule that is satisfied in all but the small set of cases in which legislators are foolish enough to flout facial neutrality (or almost-facial neutrality).[151] In most instances, it will be feasible to mask impermissible motives.

Moreover, the Court's sensitivity to anti-endorsement and anti-entanglement concerns has also diminished. Three trends in recent doctrine, palpable largely in Establishment Clause cases, undermine the claim that state action is unconstitutional if it impinges on a religious group's autonomy and communicates a view about internal doctrinal debates. Coupled with *Smith*'s relaxed view of Free Exercise protections, these Establishment

146. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 694–706 (2002) (chronicling the shift toward minority protection in religious free-expression cases).

147. *See* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1264 (2008) (referencing the general agreement that the government cannot target individual religious groups in regulations, barring extraordinary circumstances). *But cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338–39 (1987) (finding an exception to Title VII for religious groups).

148. 494 U.S. 872 (1990).

149. *Id.* at 879; *accord* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32, 546 (1993) (holding that a "law burdening religious practice that is neither neutral nor of general application must undergo the most rigorous of scrutiny"). For early criticism of *Smith*, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 10–23; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 138–39 (1992).

150. *Smith*, 494 U.S. at 882; *see also Lukumi Babalu*, 508 U.S. at 536 (applying this rule).

151. The relevant Supreme Court precedent for this proposition, *Lukumi Babalu Aye*, is an outlier. In that case, the social and historical context of the local ordinance at issue could not have been more thoroughly imbricated with evidence of animus against a classically discrete, insular, and unpopular minority. *Lukumi Babalu Aye*, 508 U.S. at 526–27. The social meaning of a law will not necessarily be so obvious.

Clause trends mark a retreat from vigorous protection of epistemic religious autonomy.

First, the Court is less sensitive about government action that takes a position on religious meaning. It is less willing to intervene when the state echoes and endorses a majoritarian preference on religion. In 2005, for example, when the Court held that a Texas display of the Decalogue did not violate the Establishment Clause, a plurality of Justices invoked tradition and history as constitutionally sufficient justifications.[152] Allowing inchoate ideas of tradition to trump otherwise applicable Establishment Clause values allows the state to take sides in important religious disputes if a historically powerful majority faction endorses it. More generally, support within the Court for Justice O'Connor's anti-endorsement test has waned. Commentators criticize it as analytically incoherent and insufficiently responsive to minority sensitivities.[153] Justice Scalia has already set forth an alternative view whereby government need not remain neutral between religion and nonreligion but can "acknowledg[e] a single Creator."[154] And a plurality of the Court has recently indicated an openness to some kinds of religious endorsement on the ground that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."[155] As the Court becomes less troubled by the expressive effects of state action on religious matters, it becomes less likely to take umbrage at the disruption of epistemic autonomy wrought by counterterrorism enforcement actions.

Second, the Court, in another line of cases, has authorized state-funding mechanisms that aggregate private choices in ways that set the state's imprimatur upon one religious practice or another. In so doing, the Court has created another vehicle for majorities to give expressive effect to their reli-

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152. *See* Van Orden v. Perry, 545 U.S. 677, 686–92 (2005) (plurality opinion) (relying on "unbroken history" as a warrant for display of the Decalogue on the grounds of the Texas State Capitol); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26–30 (2004) (Rehnquist, J., concurring in the judgment) (arguing that expressive state action constituting "public recognition of our Nation's religious history and character" ought to survive an Establishment Clause challenge).

153. *See, e.g.*, *Van Orden*, 545 U.S. at 695–97 (Thomas, J., concurring) (criticizing the endorsement test). In the academic literature, endorsement has critics, *see* Feldman, *supra* note 146, at 710–18 (arguing that endorsement does not protect against certain forms of exclusion but that there is no reason religion should be singled out for endorsement-related protection), and putative reformers, *see* Adam Samaha, *Endorsement Retires: From Religious Symbols to Anti-sorting Principles*, 2005 SUP. CT. REV. 135, 144–58.

154. McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 888–94 (2005) (Scalia, J., dissenting).

155. Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010) (plurality opinion). *But see id.* at 1832–33 (Stevens, J., dissenting) (applying the endorsement test). The Court further diluted the endorsement test by suggesting that "text-based [public] monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable." Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1135 (2009).

gious preferences. As a result, it has corroded a little further the doctrinal grounds for treating incursions on epistemic autonomy as problematic. In 2002, the Court sanctioned government educational aid to parochial schools on the condition that the aid is "neutral with respect to religion[] and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice."[156] Then-Chief Justice Rehnquist explained this result by asserting that "numerous independent decisions of private individuals" do not add up to any "*imprimatur* of government endorsement."[157]

But Chief Justice Rehnquist's analysis is incomplete. By gerrymandering "private-choice" mechanisms, the state can easily endorse one form of religious practice over others. The private-choice exception thereby enables state endorsement and entrenchment of one religious group. Neutrality at the level of individual choice does not entail neutrality in the treatment of competing religious collectivities. For the state chooses in which domains—education, health, prison services—private choice will be made available. And it can use this choice for distributive ends. As Justice Jackson pointed out in the first case incorporating the Establishment Clause against the states, state funding for religious educational institutions predictably aids certain faiths because only some sects maintain schools.[158] A foreseeable result is state aid predictably flowing to some religious organizations, which can develop economies of scale, secure a larger market share of the social service in question (e.g., education), and discourage other faith groups from entering the same market.[159] Deciding to introduce vouchers for schooling but not health care, hence, aids certain sects over others. The possibility of private choice is not neutral as between religions. But the Court to date has declined to register the risk that private-choice mechanisms

156. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); *see also* Mitchell v. Helms, 530 U.S. 793, 809–10 (2000) (plurality opinion) (stating that neutrality toward religious groups is required to ensure that no endorsement of religion has occurred).

157. *Zelman*, 536 U.S. at 655.

158. Everson v. Bd. of Educ., 330 U.S. 1, 20 (1947) (Jackson, J., dissenting) (arguing that an aid program discriminated because the New Jersey scheme in question "authorize[d] disbursement of . . . taxpayer's money . . . to those who attend public schools and Catholic schools"). The extent to which school vouchers, for example, can yield predictable effects over time is debated. *See* Vincent Blasi, *Vouchers and Steering*, 18 J.L. & POL. 607, 619–20 (2002) (drawing attention to the differing opinions about the long-term effects of vouchers on schools' independence). From early in the twentieth century, the no-aid principle was intended to control distributional outcomes and to stop financial distributions to Catholics. *See* Jeffries & Ryan, *supra* note 110, at 312–17 (describing the evolution of Protestant and Jewish opposition to distributions to Catholics and the general public secularist interest in limiting distributions in order to protect public education).

159. *See* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 141–45 (1996) (describing cooperation–defection differential between membership and nonmembership in religious groups and noting ways the state can modify it).

alter the market in religious beliefs.[160] Nor is it willing to inquire into how a private-choice scheme might be intentionally constructed so as to advantage one sect over others.[161]

Finally, although entanglement was initially one of three tests for Establishment Clause violations,[162] the Court no longer applies a freestanding entanglement test.[163] In *Agostini v. Felton*,[164] the Court assimilated "entanglement" into its analysis of a law's effect.[165] Entanglement is now a second-order justification for declining to scrutinize closely a sectarian recipient of state funds and hence a rationale for relaxing the judicial regulation of private-choice programs recently endorsed by the Court.[166] The Court has also rejected challenges to substantial regulation of religious entities' internal affairs in the course of general regulatory measures or the disbursement of special benefits.[167]

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160. In *Zelman*, Chief Justice Rehnquist acknowledged the risk that financial incentives might skew a program toward religious schools but concluded that so long as "neutral, secular" criteria were used no constitutional problem obtained. *See Zelman*, 536 U.S. at 653–54 & n.3 (noting in addition that the Cleveland voucher program "in fact create[d] financial *dis*incentives for religious schools," which received less funding than community or magnet schools).

161. At the time of this writing, the Supreme Court has *sub judice* a challenge to an Arizona school voucher system that raises a version of this concern. *See* Garriott v. Winn, 130 S. Ct. 3324 (2010); Ariz. Christian Sch. Tuition Org. v. Winn, 130 S. Ct. 3350 (2010) (both granting writ of certiorari).

162. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); *see also* Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1197–98 (1980) (noting that entanglement was first articulated in Walz v. Tax Commission, 397 U.S. 664 (1970), but only designated as a separate Establishment Clause test in *Lemon*).

163. For past applications of entanglement, see, for example, *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977), and *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 749–60 (1976).

164. 521 U.S. 203 (1997).

165. *Id.* at 232–33. Arguably, the end was visible earlier. *See* Ripple, *supra* note 162, at 1208–14. *Agostini* abandoned the idea that a prohibition on entanglement reflected a value distinct from the no-aid and no-harm elements of the Establishment Clause. Justice Souter commented that excessive focus on entanglement in *Aguilar* "obscured" constitutionally salient facts. *Agostini*, 521 U.S. at 242 (Souter, J., dissenting).

166. *See* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion) (stating that "inquiry into the [state aid] recipient's religious views . . . is not only unnecessary but also offensive" because "courts should refrain from trolling through a person's or institution's religious beliefs"). The *Mitchell* plurality picked up a thread initially developed in cases concerning property-tax exceptions and aid to tertiary educational institutions. *See Roemer*, 426 U.S. at 748 n.15 ("The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the *extension*, rather than the withholding, of certain benefits to religious organizations."); *Walz*, 397 U.S. at 691–92 & n.12 (Brennan, J., concurring) (noting that state cessation of exemptions "might conflict with the demands of the Free Exercise Clause").

167. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 394–95 (1990) (holding that the administration and collection of a sales tax is not entangling); Hernandez v. Comm'r, 490 U.S. 680, 696–97 (1989) (holding that the monitoring of a tax benefit is not entangling); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305–06 (1985) (holding that the record-keeping requirements of the Fair Labor Standards Act are not entangling).

By contrast, judicial inquiry into religious belief is now commonplace. Under the Religious Freedom Restoration Act (RFRA), courts must ascertain what constitutes a "substantial[] burden" on a person's "exercise of religion."[168] This test means that RFRA cases plunge courts into religious exegesis.[169] "[T]heological questions are begged throughout the testimony and opinions" in RFRA cases.[170] And judges "confidently assert[] the entire and complete right of every American to believe as she or he chooses while at the same time thoroughly enjoying arbitrating among competing views."[171] The mere existence of the RFRA dilutes the force of entanglement concerns because it makes entanglements a routine part of federal court litigation notionally aimed at protecting religious liberty. Courts are becoming acclimatized to such entanglement, which obviously no longer provides an independent ground for invalidity on constitutional grounds. Rather, entanglement merely functions as a supernumerary factor in a constitutional calculus driven by extrinsic considerations.

C. Conclusion

This Part began by identifying two constitutional harms to individuals and religious communities respectively from the government's reliance on religious speech as a signal in counterterrorism policing. It argued that these harms are plausibly at stake each time the federal government relies on religious speech as a signal in counterterrorism. Nevertheless, the individual harm, which takes the form of a chilling effect and an incursion on individual dignity, is not a significant marginal cost beyond the necessary expenditures of a criminal prosecution or other enforcement action. By contrast, the impact on a religious community's interest in epistemic autonomy—i.e., free development of norms and beliefs independent of state interference—could be substantial. Religion Clause doctrine, developed first in cases concerning the state's treatment of religious property, recognizes and protects this epistemic autonomy interest. But that doctrine has been corroded by changes in Religion Clause doctrine. Epistemic autonomy is now unlikely to command substantial respect or protection in the federal courts. The government

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168. 42 U.S.C § 2000bb-1 (2006); *see also id.* § 2000cc-5(7) (providing that a practice need not be "central to" a religion to be an "exercise of religion"). A unanimous Supreme Court endorsed this test in 2006 as applied to the federal government. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 424 & n.1 (2006).

169. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 444–49 (1998) [hereinafter Sullivan, *Judging Religion*]. Sullivan argues for "the impossibility of fairly delimiting the contours of contemporary religious life" in light of the thick multitude of localized religious "folkways" that characterize religious life in the United States. WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 146, 153 (2005) [hereinafter SULLIVAN, IMPOSSIBILITY OF RELIGIOUS FREEDOM].

170. Sullivan, *Judging Religion*, *supra* note 169, at 448–49.

171. SULLIVAN, IMPOSSIBILITY OF RELIGIOUS FREEDOM, *supra* note 169, at 6; *accord* Sullivan, *Judging Religion*, *supra* note 169, at 448–49.

has little reason to factor in the costs to free speech or religious autonomy interests when it designs its policy responses to domestic terrorism.

This is not an unfamiliar result. Doctrine falls short of full specification or protection of constitutional norms for many reasons,[172] including a Thayerian respect for legislative judgment or other "institutional concerns."[173] More importantly, the result of the analysis of this Part accords with the general approach taken by courts to constitutional rights imperiled by novel security policies adopted in the wake of the September 11 attacks. Courts have not emerged as robust defenders of individual liberties post-9/11. Even in areas in which judicial pushback has been seemingly robust, such as in the exercise of habeas corpus jurisdiction, the Supreme Court's position may amount to more rhetoric than substance.[174] In part, this may be because the Court has long been reluctant to regulate investigatory, prosecutorial, and immigration discretion, even when core constitutional liberty interests are at issue.[175] Confrontations with law enforcement tend to be costly for the court's public reputation.[176] And these costs will be especially high in the wake of 9/11.

Further, judicial responses to national security have not been acoustically separated from other bodies of law. "[T]here is nothing *sui generis*" about the federal bench's responses to post-9/11 security policies.[177] Judicial responses to post-9/11 policies echo federal courts' approaches to other complex state institutions with rights implications.[178] At the same time, the increasing concern for security bleeds over into other doctrinal areas, weakening rights protections that are only tangentially related to terrorism

172. *But see* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 924 (1999) (arguing for a theory of "remedial equilibration" that "leaves no room for a distinction between the abstract, analytic definitions of constitutional rights and remedial concerns that prevent courts from enforcing those rights to their 'true' limits").

173. Sager, *supra* note 19, at 1222–27.

174. *See* Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 431 (2010) (questioning the effect of the Supreme Court's interventions related to Guantanamo).

175. *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 260 (2006) (holding that, for a retaliatory-prosecution case, once a claimant has made a prima facie showing of retaliatory harm, if the defendant official can show that "retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind"); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999) (holding that the doctrine of constitutional doubt does not require that 28 U.S.C. § 1252(g) be interpreted to permit immediate review of a respondent's selective-enforcement claim); United States v. Armstrong, 517 U.S. 456, 462 (1996) (holding that Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure does not require the government to permit discovery of documents material to the "defense" of a selective-prosecution claim).

176. For example, the Warren Court's criminal procedure cases provided a centerpiece for Richard Nixon's presidential campaign, which in turn led to a change in the Court's personnel and thus direction. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 410 (2002).

177. Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226.

178. *Id.* at 257–65.

risk.[179] Consider the Fifth Amendment right against self-incrimination. In recent cases, the Court has made it easier for law enforcement to demand identification[180] and to secure waivers of the right in custodial interrogations.[181] By extension, it might be predicted that the judicial response to 9/11 will only weaken religious liberty interests.

Finally, there is little public or political pressure on the courts to recognize and remedy harms from the signaling function of religious speech. Public concern about counterterrorism law enforcement (to the extent that it exists) generally focuses on prosecutorial or enforcement actions that discriminate on racial or religious grounds.[182] Discriminatory enforcement and profiling are familiar and resonant criticisms of American law enforcement.[183] They are politically potent and recognizable, albeit intractable.[184] By contrast, the effects of using religious speech as a signal in counterterrorism enforcement are neither easy to identify nor plainly visible. The practice is partially buried in enforcement protocols. It generally comes to public attention only sporadically in geographically and temporally dispersed criminal trials. Reliance on religious speech as a signal in counterterrorism is as a result unlikely to precipitate public outrage or pressure for reform either by legislation or through interest-group litigation.[185]

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179. *See, e.g.*, *id.* at 267–72 (discussing Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), as an example of the impact of security concerns on transsubstantive rules, such as civil pleading requirements).

180. *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 190–91 (2004) (upholding a state statute requiring a person stopped by the police to produce identification documents).

181. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2262–63 (2010) (finding a waiver of the right against self-incrimination based on a one-word answer given after two hours and forty-five minutes of silence in the face of questions).

182. *See* Gross & Livingston, *supra* note 4, at 1415 (defining "racial profiling"—at least the kind that provokes public outrage—as "whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person" because of his or her racial or ethnic background).

183. *See, e.g.*, Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. C.R. L.J. 219, 219 (2005) (highlighting the growth of the term *racial profiling* from "a term virtually unheard of five years ago" to a "part of the national lexicon").

184. The *Hayat* case was criticized by the Muslim community of Lodi, California, where Hayat lived, as an instance of *discrimination*—not as a failure of interpretation. MacFarquhar, *supra* note 39.

185. Commentators from across the political spectrum noted the lack of public reaction to the trial of Ali al-Timimi. *See, e.g.*, Debra Erdley, *Al-Timimi Verdict Turning Point in Legal War on Terror*, TRIBLIVE NEWS, May 1, 2005, http://www.pittsburghlive.com/x/pittsburghtrib/s_329818.html (quoting a defense attorney in saying that the Muslim community "seem[s] resigned to what's going on" and that they no longer expect fair trials); Daniel Pipes, *Convicting [Ali al-Timimi,] the "Paintball Sheikh,"* DANIELPIPES.COM (May 2, 2005), http://www.danielpipes.org/2579/convicting-ali-al-timimi-the-paintball-sheikh (observing that "the mainstream media stayed resolutely away from the case").

Whatever harm flows from the practice will instead be externalized onto the relevant minority religious community.[186]

IV. Selecting the Optimal Signal for Domestic Counterterrorism

Government recourse to religious speech as a proxy in domestic counterterrorism may not collide with constitutional doctrine, but does it provide an efficient signaling mechanism? This Part switches from a legal, doctrinal lens to an institutional- and policy-design inquiry. It considers whether law enforcement entities indeed have lighted on the optimal signal for their aims. Recall that prosecutors and police turned to religious speech relatively quickly after 9/11.[187] To minimize search time and costs, they may have grasped the most readily available and the most obvious signal. If executive officials came to rely on religious speech by default as the most obvious tool at hand, then officials may not have considered the full range of possible signaling options. Moreover, legislators and executive officials did not benefit from the new empirical research into the dynamics of terrorism that emerged after 9/11. At a minimum, therefore, the circumstances under which religious speech was adopted as a signaling device should counsel for caution. Religious speech may not in fact be the most efficient signal for resolving epistemic uncertainties in domestic counterterrorism.

This Part analyzes two reasons for questioning reliance on the signaling function of religious speech. It further suggests that governments may be better off eschewing such reliance and turning instead to a closer study of suspects' associations to resolve the signaling problem. The first reason is institutional: Government interpretation of religious speech is likely to be characterized by a high error rate because of the relative lack of institutional knowledge, the predictable incentives of law enforcement officials, and the semantic complexity of religious speech. The discrete interpretative error manifested in Hayat's case,[188] that is, is probably not an outlier.

Second, religious speech may not, in any event, be the optimal signal for terrorism—association may be a better signal. There is a rich and increasingly sophisticated empirical literature about terrorism that casts some light on the signaling question. It suggests that religious speech or conduct plays only a tangential role in the etiology of terrorism. Its inconsistent incidence in terrorism cases provides scant basis for inferring the correlation that current government practice presupposes. To the contrary, the empirical and

186. *See supra* notes 104–08 and accompanying text; *cf.* Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 459 n.125 (2004) (summarizing congressional findings that racial profiling causes members of minority communities to "experience fear, anxiety, humiliation, anger, resentment, and cynicism when they are unjustifiably treated as criminal suspects").

187. *See supra* Part II.

188. *See supra* notes 38–57 and accompanying text.

social science literature suggests that a terrorist's path generally passes through what Louise Richardson calls a "complicit surround":[189] an insular group with distinctive, even idiosyncratic, normative and ethical characteristics that influence the individual turn to political violence. There is surprising convergence on this finding. While its validity should remain open to new challenges based on new empirical evidence, there is sufficient consensus in the literature to suggest that it is certain forms of association, and not religious speech, that will be correlated with terrorism. At a minimum, this casts current counterterrorism practice into doubt. Moreover, it suggests that law enforcement should reorient toward the mapping and understanding of social networks and away from a preoccupation with religious speech. This Part concludes by considering what it would entail for law enforcement entities to retool their reliance on religious speech as a signal in counterterrorism.

A. The Error Rate in Current Signaling Practice

Even if religious speech provides an accurate signal for counterterrorism, it may be better for the state to use a different signal. This will be the case if the government cannot operationalize the correlation between religious speech and risk. Indeed, it is likely that the government will have high error rates in handling religious speech for three separate reasons. First, religious speech is more complex and liable to misunderstanding than other nonreligious discourses. Second, in the American context there has been little state investment in developing a competency in religious interpretation. To the contrary, constitutional theorists and scholars have long insisted on the incompetence of the state in religious matters, providing an affirmative reason for not investing in such expertise. By now, this may have become a self-fulfilling prophecy. Finally, the distribution of incentives within policing and prosecutorial institutions will predictably increase the rate of error. These three reasons suggest that religious speech may not be an optimal signal for *our* government even if it might be an effective tool in the hands of some ideal government.

First, the risk of interpretive error is especially high with respect to religious speech because of its origins and nature. In the three main monotheistic faiths, most religious texts, doctrine, and dogma have survived centuries or more. Over extended use in different cultural and historical circumstances, they have accrued multiple and potentially inconsistent meanings. It is possible that religious texts must be especially open textured and receptive to reinterpretation and reappropriation if they are to maintain their relevance through changing times (because if they are not, they fall out

189. LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT 49 (2006).

of use).[190] That is, there may be a selection effect that favors hermeneutic malleability. Even without adopting an ambitious account of religious texts' evolution, it still seems plausible to posit that as a general matter, religious texts are likely to be more semantically elastic than the mine run of normative or political vocabulary.

By way of example, consider the word *jihad*.[191] An Arabic word literally meaning "striving," the term jihad is used in the Koran to refer in some places "to disputation and efforts made for the sake of God and in his cause" and, in other places, to the conduct of war related to the exercise of a communal duty.[192] In the seventh century, the term evolved into a referent for a larger body of legal doctrine analogous to *jus in bello* and *jus ad bellum* in the Western legal tradition.[193] More modern jurists, however, propounded another, much more expansive, understanding of jihad to justify terrorism.[194] They draw on another distinctive strand of theological thought beginning with the thirteenth century Damascus-based scholar Taqī-d-dīn Ahmad ibn-Taymiyya.[195] By contrast, yet another denomination, the ascetic Sufi tradition, uses the term "greater Holy War" (i.e., jihad) to describe the "constant struggle against the *nafs*, the 'soul'—the lower self, the base

190. *Cf.* Michael Pye, *Problems of Method in the Interpretation of Religion*, 1 JAPANESE J. RELIGIOUS STUD. 107, 120–21 (1974) ("All sophisticated religions experience some degree of tension between the doctrinal norms and formulations which they have inherited and the changing needs of the times. This results in a constant string of new interpretations.").

191. *See* MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: DOCTRINES AND PRACTICE 1–2 (2006) (summarizing the different interpretations of the word).

192. *Id.* at 2, 21; *see also* Fred M. Donner, *The Sources of Islamic Conceptions of War* ("The Qur'an makes . . . frequent reference to 'struggle' or striving[] (*jihad* and other derivations), by which physical confrontation or fighting appears often—but not always—to be intended."), *in* JUST WAR AND JIHAD: HISTORICAL AND THEORETICAL PERSPECTIVES ON WAR AND PEACE IN WESTERN AND ISLAMIC TRADITIONS 31, 46 (John Kelsay & James Turner Johnson eds., 1991).

193. BONNER, *supra* note 191, at 3 ("A typical *Book of Jihad* [within a larger work of jurisprudence] includes the law governing the conduct of war, which covers treatment of nonbelligerents, division of spoils among the victors, and such matters."); Donner, *supra* note 192, at 52 (describing the development of Islamic *jus in bello* rules).

194. *See* KHALED ABOU EL FADL, THE PLACE OF TOLERANCE IN ISLAM 11–13 (2002) (describing the "literal[] and ahistorical[]" Koranic readings used to justify terrorism); HABECK, *supra* note 11, at 19–39 (sketching the evolution of jihad as a justification for violence). As Olivier Roy points out, "the new jihad is an individual and personal decision" quite distinct from the "collective duty (*fard kifaya*)" that jihad connoted in earlier doctrinal discussions. OLIVIER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 41–43 (2004); *accord* GILLES KEPEL, JIHAD: EXPANSION ET DÉCLIN DE L'ISLAMISME 487–88 (2d ed. 2003).

195. *See* W. MONTGOMERY WATT, ISLAMIC PHILOSOPHY AND THEOLOGY 159–60 (2008) (chronicling the life, thought, and influence of Ibn-Taymiyya); *see also* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 139–40 (1997) (situating Ibn-Taymiyya in the context of debates about the epistemological force of analogies); *cf.* CHARLES ALLEN, GOD'S TERRORISTS: THE WAHHABI CULT AND THE HIDDEN ROOTS OF MODERN JIHAD 42–48 (2006) (discussing Ibn-Taymiyya's life and how "his reinterpretation of jihad lies at the heart of modern Islamist revivalism").

instincts."[196] However it is generally used now, the term jihad clearly has a rich history that lends itself to more than one interpretation.

The second reason to posit that error rates may be high is related to the first: There is a long tradition in American constitutional law warning that the state is especially likely to make mistakes when it interprets religious texts. Whether or not this prediction was true when first made, it is plausible to posit now that the tradition has discouraged government from investing in expertise in religious speech. The prediction has become self-fulfilling.

Longstanding accounts of religious liberty in constitutional theory underscore a special government fallibility in religious matters. In the *Memorial and Remonstrance Against Religious Assessments*, James Madison warned that "the Civil Magistrate is [not] a competent Judge of Religious Truth."[197] He was echoing John Locke's 1689 first letter on toleration[198] as well as an older Christian theological vein.[199] The assumption of state incompetence in religious matters is widely echoed today by the courts and analysts of the Religion Clauses. The Supreme Court has repeatedly cautioned that "it is not within the judicial function and judicial competence to inquire whether [one person or another] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[200] Commentators concur. Michael McConnell posits that "government cannot be a competent judge of religious truth because there is no reason to believe that religious understanding has been vouchsafed to the majority, or any governmental elite."[201] And Kent Greenawalt, in a recent comprehensive treatment of the Religion Clauses, finds general agreement about the "limited competence of secular courts" in matters of faith.[202] There

196. ANNEMARIE SCHIMMEL, MYSTICAL DIMENSIONS OF ISLAM 98, 112 (1975).

197. James Madison, *Memorial and Remonstrance Against Religious Assessments* ("Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."), *reprinted in* 5 THE FOUNDERS CONSTITUTION 83 (Philip Kurland & Ralph Lerner eds., 1987).

198. JOHN LOCKE, TWO TREATISES ON GOVERNMENT AND A LETTER CONCERNING TOLERATION 220 (Ian Shapiro ed., 2003).

199. *See* Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1672 (2003) (book review) (collecting Biblical authorities).

200. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981); *see also* United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.").

201. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 24 (2000).

202. 1 GREENAWALT, *supra* note 124, at 262. Other commentators provide specific grounds for concern about the status and treatment of religious identity. *See, e.g.*, Blasi, *supra* note 158, at 613 ("[R]eligion remains as a distinctively dangerous political force, even as it serves for many individuals as an important source of communal identity, personal understanding, and comfort.").

is little dissent, in short, from the proposition that the state is not competent in matters of religious meaning.

The Madisonian discounting of governmental knowledge of religion rests on an ambitious and sophisticated epistemological account of religion. Yet, there is no need to endorse that sophisticated account to conclude that Madison may now be correct. Even if there is nothing special about religious meaning, there has long been a broad consensus that the government is not competent in the field of faith. Governments, at least in the United States, have scant incentive to accrue such knowledge. Long-standing pessimism about the state's competence in religious matters yields a self-confirming result: underinvestment in religious knowledge. Quite apart from more ambitious Madisonian theories, this diachronic dynamic creates doubt about government's ability to deal with religious terms accurately.

The third and final source of error lies in the institutional context in which religious speech is used as a signal. Absent the development of a centralized stock of religious knowledge, decisions about how to interpret religious speech lie in the hands of individual investigators and prosecutors. Their incentives push them toward finding experts such as Khaleel Mohammed, the expert witness who testified in Hayat's case, who will confirm that costs sunk into investigations and prosecutions have been well spent.[203] To the extent that government now must rely on outside experts, it risks compounding rather than mitigating error costs. Jurors, who are generally relied on to filter out false positives proffered by the government,[204] are unlikely to catch errors. Moreover, to the extent that government must overcome a past failure to invest in religious competence, its current incentives mean that any investments henceforth undertaken likely will be tailored to maximize convictions rather than accuracy.

As a threshold matter, there is reason to be skeptical about the decentralized manner in which decisions about religious speech's meaning are made. The decision to hire an expert for a terrorism trial, for example, is made on the retail level, not currently by a centralized mechanism. The resulting dispersion of authority creates opportunities for distortion. Pooling discretion at the base of a bureaucratic chain always makes it difficult to determine whether animus or bias has influenced decision making. William Stuntz has observed that "discriminatory policing is much harder to combat when the police deal with individuals" because the retail is much more costly

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203. *See* Waldman, *supra* note 7, at 89 (stating that the prosecution in Hayat's case felt that a prayer found in Hayat's wallet was so critical to the case that the prosecution hired Mohammed—who affirmed that the prayer had no other use than in connection with violent jihad—to interpret it).

204. *See* United States v. Scheffer, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'" (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973))); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891) (stating that jurors "are presumed to be fitted for [their task] by their natural intelligence and their practical knowledge of men and the ways of men").

and intractable to monitor than the wholesale.[205] While Stuntz was focused on racial discrimination, the same holds for religious animus. Writing about the distinct and different problem of discriminatory allocation of subsidies for religious activities, Douglas Laycock argued that "discretion threatens religious liberty" by enabling line drawing distorted by bias.[206] In the context of federal criminal prosecutions, for example, it is difficult to ensure that the diverse Assistant U.S. Attorneys making decisions about who to call and use as an expert will not exercise that discretion in ways that maximize the chances of conviction rather than the accuracy of trial results.[207]

Moreover, there are plausible reasons for being skeptical of the market for expertise that prosecutors must tap in these cases. The provision of terrorism expertise is lucrative.[208] It is reasonable to assume that it will attract rent-seeking interest groups. Anecdotal evidence suggests state and local police departments depend on "self-described experts whose extremist views are considered inaccurate and harmful by the FBI."[209] By definition, a government ill equipped with the relevant knowledge cannot effectively screen out rent-seeking "experts." Further, there is little empirical evidence that government imposes demanding requirements in terms of formal credentials.[210] Anecdotal evidence from other countries with longer experience with Muslim minorities supports this skepticism.[211] The federal Office for the Protection of the Constitution (BfV) in Germany, responsible for domestic counterterrorism, for example, has also been criticized for its

205. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2164 (2002).

206. Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 195–96 (2004).

207. There is no reason to believe that the adversarial system will throw up the best available expertise to enable a fact finder to resolve an empirical question. *See* Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 184 (2010) (arguing that "[t]hrough selection, affiliation, and compensation biases, litigants make experts *more favorable* but *less accurate* compared to their base rates of accuracy in the real world").

208. *See, e.g.*, JOHN MUELLER, OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE THE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM 29–50 (2006) (describing the "terrorism industry" and condemning its distorting effect on policy choices); Petra Bartosiewicz, *Experts in Terror*, NATION, Feb. 4, 2008, http://www.thenation.com/article/experts-terror (noting that one expert received $135,000 in Justice Department funds in one year).

209. Dana Priest & William M. Arkin, *Monitoring America*, WASH. POST, Dec. 20, 2010, http://projects.washingtonpost.com/top-secret-america/articles/monitoring-america/.

210. Bartosiewicz, *supra* note 208 (describing one expert who lacked formal academic credentials and noting that those with credentials are often reluctant to take sides).

211. Elected officials generally evince low levels of understanding of Islam and Muslim constituencies. *See* LORENZO VIDINO, THE NEW MUSLIM BROTHERHOOD IN THE WEST 102–04 (2010) (discussing factors that contribute to "a pervasive ignorance among many of the top officials in charge of issues that have closely to do with Islam and Islamism").

incorrect translation of monitored religious groups' documents, which have yielded accusations based on weak evidence.[212]

Countervailing incentives may mitigate these distortions. Government officials clearly have a strong incentive to prevent terrorist attacks and a strong fear of being blamed if they fail. But there is reason to doubt the latter constraint's effectiveness. As a threshold matter, the costs and consequences of policy failure are not evenly distributed so as to encourage efficient policy responses. While the costs of developing a correct understanding of religious speech in any particular case fall on one official alone, blame in the case of a terrorist attack is dispersed widely. High-level, visible officials are more likely than line officials to be publicly held to account. Perceptive counterterrorism officials will have observed that few officials suffered due to their failure to prevent the September 11 attacks. For example, the 9/11 Commission highlighted institutional problems, rather than isolating and blaming particular individuals.[213] Moreover, there is scant evidence that the federal intelligence apparatus in fact can effectively respond to evolving threats. To the contrary, a leading political science account suggests that intelligence agencies suffer from a sclerosis that has prevented them from overcoming Cold War-era mindsets and investment strategies.[214] As recent "near misses" suggest, American counterterrorism bureaucracies appear simply to be quite bad at adapting to new circumstances.[215]

In sum, the distinctive characteristics of religious speech and the institutional environment in which it is used as a signal for counterterrorism ends will predictably yield a high error rate. In turn, a high error rate means that even if religious speech is otherwise reliable as a signal, the government should be cautious before adopting it to that end.

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212. INT'L CRISIS GRP., ISLAM AND IDENTITY IN GERMANY 17 (2007), *available at* http://www.crisisgroup.org/~/media/Files/europe/181_islam_in_germany.ashx.

213. *See* 9/11 COMMISSION REPORT, *supra* note 26, at 73–107 (describing the evolution of counterterrorist activities in the United States and noting institutional failures in law enforcement, the FAA, the U.S. Intelligence Community, the State Department, the Department of Defense, the White House, and Congress that impaired effective counterterrorist efforts).

214. *See generally* AMY B. ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11, at 49–56 (2007) (describing how government agencies do not experience the market pressure to adapt that private firms experience). This was the case even before 9/11. *See* AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JSC, AND NSC 9 (1999) ("[T]he modern American national security apparatus has not performed up to par . . . . We do not need a theory of optimal agency design to reach this conclusion.").

215. *See, e.g.*, Ben Feller, *Obama Acknowledges More 'Red Flags' in Flight Plot*, BOSTON.COM, Jan. 6, 2010, http://www.boston.com/news/nation/washington/articles/2010/01/06/obama_acknowledges_more_red_flags_in_flight_plot/ (quoting President Obama as saying that the Intelligence Community failed to "'connect [the] dots'" and prevent an attempted bombing by Umar Farouk Abdulmutallab).

B. *The Choice of Optimal Signal for Domestic Counterterrorism*

Even if law enforcement could overcome these hurdles, there is still the question of whether religious speech is indeed the optimal signal for counterterrorism ends. This subpart suggests that it is not. Mounting empirical evidence points away from a correlation between religious speech and terrorism, and instead highlights the importance of association—the immediate, insular small groups to which a person is closely linked—in the development of terrorist violence.

This argument proceeds in four sections. The first introduces basic theories of signaling in conditions of asymmetric information from economic theory. The second addresses the question whether religious speech provides an effective signal. The third section looks at empirical and social science evidence about what *does* correlate with political violence. The final section considers constitutional objections to the use of association.

1. Signaling as a Solution to Information Asymmetries.—Governments are searching for a readily observable trait that reliably correlates with terrorist risk in order to sort between those who may warrant targeting for investigation or prosecution and those who do not. To understand solutions to the problem, it is helpful to contrast the position of the government to the position of an employer searching for productive employees—a situation that has received much scrutiny in the economics literature.[216] An employer looking at a large pool of job applicants is searching for a candidate who will not shirk or misbehave once hired. Like the government, the employer operates in a context of information asymmetry. Candidates know much more about whether they will shirk or misbehave than the employer does. Like government, employers seek low-cost signals that reliably sort out false positives in order to hone in on the best candidates for a position. Both the government searching for threats and the employer searching for employees confront an unsegregated population and seek to sort for a certain "type" within that population. Crucially, both are concerned that if they identify a signal to discern the favored population, the disfavored population will simply mimic that signal.[217] Employers, that is, do not want to rely on some indicia of job performance that less attractive candidates can easily imitate.

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216. This is not the only instance in which government confronts a sorting problem. Identifying desired migrants from a larger immigration inflow is another example of the problem. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824 (2007) (describing immigration as an example of a sorting problem where the information relevant to the sorting algorithm is unknown to the state but may be known to the immigrants).

217. *See* Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 463–64 (2002) (describing incentives to either share or hide information regarding educational qualifications by individuals in the Kenyan employment market depending on how the Kenyan government valued education).

They must hence contend with two problems: first, the problem of accuracy in the original signal and, second, the fact that even if a signal is accurate it will be mimicked by the disfavored class to the extent that it can no longer serve the sorting function.

In the employer's case, the sought-after population—i.e., productive potential employees—has an interest in signaling to the employer who they are. But the disfavored population—i.e., less productive employees—will try to mimic that signal so as to persuade the employer that they should be hired and thereby receive higher wages.[218] The entity seeking to use a signal must account for the strategic behavior of one portion of the population. Both government and employers must pick a signal that minimizes inaccuracy and also limits the strategic behavior of the disfavored class. In both cases, "the fact that actions convey information leads people to alter their behavior"[219] so "even small information costs can have large consequences."[220]

Economists studying the dynamics of employment markets have developed a number of approaches and solutions to this distinctively bifurcated selection problem.[221] In path-breaking work, Michael Spence identified one solution. He argued that there may be a "signal [that] actually does distinguish low- and high-productivity people and the reason it is able to do so is that the cost of the signal is *negatively correlated* with the unseen characteristic that is valuable to the employers."[222] In the employment market, education fulfills this function under certain conditions. Education is an accurate proxy for the characteristics sought by an employer. Moreover, the cost of obtaining education can be lower for productive candidates than for unproductive candidates. Hence, it is cheaper for a more productive employee to obtain education and to signal her worth than it is for an unproductive employee to mimic that signal. The inverse correlation between productivity and the cost of the signal (education) undercuts the ability of unproductive candidates to mimic the signal.[223] By contrast, if education's costs were identical for productive and nonproductive job candidates in the market, the latter would mimic the educational investments of their more productive peers.[224] Education in that case would no longer play a useful signaling function.

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218. *See id.* ("[T]here are incentives on the part of individuals for information not to be revealed, for secrecy, or, in modern parlance, for a lack of transparency.").

219. *Id.* at 473.

220. Joseph E. Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Q.J. ECON. 1441, 1443 (2000).

221. *See id.* at 1450–53 (noting different approaches to the selection problem).

222. Spence, *supra* note 13, at 437 (emphasis added). Spence emphasized the possibility of "*multiple equilibria* in the market." *Id.* That is, education does not always function as a signal; its capacity to do so depends on its cost profile.

223. If education is too expensive for either high- or low-productivity workers, it will obviously not serve the same function.

224. *Id.* at 440.

The key to generalizing this model is the existence of two facts: (1) the appearance of the signal is positively correlated to the desired trait, and (2) the cost of the signal is negatively correlated with the underlying trait.[225] It is, therefore, a necessary but not sufficient condition for an action to be correlated with a specific trait for it to function as a signal. There must also be a negative correlation between the favored trait and the cost of acquiring the signal in order to preclude strategic mimicry.

2. Religious Speech's Limited Signaling Function.—It should be immediately apparent from this model that religious speech cannot play an effective signaling role. Religious speech fails to meet the second necessary criteria for an effective signal: the cost of either using or avoiding stipulated forms of religious speech is not correlated in any way with the characteristic government seeks to identify. It is not meaningfully more expensive for a terrorist to avoid telltale forms of religious speech than it is for a nonterrorist to do the same. A terrorist group with even a modicum of strategic sense would instead encourage its agents to eschew forms of religious behavior that mark them out as possible suspects.[226]

The signaling function of religious—almost always Islamic in the current context—speech in counterterrorism might alternatively be predicated on the claim of a correlation between terrorist violence and *Islamic* texts on the assumption that for *Muslims* these texts are costly to avoid. Some commentators have indeed contended that there is a close connection between Islam as a faith and violence, quite apart from the connection between certain texts and violence.[227] On this logic, religious speech works as a signal because it will be more costly for Muslims than for non-Muslims to abandon such speech.

But there is in fact very little evidence that religiosity, even in general, is correlated with the risk of terrorism. Compare the number of attempted terrorist attacks by Muslim-Americans in the United States since 9/11 with

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225. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 123 (1994) ("Employers are most likely to be able to draw [positive] inferences when there is an action that industrious applicants can take that is more attractive to them than to lazy applicants."); Nick Feltovich et al., *Too Cool for School? Signaling and Countersignaling*, 33 RAND J. ECON. 630, 631 (2002) (noting that standard models conclude that "in a separating equilibrium, 'high' types . . . send a costly signal to differentiate themselves from lower types").

226. Al Qaeda indeed did in preparing the September 11 attacks. *See* JERROLD M. POST, THE MIND OF THE TERRORIST: THE PSYCHOLOGY OF TERRORISM FROM THE IRA TO AL-QAEDA 200 (2007) (describing an al Qaeda training manual that instructs terrorists to avoid certain behaviors in order to "maintain their cover").

227. *See, e.g.*, SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON 123 (2004) ("Islam, more than any other religion human beings have devised, has all the makings of a thoroughgoing cult of death."); Ralph Peters, *Betraying Our Dead: Forgetting the Vows We Made*, N.Y. POST, Sept. 11, 2009, http://www.nypost.com/p/news/opinion/opedcolumnists/betraying_our_dead_H6T95r1BTCnkC1UbEdUfsO (arguing that Islam is not a religion of peace, as evidenced by "the curious absence of Baptist suicide bombers").

the fact that, according to the Pew Research Center, there are at least 1.4 million Muslim adults age eighteen or older living in the United States.[228] The sheer disparity (measurable in orders of magnitude) between the number of American Muslims and the quanta of domestic terrorist violence makes a necessary connection between faith and violence implausible.[229] Further, studies of terrorism fail to find a correlation between terrorism and a particular belief structure such as Islam. As RAND Institute scholar Bruce Hoffman has observed, any claim of a historical correlation between terrorism and religion (let alone a specific faith like Islam) is historically tenuous. None of the eleven identifiable terrorist groups operating in 1968 was religious, Hoffman notes, and it was not until 1980 that "the first 'modern' religious terrorist groups appear[ed]."[230] Time-series studies of the geographic distribution of global terrorism also illustrate considerable variance uncorrelated to patterns of religious settlement.[231] And a more discrete study of Dutch Muslims found no causal relationship between religious orthodoxy and political discontent.[232]

Further evidence of the absence of correlation emerges from comparative analysis of religious terrorists. Scholars who focus on religiously motivated terrorism instead emphasize the *invariant* incidence of terrorist violence across faith groups. No faith has a monopoly on terrorist violence.[233] While religious belief can supply a "transcendent moralism with which such acts are justified," the actual content of that belief proves less important than the social structures and the community of interest that belief

228. PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 9–10 (2007), *available at* http://pewresearch.org/assets/pdf/muslim-americans.pdf.

229. Across Muslim majority countries, support for terrorism also varies widely. C. Christine Fair & Bryan Shepherd, Research Note, *Who Supports Terrorism? Evidence from Fourteen Muslim Countries*, 29 STUD. CONFLICT & TERRORISM 51, 53, 58 tbl.2 (2006).

230. BRUCE HOFFMAN, INSIDE TERRORISM 84–85 (rev. & expanded ed. 2006); *see also* MATTHEW CARR, THE INFERNAL MACHINE: A HISTORY OF TERRORISM 239 (2006); ALAN B. KRUEGER, WHAT MAKES A TERRORIST: ECONOMICS AND THE ROOTS OF TERRORISM 80–81 (2007) ("[R]eligious differences are among the many potential sources of the grievances that lead to terrorism. They are not the only reason . . . [and] are not specific to any one religion.").

231. *See* Gary LaFree et al., *Cross-National Patterns of Terrorism: Comparing Trajectories for Total, Attributed and Fatal Attacks, 1970–2006*, 50 BRIT. J. CRIMINOLOGY 622, 639 fig.1 (2010) (listing the countries with the highest total number of terrorist attacks between 1970 and 2006 as Colombia, France, India, Israel, Northern Ireland, Pakistan, Russia, Spain, Sri Lanka, and Turkey).

232. *See* MARIEKE SLOOTMAN & JEAN TILLIE, INST. FOR MIGRATION & ETHNIC STUDIES, PROCESSES OF RADICALISATION: WHY SOME AMSTERDAM MUSLIMS BECOME RADICALS 4 (2006), *available at* http://www.dmo.amsterdam.nl/publish/pages/85462/processesofradicalisationimes.pdf (stressing that "orthodoxy does not lead automatically to political discontent (and from there to potential radicalisation), and vice versa" because "the religious and political dimensions are *independent* of each other").

233. *See* MARK JUERGENSMEYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE, at xi (3d ed. 2003) ("Violent ideas and images are not the monopoly of any single religion. Virtually every major religious tradition . . . has served as a resource for violent actors.").

binds together.[234] Hence, one study of religious terrorism has identified "remarkable regularity" in the "organizational design" of Muslim, Jewish, and Christian groups that have resorted to violence: a thick network of interpersonal linkages that enables "mutual aid."[235] This anticipates a point developed at greater length in the following section: What enables the commission of terrorist violence is a person's network of immediate associations, not his or her particular beliefs. While religious belief can play an important functional part of the process of endorsing the use of political violence, its actual content is not terribly important in accomplishing that end.

This claim of correlation, however, might be amended to yield a narrower hypothesis: that there is a correlation between certain strands of Islam and political violence. Yet the relationship between the specific religious doctrine of sects in Islam and terrorist action appears fluid and contingent. Case studies of more rigidly doctrinaire strands of Islam yield surprisingly little evidence of connection between these traditions and political violence. Connections between violence and the revisionist puritanical Saudi strain of Wahhabism, for example, are slim.[236] The Salafi movement out of which al Qaeda emerges has factions that support and factions that oppose violent political action.[237] One Salafi group has even decreed "a general ban on politico and jihadi publications."[238] The most comprehensive study of a Western Salafist group currently available rejects the notion that "the uniqueness of Islam" explains political violence and instead favors an explanation focused on the "shared mechanisms of contention" particular to the group at hand, not the contents of doctrine.[239] Investigations of developments among Salafist groups in Egypt also emphasize divisions inside the movement, with prominent leaders of that movement explicitly condemning the actions of al Qaeda, in particular the commission of terrorist attacks.[240] Sects that agree on a political role for Islam diverge about the

234. *Id.* at 10–11.

235. ELI BERMAN, RADICAL, RELIGIOUS, AND VIOLENT: THE NEW ECONOMICS OF TERRORISM 16 (2009).

236. *See* EL FADL, *supra* note 194, at 10–11 ("Wahhabism and its militant offshoots share both attitudinal and ideological orientations. . . . But Wahhabism is distinctively inward-looking—although focused on power, it primarily asserts power over other Muslims.").

237. Quintan Wiktorowicz, *Anatomy of the Salafi Movement*, 29 STUD. CONFLICT & TERRORISM 207, 208, 225–28 (2006) [hereinafter Wiktorowicz, *Anatomy*]; Quintan Wiktorowicz, *A Genealogy of Radical Islam*, 28 STUD. CONFLICT & TERRORISM 75, 75 (2005) [hereinafter Wiktorowicz, *Genealogy*].

238. Wiktorowicz, *Anatomy*, *supra* note 237, at 221.

239. QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST 14 (2005).

240. *See* FAWAZ A. GERGES, JOURNEY OF THE JIHADIST: INSIDE MUSLIM MILITANCY 224–29 (2007) (describing the fractured Islamist reaction to 9/11); FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 29–34 (2005) (illustrating the struggle between jihadi leaders about whether their efforts should be focused locally or globally); Peter Bergen & Paul Cruickshank, *The Unraveling: Al Qaeda's Revolt Against bin Laden*, NEW REPUBLIC, June 11, 2008, at 16, 18

legitimacy of violence in achieving an Islamic state,[241] and consensus on Islamic doctrine consistently coexists with sharp disagreement about the use of violence.[242] The connection between religious ideology, even defined at a relatively specific level within a particular faith tradition, and attitudes to political violence is therefore thin.

Finally, it is worth noting that studies have also rejected other frequently suggested causes of terrorist violence. The political science, sociology, and psychology literature, for example, uniformly rejects dispositional, psychological accounts of terrorism, i.e., accounts grounded in terrorists' individualized pathologies.[243] Dean Louise Richardson pithily observes that "terrorists, by and large, are not insane."[244] Efforts to build "a terrorist profile" or to predict which individuals will engage in terrorism "have invariably failed."[245] Summarizing recent research, Richardson acknowledges that there are psychological traits common to those who use terrorist violence: "Terrorists see the world in Manichean, black-and-white terms; they identify with others [i.e., as part of a larger communal whole]; and they desire revenge."[246] But it is not clear whether these attitudes are a predisposition for the commission of terrorist violence or whether they are a

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(describing the repudiation of al Qaeda by Sayyid Imam Al Sharif, the organization's "ideological godfather"). Similarly, radical Islamists in Libya have also repudiated political violence. *Id.* at 17.

241. *See* Farhad Khosrokhavar, *The Psychology of the Global Jihadists* (identifying specific sects that disagree on the use of violence), *in* THE FUNDAMENTALIST MINDSET 139, 139 (Charles B. Strozier et al. eds., 2010).

242. Wiktorowicz, *Genealogy*, *supra* note 237, at 75, 87.

243. There is a large body of literature on psychological profiling. *See* MICHAEL P. ARENA & BRUCE A. ARRIGO, THE TERRORIST IDENTITY: EXPLAINING THE TERRORIST THREAT 4 (2006) (noting that research describing those who commit terrorist acts as "intrapsychically flawed, abnormal, and/or psychopathic is rare and typically of poor quality"); *id.* at 26, 229 (finding "serious limitations" in the focus on individual abnormality); JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM 28–46 (2005) (discussing the limitation of psychology literature on terrorism but stressing the importance of an "environmental context which gives rise to, sustains, directs, and controls it"); MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 83–91 (2004) (reviewing and rejecting psychological personality explanations); Arie Kruglanski & Shira Fishman, *The Psychology of Terrorism: "Syndrome" versus "Tool" Perspectives*, 18 TERRORISM & POL. VIOLENCE 193, 195, 200–01 (2006) (noting that "the systematic quest for a unique terrorist personality has yielded few encouraging results" and rejecting the idea of a "uniform socio-psychological phenomenon" of the terrorist "syndrome"); Max Taylor & John Horgan, *A Conceptual Framework for Addressing Psychological Process in the Development of the Terrorist*, 18 TERRORISM & POL. VIOLENCE 585, 585 (2006) (finding "little or no evidence of particular or distinctive individual qualities being associated with the terrorist"); Charles Tilly, *Terror as Strategy and Relational Process*, 46 INT'L J. COMP. SOC. 11, 21 (2005) ("If we are trying to explain when, where, and how people actually engage in terror, relational explanations will serve us far better than systemic or dispositional explanations.").

244. RICHARDSON, *supra* note 189, at 14–15, 41. Psychologist Marc Sageman's study found evidence of childhood conduct disorders in a small minority of the sample of Islamist terrorists he studied (four of sixty-one). SAGEMAN, *supra* note 243, at 80–83.

245. RICHARDSON, *supra* note 189, at 14–15, 41.

246. *Id.* at 41; *see also id.* at 41–44 (noting that these are reasons why individuals join a terrorist group in the first place).

consequence of having already become committed to terrorist action. Nor is poverty, another frequent suspect, meaningfully correlated with terrorism.[247]

In summary, not only religion but also other commonly assumed causes of terrorism—such as psychological defects or poverty—all fail to show the characteristics of a signal. They are not positively correlated to the incidence of terrorism. Even if there were proof of a correlation, there is no evidence that the cost of abandoning certain forms of religious speech would be negatively correlated with a likelihood of commitment to political violence. Religious speech, therefore, is a poor fit for the signaling function in counterterrorism.

3. Insular Groups and Terrorist Violence.—Another trait does, however, correlate with the incidence of political violence and has the appropriate cost profile to render it resilient to mimicry. There is growing empirical evidence that the characteristics of a suspect's close and immediate associations have these two characteristics: Association with individuals who in turn are affiliated with terrorism, or are believed to present terrorist risks, is correlated with the risk of terrorism. Further, because such association is causally linked to the production of terrorism, it is more costly for those wishing to engage in terrorism to give up those associations than for others.

The basic insight was captured in the U.K. *Guardian* newspaper in late 2006 by humorist Urmee Khan, who offered a list of ten "do's-and-don'ts" for British Muslims. Number four was "Don't join groups or clubs":

> Somewhere there is a dusty office in Whitehall whose function is to ban organisations . . . . The room is probably full of mildewed, dusty files about Northern Ireland's paramilitary groups, and there is no doubt a faded map of Belfast peeling from the wall. But now the dust has been blown off, because there is a use for the office again.
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> . . . .
>
> If you are a barking mad, dangerous extremist, in a group prepared to countenance violence to get their way, then you better make sure that you are white. For Muslims, this is a no-no. So, to be a fully accredited ordinary, decent Muslim, you should join only the Scouts, the Brownies or—if force is your thing—the British Army.[248]

The social science literature strongly suggests that Khan's wit hits close to the mark. A consensus in that literature exists about one aspect of the process of becoming a terrorist: its connection with insular groups. This consensus suggests that "[i]f we are trying to explain when, where, and how

247. *See* Edward Newman, *Exploring the "Root Causes" of Terrorism*, 29 STUD. CONFLICT & TERRORISM 749, 750–52 (2006) (finding no correlation between terrorist acts and either poverty or educational deprivation).

248. Urmee Khan, *How to Be an 'Ordinary, Decent' Muslim*, GUARDIAN (U.K.), Aug. 31, 2006, http://www.guardian.co.uk/world/2006/aug/31/religion.uk.

people actually engage in terror, relational explanations will serve us far better than systemic or dispositional explanations."[249] In particular, a person's immediate, intimate circle of association plays an important role in becoming a terrorist: "[T]he process of radicalisation takes place in the framework of a small group of friends."[250] Associational context correlates better with the incidence of terrorist violence than religious speech. And, as explored in greater detail below, association has the necessary cost profile to limit mimicry: It appears to be difficult to become a terrorist without the appropriate cluster of associations.

The empirical and social science literature on political violence suggests that terrorism is frequently seeded in small groups with distinctive idioms and discourses. "Arguably the most important development for understanding the causes of terrorism are within group dynamics."[251] Such group dynamics and structures can be observed even within al Qaeda.[252] Within groups, shared and insular idioms, identities, and discourses prove pivotal to terrorism's etiology.[253] The production of terrorism itself is "undeniably a group process," in the sense that individuals almost invariably accrue necessary incentives and skills to commit terrorist violence within

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249. Tilly, *supra* note 243, at 21. In his larger work, Tilly emphasizes the collective context of contentious political claim making in general. *See* CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 31 (2003) ("[E]very actor that engages in claim making includes at least one cluster of previously connected persons among whom have circulated widely accepted stories concerning their strategic situation . . . .").

250. Olivier Roy, *Al Qaeda in the West as a Youth Movement: The Power of a Narrative* 16 (MICROCON, Policy Working Paper No. 2, 2008), *available at* http://www.microconflict.eu/publications/PWP2_OR.pdf.

251. JASON FRANKS, RETHINKING THE ROOTS OF TERRORISM 41 (2006); *see also* ARENA & ARRIGO, *supra* note 243, at 73–74 (stressing the centrality of "group relationships" because "groups have a more immediate influence on shaping behavior" than traits such as race, religion, or ethnicity); RICHARDSON, *supra* note 189, at 45 (noting that becoming a terrorist "requires a charismatic leader or a functioning organization to mix these feelings [of simplification, identification, and revenge] . . . and turn them into action"); WIKTOROWICZ, *supra* note 239, at 14–15 (describing the importance of social networks to recruitment for Islamist groups); HORGAN, *supra* note 243, at 34, 104–07; Kruglanski & Fishman, *supra* note 243, at 199–201; Taylor & Horgan, *supra* note 243, at 590–91, 598 (all noting the importance of group context and emphasizing "gradual socialization" into committing terrorist acts).

252. *See* ROY, *supra* note 194, at 50 ("Islamic radical movements are always structured as a sect, with a tight-knit core and a looser network of sympathisers."); David J. Kilcullen, *Countering Global Insurgency*, 28 J. STRATEGIC STUD. 597, 603 (2005) (describing al Qaeda as modeled "on a traditional Middle Eastern patronage network" with an intricate "web of dependency" that is "like a tribal group").

253. *See* TILLY, *supra* note 249, at 32 ("[C]onstituent units of claim-making actors often consist not of living breathing individuals, but of groups, organizations, bundles of social relations, and social sites such as occupations and neighborhoods."); Anthony Oberschall, *Explaining Terrorism: The Contribution of Collective Action Theory*, 22 SOC. THEORY 26, 27–28 (2004) (noting the importance of organizational capacity for achieving terrorist violence); Jerrold M. Post et al., *The Terrorists in Their Own Words: Interviews with 35 Incarcerated Middle Eastern Terrorists*, 15 TERRORISM & POL. VIOLENCE 171, 175 (2003) (observing the salience of group identity among the terrorists studied).

group contexts.[254] These groups may be nested in a larger network structure with independent dynamics. But it is the intimate, insular circle of friends that warrants separate study for its incubational function in relation to terrorism. Absent this distinctive associational context, the literature suggests, terrorism is potentially prohibitively costly to generate.[255]

To understand the central importance of insular groups, consider terrorism's gestation in purely functional terms (and, solely for the purpose of analysis, stripped of moral implications). Recruitment to terrorism faces at least two obstacles.[256] First, it confronts a collective-action problem. Commission of terrorist violence means a small minority shoulders the cost of political action on behalf of a larger group. Suicide terrorism, for instance, may be collectively rational; individually, it is (generally) considered not. Hence, a collective enterprise such as al Qaeda has quite different incentives when it comes to planning and committing terrorist acts than its constituent members. As one study of suicide bombing has observed, organizations "reap multiple benefits on various levels without incurring significant costs" from attacks—a characterization that would be inapposite applied to the individual attackers.[257] In most cases, collective-action problems ought to render it unlikely that a discrete group will assume risks of political action otherwise spread across a broader population.[258] How can a rational terrorist organization surmount this free-rider problem?[259]

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254. HORGAN, *supra* note 243, at 294.

255. But it not impossible: the claim here is probabilistic, not a matter of formal logic.

256. This is not to suggest that in every group there is a clearly identified facilitator. There are some anecdotal accounts of groups moving collectively toward endorsement and use of terrorist violence, rather than being moved in that direction by the conscious actions of one individual. Some studies of terrorist recruitment among European Muslims, for example, highlight the role of "gatekeepers[,] . . . veteran militants who fought against the Soviets in the 1980s, or radicals who have trained in *jihad* camps." Petter Nesser, *Jihadism in Western Europe After the Invasion of Iraq: Tracing Motivational Influences from the Iraq War on Jihadist Terrorism in Western Europe*, 29 STUD. CONFLICT & TERRORISM 323, 326 (2006); *see also* Donald Black, *The Geometry of Terrorism*, 22 SOC. THEORY 14, 16 (2004) ("Pure terrorism is not only collective but well organized."). *But see* Kruglanski & Fishman, *supra* note 243, at 199–200 (observing a variety of leadership, charismatic and otherwise, among terrorist groups).

257. MIA BLOOM, DYING TO KILL: THE ALLURE OF SUICIDE TERROR 76 (2005); *cf. id.* at 84 (distinguishing between the individual and group rationality of suicide bombing). For an individual, hypothesized posthumous spiritual rewards or the psychic gain of imagining an opponent's losses might arguably suffice to make an act of suicide terrorism rational.

258. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1–3, 7 (1971) ("[W]hen a number of individuals have a common or collective interest—when they share a single purpose or objective—individual, unorganized action . . . will either not be able to advance that common interest at all, or will not be able to advance that interest adequately."); *id.* at 33–36 (explaining why "the larger the group, the less it will further its common interests").

259. *See* Peter Kurrild-Klitgaard et al., *The Political Economy of Freedom, Democracy and Transnational Terrorism*, 128 PUB. CHOICE 289, 291 (2006) (discussing the "early application of rational choice theory to the study of terrorism"); Michael Munger, *Preference Modification vs.*

The second obstacle is ethical in nature. Terrorism requires the commission of violence outside the accepted portfolio of political strategies and entails acts that often transgress widely shared ethical boundaries.[260] Ethical scruples generally stand in the way of terrorist violence, or at least impose heavy costs on its commission, especially for those that a terrorist organization seeks to recruit from a culture and educational environment that otherwise rejects terrorism. Ethical scruples are often the focus of effective counterterrorism strategy, which have often been focused on persuading potential and actual users of terrorist violence that the latter is morally wrong.[261] The United Kingdom takes this approach now. One analyst characterized British counterterrorism policy as bearing "far more resemblance to countering an insurgency than to countering terrorism" because it is aimed at "winning over the communities at the heart of the problem."[262]

It is the distinctive characteristics of small groups that provide the transformative environment for both preferences related to risk taking and also ethical tastes. In Dean Richardson's evocative phrase, groups are "complicit surround[s]."[263] They are environments "in which violence is condoned and even glorified" in ways that reorient individuals toward the willingness to use asymmetrical violence against strangers.[264] While it is of course the case that not all small groups serve as incubators for violence, it is also the case that terrorism's production is regularly linked to a small group environment and that complicit surrounds play a causal role in becoming a terrorist.

Consider first the collective-action barrier to terrorism. As sociologist Michael Munger explains, one way of overcoming free-rider problems is by altering tastes. Discussing terrorist recruitment, Munger identifies "culture" as the "shared understanding of something that identifies insiders."[265] It is these shared understandings and distinctive idioms and arguments that are pivotal to terrorism's production. According to Munger, culture is the vehicle for changing "metapreference[s], in the sense [that] it tells us what we should want to want."[266] For the terrorist recruiter, the complicit surround

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Incentive Manipulation as Tools of Terrorist Recruitment: The Role of Culture, 128 PUB. CHOICE 131, 132, 138 (2006) (noting the risk of free riding).

260. *See* Charles Tilly, *Terror, Terrorism, Terrorists*, 22 SOC. THEORY 5, 5 (2004) (describing terrorism as the "asymmetrical deployment of threats and violence against enemies using means that fall outside the forms of political struggle routinely operating within some current regime").

261. *See* Kruglanski & Fishman, *supra* note 243, at 202–03.

262. JOHN MACKINLAY, THE INSURGENT ARCHIPELAGO 199 (2009).

263. RICHARDSON, *supra* note 189, at 49.

264. *Id.* Richardson uses the phrase to describe broader public cultures, but it also has resonance here. *Cf.* Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2105 (1996) ("Individuals tend to form their views on social issues within the context of specific group memberships.").

265. Munger, *supra* note 259, at 153.

266. *Id.* at 144.

supplied by a group constitutes the medium for transforming tastes.[267] And culture, in the form of shared idioms, understandings, and arguments, furnishes the lever for change.[268] As Eric Hoffer, writing in 1951 in the shadow of Nazism and Stalinism, summarized the process: "For men to plunge headlong into an undertaking of vast change, they must be intensely discontented yet not destitute, and they must have the feeling that by possession of some potent doctrine, infallible leader, or some new technique, they have access to a source of irresistible power."[269]

Terrorist groups have tools to overcome collective-action problems.[270] Reviewing recent research, Max Taylor and John Horgan argue that groups provide cultural reorientation for terrorists. Groups are a "Community of Practice," i.e., a "structure to understand the emergence of ideological and social control" that can fashion new ideological and practical political commitments.[271] Within that framework, the group's culture influences individual identity and "the meanings that persons attach to the multiple roles they typically play."[272] The group's tools are "shared symbols" whereby "members partake of common encapsulations of their orientations."[273] That common culture creates "interpretative schemata that provide a cognitive structure for comprehending the surrounding environment" and, significantly, "a *language* and cognitive tools for making sense of events and

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267. The salience of culture as a source of tastes and preferences is not limited to terrorism. Lauding networks of shared production, Yochai Benkler argues that such networks provide "shared frames of meaning" through which individuals decide what "institutions and decisions are considered 'legitimate' and worthy of compliance and participation," and "what courses of action are attractive." YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 274–75 (2006). Contemporary terrorism involves a similar pooling of ideas and social capital for quite different purposes. Another relevant analytic frame that might be applied here is Pierre Bourdieu's notion of "habitus." *See* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 78 (Richard Nice trans., 1972) (defining *habitus* as a "durably installed generative principle of regulated improvisations" that produces regular behavioral patterns).

268. A religious "community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

269. ERIC HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS 11 (1951).

270. In some contexts, this includes provision of nonspiritual services, in the form of material aid to the families and intimates of group members. BERMAN, *supra* note 235, at 75–78 (describing the use of mutual aid).

271. Taylor & Horgan, *supra* note 243, at 590–93.

272. Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 SOC. PSYCHOL. Q. 284, 284 (2000). Relevant here, Stryker and Burke describe how the "structure and connectedness" of groups "provides the first level of social structures' impact on identities." *Id.* at 289.

273. Lawrence Rosen, *The Integrity of Cultures*, 34 AM. BEHAV. SCIENTIST 594, 595 (1991). As Alan Krueger notes, terrorists tend to be educated and thus to have developed a political vocabulary. The utterly dispossessed, by contrast, lack the rhetorical arsenal necessary for the turn to violence and thus rarely engage in terrorism. *See* KRUEGER, *supra* note 230, at 7, 46–48 (suggesting terrorists are more likely to come from moderate-income and high-income countries than from low-income countries).

experiences by interpreting causation, evaluating situations, and offering prescriptive remedies."[274] It is, in Clifford Geertz's famous summation, "context" that makes acts and expressions "intelligibl[e]."[275] Through group identification, individuals revise their contextualized sense of individual interests.[276] Acts of violence previously seen as "maladaptive or even self-destructive" are refashioned as rational.[277]

Some legal scholars have noted the salience of sociolinguistic dynamics to the actions and internal dynamics of other violent or antisocial small groups. Examining the dynamics of criminal conspiracies, Neal Katyal has argued that small-group contexts facilitate transformations of individual preferences and self-identifications as members "tend to refer more to each other than they do to outsiders, listen more to each other, and reward each other more often."[278] Katyal also notes that "people are far more likely to experience doubts about their performance and disillusionment when they act as individuals compared to when they act as groups."[279] The medium of such transformations is the shared idiom and discursive practice of the group.[280] Elaborating on the idea of group polarization, Cass Sunstein identifies its mechanisms: informational cascades, whereby "small or even large groups of people end up believing something—even if that something is false—simply

274. WIKTOROWICZ, *supra* note 239, at 15–16 (emphasis added).

275. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 14 (1973).

276. *See* AMY GUTMANN, IDENTITY IN DEMOCRACY 14 (2003) ("[R]ecognition of interests often follows from group identification rather than being given simply by the pre-existing interests of individuals apart from their group identifications."); Post et al., *supra* note 253, at 176 ("[I]ndividual measures of success become increasingly linked to the organization and stature and accomplishments within the organization.").

277. George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715, 717 (2000). Relevant here, Akerlof and Kranton observe that identity also underlies "a new type of externality." *Id.* They give the example of socialization into gender roles, and how a man wearing a dress creates externalities in the form of other men's anxieties about masculinity. *Id.* Analogously, an individual recruited to be a terrorist may experience new externalities as a result of exposure to "impure" cultures. These in turn may reinforce his turn toward the group.

278. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1317 (2003).

279. *Id.* at 1322.

280. Psychological research, explains Katyal, demonstrates that groups often polarize to "extreme attitudes and behaviors," and alter members' perceptions of their own preferences. *Id.* at 1316–21. There are feedback loops between group identity and group rewards. *See, e.g.*, *id.* at 1362–63. Group polarization is "a predictable shift within a group discussing a case or problem. As the shift occurs . . . groups coalesce, not toward the middle of antecedent dispositions, but toward a more extreme position in the direction indicated by those dispositions." Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85 (2000) [hereinafter Sunstein, *Deliberative Trouble*]; *see also* Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 979–81, 985–86 (2005) [hereinafter Sunstein, *Group Judgments*] (comparing the function of deliberation in problem solving and the ability of individuals and groups to answer questions correctly).

because other people seem to believe that it is true";[281] the effect of a "limited argument pool" that also "operate[s] in favor of group polarization";[282] and the tendency of a group's members to view themselves in "self-contrast to others."[283] Through a distinctive way of speaking, groups reengineer individual preferences, often into closer alignment with group interests. This deemphasis of individual interests, with a concomitant elevation of group-based interests, is concretely how group culture surmounts collective-action problems.[284]

"Culture" within an insular group is also relevant to the second obstacle to recruitment to terrorism violence: the ethical tastes that would normally preclude violence. Terrorist recruitment entails "not only instrumental but also moral justification that would lend it legitimacy above and beyond its instrumentality as a means."[285] Ideologies inculcated by a terrorist group "relate distant events to immediate behaviour," vesting specific acts and circumstances with new meaning.[286] The "tight-knit" and "secret[ive]" clusters[287] that constitute terrorist groups furnish an environment for this reorientation of ethical tastes.[288] At the same time, groups satisfy a separate taste, supplying a new sense of camaraderie and belonging.[289] Contemporary studies of terrorists also find strong beliefs in the justice of terror as a

281. Sunstein, *Deliberative Trouble*, *supra* note 280, at 82 (asserting that "[p]eople think and do what they think . . . relevant others think and do" thanks to informational cascades and reputational sanctions).

282. *Id.* at 107.

283. *Id.* at 98.

284. *See* WIKTOROWICZ, *supra* note 239, at 18 ("For Islamist groups, socialization is thus critical for mobilizing support and activism in the face of extensive costs and risks.").

285. Kruglanski & Fishman, *supra* note 243, at 206.

286. Taylor & Horgan, *supra* note 243, at 58, 61.

287. ROY, *supra* note 194, at 50.

288. Michael Walzer has suggested that "moral life is rooted in a kind of association that military discipline precludes or temporarily cuts off" because of the pressures of conformity, the presumption of superior orders' validity, and the pervasive need to participate in unreflective coordinated action. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 316 (1977). One way of seeing the moral valence of terrorist groups is an effort to re-create, or even heighten, this aspect of military life.

289. Marc Sageman succinctly calls it the "'bunch of guys' phenomenon": "cliques commonly produce social cohesion and a collective identity and foster solidarity, trust, community, political inclusion . . . and other valuable social outcomes." SAGEMAN, *supra* note 243, at 155–57; *see also* RICHARDSON, *supra* note 189, at 48 (noting that many activists speak of an "intense feeling of camaraderie within the group"); Chong, *supra* note 264, at 2110 ("People will sometimes defend values that appear to run against their immediate self-interest in order to preserve social relationships that return long-term benefits."); *cf.* Mariano-Florentino Cuéllar, *The Untold Story of al Qaeda's Administrative Law Dilemmas*, 91 MINN. L. REV. 1302, 1339–40 (2007) (noting al Qaeda's use of financial resources to secure loyalty). In his account of joining Hizb-ut-Tahrir, Ed Husain notes that members gained greater social standing within the group for "more extrovert[ed]" expressions of solidarity with the group. ED HUSAIN, THE ISLAMIST 67 (2007).

political strategy.[290] Such new solidarities, indeed, are collateral consequences of the "decentralized norms" and "governance structures" that flourish in complicit surrounds.[291] This also happens in other social groups that adopt violent tactics for expressive ends. In neo-Nazi groups, for example, participants acquire a taste for violence on joining the group. One female neo-Nazi explained, "It is remarkable how fast I shifted my boundaries regarding violence. I used to be against violence, but *now it does not cost me a penny* to beat up and take out my aggression on someone who represents what I hate."[292] Quite literally, group membership changes the personal cost of ethical transgression.[293]

These models suggest that small groups *could* provide the environment for generating terrorism. Empirical case studies of violent Islamic political movements, especially in the recent European context, supplement the theoretical model by showing that complicit surrounds *do* provide a nurturing environment for terrorism. These studies bear out the theoretical insights about the role of group culture in overcoming collective-action problems and dissolving ethical hurdles.

In the European context, sociologist Olivier Roy has found that most "militants broke with their own past and experienced an individual re-Islamisation in a small cell of uprooted fellows."[294] The group responsible for the July 2005 London attacks, for example, coalesced out of an "informal social network" in mosques and bookstores, a network that provided opportunities for the conspiracy's leader "to identify candidates for indoctrination, even if the indoctrination itself took place more privately to avoid detection."[295]

Individuals generally portrayed as lone actors also prove to be embedded in intimate networks.[296] The murderer of Dutch filmmaker Theo

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290. *See* Kruglanski & Fishman, *supra* note 241, at 203 (rejecting the idea of a "uniform socio-psychological phenomenon" of the terrorist "syndrome"); Post et al., *supra* note 253, at 179 (describing how different terrorists justified their actions as a means to affect political change).

291. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 373–76 (2003).

292. Karsten Hundeide, *Becoming a Committed Insider*, 9 CULTURE & PSYCHOL. 107, 111 (2003) (emphasis added).

293. One example of ethical reorientation is al-Muhajiroun's use of the doctrine of *takfir*, or "the process of declaring a Muslim an unbeliever." WIKTOROWICZ, *supra* note 239, at 174. Al-Muhajiroun has developed an intricately exhaustive enumeration of reasons for declaring individuals *takfiri*, hence, moving them beyond the pale of ethical concern. *Id.* at 75.

294. ROY, *supra* note 194, at 52; *see also id.* at 316–19 (describing the formation of networks in Europe and the United States); GILLES KEPEL, THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST 250 (Pascale Ghazaleh trans., 2004); OLIVIER ROY, THE POLITICS OF CHAOS IN THE MIDDLE EAST 144–45 (Ros Schwartz trans., 2008) (both noting the possibility of increasing cycles of alienation among Muslim youth in Europe).

295. REPORT ON LONDON BOMBINGS, *supra* note 27, at 16–17; *see also* SLOOTMAN & TILLIE, *supra* note 232, at 5 (describing radicalization as a "social phenomenon").

296. Bruce Hoffman points out that the "terrorist is also very different from the lunatic assassin, who may use identical tactics," and distinguishes the "political" goals of a group from the

van Gogh, Muhammad Bouyeri, for example, was no lone actor, despite the solitary, idiosyncratic nature of his crime. He had drifted into the Hofstad Group, "a jihadist group headed by a Syrian radical preacher," Abu Khatib.[297] Comprising sixteen militants, the Hofstad Group included a spiritual leader and three people who had trained in Pakistan or Afghanistan.[298] What first appeared as the act of a crazed psychopath in fact emerged from a thick local network of social relations and religious ideological commitments.

More relevant data comes from a study by the French sociologist Farhad Khosrokhavar. He conducted detailed interviews with fifteen of the twenty men imprisoned in France based on suspected or confirmed membership in an al Qaeda affiliate, and he found few common social or economic traits.[299] Instead, Khosrokhavar identified shared representations of the world and life and shared idiosyncratic interpretation of symbols, events, and religious texts as the common ground among his interviewees.[300] Through their complicit surrounds, Khosrokhavar's respondents had developed idiosyncratic views of the world and idioms that would have been hard to develop in more diverse normative and ethical contexts.[301] In another study of five terrorist organizations, Michael Arena and Bruce Arrigo also found that "symbols developed shared meanings within individual groups and among their respective memberships through exposure to history, culture, socialization, and social structure."[302]

Furthermore, studies of terrorists in the Middle East yield evidence that distinctive discourses and idioms are critical to terrorist groups. In a study of captured Middle Eastern terrorists, for example, Jerrold Post and his colleagues identified a characteristic "framework" and a "common bond of

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"intrinsically idiosyncratic, completely egocentric and deeply personal" attitude of an individual violent actor, even one such as Sirhan Sirhan (Robert Kennedy's assassin), who acted for explicitly political ends. HOFFMAN, *supra* note 230, at 37. Hoffman argues that an individual acting alone is not properly categorized as a "terrorist." *Id.*

297. Nesser, *supra* note 256, at 334; *see also* IAN BURUMA, MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE 193–95, 205–16 (2006) (recounting Bouyeri's involvement in the Hofstad Group).

298. Nesser, *supra* note 256, at 334–35. Evidence suggested that the group had planned attacks on Dutch public and governmental sites before being broken up by police. *Id.*

299. FARHAD KHOSROKHAVAR, QUAND AL-QAÏDA PARLE: TÉMOIGNAGES DERRIÈRE LES BARREAUX 11, 20–21 (2006).

300. "Il faut . . . tenter de comprendre les mécanismes subjectifs qui leur donnent leur spécificité, commandant leur representation du monde et leur vécu, les sentiments religioux qui les animent." *Id.* In one of Khosrokhavar's fascinating interviews, one informant sketches his view of an unbridgeable gap between Islam and the West and specifically describes the separation as a failure of interpretation: "Il y a une histoire commune entre l'Occident et l'islam mais en fait, rien n'est commun. *L'interpretation n'est pas commune.*" *Id.* at 178 (emphasis added).

301. *Cf.* FARHAD KHOSROKHAVAR, INSIDE JIHADISM: UNDERSTANDING JIHADI MOVEMENTS WORLDWIDE 9–10 (2009) (noting the evidence that shows that "Jihadist cells are formed in relation to ties of family, friendship, local residence, and kinship relations").

302. ARENA & ARRIGO, *supra* note 243, at 230–31.

belief" as regularities among the terrorists they profiled.[303] They found a consistent "readiness to merge . . . individual identity with that of the organization in pursuit of their cause."[304] Once this "clear fusing of individual identity and group identity" occurs, "the organization's success become[s] central to individual identity and provides a 'reason for living.'"[305] Similarly, Bernard Rougier's study of jihadist networks in Lebanon's Palestinian camps emphasizes "the way preachers played a decisive role in reframing social reality exclusively in religious categories," transforming "perceptions of self and other."[306]

Case studies of terrorist histories confirm that groups create and share an internal "context . . . within which [acts and expressions] can be intelligibl[e]."[307] It is the "shared symbols"[308] of particular group cultures that give sense to doctrine and texts, from the throat note in the *Hayat* case to the Koranic verses and *hadith* on jihad. Consequently, it cannot be assumed that the meaning assigned by a broader religious culture to a particular text will be shared by a subgroup.[309] The latter may take a more or less aggressive view of a text. In the prosecution of Hayat, by contrast, the state's expert witness (and the jury) erroneously assumed that speech's local context had no relevance and that meaning was fungible between different factions and strands of a religious community.[310] The evidence about terrorism's etiology suggests precisely the opposite: it is idiosyncratic and distinctive local discursive contexts, not universally available religious meanings, that enable the transformation of ethical tastes and preferences. Generalizing inferences from the communal to the individual creates a special risk of error

303. Post et al., *supra* note 253, at 176.

304. *Id.* at 175.

305. *Id.*

306. BERNARD ROUGIER, EVERYDAY JIHAD: THE RISE OF MILITANT ISLAM AMONG PALESTINIANS IN LEBANON 21 (Pascale Chazaleh trans., 2007).

307. GEERTZ, *supra* note 275, at 14.

308. Rosen, *supra* note 273, at 595; *see also* KHOSROKHAVAR, *supra* note 299, at 18 (emphasizing the coherence of "Jihadist ideology").

309. Winnifred Sullivan observes that the vast majority of religious practice in America is made up of "folkways," not "high tradition." SULLIVAN, IMPOSSIBILITY OF RELIGIOUS FREEDOM, *supra* note 169, at 140–41, 146. In deciding which religious practices to recognize and protect, courts must decide what "counts *legally* [as] religion." *Id.* at 147. Sullivan argues that courts have placed themselves "at odds with the mainstream of American religion" by failing to focus on local practices. *Id.*

310. *See supra* text accompanying notes 38–57.

when made without knowledge of an individual's local circumstances,[311] at least in the absence of countervailing factors.[312]

Empirical evidence, in sum, suggests that the production of terrorist violence is correlated with the presence of an insular group that provides a complicit surround for recruits and enables the reorientation of individuals' ethical values and normative commitments. Studies from varied disciplinary angles—from empirical sociology to history to rational-actor analysis—all confirm the importance of such groups.

The causal connection between complicit surrounds and the production of terrorist violence is relevant to the signaling problem in domestic counterterrorism because association, understood in light of this empirical research, shows the two necessary characteristics of an effective signal.[313] First, existence of an appropriate complicit surround—not just any close or intimate circle of associates, but a group where critiques of larger society and justifications of violence are common verbal currency—is positively correlated to the desired trait. Second, it is more costly for the aspirant terrorist to renounce this complicit surround than for others. There is a negative correlation between the cost of repudiating, renouncing, or avoiding such complicit surrounds and the likelihood of becoming a terrorist because complicit surrounds furnish the ethical and organizational tools that enable terrorism. The absence of a complicit surround is an effective signal of the absence of terror risk for law enforcement. Further, it is a signal that is difficult for the aspiring terrorist to mimic. Of course, it is possible to engage in terrorism without the benefit of a complicit surround. The relation is a probabilistic correlation, not a logical entailment. The rising level of concern about domestic terrorism and sleeper cells, however, renders it plausible that in many situations law enforcement will find some value in the use of associational context as a signal to sort for possible terrorism risk.

4. Constitutional Objections.—Before turning to the institutional-design questions implicated by any effort to incorporate these findings about association as a potential signaling tool in counterterrorism, it is worth asking whether there are constitutional objections that preclude such reliance. To the civil libertarian, the reorientation of domestic counterterrorism proposed

311. Anthropologists have long been acutely aware of "the difficulty of grasping the world of alien peoples—the many years of learning and unlearning needed, the problems of acquiring a thorough linguistic competence" and, perhaps more relevant here, the "both subtle and blatant" ways understanding is "directed or circumscribed by . . . informants." James Clifford, *On Ethnographic Authority*, REPRESENTATIONS, Spring 1983, at 118, 122, 135.

312. There may be other factors cutting in favor of wider judgments. For example, al Qaeda and its affiliates have invested in "ideological training." ROHAN GUNARATNA, INSIDE AL-QAEDA: GLOBAL NETWORK OF TERROR 112–26 (3d ed. 2003). They have "intuitively grasped the enormous communicative potential of the Internet" in spreading their ideology. HOFFMAN, *supra* note 230, at 214–20.

313. *See supra* note 225 and accompanying text.

here may seem unappealing: It appears to trade government pressure on religious liberty for the sacrifice of associational freedoms that are protected by another part of the First Amendment. But again, constitutional doctrine imposes very little constraint on the path proposed here. Gains to constitutional rights are to be had not from a strict delineation of protected interests but rather by increasing the efficacy of law enforcement interventions, eliminating tactics that generate errors, and minimizing overall the volume of false positives.

Like the Religion Clause doctrine examined in Part II, doctrine under the Free Speech Clause is ill designed to address the constitutional externalities of new law enforcement tactics prompted by terrorism concerns. Free speech doctrine received its definitive elaboration long after the Amendment's adoption, with the 1950s and 1960s being pivotal moments in the Court's elaboration of doctrinal protection for dissenting political speech. At the time, judges were immediately motivated by concerns about the overreach of anti-Communist efforts in Congress and across the states.[314] Postbellum anti-Communism illustrated the perils of guilt by association. "[T]housands of Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or fellow travelers with the Communist Party."[315] As a result, the Court crafted doctrine with special sensitivity to the risks of guilt by association. Now-canonical precedent directs that associational conduct can be punished only when evidence exists that a defendant has a "specific intent" regarding an organization's criminal ends.[316] This specific intent rule prevents jurors from using unpopular associational ties as a proxy for dangerousness. It hence mitigates "the special danger that juries trying defendants who have advocated unpopular social doctrines will find serious intent on the basis of ambiguous evidence."[317] That is, it responds to and attempts to mitigate the specific danger to First Amendment values that happened to be the most salient at the time of the doctrine's articulation in the Cold War era.

This specific intent rule, however, does not preclude the turn to association to root out terrorist risk for at least three reasons. First, that rule does not preclude the use of association at the investigative stage. In

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314. *See* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008, at 232–39 (2009) (describing the Cold War historical context).

315. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 216.

316. Elfbrandt v. Russell, 384 U.S. 11, 19 (1966); *see also* United States v. Robel, 389 U.S. 258, 262 (1967) (noting the specific intent requirement of the Smith Act); Scales v. United States, 367 U.S. 203, 228–30 (1961) (finding the specific intent requirement to be "fairly implied" from the statute); *cf.* Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (finding a statute that indiscriminately classified innocent activity with knowing activity to be an unconstitutional assertion of arbitrary power).

317. GREENAWALT, *supra* note 107, at 266.

investigations, iterative interactions with other suspects furnish grounds not merely for law enforcement attention but also for individual searches. It is only when police rely on "mere propinquity" to a crime that search becomes unlawful.[318] Nor do suspects have any constitutional protection against informants,[319] the most frequently used policing tool for piercing complicit surrounds. At the investigative stage, therefore, concerns about "guilt by association" do little constraining work.

Second, at the trial stage there is no bar to the introduction of evidence concerning association as one means of showing specific intent. In announcing the specific intent rule, the Supreme Court pointed to expressive evidence and directed that while that material was "not *in itself* sufficient to show illegal advocacy," it nonetheless was admissible and had potential inculpatory "value in showing illegal advocacy."[320] That dynamic was visible in prosecutions under the Smith Act.[321] Smith Act prosecutions involved "routine introduction" by the prosecution of "massive collections of books, tracts, pamphlets, newspapers, and manifestoes discussing Communism, Socialism, Capitalism, Feudalism and governmental institutions in general . . . . Guilt or innocence . . . turn[ed] on what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago."[322] Blocked from using associations against a defendant, the federal government nevertheless could use her words against her. If specific intent can be demonstrated by evidence of expressive conduct, it is difficult to see why evidence of association should not also be probative.

Third, the Supreme Court has recently loosened the First Amendment's constraint on criminal penalties for associational conduct. Upholding speech-related applications of one prong of the material support law, the Court held that speech coordinated with a proscribed terrorist organization could be criminalized.[323] The Court's decision in *Holder v. Humanitarian Law Project* unconvincingly distinguished between constitutional protection of membership and constitutional indifference to material support in the form of speech, implying that it was a constitutionally protected activity to join an organization but a potentially criminal one to engage in any speech that aided

318. Ybarra v. Illinois, 444 U.S. 85, 91 (1979); *cf.* Maryland v. Pringle, 540 U.S. 366, 372 (2003) (upholding searches of all men in an automobile where narcotics were found).

319. *See* Hoffa v. United States, 385 U.S. 293, 300–03 (1966) (rejecting Fourth Amendment arguments against the use of informants).

320. *Scales*, 367 U.S. at 232–33.

321. *See* Alien Registration (Smith) Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387 (2006)) (criminalizing advocacy of the forceful overthrow of government).

322. Yates v. United States, 354 U.S. 298, 339 (1957) (Black, J., concurring in part and dissenting in part). The record in *Yates* consisted of 14,000 pages. *Id.* at 327 n.34 (majority opinion). Yates's prosecution for advocacy of "Marxist-Leninist principles" was "standard fare" in Smith Act cases. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 413 (2004).

323. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–27 (2010).

the organization.[324] In so doing, the Court applied a standard of review that, while notionally robust, in practice resembled rational basis scrutiny of the proffered governmental justifications.[325] The net result was to reduce constitutional protection against guilt by association in a class of cases defined by the government to a token ban on membership proscription that government can easily circumvent. As in other areas of the law, the Court's post-9/11 amendments to constitutional doctrine are less adaptation and more abrogation.

Current constitutional doctrine, in short, has no more of a constraining role with respect to government use of association as a signal than it does with respect to religious speech. Constitutional law is path dependent.[326] It is shaped by the problems that were salient when doctrine was fashioned. Change is difficult and costly. And in the face of rising concerns about terrorism, change in ways favorable to suspects and defendants is especially unlikely.[327]

5. Conclusion.—After 9/11, reliance on the signaling function of religious speech in domestic counterterrorism may have seemed plausible and even necessary in light of al Qaeda's open appeal to religious justifications and solidarities. But increasing evidence from empirical and social science studies of terrorism casts doubt on that approach. There is scant reason to believe that religious doctrine or speech correlates with political violence. Rather, the social science and empirical evidence suggests that one of the regularities of terrorism's production is the presence of closely knit complicit surrounds in which individual tastes and preferences concerning violence and political change are reengineered. Evidence of a person's immediate associations appears correlated with terrorism's incidence. It is also costly for aspirant terrorists to mimic nonterrorists by eschewing such

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324. *See id.* at 2730 ("'The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support . . . .'" (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000))). The protection of membership simpliciter, but not membership plus any affirmative collaboration, in effect renders collective action impossible.

325. *See id.* at 2724–31 (affirming that the case was controlled by precedents dictating a high level of scrutiny but nonetheless liberally hypothesizing as to how plaintiffs' speech could aid proscribed terrorist organizations).

326. For a general explanation of path dependency, see Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 260–62 (2000). For applications in law, see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–06 (2001); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543, 570 (2005); R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 694 (2008).

327. *See* Andrew E. Taslitz, *Fortune Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 234–35 (2005) (explaining how fresh acts of terrorism increase pressure to relax civil liberties).

associations. Extending Spence's model of signaling on job markets, it is therefore plausible to posit that one way in which law enforcement can sort for possible terrorist risk is by searching for complicit surrounds of the appropriate kind.

C. *Retooling Signaling Policy*

For terrorist conspiracies generated domestically—which is the category that law enforcement is increasingly concerned about—an insular associational environment serving as the complicit surround appears to be almost always—or at least with great empirical regularity—pivotal to the production of terrorism. It is more costly for aspirant terrorists than for members of the general population to give up their complicit surrounds. But how then can law enforcement use association as a differentially "costly signal"[328] to sort possible aspirant terrorists from the general population? This subpart identifies three strands of current counterterrorism practice in the United States and the United Kingdom that build on association as a signal for counterterrorism ends. Its aim is not to endorse any of these measures, or to evaluate comprehensively costs and benefits, but rather to point to possibilities.

First, in the United States, police have invested heavily in invasive and noncooperative tactics such as surveillance, electronic monitoring, and informants. The New York Police Department (NYPD), for example, aggressively deploys informants within New York's Muslim community to monitor conversations there. In 2006, testimony in the federal criminal prosecution of 23-year-old Shahawar Matin Siraj, who was charged with plotting an explosion at the Herald Square subway station, revealed that at least three informants working for the NYPD's Terrorist Interdiction Unit had been attending services regularly at a Brooklyn mosque, the Islamic Society of Bay Ridge, in winter 2003.[329] In May 2009, another set of arrests in an alleged terrorist conspiracy again hinged on the testimony of an

328. Feltovich et al., *supra* note 225, at 631.

329. *See* William K. Rashbaum, *At Trial on Subway Bomb Plot, Informer Finishes Star Turn*, N.Y. TIMES, May 9, 2006, at B2 (illustrating the mosque police informant's colorful testimony); William K. Rashbaum, *Closing Arguments in Trial of Subway Bombing Case*, N.Y. TIMES, May 23, 2006, at B3 (elaborating on the entrapment defense of a subway plotter caught with help from the mosque informant); William K. Rashbaum, *Window Opens on City Tactics Among Muslims: Getting a Conviction and Causing Concern*, N.Y. TIMES, May 28, 2006, at B29 (recounting courtroom revelations of the police informants' activity at an area mosque). For similar stories, see John Caher, *Terrorism Trial of Muslims Raises Issues of Entrapment*, N.Y. L.J., Sept. 14, 2006, at 1 (reporting on the trial of businessmen accused of entering into a money laundering plot with an undercover agent posing as a terrorist); Larry Keller, *Disputes Bedevil Terrorism Arrests: Opinions Diverge on Whether Increased Post-Sept. 11 Arrests Are Justified or Effective in Fighting the War on Terror*, PALM BEACH POST, June 26, 2005, at A1 (highlighting the dilemma posed in distinguishing "wannabees egged on by [an] undercover agent to make foolish boasts" and serious terrorists); Walter Pincus, *FBI Role in Terror Probe Questioned: Lawyers Point to Fine Line Between Sting and Entrapment*, WASH. POST, Sept. 2, 2006, at A1 (detailing the role of FBI informants in a nascent terrorist cell and the possibility of entrapment).

informant who cultivated contacts through a Newburgh, New York, mosque.[330]

This strategy risks considerable harms. Aggressive use of informants, especially within religious communities, not only imposes burdens on third parties' constitutional rights but also risks false positives.[331] In the *Siraj* case, for example, evidence at trial cast doubt on whether Siraj would ever have acted absent the informant's encouragement. A federal informant in Orange County, California, "aggressively promot[ed] terrorism plots and tr[ied] to recruit others to join him."[332] Creating complicit surrounds by the deployment of agent provocateurs may also risk the inefficient deployment of policing resources even aside from constitutional costs.

An alternative to hostile acquisition of information is the cultivation of information-sharing networks with religious and ethnic minorities through collaborative means. In the United Kingdom, police have taken this tack. Leading this approach is a new unit within the Special Branch of London's Metropolitan Police called the Muslim Contact Unit. This unit cultivates relations with the London Salafist and Islamist communities with the aim of identifying potential recruits to violence early. It was formed after a member of one of these mosques approached local police to urge them to investigate a man called Richard Reid, later the so-called shoe bomber, who had expressed an interest in violence.[333] The British strategy leverages the insight that transparency will be cheaper for groups that do not intend to cultivate political violence.[334] By affirmatively offering the benefits of a closer relationship with police—for example, by serving as a liaison between cooperating groups and other parts of the police and government—the Muslim Contact Unit obtains much of the local knowledge gleaned via informants without the false positives or damage to constitutional rights and police–community relations.[335] The American reliance on informants, by contrast, may well prove less effective in the long term than the British approach as trust in the police declines (leading to fewer leads through

330. William K. Rashbaum & Kareem Fahim, *Informer's Role in Bombing Plot: Looking for Recruits in a Newburgh Mosque*, N.Y. TIMES, May 23, 2009, at A1.

331. For a general analysis of the legal regulation of confidential informants, see Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

332. Teresa Watanabe & Scott Glover, *Man Says He Was FBI Informant*, L.A. TIMES, May 23, 2009, at B1.

333. Robert Lambert, *Empowering Salafis and Islamists Against Al-Qaeda: A London Counterterrorism Case Study*, 41 PS: POL. SCI. & POL. 31, 32 (2008).

334. To be sure, information privacy is valuable to many people without respect to their links to crime or terror.

335. Lambert, *supra* note 333, at 32.

cooperation) and potential terrorists find ways to work around the problem of informants.[336]

Second, governments have tried to build a more textured understanding of social contexts in order to more accurately identify complicit surrounds. Some governments stumbling toward this goal have turned to data-collection efforts so broad-brush and indiscriminate that they raise concerns about racial and religious profiling. In Germany, for example, the BfV monitors the publications, statements, meetings, and mosques of both federally registered and "homegrown," or underground, civil-society groups even if these organizations are entirely law-abiding.[337] In the United States, similar efforts proved controversial. In October 2007, for example, the Los Angeles Police Department (LAPD) announced a decision to implement a "community mapping" plan in order to "lay out the geographic locations of the many different Muslim population groups around Los Angeles . . . [and] take a deeper look at their history, demographics, language, culture, ethnic breakdown, socio-economic status, and social interactions" so as to "identify communities, within the larger Muslim community, which may be susceptible to violent ideologically-based extremism."[338] The breadth of the plan, and its presentation as a *fait accompli*, elicited vigorous opposition from Los Angeles's Muslim-American community. In response, Mayor Antonio Villaraigosa scrapped the plan, citing the "fear and apprehension" prompted by its disclosure.[339]

But community mapping may have been a lost opportunity for both police and the Muslim-American community in Los Angeles. Rather than an invasive, onerous, and racially disparate scheme of surveillance, the project could have been a collaborative measure aimed at diminishing the need for more intrusive measures, such as the insertion of informants into religious communities.[340] It could have been the ground for closer relationships

336. *See, e.g.*, Teresa Watanabe & Paloma Esquivel, *Muslims Say FBI Spying is Causing Anxiety: Use of an Informant in Orange County Leads Some to Shun Mosques*, L.A. TIMES, Mar. 1, 2009, at B1 (describing community outrage and degradation of the FBI's reputation with the community as effects of the FBI's use of undercover informants in local mosques).

337. INT'L CRISIS GRP., *supra* note 212, at 14–15.

338. *The Role of Local Law Enforcement in Countering Violent Islamist Extremism: Before the S. Comm. on Homeland Sec. and Gov. Affairs*, 110th Cong. (2007) (statement of Michael P. Downing, Commanding Officer, Counter-Terrorism/Criminal Intelligence Bureau, LAPD), *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=483590e6-9f4e-4aa6-b595-8ca3791e4acb.

339. Richard Winton & Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. TIMES, Nov. 15, 2007, at A1; *see also* Richard Winton et al., *Outcry over Muslim Mapping*, L.A. TIMES, Nov. 10, 2007, at A1 (noting "intense backlash" against the mapping plan and concerns among Muslim activists and civil libertarians that it amounted to "religious profiling").

340. Similar frictions arose in the United Kingdom around the government's "Prevent" strategy, which included local government agencies in counterterrorism strategies. Some Muslim community groups objected to "the requirement in the [Prevent] strategy for local authorities to have a 'sophisticated understanding of local Muslim communities.'" HOUSE OF COMMONS

between mosques and police that would not just facilitate more focused investigations but that would enable community leaders to secure policing against hate crimes.[341] Rather than confrontation, it could have been a platform of cooperation to alleviate tensions over profiling or intrusive policing.[342] Alas, the opportunity was squandered on both sides.

Third, governments now use information about associations to condition benefits or privileges in ways that raise the costs of membership in a complicit surround and so sort for aspirant terrorists. Consider an example from the United Kingdom:

> Mr. Tariq commenced employment with the Home Office in April 2003 as an immigration officer. He received the necessary security clearance. However, in August 2006, he was suspended from duty due to national security concerns and on 20 December 2006 all levels of security clearance were withdrawn from him. He was told that this was based on his close association with individuals suspected of planning to mount terrorist attacks and that it was considered that association with such individuals might put him at risk of their attempting to exert influence on him to abuse his position as an immigration officer.[343]

The fact of association with a potential complicit surround was here the basis for denial of an employment-related benefit. The same approach, it is worth noting, is feasible under U.S. law because of the absence of judicial review of such employment decisions.[344] More generally, this tactic raises the possibility that association can be used to condition benefits in ways that sort for potential terrorism risk.

Again, this approach raises risks of inequitable error and collateral harm. At a minimum, in cases like Mr. Tariq's, it would seem generally

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COMMUNITIES & LOCAL GOV'T COMM., PREVENTING VIOLENT EXTREMISM: SIXTH REPORT OF SESSION 2009–10, at 15 (2010), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf [hereinafter HOUSE OF COMMONS REPORT]. Non-Muslim ethnic groups also objected to the greater local government attention toward Muslims. *Id.* at 18.

341. *See* Tom R. Tyler, Stephen J. Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism: A Study of Muslim Americans*, 44 L. & SOC. REV. 365 (2010) (presenting empirical evidence that public cooperation in counterterrorism efforts is linked to public perceptions of police procedural justice).

342. *Cf.* KEPEL, *supra* note 294, at 8 ("The most important battle in the war for Muslim minds during the next decade will be fought not in Palestine or Iraq but in these communities of believers on the outskirts of London, Paris, and other European cities, where Islam is already a growing part of the West.").

343. Home Office v. Tariq, [2010] EWCA (Civ) 462, [2] (Eng.).

344. Federal courts have declined to review the merits of decisions to deny security clearances. *See* Bennett v. Chertoff, 425 F.3d 999, 1001 (D.C. Cir. 2005) ("Because the authority to issue a security clearance is a discretionary function of the Executive Branch and involves the complex area of foreign relations and national security, employment actions based on denial of security clearance are not subject to judicial review, including under Title VII."); Ryan v. Reno, 168 F.3d 520, 523 (D.C. Cir. 1999) (collecting like authority from other circuits).

feasible for the state to mitigate those costs by reassigning the barred individual to an equivalent, nonsensitive position and by taking steps to dissipate any downstream reputational consequences of the transfer. Alternatively, government might use subsidies to sort among private groups and to encourage groups to be transparent so as to preclude their functioning as a complicit surround. Groups that aim at violence will find transparency more costly than groups that are innocent. Insularity is more valuable to the former. Of course, this is not to say that transparency has *no* cost for nonterrorist groups. Privacy and resistance to state surveillance are valued by many private groups. Private groups allow ideas and norms to develop free of potentially distorting state influences by providing "a vital margin of political safety from control by outside elites."[345] Social spaces free of state supervision "enable[] people to engage in worthwhile activities in ways that they would otherwise find difficult or impossible."[346] Rather, the point is that transparency will be *more* costly for a group connected to terrorism than for one concerned with privacy alone. A group aimed at political violence has an additional and especially powerful reason for valuing the freedom from state supervision. By finding ways to enable suspected groups to signal the absence of terrorism risk through transparency, the state may be able to better isolate possible threats from some larger pool of suspects.

Although current constitutional doctrine forbids the state from conditioning subsidies on the forfeiture of constitutional rights,[347] government can channel funds to religious or ethnic groups that affirmatively engage in collaborative partnerships with law enforcement. In the United Kingdom, the British government has channeled funding to some domestic imams through a program called "the Radical Middle Way," which is aimed at promoting nonrejectionist strands of Islam.[348] In October 2006, the British government announced £5 million scheme to be disbursed through local governments to train imams, establish study circles for young people, and engage with at-risk youth.[349] Several of these interventions explicitly aimed to

345. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 54 (1998).

346. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 484 (2006); *see also* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1427–28 (2000) ("Informational privacy . . . is a constitutive element of a civil society in the broadest sense of that term.").

347. Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 59 (2006) (stating that the government cannot withhold benefits from a person due the constitutionally protected exercise of free speech, even if the person is not entitled to the benefit).

348. Birt, *supra* note 91, at 701–02.

349. *See* HOUSE OF COMMONS, COMMUNITIES & LOCAL GOV'T COMM., PREVENTING VIOLENT EXTREMISM PATHFINDER FUND 2007/08: CASE STUDIES 4 (2007) (discussing the objectives of the Preventing Violent Extremism Pathfinder Fund, including establishing dialogues with communities and working with mosques and educational institutions, and deciding to increase the funding available to six million pounds for fiscal year 2007–2008); *see also* HOUSE OF COMMONS, COMMUNITIES & LOCAL GOV'T COMM., PREVENTING VIOLENT EXTREMISM:

strengthen "mainstream Islamic voices" at the expense of more marginal groups.[350] In the United States, similar efforts occur in the foreign-aid realm. The U.S. Agency for International Development has programs in Indonesia that "promote[] a moderate or liberal form of Islam over more extreme sects" via conditional federal funding.[351] Such efforts have been controversial. Critics in the United Kingdom have argued that they have the effect of "singling out" Muslims from other ethnic communities.[352] The flow of funding may also "reinforc[e] the Muslim identity because it only approaches Muslims through their faith rather than recognizing that everyone, all communities, all people, has lots of different identities and multiple identities."[353] Such criticisms may be blunted by careful policy design. They may also lose their force if the alternative is more coercive forms of law enforcement.

This method of distinguishing dangerous groups has a historical precedent of sorts. In the aftermath of the English Civil War, the English 1689 Toleration Act relieved Protestant dissenters of the statutory penalties that had previously been imposed on them out of fear of their political disloyalty—but at a price: "[D]issenters had to certify the place of their congregation to local authorities, . . . they had to leave the doors of their chapels unlocked during meetings, and . . . they had to take oaths of fidelity."[354] The price of avoiding generalized suspicion of sedition, in short, was increased transparency—literally opening their doors to the state. In the short term, this imposed a heavy cost on a minority of religious dissenting groups. In the long term, however, historians argue that it eased the path of religious toleration in Britain as "the monopoly of the established Church gave way to consumers' choice in religion."[355] Short-term costs, therefore, may be balanced by the long-term gain in the mitigation of friction and animus directed at minority groups.

COMMUNITY LEADERSHIP FUND GUIDANCE 3 (2008) (describing availability of funds for community groups); Alan Travis, *New Plan to Tackle Violent Extremism*, GUARDIAN (U.K.), June 3, 2008 (describing the plan as a "nationwide 'deradicalisation' programme").

350. HM GOVERNMENT, THE PREVENT STRATEGY: A GUIDE FOR LOCAL PARTNERS IN ENGLAND 18 (2008).

351. Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 179 (2006).

352. HOUSE OF COMMONS REPORT, *supra* note 340, at 21 (citation and quotation marks omitted).

353. *Id.* (citation and quotation marks omitted); *see also* Vikram Dodd, *Communities Fear Project to Counter Extremism Is Not What It Seems*, GUARDIAN (U.K.), Oct. 19, 2010, http://www.guardian.co.uk/society/2009/oct/16/prevent-counter-islamic-extremism-intelligence (noting concerns about information sharing as a consequence of the Prevent strategy).

354. Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 840 (2004) (citing the Toleration Act, 1689, 1 W. & M., c.18 (Eng.)).

355. CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603–1714, at 211–12 (1961).

V. Conclusion

One of the most difficult challenges in contemporary counterterrorism policy is identifying signals or proxies for the risk of terrorism in an information-poor context. By drift or default, law enforcement has turned to religious speech to serve as that signal in American and British domestic counterterrorism. In the American context, the First Amendment, which might be thought to preclude such reliance, in fact places few constraints on this approach. As has been generally the case, constitutional doctrine has not adapted or responded to the way in which post-9/11 counterterrorism policies may impose new costs on constitutional rights. Although constitutional doctrine yields no impetus for the state to change tack, the emerging social science evidence about terrorism suggests a reason for rebooting. That literature shows there is scant evidence of a correlation between religious speech or particular religious ideologies and terrorism. By contrast, one observed regularity in the incidence of terrorism is the salience of complicit surrounds in the development of terrorism. Governments should focus on association, rather than religious speech. Law enforcement policies are already edging tentatively toward this goal, albeit in occasionally problematic ways. This Article has aimed to encourage further experimentation and investment to that end as part of a larger ongoing reconsideration of the first generation of post-9/11 responses to al Qaeda-related terrorism.

Book Reviews

Laycock's Legacy

RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY. By Douglas Laycock. Wm. B. Eerdmans Publishing Co., 2010. 888 pages. $35.00.

Reviewed by Thomas C. Berg*

Douglas Laycock is a towering figure in the law of religious liberty. He has been a path-breaking scholar, a successful appellate litigator, a legislative advocate instrumental in the development of statutes protecting religious liberty, and a commentator known for his ability to summarize church–state law and debates cogently and with sympathy for the conflicting sides.[1] He has defended the rights of individuals and groups of almost every possible religious view, from evangelical Christians to Santeria animist worshipers to atheists. As a result, he is respected by people on both sides of the culture wars that animate many Religion Clause controversies.

Now a forthcoming four-volume set of Laycock's collected writings on religious liberty will help to assess his remarkable (and still unfinished) legacy. This first volume, *Overviews & History*,[2] actually does not include his most immediately influential work: articles, testimony, and other writings on the Free Exercise Clause and on religious liberty statutes, such as the Religious Freedom Restoration Act,[3] whose enactment owed much to his efforts.[4] These will have to wait until volumes 2 and 3.[5] Taking one volume at a time, however, at least makes the reviewer's task manageable. It is hard

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1. For a brief summary of Laycock's accomplishments, see John Witte's Foreword to this first volume of Laycock's collected works. John Witte, Jr., *Foreword* to DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY, at xiii, xiii–xv (2010).

2. 1 RELIGIOUS LIBERTY, *supra* note 1.

3. *See, e.g.*, Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006) (requiring that government actions substantially burdening religious exercise be justified by a compelling governmental interest); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006) (protecting religious exercise against restrictive land-use laws and prison regulations); Eugene Volokh, *Religious Exemption Law Map of the United States*, THE VOLOKH CONSPIRACY (July 9, 2010), http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states/ (noting that versions of RFRA have passed in 16 states).

4. *See* Witte, *supra* note 1, at xiv (noting that Laycock was one of the "principal champions" of RFRA and RLUIPA).

5. 1 RELIGIOUS LIBERTY, *supra* note 1, at xvii–xviii, xxi.

to see how a review article could do justice to the full range of Laycock's religious liberty work.

Any review I write about Doug Laycock is inevitably a tribute, for he was an inspiration to me when I entered law teaching almost twenty years ago and remains so today. His ideas on religious liberty have deeply shaped my own, but the influence has gone beyond ideas. His combination of scrupulous scholarship and powerful advocacy has been a model for me, even though (as this collection reminds me) it is nearly impossible to carry it out as well as he has. As we have shared ideas in the settings of scholarship, litigation, or legislation, he has taught by example how to communicate crisply, how to think strategically and tactically, and how to offer assistance to others with both generosity and rigor. Among my greatest professional satisfactions has been to collaborate with him on articles and briefs.[6]

I begin this Review by describing what I see as Laycock's greatest contributions to the theory of religious liberty. Then I examine the one area where I have material doubts about his position.

I. Laycock's Achievements

A. Liberty, Neutrality, Voluntarism

Laycock's greatest contribution to theory has been to explain how religious liberty can coincide with government neutrality and evenhandedness toward religion. All these values are associated with the Religion Clauses, but one might easily conclude they conflict. Religion involves not only belief and speech but also conduct, and the modern state affects conduct pervasively through both regulation and subsidies. Preserving meaningful religious liberty therefore can require the state to treat religion differently from many other activities. But special treatment of religion might be said to violate neutrality and evenhandedness toward religion. These are also important First Amendment values, since the existence of two provisions, nonestablishment and free exercise, suggests that government's treatment of religion must be in some sense balanced—neither promotion nor discouragement.

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6. Brief Amici Curiae of U.S. Conference of Catholic Bishops et al. in Support of Petitioners, Ariz. Christian Sch. Tuition Org. v. Winn, No. 09-987 (Aug. 5, 2010), 2010 WL 3535061; Brief Amici Curiae of the Council for Christian Colls. & Univs. et al. in Support of Respondents, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 22176102; Douglas Laycock & Thomas C. Berg, *Zoning*, *in* ENCYCLOPEDIA OF RELIGIOUS FREEDOM 519 (Catharine Cookson ed., 2003); Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227 (2004). I would say essentially the same things about Michael McConnell—my law school professor, mentor, casebook coauthor, and sometime collaborator in litigation—whose collected religious-liberty works are set to appear later in this series. Witte, *supra* note 1, at xv.

Laycock tackled this problem in the context of the debate over whether the Free Exercise Clause requires government to exempt religious practice from generally applicable laws. Exemptions are necessary to preserve meaningful liberty for religious exercise, because in a modern, pluralistic state with many laws and many different religions, inadvertent conflicts between regulations and religious practices will be frequent. After mandating some exemptions in the 1960s and 70s,[7] the Supreme Court began to turn against them.[8] The turn reflected partly an attitude of judicial restraint, but partly also an objection that it violates neutrality to exempt conduct motivated by religion but not conduct motivated by other reasons. In the 1980s, commentators began to press this claim,[9] and the Court twice held that particular statutory exemptions gave unconstitutional aid to religion.[10]

In this context Laycock, in a 1989 lecture at DePaul University, specified a different concept of governmental neutrality. It was not "formal" neutrality, in the sense of "a ban on religious classifications" or on categories referring to religion—a standard inconsistent with religious exemptions.[11] It was "substantive" neutrality, in the sense that government must "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[12] Substantive neutrality "will often require that religion be singled out for special treatment."[13] Specifically, it may require government to exempt religion from generally applicable laws to avoid serious disincentives to religious

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7. *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (both holding that the state could not deny unemployment benefits to a worker who refused particular employment for reasons of religious conscience); Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (holding that Wisconsin could not compel the attendance of Old Order Amish children in public schools to age sixteen); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

8. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (refusing to order the IRS to maintain a tax exemption for a small fundamentalist college that banned interracial dating by students); United States v. Lee, 455 U.S. 252, 256–60 (1982) (refusing to mandate an exemption for Amish employers from paying Social Security taxes for Amish employees); *see also* Goldman v. Weinberger, 475 U.S. 534 (1986) (refusing to mandate an exemption from military-dress regulations for Orthodox Jewish Air Force officers to wear yarmulkes in noncombat situations).

9. *See, e.g.*, Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 389–96 (arguing that exemptions are unconstitutional because they classify claimants according to religion); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 412 (1989) (arguing that "[e]xemption offends the equality-of-ideas notion that is at the core of constitutional law," but concluding only that exemptions are not constitutionally required).

10. Texas Monthly v. Bullock, 489 U.S. 1 (1989) (plurality opinion) (striking down an exemption for religious publications from general sales tax); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down a law requiring employers to accommodate any employee's objection to working on his or her Sabbath).

11. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 3, 11–13.

12. *Id.* at 13.

13. *Id.* at 15.

practice—for example, to avoid banning the Catholic Mass through a general law against serving alcohol.[14]

This conception harmonized neutrality with religious liberty, for it meant that "religion is to be left as wholly to private choice as anything can be."[15] Laycock brought out "the connections among religious neutrality, religious autonomy, and religious voluntarism": "Government must be neutral so that religious belief and practice can be free," and "[t]he autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized."[16] To paraphrase the psalmist, in Laycock's work, liberty and evenhandedness come together, freedom and neutrality clasp hands.[17] His first great contribution is to reconcile these two "distinct but tangled threads of explanation for the Religion Clauses."[18]

Just as important, however, has been Laycock's argument that judgments about what is neutral cannot be "disaggregated"[19]: government affects religious choices however it acts in a given situation, and proper analysis requires comparison to determine "the alternative that departs least from the hypothetical baseline of neither encouraging nor discouraging religion."[20] Thus, exempting religious practice from conflicting law is substantively neutral when, as in most cases, it removes a significant imposition from religious practice without thereby encouraging people to adopt the exempted practice. An exemption from Prohibition for communion laws removes a serious burden, and it is far-fetched "that the prospect of a tiny nip would encourage some desperate folks to join a church that uses real wine, or to attend Mass daily instead of weekly or only at Easter."[21] But in other cases, such as objections to taxes, an exemption may coincide sufficiently with self-

14. *Id.*

15. *Id.* at 13–14.

16. *Id.* at 14.

17. *Psalms* 85:10 (King James) ("Mercy and truth are met together; righteousness and peace have kissed each other.").

18. Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 225, 240. As Laycock notes, he was not alone in this insight: simultaneously Michael McConnell and Richard Posner were similarly distinguishing "incentive neutrality" from "category neutrality." Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37 (1989) (cited in Laycock, *Substantive Neutrality Revisited*, *supra* at 230).

19. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 19–21.

20. Douglas Laycock, *Free Exercise Clause and Establishment Clause: General Theories*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA (Paul Finkelman ed., 2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 103, 107 [hereinafter Laycock, *Free Exercise Clause and Establishment Clause*].

21. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 15.

interest that it would encourage people to present claims as religious and therefore should be denied.[22]

The "aggregate" assessment of neutrality is crucial to Laycock's method generally. I remember, on first hearing this analysis at DePaul, how powerful it seemed for diagnosing what had gone wrong in *Aguilar v. Felton*,[23] the now-overruled decision that held it unconstitutional for public-school teachers to offer remedial classes in secular subjects to parochial-school children after regular hours. Laycock wrote:

> So thousands of our least advantaged citizens are now forced to choose: forfeit their right to remedial instruction in math and reading, or forfeit their right to education in a religious environment. That effect discourages religion, and dwarfs the risk that the government's remedial math or reading teacher might suddenly start proselytizing.[24]

Laycock harmonizes neutrality not only with liberty, but with voluntarism, a concept that resonates in American constitutional and religious history. In the 1840s, just after the last state tax for churches and clergy had been eliminated, scholar Robert Baird described the nation's church–state pattern as "the voluntary principle," under which religion relies "upon the efforts of its friends, acting from their own free will," rather than upon government promotion.[25] Many subsequent historians have identified voluntarism as America's distinctive church–state approach,[26] and Carl Esbeck has traced its emergence in the Founding Era and the early Republic.[27] Saying that government should minimize its encouragement or

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22. *Id.* at 30–32.

23. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

24. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 20–21.

25. ROBERT BAIRD, RELIGION IN THE UNITED STATES OF AMERICA 288 (Edwin S. Gaustad ed., Arno Press & N.Y. Times 1969) (1844).

26. *See* EDWIN GAUSTAD & LEIGH SCHMIDT, THE RELIGIOUS HISTORY OF AMERICA 139 (HarperCollins rev. ed. 2002) ("'Voluntarism,' that is, action unaided by the state and undirected by any supreme ecclesiastical authority, came to be the distinguishing feature of religion in America, and at no time more conspicuously so than in the early decades of the nineteenth century."). For further historical discussion of America's principles of voluntarism in religion and reliance on voluntary religious associations, see, e.g., JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, GOD IS BACK 62–65 (2009) (describing "free market" in religion, based on individual choice, as "the American Way" concerning religion, government, and society); MARK A. NOLL, AMERICA'S GOD 175 (2002) (noting how reliance on voluntary but active religious associations constituted the "singularity of the American situation" concerning church and state); TIMOTHY L. SMITH, REVIVALISM AND SOCIAL REFORM 35 (1957) (noting how America's "voluntary system" created "a new pattern of church–state relations, unknown since the first century").

27. *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1396–98 ("[T]he American theory of religious freedom pushed for the decoupling of formal ties between religious institutions and government institutions. . . . Faith, if it was to be genuine, was acquired as a voluntary act, without Caesar's aid."). For my glosses on Esbeck's important account, see generally Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593.

discouragement of religious decisions is another way of saying it should leave religion to the voluntary decisions of individuals and groups.[28] Laycock has tied substantive neutrality to voluntarism: "What happens to religion is up to the people acting severally and voluntarily; it is not up to the people acting collectively through government."[29] Or as the Supreme Court has put it, each religious view should "flourish according to the zeal of its adherents and the appeal of its dogma."[30]

Laycock's third great contribution, in my view, is to provide a method of preserving liberty in religious matters in the face of the challenges of the modern, active state. I have already described how free-exercise exemptions do this. Another example involves government funding of education or social services provided by religious institutions, an area where substantive neutrality, I think, exercises a good influence on how we understand voluntarism. The original thrust of voluntarism may have been that no government money should support religious institutions. But in our day, when the state funds education or social services provided by secular private institutions, voluntarism may well require the same funding when the services come from religious institutions. Otherwise, as Laycock emphasizes, government funding may push people's choices toward secular, and away from religious, options.[31] Substantive neutrality captures this argument; it restates voluntarism in a way suitable for the challenges of the welfare state.

Both the religious-exemptions and funding issues raise the question from what baseline one should measure encouragements or discouragements of religion.[32] Formal (category) neutrality purports to offer an easy answer. The baseline is the treatment of nonreligious beliefs, conduct, or entities, and the departure is for government action to treat religion differently from these or mention it as a category.[33] The baseline for substantive neutrality may be

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28. *See* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703–04 (1997) (connecting substantive neutrality and voluntarism).

29. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 14; *see also* Laycock, *Substantive Neutrality Revisited*, *supra* note 18, at 241 ("[S]ubstantive neutrality insists on minimizing government influence on religion. Minimizing government influence leaves religion maximally subject to private choice, thus maximizing religious liberty.").

30. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

31. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 54, 95.

32. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 17 ("[S]ubstantive neutrality requires a baseline from which to measure encouragement and discouragement.").

33. Actually, the baseline for formal or category neutrality is much more complicated; the approach's clarity is illusory. Frequently a law exempts some other instances of conduct, requiring a judgment in a free-exercise case whether religion should be treated equally with the category that is restricted or the one that is exempted. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3–9 (2000) (analyzing several such fact patterns in which religious interests are exempted to place them on equal footing with secular interests that are exempted and noting how this renders it ambiguous to say religion must receive equal treatment or regard); *see*

more complex to identify.[34] Some critics have accused Laycock and other proponents of substantive neutrality of speaking, incoherently, of a world in which government has no effects on behavior.[35] Others have accused him of adopting inconsistent baselines in different classes of cases, such as free exercise (where he supports exemptions) and funding of religious schools or social services (where he generally supports equal treatment).[36]

The essays reprinted in this volume, however, answered these criticisms, often by anticipating them. The baseline goal, Laycock's DePaul lecture stated, "is not to leave religion in a Hobbesian state of nature, nor to leave it regulated exactly to the extent that commercial businesses are regulated," but rather "to maximize the religious liberty of both believers and nonbelievers."[37] I read him to assert that one should, and can, undertake a common-sense analysis of which government action would most leave individuals and groups free to decide about and pursue religious beliefs according to their own assessments of the beliefs' merits. To quote the Court again, religion should flourish, or not, "according to the zeal of its adherents and the appeal of its dogma."[38]

Laycock also explains why his positions on funding and free exercise are consistent once neutrality is seen in the aggregate. For funding of education and social services, the prima facie argument for equal treatment is strong under substantive neutrality. The reason again involves the comparison of effects on individuals:

> [The] effect on [taxpayers] is just too small and too attenuated to outweigh the effect, on families choosing schools, of funding some options and not others. Each taxpayer's money goes into an enormous pool, making an infinitesimal fraction of the government's budget, and government then spends a small fraction of that budget to support secular education in religious institutions, and that expenditure makes it easier for those institutions to teach religion with their own funds.

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also Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1194–95 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)) (likewise noting this ambiguity and the problem it poses for theories of "equal regard").

34. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 17.

35. *See, e.g.*, EISGRUBER & SAGER, *supra* note 33, at 27–28 (describing Douglas Laycock and Michael McConnell as proponents of substantive neutrality theory and stating that "[t]he idea that government should leave religious choice 'unaffected' makes no more sense than the idea that government and religion should be 'separate.'").

36. *See, e.g.*, Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 247 (1999) (arguing that the neutrality theory is not in fact neutral because it promotes the protection of religiously motivated conduct).

37. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 11, at 19.

38. *Zorach*, 343 U.S. at 313.

> This is not nearly a big enough effect to outweigh the large penalty we traditionally impose on the choice to be educated in a religious environment.[39]

In contrast, for free exercise claims the comparison of effects should often lead to the conclusion that distinctive treatment through exemption is the substantively neutral course. Exemptions remove a disincentive to a belief or practice the claimant would adopt on its merits, while

> [m]ost exemptions do very little to draw adherents to a faith. . . . I do not want to have a driver's license without a picture; I would have a harder time cashing checks or proving my identity in other contexts. I do not want to refrain from work on the Sabbath; I am too far behind as it is. I do not want to eat peyote; I would almost certainly throw up.[40]

It has been argued that these examples are the exception rather than the norm: that exempting a religious observance from a general law will frequently encourage the observance. For this reason, Nelson Tebbe argues that exemptions are consistent with religious liberty but violate substantive neutrality.[41] He says, for example, that exemptions under the Religious Land Use and Institutionalized Person Act (RLUIPA) will encourage religion, either by favoring churches over nonreligious institutions in challenges to zoning laws, or by giving religious prisoners claims that nonreligious prisoners do not have and would want.[42] Tebbe may be correct that exemptions frequently have some tendency to make religion more attractive than otherwise. But he fails to weigh that against the serious discouragement imposed on religion when it is subjected to criminal or civil sanctions. Tebbe acknowledges that Laycock "advocates a balancing test" leading to "the course that creates the smallest incentive in either direction."[43] But when Tebbe finally analyzes RLUIPA, any balancing drops out. He finds that the statute violates neutrality simply because it "advantages religion over irreligion"—for example, protecting religiously motivated over nonreligiously motivated expression[44]—not because he concludes, after assessing the balance, that it creates an inducement to religion greater than the burden that regulation would impose on religion. Similarly, he objects that substantive neutrality could not justify an exemption from Prohibition for the sacramental use of wine, because exemption "may well have had the effect of

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39. Laycock, *Substantive Neutrality Revisited*, *supra* note 18, at 85.

40. Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 95–96.

41. Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 714–15 (2005).

42. *See id.* at 718–20 (discussing the perceived violation of substantive neutrality in a case in which a prisoner who was a member of the Aryan Nation claimed a religious exemption for censored hate materials) (citing Cutter v. Wilkinson, 349 F.3d 257, 266 (6th Cir. 2003)).

43. *Id.* at 716.

44. *Id.* at 718–19.

encouraging Catholicism"[45]—letting this speculative possibility outweigh the grievous burden on Catholicism from prohibiting wine at Mass. By focusing almost solely in practice on the possible inducements to religion from exemption, and not on the burden to religion from regulation, Tebbe "disaggregates" substantive neutrality in precisely the way Laycock criticizes. As a result, although Tebbe purports to apply substantive neutrality, his actual method in analyzing RLUIPA—focusing almost entirely on the different treatment of religious claims—is closer to formal neutrality.

B. Avoiding "the Puritan Mistake"

Before concluding discussion of Laycock's contributions, I should mention the other theme central to this volume: his willingness to defend the liberty of persons and groups of all views on religion, including views far from his own.[46] Not only his writings, but also his professional life, speak eloquently for the vision of religious liberty under which "people from across the whole range of views about religion agree to respect the religious liberty of everyone else across the whole range of views about religion."[47] He is scrupulous to avoid what he calls "the Puritan mistake": the tendency, like Puritans of Massachusetts, to support "[r]eligious liberty only or principally for people of one's own views" about religion.[48] In the next section I raise some questions about the foundations and applications of this approach. But it is a powerful vision.

II. My Doubts: Religious Liberty Rationales and Government Speech on Religion

My one significant doubt about Laycock's approach concerns two corollaries and entailments he draws from substantive neutrality. One involves whether religious or theological arguments may serve as significant public reasons for America's system of religious liberty. The other involves whether the Establishment Clause permits government any power to include religious content in its statements.

Historically and today, some of the most influential arguments in America for full religious liberty—disestablishment as well as free exercise—have themselves been theological in nature. James Madison's *Memorial and Remonstrance Against Religious Assessments* includes several such claims: that duties to God take precedence over the claims of civil society, that only voluntary faith has any religious value, that establishments

45. *Id.* at 715.

46. For his statement of his personal views, see Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 97–102.

47. *Id.* at 98.

48. *Id.*

of religion undermine "the purity and efficacy of [r]eligion," and so forth.[49] Laycock frequently recognizes that these arguments, and the evangelical sects to whom they appealed, were crucial to disestablishment.[50] But he does not think they can serve as public reasons justifying the Religion Clauses and affecting their scope, because they are non-neutral: they "can neither persuade nontheists nor speak equally to all the varieties of theistic religious experience."[51] Indeed, "[t]o explain religious liberty on either theistic or anti-theistic grounds is to make a diluted form of the Puritan mistake."[52]

Instead, Laycock says, religious liberty should rest on reasons that "make sense of the ratified text without entailing commitments to any proposition about religious belief"[53] and that "are entirely neutral about the truth or value of any religious belief."[54] He argues that three such propositions together can support a strong version of substantive neutrality and religious liberty. First, "governmental attempts to suppress disapproved religious views ha[ve] caused vast human suffering," both in history that the Founders knew well and in more recent times.[55] "Second, beliefs about religion are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for"—which suggests both that efforts to impose religious uniformity will fail and that religion should be left "to the people who care about it most," that is, to individuals and to voluntary groups.[56] Third, "beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government," since it has long been clear that "people of quite different religious beliefs c[an] be loyal citizens or subjects."[57] Any asserted relationship between certain religious beliefs and civic virtues and vices is generally "indirect and . . . debatable" and "will never make religious beliefs as important to the government as to the individual."[58] These three propositions can generate strong free exercise protection, he argues, because people can suffer from suppression of their religious conduct as well as their beliefs. And these propositions can justify a strong rule of neutrality, prohibiting any government-sponsored religious

49. James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 24 (Ralph Ketcham ed., 2006).

50. *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 33, 34 ("It is important to remember that the votes for disestablishment came from evangelicals."); Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 90 ("[I]t was the evangelicals who led the fight for disestablishment.").

51. Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 67.

52. *Id.* at 101.

53. *Id.* at 58.

54. *Id.* at 60.

55. *Id.* at 59.

56. *Id.*

57. *Id.*

58. *Id.* at 60.

symbols or speech, because such practices cause totally unnecessary divisions in society.

I agree that these reasons have force; and perhaps they suffice for a strong theory of religious liberty and neutrality. But I am skeptical about omitting the theological arguments for two reasons. First, I question whether they can ground the strong commitment to religious liberty that Laycock advocates. One of the three reasons does not apply to the cases where religious conduct contravenes generally applicable laws: those are precisely the cases where religion is directly relevant to civil government's concerns, where the relation is no longer "indirect [and] debatable," as with beliefs.[59] Even in these cases, it is true, the importance of religion to the individual still gives a reason not to suppress it.[60] But can the importance of the practice to the individual alone justify a stringent standard of justification, when government restricts practices important to individuals in many other contexts?

I still have doubts. I think that Steven Smith has a point when he argues that the sense that we cannot invoke religious justifications for religious freedom has weakened the case for that right.[61] I question whether we can really justify a "hands-off" mandate to government in the area of religion without some sense that in that area the government touches on matters that are (or may be) of the greatest importance—objectively, and not just subjectively to the individual. Moreover, the question is particularly sharp in a class of free exercise claims that Laycock is particularly known for defending: claims of "church autonomy," where a religious institution argues not that government regulation would violate its conscientious beliefs (which would raise the concern about people suffering for beliefs), but rather that it would interfere with the institution's ability to organize itself to pursue its mission.[62] Historically our church–state tradition rests institutional autonomy significantly on the principle that core religious matters are beyond government's jurisdiction, not just that interference with them causes harm to individuals.[63]

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59. *Id.*

60. *See id.* at 61–62 (arguing that religious conduct should generally be protected, but acknowledging that government might at times have compelling interests in suppressing such conduct).

61. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149 (1991) (arguing that a religious rationale was the "principal historical justification" and still is "the most satisfactory" justification for religious freedom, and that our commitment to religious freedom has become "self-cancelling" because government can no longer defend it based on a religious rationale).

62. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (discussing the right of churches to control their own activities and institutions).

63. *See* Carl H. Esbeck, *The Establishment Clause as a Structual Restraint on Governmental Power*, 84 IOWA L. REV. 1, 51–54 (1998) (discussing the operation and application of associational rights under the Free Exercise clause).

The various religious justifications for religious freedom need not rest on confidence that God, or a higher realm, exists. They might rest on simply recognizing the potential that such a realm exists and the potential cost of interfering with individuals' duties or fulfillment in that realm—coupled with the proposition that the government is not competent to make judgments about the true nature of any such power or realm.[64]

Even if the theological arguments are not logically necessary for strong religious liberty, they may be crucial as a matter of history and popular support. Michael Perry argues that in America, "[n]o political argument for [human rights] will begin to have the power of an argument that appeals at least in part to the conviction that all human beings are sacred and 'created equal and endowed by their Creator with certain inalienable Rights . . . .'"[65] The reason is largely that the United States "remains a pervasively religious society," where "the conviction that human beings are sacred is for most persons a religious conviction."[66] Laycock's own answer to the question of "Why protect religious liberty specially?" "depends far more on history than on logic."[67] On that very premise, it may be more important to have an account of religious liberty that resonates with Americans' history and widely held sentiments—an account that, I expect, will have to include theological reasons—than to have an account whose reasons do not provoke substantial disagreement.

What follows from the argument that the public reasons for religious liberty may include theological reasons? The fact that government relies on a religious rationale, or even that it views religion as positive for society, does not entail that it should promote religion. Many advocates of disestablishment in America over the decades have agreed with Alexis de Tocqueville that religion is important to the maintenance of republican government, but only if it is voluntary and largely independent from government.[68] I would agree with Laycock that the government should not

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64. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990) ("While the government is powerless and incompetent to determine what particular conception of the divine is authoritative, the free exercise clause stands as a recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens."); Note, *Wagering on Religious Liberty*, 116 HARV. L. REV. 946, 961–63 (2003) (arguing that the government, as an agnostic state, can be justified in allowing religious conduct because of the chance that its citizens will suffer "hellfire and damnation" if such conduct is proscribed).

65. Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, 27 U. RICH. L. REV. 1023, 1073 (1993) [hereinafter Perry, *Human Rights*]; *see also* Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 302 (2000) [hereinafter Perry, *Freedom of Religion*] (applying the point to religious freedom).

66. Perry, *Human Rights*, *supra* note 65, at 1073.

67. Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 58.

68. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 309, 335 (Henry Reeve trans., D. Appleton & Co., 1899) (1835) (recognizing that religion "powerfully contributes to the maintenance of the democratic republic among the Americans," but warning about the "dangers

conduct prayers or make official statements taking religious positions, even if those statements are ecumenical and noncoercive. As he says, "with respect to government speech" in most cases, "the most nearly neutral course is for government to be quiet."[69]

But the concerns above do affect my analysis in a couple of situations. One is the inclusion of "under God" in the Pledge of Allegiance, the issue the Supreme Court dodged in *Elk Grove Unified School District v. Newdow*.[70] I agree with Laycock's argument, in his comment on the case, that the inclusion of the phrase in the Pledge is constitutionally troublesome.[71] The Pledge is more intrusive than other government religious affirmations, he points out, first because "it is most frequently used in public schools," where the Court has always been "more sensitive to departures from religious neutrality" in large part because children are a captive audience.[72] In addition, unlike other governmental religious acts—legislative prayers, presidential Thanksgiving proclamations, "In God We Trust" on currency—the Pledge actually "asks for a personal statement of belief in God, and it links that request to a profession of loyalty to the nation."[73] Thus it can leave an especially vivid suggestion that non-theists are "'outsiders, not full members of the political community.'"[74]

But I am also uncomfortable with simply excluding "under God" from the Pledge, largely because I am uncomfortable with excluding religious justifications for religious freedom and other rights. First, as I have previously argued, there is a reading of the phrase under which it simply expresses a religious rationale for limited government and human rights, including religious freedom.[75] The congressional conference report on the 1954 resolution adding the phrase expressed the rationale: "Our American Government is founded on the concept of the individuality and dignity of the human being. Underlying this concept is the belief that the human person is important

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which may accrue from a union of Church and State"). Thus, while I agree that religious liberty, or substantive neutrality, "does not view religion as a good thing to be promoted," I believe it may "view religion as a good thing." Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 55.

69. Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 97.

70. 542 U.S. 1 (2004). *See id.* at 17–18 (holding that Newdow lacked standing to sue, thereby avoiding the constitutional question).

71. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 156 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 1, at 126, 203–05 [hereinafter Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*] (arguing that the Pledge of Allegiance is an endorsement of religion that is generic but is also "uniquely intrusive" on individuals).

72. *Id.* at 203–04.

73. *Id.* at 203.

74. *Id.* at 205 n.468 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000)).

75. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 52–58 (2003).

because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp."[76]

In contrast, the report said, "the atheistic and materialistic conceptions of communism" lead to the "subservience of the individual" to the state.[77] The philosophy that the inalienability of rights stem from their source in a higher authority is, of course, the philosophy of the Declaration of Independence. It is troublesome to bar the government from stating that philosophy.[78]

Second, as I have argued previously, eliminating "under God" may imply, or be taken to imply, that the state acknowledges no possible higher limits on its authority.[79] One could argue that once the phrase is eliminated, the state is simply saying nothing about God and is therefore acting neutrally. But in the context of a loyalty oath, I doubt that silence is neutral. Given the claims that governments have made on their citizens over the centuries, a citizen can quite reasonably assert that when the government asks for a loyalty oath, it should simultaneously offer some kind of acknowledgment of its limited status. And the citizen might reasonably fear that if government does not explicitly make that acknowledgment—if it indeed is prohibited from acknowledging any higher authority—then it will deny such authority in practice and will act like an entity without limits. Thus, a burden similar to the one the atheist student suffers from "under God" may arise for the theist student if "under God" is eliminated. In either case, the student has to accept a claim, explicit or implicit, about government's relationship to a higher power—a claim she deeply rejects—as the price of affirming loyalty to the nation. Simple removal of the religious phrase is not adequate or necessarily neutral.

There are various solutions to the Pledge problem that take account of burdens on both groups. Professors Eisgruber and Sager filed an amicus brief in *Newdow* arguing that a school could include "under God" in the Pledge if it also offered students a secular alternative, such as "one Nation, *of equals*, indivisible."[80] They analogized the case to pledges by officeholders or courtroom witnesses, which may be made "by oath [a religious concept] or affirmation."[81] But I am not sure if Laycock would accept this solution,

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76. H.R. REP. NO. 83-1693, 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

77. *Id.* at 2.

78. I agree with Laycock that schoolchildren might read "under God" in any number of ways. Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 71, at 203. However, teachers might be instructed to explain how the phrase suggests the limited authority of the government and the higher status of rights. Berg, *supra* note 75, at 73–74.

79. Berg, *supra* note 75, at 69–71.

80. Brief of Christopher L. Eisgruber and Lawrence G. Sager as Amicus Curiae Supporting Respondent Michael A. Newdow, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624), 2004 WL 314155 at *14–15.

81. *Id.* at *5–6, 9 (quoting U.S. CONST. art. I, § 3; U.S. CONST. art. II, § 1; U.S. CONST. art. VI, § 3; FED. R. CIV. P. 43(d); FED. R. EVID. 603) (emphasis omitted).

since under it the school still presents "under God" as part of the Pledge, albeit as only one alternative—in contrast with his position that the neutral course "is for government to be quiet." Although I agree with his position in most cases, I think it fails in the Pledge case to give weight to the claims of both sides. I have proposed a different solution, a pause in the Pledge into which students could insert "under God" or some other phrase chosen by themselves or their parents.[82] Under that solution government does remain quiet about religion; the analogies are a classroom moment of silence or a highly limited forum for student expression. But the "student-choice pause" would be harder to administer than would the provision of two alternative forms of the Pledge.

My concern about the exclusion of religious alternatives in the context of government speech has one other effect. I would probably find more room than Laycock for government to include religious symbols among broader displays as acknowledgments of the role religion has played in American history and society. I do not think, for example, that government must necessarily leave the Ten Commandments out of displays about influences on Western or American law.[83] I would be mindful of the efforts of officials to use such arguments as a means of asserting the truth or favored status of Christianity or theism. I would require that the historical connection be more than a fig leaf; there should be a "unifying, cohesive secular theme" into which the religious component fits.[84] But when such a theme exists, to exclude a religious component that fits it is not the most neutral course and should not be required.

III. Conclusion

I have a few doubts about the restrictions Laycock places on the set of reasons that support principles of religious liberty and substantive neutrality. But the principles themselves reflect remarkable analytical power and

82. Berg, *supra* note 75, at 74–75.

83. *See* Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 71, at 213–15 (applying Justice O'Connor's four factors from *Newdow*, 542 U.S. at 37–44 (O'Connor, J., concurring), and arguing that invalidation of displays of the Commandments' text "should be an easy case" under the factors). *Compare* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) (striking down inclusion of Commandments in multidocument display because its purpose was religious in light of previous displays containing only the Commandments or only religious affirmations), *with* Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a display of the Commandments on state capitol grounds because when taken with other monuments, it conveyed a historical rather than religious purpose). Laycock does not explicitly say that displays of the Commandments that include other documents should be invalidated too, but he does not qualify his argument against them, and elsewhere he has argued that government displays in general should exclude religious symbols and leave them to be displayed by the private sector. Laycock, *Religious Liberty as Liberty*, *supra* note 31, at 351–52.

84. *See* Green v. Haskell Cnty. Bd. of Comm'rs, 568 F.3d 784, 805–06 n.16 (10th Cir. 2009) (discussing *Van Orden*, 545 U.S. 677, in striking down a Ten Commandments display because of the lack of such a theme).

remarkable sympathy for the claims of people of widely varying views. This volume alone shows why Douglas Laycock should rank among the great thinkers on religious liberty in our history. And there are three more volumes still to savor.

Lawyering Religious Liberty

RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY. By Douglas Laycock. Wm. B. Eerdmans Publishing Co., 2010. 888 pages. $35.00.

Reviewed by Steven D. Smith*

Douglas Laycock has been the preeminent lawyer–scholar of religious freedom over the last quarter-century[1]—that would be my judgment, anyway—and his influential writings, though already familiar to those who work in this area, amply repay rereading. So it is fitting, as well as convenient, that those writings are being gathered into a collected works series.[2]

The challenge for a reviewer, however, is daunting. There is vastly more both to praise and to question in this book of over 800 pages (the first of four projected volumes) than my competence and my modest prescribed word limit allow. So I propose to use the event of a collection of Laycock's leading writings to attempt a more overarching appraisal. I will try to distill down the overall purpose and shape of his project, to reflect on what it has contributed to our understanding and our law, and also to note what seem to me its principal limitations.

I. Laycock's Substantive Neutrality

First the distillation. At the heart of Laycock's work is a (seemingly) simple, powerful proposition: we should understand the First Amendment Religion Clauses to be about *religious liberty*. The clauses are not designed to promote or protect religion—or secularism either; they protect liberty.[3] Laycock repeatedly objects to the practice by religious believers and skeptics alike of importing their views of religion into their interpretations of the First Amendment, thereby committing what he calls the "Puritan mistake."[4] (Whether Laycock himself is guilty of the same transgression, if it is one, is a question we will consider later.)

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1. In this respect, despite their different views, Laycock might be seen as a worthy successor to Leo Pfeffer, who was similarly both a consummate lawyer and an erudite scholar.

2. DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY (2010).

3. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 54, 54–55.

4. Douglas Laycock, *Religious Liberty: Not for Religion or against Religion, but for Individual Choice*, 3 UT L. MAG. 42 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 123, 123 [hereinafter Laycock, *Religious Liberty*]; Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 225, 245.

Having declared that the religion clauses are about religious liberty, Laycock next proposes what he seems to regard virtually as a truism—that a commitment to religious liberty entails an effort to minimize governmental influence over individual choice in the areas of religious belief or practice. He describes this commitment to minimizing influence as substantive neutrality; this, he says, is the central theme that runs through and unifies his work.[5]

Elaborating on the implications of substantive neutrality, Laycock goes on to address the concrete controversies of the day. In broad terms, he (a) generally favors what are often called free exercise exemptions,[6] (b) approves governmental funding for religious schools and social service providers *if* and only if they qualify under general and neutral criteria or programs,[7] and (c) condemns governmental religious expressions such as "under God" in the Pledge of Allegiance and publicly sponsored Christmas creches.[8] In arguing for these premises and conclusions, Laycock engages in extensive normative theorizing,[9] presents and draws conclusions from history,[10] and demonstrates a consummate mastery of the lawyerly arts of analyzing cases.[11]

This brief summary obviously does not pretend to give the nuances and details of Laycock's descriptions and arguments. Even so, I hope this distillation is enough to permit an appreciation of Laycock's remarkable achievement—and also of some central questions and doubts that his work provokes.

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5. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 3, 13; Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 225–26.

6. *See* Douglas Laycock, *Free Exercise Clause and Establishment Clause: General Theories*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA (Paul Finkelman ed., 2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 103, 109 [hereinafter Laycock, *Free Exercise Clause and Establishment Clause*] (describing Laycock as having written one of "the most extensive defenses of a right to exemptions").

7. *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 247 (discussing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)).

8. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 156 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 126, 200 [hereinafter Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*] (stating that "'under God' is inherently a religious affirmation" by the government).

9. Part I.A of the book is mainly devoted to such theorizing.

10. Part II of the book is mainly devoted to historical discussion and argumentation.

11. This sort of analysis occurs throughout the book, including in Part I.B's well-crafted descriptive summaries of the law of religious freedom. The chapter discussing the Supreme Court's 2004 decisions concerning theology scholarships and the Pledge of Allegiance is an impressively and even numbingly intricate exhibition of such analysis. *See* 1 RELIGIOUS LIBERTY, *supra* note 2, at 126–224.

II. The Context: Religious Freedom in the Ruins?

Laycock's project in defining and defending religious liberty must be appreciated, I think, in light of the immensely challenging context in which he is working. Two troublesome features of that context are well known. First, the doctrine and case law of religious freedom are widely viewed as being in disarray.[12] Second, the larger society within which judges and scholars address the questions of religious freedom is deeply divided. On virtually every issue that Laycock discusses, Americans disagree, often passionately; these divisions are reflected in what Laycock and others often describe as the culture wars.[13]

A third difficulty is less obvious but ultimately even more daunting. As I have argued at length elsewhere,[14] modern commitments to religious freedom are derived from a long history of thought and action that was anchored in a dualist-Christian worldview in which God and Caesar were believed to work through independent authoritative institutions (church and state) and to impose independent but valid obligations on their subjects. The medieval effort to liberate the church from Caesar's rule—to achieve freedom of the church—was a progenitor of the modern commitment to separation of church and state. In the post-Reformation period, as the functions and dignity of the *church* came to be transferred in part to the individual *conscience*, freedom of the church begat a fierce devotion to freedom of conscience—a cause for which thousands suffered martyrdom. This cause culminated in the modern constitutional commitment to free exercise of religion.[15]

The religious origins of religious freedom were tersely but eloquently reflected in the explicitly theological rationales offered, for example, in James Madison's famous *Memorial and Remonstrance Against Religious Assessments*[16] and in Jefferson's celebrated Virginia Statute for Religious Freedom.[17] Laycock himself acknowledges that "[t]heological developments played an important role [in the establishment of religious freedom], perhaps an indispensable one."[18] The problem is that in contemporary circumstances

12. Laycock offers his own diagnoses of that disarray. *See, e.g.*, Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 5, at 22–23 (suggesting that the Supreme Court does not base decisions on neutrality or, if it does, applies the principle inconsistently).

13. 1 RELIGIOUS LIBERTY, *supra* note 2, at xvi.

14. STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 107–50 (2010); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom*, 122 HARV. L. REV. 1869 (2009).

15. SMITH, *supra* note 14, at 121–27.

16. JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21 (Ralph Ketchm ed., 2006).

17. An Act for Establishing Religious Freedom, ch. 34, 1785 Va. Acts 26.

18. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 67.

the very commitment to religious freedom has contributed, first, to an increasingly religiously (and nonreligiously) diverse population in which the classical religious premises and rationales are unlikely to enjoy universal acceptance and, second, to a general understanding that government is supposed to act only on secular rationales. In this way, religious freedom comes to snub or subvert its own supporting rationales and, thus, threatens to cancel itself out.[19] And, indeed, some scholars have begun to call for the retirement of any special constitutional protection for religion.[20]

Laycock, by contrast, is not ready to relinquish the constitutional commitment to religious freedom. On the contrary, he remains a stalwart, even vehement,[21] defender. At the same time, he whole-heartedly joins in the prevailing contemporary assumption that the classical religious rationales are inadmissible today. Government, he insists, cannot act on religious beliefs or reasons.[22]

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19. For a more detailed elaboration of this argument, see Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

20. *See, e.g.*, James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 943 (2005) (arguing that a separate enumerated freedom of religion is unnecessary).

21. Laycock does not pull punches in saying what he thinks of opposing views: terms like "nonsense," "preposterous," "absurd," "phony," and "silly" are sprinkled through his discussion. *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992), *reprinted* in 1 RELIGIOUS LIBERTY, *supra* note 2, at 33, 4; *id.* at 46, Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 88; Laycock, *Theology Scholarships, the Pledge of Alleigiance, and Religious Liberty*, *supra* note 8, at 133; Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503 (2006), *reprinted* in 1 RELIGIOUS LIBERTY, *supra* note 2, at 399, 424 [hereinafter Laycock, *Church and State in the United States*]; Douglas Laycock, Op-Ed., *Founders Wanted Total Neutrality*, USA TODAY, Aug. 12, 1985, at 8A, *reprinted* in 1 RELIGIOUS LIBERTY, *supra* note 2, at, 529, 530. At one point, commenting on some past writings, he remarks that they were "a bit more combative than if I had written them today," *id.* at 527, and one wonders whether he will come to second guess himself about some more recent writings. *See* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007) (reviewing, in unusually harsh terms, MARCI A. HAMILTON, GOD VS. THE GAVEL (2005)). Given these tendencies, I suppose I proceed at my peril in criticizing parts of Laycock's argument. On the whole, however, I do not find Laycock's sometimes feisty manner off-putting, but rather refreshingly candid. He is sometimes similarly candid in confessing his own limitations. *See, e.g.*, Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 243 ("I have been inconsistent over the years about separation."); *id.* at 262 (acknowledging that "I have waffled" regarding school funding issues).

22. *See* Douglas Laycock, *Religious Liberty as Liberty*, *supra* note 3, 58 (arguing that beliefs about religion cannot explain or maintain support for religious liberty and that religious liberty is intuitively inconsistent with the government's adoption of some religious beliefs and rejection of others). Unlike some theorists, however, Laycock does not argue for the exclusion of religious belief from public debate and deliberation on political issues; on the contrary, he defends the right of citizens to urge and rely on such beliefs. *Id.* at 93. Whether this position is consistent with his simultaneous insistence that *government* cannot rely on religious rationales might be questioned, as might Laycock's consistent drawing of a strong distinction between what is proper and important for government and what is proper and important for individuals. By one familiar view, after all, government is "of the people, by the people, and for the people": hence, any strong distinction between the reasons permitted to government and the reasons permitted to individuals would seem suspect. For discussion, see Steven D. Smith, *Toleration and Liberal Commitments*, *in* NOMOS XLVIII TOLERATION AND ITS LIMITS 243, 259–61 (Melissa Williams & Jeremy Waldron eds.,

So, if we can no longer rely on the "indispensable" religious rationales that historically grounded our commitments to religious freedom, what are we to do? This is our predicament—and Laycock's.

He approaches the challenge as a lawyer working within the American constitutional tradition. As noted, Laycock engages in extensive normative theorizing. But his primary goal is not to produce a theory to be admired by political philosophers for its elegance or sophistication. Rather the reverse: his development of general principles, he explains, has been "inductive" and has occurred "in the course of proposing solutions to specific controversies."[23] Laycock's goal has been to devise a plausible account of the religion provisions of the United States Constitution that can be used to resolve contemporary controversies.

Not every scholar will conceive of his calling in this way. Still, Laycock's is surely a worthy purpose. And it is important to keep this purpose in mind, I think, because what might look like lapses in Laycock's analysis may claim an excuse, perhaps even a justification, if we recall that he is using theory and history for the purpose of doing law, not vice versa.

So, how does Laycock pursue his lawyerly project in the face of the difficulties noted above? I have already observed that Laycock repeatedly emphasizes that the religion clauses are about promoting religious liberty. That is the bedrock on which he tries to build his position, and for good reason: it is quite possibly the strongest foundation currently available. For one thing, even in the midst of divisions and culture wars, most Americans probably have a favorable attitude toward the notion of religious freedom, at least in the abstract. For another, by labeling his position *substantive* neutrality (as opposed to the stiffer and less inviting *formal* neutrality from which he distinguishes it) and by emphasizing that religious liberty is neither for nor against religion, Laycock seeks to stay on diplomatic terms with all factions in the culture wars.

In addition, like many academics and many modern Supreme Court decisions, Laycock argues that current interpretations of the Religion Clauses should be broadly faithful to founding-era understandings—but only at the level of general principles, not specific expectations.[24] And on the plane of general principles, it seems entirely plausible—platitudinous even—to say

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2008). However, Laycock's major essay on the permissibility of religion in political discourse, Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996), has been reserved for a later volume, so I will not pursue these questions here.

23. 1 RELIGIOUS LIBERTY, *supra* note 2, at xix.

24. *See* Douglas Laycock, *Original Intent and the Constitution Today*, *in* THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 87 (James E. Wood ed., 1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 594, 596 ("So the search for intent is not for the Founders' specific applications . . . . The search for intent must be for principles that are consistent with the text and as broad as the text . . . .").

that the enactors of the First Amendment were attempting to secure religious liberty.

Add to these advantages Laycock's ample prowess as an advocate and his apparently tireless zeal for the cause—he has defended religious liberty not only as a scholar but also as a litigator,[25] lobbyist,[26] and op-ed writer[27]—and you have a formidable constitutional force. It is no wonder that Laycock has exercised considerable influence—far more than the typical academic would enjoy, at least—over the legal thinking about religious liberty in this country.

My own judgment is that the country is very much in his debt for this contribution. Even so, it is a reviewer's job to raise objections, and I think Laycock's substantive neutrality provokes some fundamental ones. So let us consider two sets of likely criticisms, one set naturally arising from the secular side of the culture and the other from the more devout side.

III. Why *Religious* Liberty?

An objection likely to arise from a secular orientation asks why *religious* belief and conduct (and institutions[28]) should be singled out for special constitutional protection. Sometimes this question is posed as a general theoretical matter, but more often it arises in discussions of free exercise exemptions: if nonreligious objectors to a law are required to obey, why should religious objectors enjoy a presumptive exemption?[29]

Some theorists, such as John Garvey and myself, have suggested that it may be impossible to justify special protection for religious freedom except on the basis of religious rationales similar to the classical rationales that gave rise to the constitutional commitment in the first place.[30] Laycock emphatically rejects this approach. As noted, he acknowledges that

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25. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 293 (2000); City of Boerne v. Flores, 521 U.S. 507, 510 (1997); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993).

26. *See, e.g.*, 146 CONG. REC. 16,698–99, 16,702 (2000) (transcribing Laycock's Congressional testimony on religious land usage).

27. *See, e.g.*, Douglas Laycock, Op-Ed., *Founders Wanted Total Neutrality*, USA TODAY, Aug. 12, 1985, at 8A, *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 529, 529–30 (arguing that the Constitution requires "neutrality towards religion" rather than "neutrality among religions").

28. One of Laycock's important and pioneering articles argued that the Free Exercise Clause protects not only individuals but also churches. *See* Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). That article and issue have been reserved, however, for a later volume.

29. Laycock to some extent blunts the force of this more specific challenge by defining the scope of "religion" broadly, much in the way the draft exemption cases did.

30. *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996) (suggesting that religion should be protected because it is inherently important); Smith, *supra* note 20, at 149 (1991) (arguing that the original rationale for protecting religious freedom was itself based on religious premises).

theological rationales may have been indispensable in the historical development of the constitutional commitment, but he is adamant that such reasons are inadmissible today. Instead, he adopts a different strategy, which we might call the "recasting" strategy. "*Religious reasons have to be recast*," he says, "in the form of a statement about *what some people believe*."[31] Government today, in short, cannot join with Jefferson's Virginia Statute in affirming that "Almighty God hath created the mind free."[32] But government can say that *some people believe* that Almighty God created the mind free.

More specifically, Laycock contends that religious freedom can be securely supported on the basis of three secular propositions. First, because people care deeply about religion, attempts to impose or suppress religion have historically given rise to a great deal of suffering and conflict.[33] Second, beliefs about religion are "often of extraordinary importance to the individual," sometimes leading people to fight, rebel, and even die.[34] Conversely, and third, religious beliefs are "of little importance to the civil government."[35] From these propositions, none of which looks theological in character, Laycock believes we can extract a strong commitment to religious liberty—which he understands, once again, to mean keeping religion as private as possible.[36]

So, how solid is this position? A predictable objection is that even if Laycock's three propositions are accepted, they do not quite answer the initial question: Why *religious* liberty? The propositions do not seem limited in their scope of application to religion, and indeed Laycock acknowledges that secular critics may argue that other strong personal commitments should have been protected as well.[37] His response to this objection is noteworthy, underscoring the practical and lawyerly nature of his project. We protect religion and not other concerns to which his secular propositions might also extend, he says,

> for the sufficient reason that other strong personal commitments had not produced the same history. The [constitutionally] protected liberty is religious liberty, and although the word "religion" must be construed in light of continuing developments in beliefs about

31. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 67 (emphasis added).

32. An Act for Establishing Religious Freedom, ch. 34, 1785 Va. Acts 26.

33. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 59.

34. *Id.*

35. *Id.*

36. *See, e.g.*, Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 33 (asserting that "the Religion Clauses are designed to make religious practice and nonpractice, belief and nonbelief, wholly matters of private choice insulated from government influence or control").

37. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 64.

> religion, we cannot rewrite the Constitution to say that religious liberty should not receive special protection.[38]

A more theory-bound scholar might huffily dismiss this contention as unresponsive, maybe even intellectually irresponsible. How can a central challenge to a normative position be shrugged off with "Good point, but that's not what the Constitution says"?

I think this dismissive response would be misdirected. Once again, Laycock is not trying to develop a theory for theory's sake; he is trying to give an attractive account of the content of the First Amendment. His prescriptions and conclusions depend, as he says, "far more on history than on logic."[39] Laycock is hardly alone in supposing that normative theories may help to illuminate the content of the Constitution;[40] at the same time, it would be surprising if a constitutional provision like the First Amendment were perfectly aligned with any particular normative theory. To the scholar primarily concerned with constitutional law, such incongruities may not be especially troublesome: a normative theory may persuade and guide even though the Constitution is over and underinclusive relative to that theory.

More generally, it may well be that Laycock's strategy of "recast[ing] [religious rationales] in the form of a statement about what some people believe" is the best approach available for protecting religious liberty in a pluralistic and heavily secular legal culture.[41] The position he stakes out, though it shows the marks of stretching and patching in places, may be good enough for government work, as they say, and it is after all government work that we are involved in here.

Even so, Laycock's recasting strategy, and the mismatch between normative theory and constitutional meaning that it produces, may leave us uneasy. The incongruity between Laycock's constitutional position and the normative rationales he enlists to support it mean that he has to put great weight on constitutional text and history—on the claim that we should do one thing and not something else just because "'the Constitution says so.'"[42] But in an age of "living constitutionalism," in which constitutional provisions are expanded or pared down or reshaped seemingly at judicial pleasure, can pounding on the table of constitutional text and historical understanding carry the argument?

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38. *Id.* at 64–65.

39. *Id.* at 58.

40. *See generally, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (contending that legal theory generally must have normative as well as conceptual components).

41. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 67.

42. *Id.* at 56.

IV. Beyond Religious *Liberty*?

Maybe. Devout citizens, at least, might happily agree with Laycock's contention that the Constitution gives special protection to religious liberty. But these people may question Laycock's insistence that all religious expressions by government—the words "under God" in the Pledge of Allegiance, Nativity scenes in publicly sponsored Christmas displays, and the like—are constitutionally forbidden. And here history is less Laycock's friend than something he has to fight to fend off.

Laycock acknowledges that early presidents and Congresses approved legislative chaplains, proclaimed national days of prayer, and invoked religion routinely in their unofficial and official statements and actions.[43] They evidently believed that the Constitution permitted such expression. Laycock says that they were mistaken, and that they were, in fact, acting from "unreflective bigotry."[44] Even though the enactors did not realize it, the "principle" contained (though not actually stated) in the Establishment Clause forbids such expression.

If this sort of argument were not so numbingly familiar in modern constitutional jurisprudence, Laycock's claim would seem truly audacious. Is it not just a bit presumptuous to declare, two centuries after the fact, that a constitutional provision enacts a "principle" that the enactors themselves were unaware of having put there, that their conduct suggests they did not favor, and that the text does not articulate? And notice that Laycock's interpretation pushes us to classify as manifestations of "unreflective bigotry" some of the most powerful and revered expressions in our political tradition—Jefferson's Virginia Statute ("Almighty God hath created the mind free"),[45] the Declaration of Independence (all are endowed "by their Creator" with unalienable rights),[46] Lincoln's Gettysburg Address ("this nation, under God")[47] and Second Inaugural Address[48]—not to mention inaugural addresses by every president from Washington to Obama.[49]

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43. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 WM. & MARY L. REV. 875 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 531, 567 [hereinafter Laycock, *"Nonpreferential" Aid to Religion*].

44. *Id.* at 571.

45. An Act for Establishing Religious Freedom, ch. 34, 1785 Va. Acts 26.

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

47. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

48. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865). This address, now engraved on the wall of the Lincoln Memorial, was, as one historian observed, a "theological classic," containing within its twenty-five sentences "fourteen references to God, many scriptural allusions, and four direct quotations from the Bible." ELTON TRUEBLOOD, ABRAHAM LINCOLN: THEOLOGIAN OF AMERICAN ANGUISH 135–36 (1973).

49. *See, e.g.*, George Washington, First Inaugural Address (Apr. 30, 1789) ("[M]y fervent supplications to that Almighty Being who rules over the universe"); Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) ("The Almighty has his own purposes"); Franklin Delano Roosevelt, First Inaugural Address (Mar. 4, 1933) ("In this dedication of a Nation we humbly ask

In the face of this history, what is the warrant for Laycock's claim that the Establishment Clause contains a "principle" forbidding religious expression by government? His argument is, and has to be, that the principle is somehow logically entailed by the clause's fundamental commitment to religious freedom. Thus, if Laycock's argument for giving special protection to *religious* freedom depends "far more on history than on logic,"[50] the opposite is true for his claim that the Establishment Clause prohibits public religious expression.

Except that the logic in this instance seems frail. For these purposes, we might analyze Laycock's argument into three steps or claims. *Claim 1*: The First Amendment affirms a constitutional commitment to religious liberty. *Claim 2*: The constitutional commitment to religious liberty means that government should strive to minimize its influence over individual choices in the areas of religious belief and practice. *Claim 3*: The constitutional commitment to minimizing influence means that government should not endorse religion or engage in any religious expression. Laycock seems to suppose that these claims constitute a single unified position—that Claim 1 (religious liberty) is equivalent to or at least entails Claim 2[51] (minimize influence), and that Claim 2 entails Claim 3 (no endorsement). But is his supposition sound?

As a logical and practical matter, I think, Claim 1 need not entail Claim 2. You can attempt to influence or persuade other people without intruding on their liberty. Indeed, far from infringing liberty, persuasion can actively promote liberty by enhancing understanding and offering options. Laycock's volume itself is a massive exercise in influencing and persuading; it does not thereby constrict anyone's liberty. Similarly, as Laycock acknowledges, government routinely tries to influence and persuade citizens on all sorts of matters without infringing on their liberty.[52] Does the government curtail people's liberty when it tries to influence them not to smoke or use drugs? There may be good reasons why government should not attempt to influence citizens in matters of religion. But a commitment to liberty, by itself, is not a sufficient reason.

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the blessing of God"); Barack Obama, Presidential Inaugural Address (Jan. 20, 2009) ("This is the source of our confidence—the knowledge that God calls on us to shape an uncertain destiny.").

50. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 58.

51. Notice, for instance, how Laycock presents a tautology as if it were an argument and then purports to deduce a conclusion about liberty: "If government minimizes the extent to which it either encourages or discourages religion, government neutrality will be maximized, government influence on religion will be minimized"—this is the tautology—"and religious liberty will be maximized for both believers and non-believers." Laycock, *Free Exercise Clause and Establishment Clause*, *supra* note 6, at 107.

52. *See* Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 34 ("There is no other area of our life where we say that government cannot even try to persuade you. On political issues, persuasion is a large part of what government does. Government leads; government tries to mold opinion.").

Moreover, even if we agree that government should not attempt to influence people's religious choices (Claim 2), it does not necessarily follow that government must refrain from all religious expression (Claim 3), as in the national motto and the Pledge of Allegiance. A person (or a group of persons, acting through their government) may express a view or value for all sorts of purposes, admirable or ignoble, other than influence or persuasion. Nor is it obvious that bland affirmations like "In God We Trust" have any significant effect of influencing religious choices.

In this respect, Laycock describes Noah Feldman's view that governmental endorsements of religion, while offensive to many, do not influence people in their own religious choices. "Many people complain to [Feldman]," Laycock reports, "about having been subjected to government-sponsored prayers, but none of the complainers was ever converted and many report being strengthened in their own faith in reaction to the unpleasant experience."[53] Feldman may well be right; indeed, while rejecting Feldman's normative position, Laycock does not actually contend that Feldman is wrong as an empirical matter. Perhaps the most vociferous critic of government religious expression in the nation today is Michael Newdow,[54] but Newdow's objection is surely not that he is afraid of becoming pious.

Thus, Laycock's conclusion condemning religious endorsements does not follow automatically or even very closely from his primary premise favoring religious liberty. That condemnation, it seems, is the product of other considerations—most likely of the same nonalienation rationale that Justice O'Connor gave for the no-endorsement doctrine, and that Laycock recites with approval. Governmental endorsement of religion is objectionable because it alienates nonbelievers, or different believers, and causes them to feel like outsiders.[55]

This concern about alienation is surely a legitimate one: it is good for government to avoid alienating citizens.[56] Even so, the nonalienation policy provokes doubts that in other contexts Laycock himself articulates. In analyzing the implications of "substantive neutrality," Laycock frequently criticizes what we might call "one-side-of-the-ledger" accounting. That is, he objects to advocates who worry only about governmental *advancement* of

53. Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 257.

54. *See, e.g.*, Newdow v. Lefevre, 598 F.3d 638, 640 (9th Cir. 2010) (challenging the use of the national motto on coins); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1013 (9th Cir. 2010) (challenging the words "under God" in the Pledge of Allegiance).

55. Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 39; Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 64.

56. To say that the concern is legitimate is not to say that it is the concern that was embodied in the First Amendment. Insofar as Laycock supports his conclusions about expression and endorsement on the basis of considerations other than religious liberty, his connection to what he says about founding-era understandings is weakened.

religion, or governmental *inhibition* of religion, but not both.[57] Neutrality, he sensibly insists, requires looking at both kinds of effects.[58] In objecting to governmental expressions of religion, however, Laycock commits the same accounting error: he considers only the alienation felt by citizens who disagree with or object to such expressions, while declining to credit the alienation felt by citizens who perceive the removal of traditional religious symbols and expressions as an official disapproval of their views.[59] The phenomenon is hardly hypothetical: Noah Feldman observes that "constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project."[60]

In Laycock's accounting, the alienation felt on this side of the ledger somehow does not seem to count. But why not?

Critics of governmental religious expression sometimes discount anger or alienation felt by religious citizens because these citizens are already ostensibly mainstream or part of the majority.[61] To his credit, Laycock does not rely on this sort of dubious sociology. He recognizes, rather, that as Will Herberg observed decades ago, "America is pre-eminently a land of minorities,"[62] and that "each group perceives itself as a mistreated minority."[63] But then the question remains: If the goal is to reduce alienation, why doesn't the alienation caused by the elimination of public religious expression count?

Sometimes Laycock suggests that the constitutional obligation of neutrality has one major exception: government need not be neutral toward the kind of religion that seeks public support or expression, because the

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57. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 12, at 20.

58. *Id.* at 17–23; Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 235.

59. In one brief passage, Laycock does allude to the problem. He describes Michael McConnell's argument that complete silence by government in matters of religion also distorts public discourse and departs from neutrality. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 96. Laycock does not directly disagree with McConnell's point but instead tries to deflect it with the observation that it is impossible for government to "'exactly mirror[] the culture as a whole.'" *Id.* at 96–97 (quoting Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193 (1992)). Probably, but it hardly follows that forbidding religious expression altogether is the best way to approximate either "the culture as a whole" or a position of substantive neutrality.

60. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM–AND WHAT WE SHOULD DO ABOUT IT 15 (2005).

61. *See, e.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1177–79 (1988); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1594–97 (2010).

62. WILL HERBERG, PROTESTANT-CATHOLIC-JEW 247 (1955).

63. Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 651, 688 [hereinafter Laycock, *Continuity and Change in the Threat to Religious Liberty*].

Constitution itself rejects that position.[64] At least as applied to public religious expression like the national motto, however, this response seems to me simply to assume what is at issue. Recall that we are not talking about the overt theocracy favored by a few outliers like the so-called Christian Reconstructionists, but rather about the sort of ecumenical public religion favored in one form or another by Washington and Adams[65] and Lincoln and millions of Americans—quite possibly a majority of them—from the founding to the present. It is hardly obvious that the Constitution rejected *that kind* of public religiosity; whether it did—or does—is precisely the question at issue.[66]

So then if the alienation experienced by many religious citizens is somehow disqualified from consideration, there must be some other reason. I suspect that the reason derives from Laycock's own version of the Puritan mistake.

V. Laycock's "Puritan Mistake"?

Implicit (and often explicit) in Laycock's writings is a particular notion of *what religion is.* More specifically, religion is, and consists of, essentially *private choices* about what to believe (and how to act) with respect to a set of ultimate questions about God and the cosmos.[67] But if religion by its nature just is an inherently private affair, then people who think government should express support for some religious view, as in the national motto ("In God We Trust"), are in effect officiously demanding that government put its imprimatur on their own essentially private sectarian beliefs. And that is an unreasonable demand that must be rejected—even if the citizens making the demand are angered or alienated as a result. Conversely, by insisting over and over again that religion ought to be left as much as possible to private choice, Laycock is merely asking that government treat religion as what it essentially is.

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64. Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 35; Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 60–61.

65. *See* JOHN WITTE JR., GOD'S JOUST, GOD'S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 246–48 (2006) (encapsulating John Adams's vision of religious liberty, which "require[d] the state to balance the freedom of many private religions with the establishment of one public religion").

66. *See* WITTE, *supra* note 65, at 245, 248–56 (chronicling the dominance of Adams's "one public religion" model of religious liberty from 1776 until 1940, followed by the rise of Jefferson's "free exercise" and "disestablishment of religion" model from 1940 to 1985).

67. Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 33; Laycock, *Church and State in the United States*, *supra* note 21, at 399, 428; Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 83; Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 241, 243; Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 8, at 129; Douglas Laycock, *Vouching Towards Bethlehem*, RELIGION IN THE NEWS 2 (Summer 2002), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 390, 390.

An analogy may help. Stephen Carter famously suggested that secular liberals view religion as something akin to a personal hobby:[68] some people build model airplanes as a hobby, others play golf, and still others recite prayers or go to church. If that is the sort of thing religion is, then people who favor public religious expressions are like golfers who are not content with being allowed to golf; they want the government to put its seal of approval on *their* hobby, while at least implicitly devaluing *other people's* hobbies. It is natural to reject that sort of self-serving demand, and to dismiss as illegitimate the resentment felt by the pro-golfing lobby when their unreasonable demand is denied. Same for religion.

This view of what religion is seems to underlie Laycock's solicitude for people who are alienated by public religious expression and his simultaneous refusal to count alienation provoked by the elimination of such expression. The problem is that, although for some Americans religion may be merely a set of private choices, for many others this is manifestly a misdescription. The description overstates the role of "individual choice" in religion;[69] even more importantly, it neglects the uncompartmentalizable, communal, and, yes, public dimension of many citizens' faith. Take as an instance Washington's affirmation that "it is the duty of all nations"—notice that the duty applies to *nations*, not just to private individuals—"to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor."[70] Or John Adams's declaration that "the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and *the national acknowledgment of this truth is . . . an indispensable duty* which the people owe to Him."[71] Some such conviction no doubt has informed the numerous instances of public prayer or endorsement of prayer—by *all* Presidents, for example, including (notwithstanding secularist protestations to the contrary) Jefferson[72]—and it surely lies behind public support for

68. Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 978.

69. *See generally* David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 852–82 (1991) (providing a broad historical argument against volitionalism).

70. George Washington, The Thanksgiving Proclamation (Oct. 3, 1789), *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES: SEPTEMBER 1789–JANUARY 1790 131–32 (University Press of Virginia, 1993).

71. *Reprinted in* John T. Noonan, Jr. & Edward McGlynn Gaffney, Jr., RELIGIOUS FREEDOM 202–03 (2001) (emphasis added).

72. Consider Jefferson's Second Inaugural Address:

> I shall need . . . the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life, who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me . . . .

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *reprinted in id.* at 206.

expressions such as the national motto. No doubt this sort of view is held by different citizens and politicians with varying degrees of intensity, reflection (or lack thereof), and sincerity (or hypocrisy), but it is undeniably a powerful and persistent theme in the American political tradition.

In dismissing this tradition as "unreflective bigotry" and in basing his interpretation of religious freedom on his own (contested) understanding of religion as a set of private choices, Laycock commits a version of the error (if it is one) that he attributes to the Puritans and others. In an especially punchy passage notable both for its calculated sarcasm and its unintended irony, Laycock observes that in American culture today some people believe religion is a good thing while others believe it is dangerous, and both sides tend to interpret the First Amendment accordingly. "Each side claims that it won the late-twentieth-century culture wars and took over the government—two hundred years ago," he chortles.[73] Then, without pausing for a paragraph break, Laycock immediately goes on to make exactly the same kind of claim on behalf of his own view of religion-as-private-choice. "What happened two hundred years ago," he declares, "is that conflict over theology, liturgy, and church governance was *confined to the private sector* [and] the federal government was declared a permanent *neutral* . . . ."[74]

Put differently, Laycock thinks the First Amendment committed the government to the same sort of respectful, neutral agnosticism that he himself embraces.[75] Anyone who supposes the First Amendment constitutionalized his own view of religion is "engaged in self-delusion," Laycock says.[76] Perhaps, but it seems that Laycock himself has not managed to escape the collective deception.[77]

Indeed, in one sense Laycock's version of the Puritan mistake is more severe than the versions of which others may be guilty. For example, John Garvey is one scholar to whom Laycock ascribes this error.[78] And it is true that Garvey understands and defends religious freedom in accordance with

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73. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 55.

74. *Id.* (emphasis added).

75. In an unusual autobiographical passage, Laycock explains his own agnosticism—an agnosticism notable, I would say, for its honesty, humility, and genuine respect for those of differing views or faiths. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 100–01.

76. Laycock, *Religious Liberty*, *supra* note 4, at 124.

77. Laycock points out that individuals are agnostic for epistemological reasons, while government must be agnostic for constitutional reasons. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 101. Could not the theorists and scholars he criticizes—John Garvey, for example—say much the same for their own favored interpretations? Laycock also pleads that "[*i*]*f we could all agree* on the principle of government neutrality toward religion, we could all abandon our efforts to influence government on religious matters, and devote all that energy to religious practice and proselytizing in the private sector." *Id.* at 64 (emphasis added). Maybe so, but of course the proponents of any position can say as much. "If only we could all agree on [Catholicism, Protestantism, scientific naturalism, . . . or agnosticism], we could live peacefully . . . ," and so forth.

78. *Id.* at 57, 65.

theistic premises.[79] But Garvey does not conclude that the Constitution requires government to espouse or promote theism or, as Laycock somewhat tendentiously suggests, that religious liberty is somehow a "guarantee of religion."[80] Laycock, by contrast, takes an agnostic and privatizing view of religion, and he goes on to conclude that religious liberty requires government itself to be agnostic and to confine religion to the private realm.

As it happens, I myself do not regard this as an egregious failing. On the contrary, I think any account of religious freedom will necessarily depend on what the theorist believes to be true with respect to religion, government, and other matters.[81] Laycock himself has loftier aspirations, though—or at least different ones. "[M]y views on *religion* were and should be irrelevant," he says, "to my views on *religious liberty*."[82] I do not think Laycock should impose that requirement on himself, and in any case I do not think he can meet it.

VI. Conclusion

In the course of this Review, I have expressed some criticisms and reservations regarding Douglas Laycock's substantive neutrality. These criticisms and reservations, however, in no way preclude praise for Laycock's extraordinary contribution. The writings in this volume alone (and as noted, there are three more volumes to come, and these do not count Laycock's work in other fields, or his future work) would be proof and product of a magnificent scholarly and public career. Despite some significant disagreements, I have long admired Laycock's work, but until rereading these writings as a body, I had not fully appreciated the magnitude of his achievement.

I would go further. At one point, Laycock notes that although he believes governmental religious expressions should be constitutionally forbidden, if he had to give up one component of Establishment Clause doctrine, this would be it.[83] I would make, tentatively, a parallel concession. I do not think that Laycock's general condemnation of public religious expression is well supported by law, history, or political prudence. More generally, I favor a smaller role in this area for constitutional law, and for courts, than Laycock does. Even so, I would concede that of the major interpretations of constitutional religious freedom that seem at the moment to

79. *See* GARVEY, *supra* note 30, at 49 ("The best reasons for protecting religious freedom rest on the assumption that religion is a good thing.").

80. Laycock, *Religious Liberty*, *supra* note 4, at 123.

81. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 63–68 (1995).

82. Laycock, *Religious Liberty as Liberty*, *supra* note 3, at 98 (emphasis added); *see also* Laycock, *Substantive Neutrality Revisited*, *supra* note 4, at 245 ("My ideal is that one's views on religion should not predict one's views on religious liberty.").

83. Laycock, *The Benefits of the Establishment Clause*, *supra* note 21, at 39.

have some significant measure of respectability, Laycock's substantive neutrality may be the most attractive. The nation could do much worse than be governed by substantive neutrality; as a political matter, I am not sure that it is likely to do better—under current circumstances, at least.

One parting point. A legal scholar who actively involves himself in litigation, legislation, and public polemics may do good (or bad) in the real world that the more secluded academic scholar cannot, but he also incurs risks. There is a real risk that intellectual integrity will sometimes bend under the force of partisan passions or rhetorical expediency; we have seen recent instances, I believe, in this very field. Impressively, Douglas Laycock seems to have resisted this temptation. He notes that he has often been in both agreement and disagreement with political parties and interest groups on all sides of the political spectrum, but "they have generally respected my integrity when we disagreed."[84] From what I know, the respect is warranted. Whatever doubts one may have about Laycock's general position or his various arguments (and as this Review reflects, I have quite a few), his extraordinary lawyerly–scholarly defense of religious liberty commands our admiration.

84. 1 RELIGIOUS LIBERTY, *supra* note 2, at xx.

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I'm a Laycockian! (for the most part)

RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY. By Douglas Laycock. Wm. B. Eerdmans Publishing Co., 2010. 888 pages. $35.00.

Reviewed by Jay Wexler*

You know you've made it, scholarly-wise speaking, when a major publishing house and a preeminent university approach you to ask whether they could publish a four-volume set of your collected works.[1] Such is the situation of Douglas Laycock (DL), long-time Professor at the University of Texas School of Law, now moving from the University of Michigan to the University of Virginia and most certainly on just about everyone's short list of greatest church–state scholars of the past quarter-century. Volume One of the collection was published in 2010;[2] it is subtitled "Overviews & History" and contains roughly forty pieces written by DL between 1985 and 2009.[3] Many of the pieces are academic works; some are newspaper articles or letters or various other types of nonscholarly writing. The volume, as observed by the subtitle, includes pieces that communicate DL's general views on the Religion Clauses and analyze the historical context of those crucial provisions. There is also a short section on DL's views about the Senate's role in confirming judicial nominees. Forthcoming volumes will focus on free exercise rights, statutory protection for religion, and religious speech/disestablishment, in that order.[4]

Writing a review of this new volume has presented me with some difficulties. For one thing, the book is 800 pages long.[5] That is pretty long. More important, however, is that I agree with almost everything in it. In a field that is marked by sharp debates over just about every single possible

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* Professor of Law, Boston University School of Law. The author would like to thank the editors of the Texas Law Review for putting together this book symposium and inviting me to participate. Thanks also to my co-participants, particularly Douglas Laycock.

1. This is even more amazing when the topic of the collected works is only *one* of your specialties; Laycock has also written widely on other topics, including judicial remedies, on which he is a recognized expert and casebook author. *E.g.*, Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767 (2004).

2. DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY (2010).

3. *Id.* at vii–xi.

4. *Id.* at xx–xxi.

5. Eight hundred and sixty-four, actually, if you include the appendices and the index. The book also weighs, according to Amazon, 2.6 pounds. Compare this with David Foster Wallace's mega-novel *Infinite Jest*, also listed by Amazon as weighing 2.6 pounds.

issue one can imagine, this agreement is remarkable. Indeed, I cannot think of another major scholar (DL being the major scholar here, obviously, not me) with whom I agree more wholeheartedly about the vast majority of difficult issues posed by the First Amendment's Free Exercise and Establishment Clauses.

Here is a list, likely incomplete, of the things on which DL and I agree:[6] the Supreme Court wrongly decided *Employment Division v. Smith*;[7] religious believers should have robust exemption rights from general laws under the Free Exercise Clause;[8] it will generally not violate the Establishment Clause for legislatures and administrative agencies to grant exemptions to religious believers from generally applicable laws that substantially burden their religion;[9] given *Lukumi*[10] and a number of lower court decisions on what counts as a generally applicable law, it is not clear exactly how much bite *Smith* will continue to have;[11] *Smith* was wrongly decided (did I mention that already?; it's probably worth reiterating)[12]; the Establishment Clause prohibits more than just religious coercion;[13] likewise, the Establishment Clause prohibits the support of religion generally as opposed to simply the support of one sect (in other words, we both reject the

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6. I will not bore you by providing citations to places in my own writing where I take any of these positions. Most, however, can be found somewhere in my book, JAY WEXLER, HOLY HULLABALOOS: A ROAD TRIP TO THE BATTLEGROUNDS OF THE CHURCH/STATE WARS (2009).

7. 494 U.S. 872 (1990). *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 156 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 126, 177–78, 185–86 [hereinafter Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*] (asserting that "the comparative right of *Smith* . . . still provides protection that is less inclusive, more complicated, and harder to invoke" than before).

8. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 3, 30 ("If we take seriously the constitutional right to freely exercise religion, we must restore a judicially enforceable right to religious exemption in appropriate cases.").

9. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 709, 758 (contending that the argument that regulatory exemptions fall under the Establishment Clause "can suggest results inconsistent with . . . underlying principles" of disestablishment and free exercise).

10. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

11. *See* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 359, 360–69 (observing that *Smith* and *Lukumi* have left "considerable disagreement" over neutral and generally applicable laws); Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 7, at 177–87 (chronicling ambiguities left by *Smith*'s holding still unresolved after *Lukumi* and other lower court decisions).

12. *See supra* note 7.

13. *See* Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 617, 621 [hereinafter Laycock, *"Noncoercive" Support for Religion*] (pointing out that if the Establishment Clause only covered religious coercion, it would be redundant with the Free Exercise Clause).

theory of "nonpreferentialism");[14] the Court's "endorsement test" protects important interests;[15] the Court has often misapplied its "endorsement test";[16] "under God" in the Pledge of Allegiance violates the First Amendment;[17] so do Ten Commandments monuments like the one in Austin that the Court upheld in 2005;[18] the rules on funding religion with public money used to be silly but are much more rational now;[19] school voucher programs such as the Cleveland program upheld by the Court in 2003 are generally constitutional;[20] individuals—including public officials—should feel and be free to speak in religious terms on policy issues and anything else;[21] the Senate has an important obligation during the judicial confirmation process;[22] and Noah Feldman's recently articulated counterintuitive position that the

14. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 531, 572–73 [hereinafter Laycock, *"Nonpreferential" Aid to Religion*] (arguing that all governmental aid to religion is preferential with respect to atheists or agnostics and therefore there is no governmental aid that is "nonpreferential").

15. *See* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 33, 38–41 (claiming that the abolition of the endorsement test would be a serious loss to religious liberty).

16. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 19 (stating that the endorsement test has been "often disaggregated" into two separate tests); Douglas Laycock, *Free Exercise Clause and Establishment Clause: General Theories*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA (Paul Finkelman ed., 2000), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 103, 113 [hereinafter Laycock, *Free Exercise Clause and Establishment Clause*] (claiming that the endorsement test lacks clarity and is "impossible . . . to predict").

17. *See* Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 7, at 200–05 (arguing that it is difficult to fit the Pledge of Allegiance within any of the defined exceptions to the Establishment Clause).

18. Van Orden v. Perry, 545 U.S. 677 (2005); *see also id.* at 215 (maintaining that "[l]arge textual displays of the Ten Commandments should be an easy case" of endorsement under the First Amendment).

19. *See id.* at 134–39 (stating that until 1986 religious funding cases involved "much-ridiculed distinctions," which have since become somewhat reconciled).

20. *See* Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 225, 262 (reasoning that "subsidizing secular subjects in a school is fundamentally different from subsidizing religious functions in a church").

21. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 8 MINN. L. REV. 1047 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 651, 683–85 [hereinafter Laycock, *Continuity and Change in the Threat to Religious Liberty*] (contending that "religious arguments in politics are protected by the text of the Free Speech and Free Exercise Clauses, and by the constitutional structure of democracy"); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 54, 93 ("[P]rivate religious speakers should be as fully protected as though they were discussing politics").

22. Douglas Laycock with Sanford V. Levinson, Letter to Senators Joseph R. Biden and Strom Thurmond, *in* NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (1987), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 490, 491 [hereinafter Laycock & Levinson, Letter to Senators Biden and Thurmond] (stating that the Senate's role in selecting judges is equally as important as the President's).

Court toughen up on funding and ease up on religious symbols is, frankly, unpersuasive.[23]

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23. *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 20, at 245–58 (contrasting Feldman's views on government religious speech and government funding with the author's). Feldman's position is set out in NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005). At the risk of going slightly off my main topic, *but see* Laycock, *"Nonpreferential" Aid to Religion*, *supra* note 14, at 531–32 (DL explaining that, despite how his symposium contribution was supposed to be a comment on a paper by Philip Kurland, he would nonetheless engage in "a fairly common academic maneuver" by "present[ing] [his] own paper that was vaguely related to [Kurland's]"), I'd just like to take a moment to comment on Feldman's position myself. Feldman argues that courts should abandon the endorsement test as part of a compromise experiment intended to advance civil peace on matters of religion and government in the United States. FELDMAN, *supra*, at 235–49. According to Feldman, we should "offer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities" because doing so would "both recognize religious values *and* respect the institutional separation of religion and government as an American value in its own right." *Id.* at 237. On the subject of symbols, specifically, Feldman argues that religious minorities need not feel excluded by government-sponsored symbols and that this feeling of exclusion is "largely an interpretive choice." *Id.* at 242.

I should point out that I agree with Feldman on a couple of things. For one, I agree that we need to move toward some sort of compromise on these church–state issues. And I also agree that we should tolerate public religious speech and not insist that religious believers pretend like they are not religious when they start talking about public issues and whatnot. But unlike Feldman I do not think we (or the courts) should tolerate government-sponsored religious displays and symbols. Feldman says that these displays just remind religious minorities of their minority status. *See id.* at 239 (claiming that religious minorities have no right to be shielded from the "brute fact" that their faith is in the minority). But nonbelievers (like me—I grew up Jewish and am now an atheist) are reminded of our minority status already, thank you very much, by the fact that *we are minorities*. As minorities, we are already surrounded by Christian talk and symbols all the time everywhere we look. But just because private individuals can talk about God and Jesus as much as they want, thereby reminding me that I am a minority, it does not follow that the *government*, which purportedly represents me and my interests in addition to everybody else's, should have the right to put up a display pointing out that it too thinks my views on ultimate reality are wrong.

Feldman's argument is that the most natural view of a religious symbol on government property is that it is just an acknowledgement of the religious majority's power and influence, rather than an endorsement of the religion. *Id.* at 238–44. Moreover, even if this is not the most natural view, Feldman says that potential plaintiffs can still make an "interpretive choice" to view the symbol as an acknowledgement rather than an endorsement, and therefore courts should require them to make such a choice. *Id.* at 242. In my view, the first part of the argument is unpersuasive, and the second one unfairly shifts the burden of avoiding harm from the perpetrator to the victim. Also, the "interpretive choice" thing assumes that we live in something more like an advanced philosophy colloquium than anything resembling the real world.

What is the most natural view of a religious symbol on government property? I think it is a safe bet that most people, when they see a religious symbol they do not share on government property, react by thinking that the government is endorsing that symbol. That is how symbols work. Unless they have lost a bet or gone insane, when a person or an entity of some sort displays a symbol, they do it because they believe in the symbol's truth or value. Why would the government, which is after all just a group of people making decisions about how to run things, be any different? When the government displays the American flag, a stamp of Martin Luther King Jr., or the Liberty Bell, we assume that the government is endorsing patriotism, equality, and liberty, not just that a majority of the country's citizens happen to believe in these things and got the government to go along with displaying them. Why would religious symbols be any different?

It is true that the government might choose, as Feldman says, to acquiesce in a group's request "for an opportunity to acknowledge their holiday or tradition." *Id.* at 239. The most natural way

In addition, we have both written not particularly flattering reviews of Jesse Choper's *Securing Religious Liberty*[24] but extremely flattering letters to the Senate praising then-nominee-to-the-Tenth-Circuit Michael McConnell[25] (DL was McConnell's Professor at University of Chicago,[26] and his letter was likely about 8,000 times more important to the Senate Judiciary Committee than mine). Both of us started our careers more classically

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that the government would do this would be to set aside a public area where religious groups can put up their symbols. Majority traditions would then most likely have the greatest representation in that public area, either with a greater number of displays, larger displays, or more elaborate displays or whatever. But minority traditions too would have a chance to put up their symbols, even if they have to be smaller or made of aluminum foil or drawn with crayons. The Supreme Court decided a case about such a public forum for the placement of religious symbols and decided that a reasonable person would not view a religious symbol in such an area (assuming it is appropriately marked) as a government endorsement of religion. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 764–65 (1995) (holding that private religious speech on a public government forum that is equally open to all participants would not violate the endorsement test). This decision was correct, but it involved a much different context than when the government itself puts up a majority religious symbol, and just a majority religious symbol, on its property. Especially because the government always has the ability to create one of these public areas for religious symbols, the Court is right to assume that a reasonable person would see a symbol actually erected by the government as an endorsement of that symbol. *Cf.* Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEXAS L. REV. 583, 595–96 (stating that the Court does not look to the actual purpose of the government, but the purpose apparent to a reasonable observer, as part of the endorsement test).

This brings us to the second part of Feldman's argument. Now, when Feldman says that viewing a religious symbol as an endorsement is an "interpretive choice," in a way I guess he is right, in the same way that if somebody called me a "stupid Jew" I would choose to interpret that to mean that the person thinks I'm a "stupid Jew" instead of choosing to interpret his words to mean that in fact he hates himself and wishes he was Jewish and is just projecting his own self-hatred onto me, or maybe that he was raised by bigots and is really making a cry for help and that I should give him my psychiatrist's card and suggest he make an appointment. With lots of effort and practice, I could probably train myself to react differently than I ordinarily would react to a lot of things, but that does not make the natural reaction less natural or valid. The fact that with a bit of intellectual gymnastics some people might be able to convince themselves that a government-sponsored religious symbol just represents an acknowledgement of religion rather than an endorsement is not a reason to place the burden of avoiding offense on the viewers rather than the government. This is particularly true because, although perhaps a few people might go around the world self-consciously making all sorts of "interpretive choices," the rest of us do not act so hyper-rationally. We see what we see, and we react the way we react, and the courts should respect this rather than asking us to go around "interpreting" the world in all sorts of counterintuitive ways.

24. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); Douglas Laycock, Book Note, *Reviewing Jesse H. Choper's* Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses, 44 POLITICAL STUDIES 1015 (1996), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 485 [hereinafter Laycock, *Reviewing Jesse H. Choper*]; Jay D. Wexler, Book Note, *Cleaning the Mess?*, 49 STAN. L. REV. 677 (1997).

25. Douglas Laycock, Letter to Senator Patrick Leahy, *in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 500.

26. *Id.*; *see also* Chris Mooney, *Impaired Faculties?*, THE AMERICAN PROSPECT (Nov. 4, 2002), http://www.prospect.org/cs/articles?article=impaired_faculties (discussing the strong support McConnell received from liberal law professors).

separationist than we are now.[27] Neither of us believe in God.[28] Both of us do believe that what one believes about God should have no effect on how one interprets the First Amendment.[29] My middle name is Douglas.[30]

Lest this review turn into an unadulterated lovefest, however, I should note I am not (yet, anyway), a complete and unadulterated 100% Laycockian. I have a few reservations about some of DL's most important points. I would like to discuss briefly my most important reservation here before moving on to some reflections about the volume itself and how it functions as a book.[31]

One of DL's most important contributions to church–state law discourse (I would say it is his most important),[32] has to do with the concept of "neutrality." The Supreme Court has talked about neutrality in connection with the religion clauses for a long time,[33] and it continues to talk about it today,[34] but it has never been particularly consistent or clear about what it means by the term.[35] In 1990, in a classic article called *Formal, Substantive, and Disaggregated Neutrality Toward Religion*,[36] published in the *DePaul Law Review* and reprinted as the very first piece in the volume under review here,[37] DL pointed out that there are two main types of neutrality—"formal" neutrality, meaning, in the words of Philip Kurland, "that government cannot

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27. Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 99 ("All my early sympathies were with the nonbelieving minority.").

28. I am an atheist; DL is an agnostic. *See id.* at 101 ("[M]y agnostic view of religion predisposes me to an agnostic explanation for religious liberty.").

29. Douglas Laycock, *Remarks on Acceptance of National First Freedom Award from the Council for America's First Freedom*, *in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 268.

30. *See, e.g.*, my birth certificate (on file with author). I was informed by DL, subsequent to the preparation of the first draft of this review, that "Douglas" is in fact DL's middle name also; he has another first name which he almost never uses.

31. I would also describe myself as less gung ho about the constitutionality of voucher programs than DL, and, therefore, also more accepting of programs, like the one in *Locke v. Davey*, 540 U.S. 712 (2004), that exclude religious schools or courses from those programs. My main concern about these programs is not that they might promote religion as opposed to non-religion (I think DL is right to say that the programs simply increase choice for those with religious views) but rather how they tend to assist some religions—those with the resources and inclination to form schools and courses—but not others. For more on this, in the context of Cleveland's Buddhist and Muslim communities, *see* WEXLER, *supra* note 6, at 154–76.

32. DL lists it first when he discusses the principles "associated with [his] work." 1 RELIGIOUS LIBERTY, *supra* note 2, at xvii. Interestingly, Witte lists it fourth, although neither DL nor Witte explicitly purport to be ranking the principles in any meaningful order. John Witte, Jr., *Foreword* to 1 RELIGIOUS LIBERTY, *supra* note 2, at xiv.

33. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers.").

34. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion . . . the program is not readily subject to challenge under the Establishment Clause.").

35. *See* Schragger, *supra* note 23, 597 (discussing the Court's "uneven jurisprudence" regarding "nonendorsement and neutrality").

36. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8.

37. *Id.* at 3.

utilize religion as a standard for action or inaction,"[38] and "substantive" neutrality, meaning, in the words of DL, that "the Religion Clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[39] DL has spent much of his career defending and applying his conception of substantive neutrality as the lodestar for Religion Clause jurisprudence, and his positions on all sorts of specific controversies (like most of those listed three paragraphs above) generally follow from his application of substantive neutrality to whatever controversy he is talking about.[40] In DL's opinion, applying substantive neutrality will tend to promote religious liberty, which is what he thinks the Religion Clauses are best understood to promote.[41]

Although DL's specification of substantive neutrality as a distinct and desirable form of neutrality has marked a thousandfold improvement over how the Court and commentators previously treated the concept of neutrality, I am still not convinced that it is worth using the word "neutrality" at all when talking about the Religion Clauses. As DL points out, neutrality by itself is not "self-defining" and requires further "specification" to give it meaning.[42] So, we need to explain more specifically what we mean when we use the word. Still, though, it only makes sense to use the word, I would think, if the specification we provide still bears some resemblance to some common understanding of the word's core meaning. In other words, to take an absurd example, if we defined neutrality to mean something like "promotion of Taoism over all other religious faiths," it would hardly make sense to call that neutrality. We could do it, of course—much like the Clean Water Act defines "navigable waters" as "waters"[43]—and then when someone objected that it does not really sound anything like neutrality to say that promoting Taoism is neutral, we could respond that promoting Taoism is in fact neutral, given that we have defined "neutral" as "promoting Taoism," but still, it would not make much sense.

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38. *Id.* at 11 (quoting Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961)).

39. *Id.* at 13.

40. *See, e.g.*, Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 399 (incorporating his theory into a primer on American law of church and state); Douglas Laycock, *Substantive Neutrality Revisited*, *supra* note 20 (clarifying and defending his views on substantive neutrality); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) (arguing that substantive neutrality allows for individual rights and the government's "obligation of neutrality").

41. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 14 ("The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized.").

42. *Id.* at 6–10.

43. 33 U.S.C. § 1362(7) (2006).

So, does DL's concept of substantive neutrality seem enough like what we generally think of as the core meaning of neutrality to justify calling it neutrality? I'm not sure. To begin with, note that the definition of substantive neutrality requires "minimizing" the effect on individual religious choices, rather than eliminating that effect.[44] The question will often be which of two possible actions (accommodating religion, for example, or not accommodating it) will minimize the effect of government action on religious choices. Some government action that affects religious choices, then, will still be substantively neutral. As DL concedes, for instance, some judicial exemptions from general laws will have some tendency to attract nonbelievers to the exempted faith, but not enough of a tendency to outweigh the negative effect on the exempted faith that would exist if the exempted faith were not exempted.[45] So, if we decided that judicially exempting members of the Native American Church (NAC) from eating peyote would have an overall effect of minimizing the effect on private religious choices (because now those who want to participate in the NAC will do so, instead of refraining for fear of prosecution), that exemption would be substantively neutral even if some non-members of the NAC may start to investigate the NAC because they are interested in finding out what eating peyote is like.[46]

Second, like everyone else who supports judicial exemptions, DL supports the idea that exemptions—even to laws that substantially burden religious practice—must bend in the face of a compelling state interest.[47] I did not get much of a sense of what DL would consider as counting as such a compelling state interest from reading this volume (I would think more on this may appear in the next volume), but surely things like stopping murder, child abuse, and other sorts of physical harm would count as compelling state interests. But laws that prohibit these things certainly affect some religious practices—potentially quite enormously. A religion that demands human sacrifice is going to have an infinitely easier time flourishing in a society that grants religious exemptions from murder laws than in a society that does not. And as we saw in the post-*Sherbert*/pre-*Smith* era, courts as a practical matter

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44. *See supra* text accompanying note 39.

45. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 31 ("[T]he most nearly neutral course will not be very neutral.").

46. *Cf.* Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 95–96 (DL noting that he thinks peyote would make him "throw up").

47. *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 8, at 30–31 (arguing that exemptions are subject to "the government's proof of a compelling reason to deny it"). *But see* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642 (1988) (reviewing JOHN T. NOONAN, JR., THE BELEIVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT (1987), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 465, 480 ("I have digressed a long way from Noonan's book on religious liberty, and have surely committed the sin of complaining that he did not write a different book.").

did find strict scrutiny to be satisfied in a good number of cases,[48] so the compelling interest proviso to the minimization rule of substantive neutrality is likely to be much broader in practice than my aforementioned extreme human sacrifice example (think polygamy bans, prison regulations, destruction of a forest believed by a religious group to be sacred, etc.). By the way, it is probably worth noting that the fact that we seemingly do not have many flourishing religions in the United States that require physical violence is not necessarily evidence that such religions are insignificant;[49] it may simply be evidence that they become insignificant in a culture that prohibits violence and does not grant violent religions exemptions from those prohibitions.

Finally, I take it that DL would agree that the government can take positions, through its speech and actions, that happen to be inconsistent with some believers' views about the world, even if, in some cases, it must exempt the religious believer from having to hear these views directly.[50] As I have suggested elsewhere,[51] the government takes positions on nearly every contested matter of fact and morals pretty much all the time, through the symbols it displays, the lessons it teaches in schools, the policies it chooses, and everything else it does. The government, just to choose three examples, subsidizes beef production,[52] teaches evolution,[53] and celebrates Martin Luther King Day.[54] These actions (and, just to emphasize, thousands (millions?) more like them every day) have potentially significant effects on religious belief and practice. Some religions do not allow the consumption of beef.[55] Some religions do not believe in evolution.[56] And some religions

48. *See, e.g.*, Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 272, 293–303 (discussing the post-*Sherbert* free exercise era).

49. JOHN L. ALLEN JR., OPUS DEI: AN OBJECTIVE LOOK BEHIND THE MYTHS AND REALITY OF THE MOST CONTROVERSIAL FORCE IN THE CATHOLIC CHURCH 165 (2007) (noting that "'mortification' is part of the daily spiritual program of all Opus Dei members").

50. *Cf.* Laycock, *The Benefits of the Establishment Clause*, *supra* note 15, at 40 ("[O]n matters of governmental policy, somebody has to decide.").

51. *See* Jay D. Wexler, *Intelligent Design and the First Amendment: A Response*, 84 WASH. U. L. REV. 63, 86–88 (2006) (noting that the United States is so religiously diverse that government can hardly avoid conflicting with religious views).

52. *See* Steve Lopez, *Plenty of Reasons for a Crowded California*, L.A. TIMES, Apr. 18, 2004, 2004 WLNR 19769820 (discussing federal livestock subsidies paid to California farmers).

53. *See* Michael Peltier, *Florida Will Teach Evolution But Only as Theory*, REUTERS (Feb. 19, 2008), http://www.reuters.com/article/idUSN1929595320080219 (reporting on new state legislation mandating the teaching of evolution in schools).

54. *See* Sheryl Gay Stolberg, *Marking King Day, From Oval Office to Soup Kitchen*, N.Y. TIMES, Jan. 19, 2010, at A19 (reporting the wide observance of Martin Luther King Day celebrations in the United States).

55. Xanthe Clay, *Meat Off the Menu as Windsor Castle Goes Vegan*, DAILY TELEGRAPH (Nov. 2, 2009), http://www.telegraph.co.uk/foodanddrink/6488123/Meat-off-the-menu-as-Windsor-Castle-goes-vegan.html ("The Daoists avoid red meat, while Buddhists and Sikhs are generally vegetarian. Hindus don't eat beef . . . .").

do not believe in racial equality.[57] These religions will have greater difficulty flourishing in the United States, in terms of attracting believers, retaining believers, receiving positive reinforcement and press from nonbelievers, etc., than they would if the government had not adopted these positions and policies. Notice that none of my examples involves anything close to an "establishment" of nonreligion; I would agree with DL that the government may not explicitly endorse or support nonbelief (as opposed to positions that happen to be consistent with nonbelief) any more than it can endorse or support belief.[58]

The relationship between the government actions/speech and the religious choices of individuals will in some cases be fairly direct and in other cases rather attenuated, but the relationship will exist in all cases to some degree nonetheless. In the more direct cases, like teaching evolution, substantive neutrality may mandate that the government exempt nonbelievers from having to hear the speech itself, but this only helps minimize the negative effect of widespread evolution teaching on religious faiths that disavow evolution; it does not eliminate it. The society is still significantly affected by the fact that government schools generally teach evolution (and that government funding agencies fund scientific research based on evolution and fund museums that assume the truth of evolution, and so on and so on), and surely fewer people will believe in a religion that rejects evolution in a society where this teaching occurs than in a society where the teaching does not occur. Likewise with the beef and MLK examples. Surely fewer people will join a faith that rejects the eating of beef in a society where beef is cheaper because of subsidization than in a society where beef is more expensive. Surely fewer people will join a faith that believes in the superiority of the white race in a society that celebrates Martin Luther King's accomplishments than one that does not.

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56. Some Christian denominations that support Creationism include the Seventh Day Adventist Church, *Fundamental Beliefs*, OFFICIAL WEBSITE OF THE SEVENTH DAY ADVENTIST CHURCH, http://www.adventist.org/beliefs/fundamental/index.html ("God is Creator of all things, and has revealed in Scripture the authentic account of His creative activity. In six days the Lord made 'the heaven and the earth' and all living things upon the earth, and rested on the seventh day of that first week.") and the Southern Baptist Convention, *Resolution on Scientific Creationism*, OFFICIAL WEBSITE OF THE S. BAPTIST CONVENTION (June 1982), http://www.sbc.net/resolutions/amResolution.asp?ID=967 ("The theory of evolution has never been proven to be a scientific fact . . . the Southern Baptist Convention . . . express our support for the teaching of Scientific Creationism in our public schools.").

57. *Fundamentalist Church of Jesus Christ of Latter-Day Saints*, S. POVERTY L. CENTER, http://www.splcenter.org/get-informed/intelligence-files/groups/fundamentalist-church-of-jesus-christ-of-latter-day-saints ("Warren Jeffs' sermons have him proclaiming, 'The black race is the people through which the devil has always been able to bring evil unto the earth.'").

58. Laycock, *Religious Liberty as Liberty*, *supra* note 21, at 73.

So, importing these three points,[59] we might reformulate DL's conception of substantive neutrality to something like this: government must minimize (not eliminate) the effects of its actions on private religious choices, unless it has a compelling interest and unless it is just sort of going about its business taking positions on contested issues that will have potentially significant effects on some religious beliefs and practices. Now, I guess we could call this a "specification" of neutrality, but I think we could just as well use some other word to describe it, like maybe "rutabaga."[60] Okay, perhaps that is taking it a little too far, but you see what I am saying. At some point, the specification of neutrality wanders so far from what we generally think of as neutrality that it no longer makes sense to call it neutrality. This is especially true because when courts continue to insist on using a word with some generally understood core meaning even though they in fact mean something very specific and kind of far from what most people think of when they say that word, they inevitably cause substantial confusion among potential litigants, the press, and the general public. If I had a dime, for example, for every time I have heard an evolution critic argue that public schools should not teach evolution because it is not neutral toward religion[61] (a claim that I think is true but constitutionally irrelevant), I would have many, many dimes. I think abandoning the word "neutral" may be overall in our best interest. Why not just define the relevant standard as I have done up in the first sentence of this paragraph following the colon, or in some other way that communicates the standard's many subtleties and complexities? It would not be as simple a formulation as "substantive neutrality," but, then again, why try to pretend that a doctrine is more simple than it actually is?

Now on to a few words about the book as a book. In the Preface to the volume, DL suggests that the book's primary virtue is that it makes previously nonaccessible writing more readily available to scholars, particularly those scholars whose primary field is not law. "We hope that this collection will make this [previously not-too-accessible] work available to religious leaders and religious scholars," DL writes, "and to scholars

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59. And there are other indeterminacies and complexities as well—for example, in the school funding context. *See* Laycock, *Substantive Neutrality Revisited*, *supra* note 20, at 261 (discussing the issue of funding religious schools through vouchers and concluding that "[i]t is very difficult for government to have no effect on people's religious incentives; government is the 800-pound gorilla in the society").

60. DL informed me, after reading a draft of this Review, that he once made a frighteningly similar fruit/vegetable related point, when he claimed that the "irreparable injury" rule might usefully be called "orange banana." DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 241 (1991). These similarities are getting kind of creepy, wouldn't you agree?

61. R. Robin McDonald, *Evolution, Creation Collide in Fed Court: Some Cobb Parents Challenge Disclaimer in Biology Textbook*, FULTON COUNTY DAILY REP., Nov. 5, 2004, 2004 WLNR 23364429; Robert Royal, *Lawsuits Over Intelligent Design and Evolution Pose a Democratic Dilemma*, NAT'L CATHOLIC REP., Oct. 21, 2005, 2005 WLNR 26283645; Terrence Tobin, *Tax Dollars in Support of Atheism*, L.A. TIMES (Nov. 27, 1994), http://articles.latimes.com/1994-11-27/local/me-1987_1_john-peloza-evolution-laguna-hills.

studying these issues from the perspective of political science, sociology, or other disciplines."[62] John Witte's Foreword makes much the same point.[63] I think that both DL and Witte are correct about this virtue of the volume, and I am glad to see that the book is priced in a way that will truly make it accessible to individuals working in these cognate fields, as well as to libraries.[64]

Given the purpose of the book—to collect DL's writings on religious liberty in one convenient place—it is probably unlikely that many readers will in fact read the volume from beginning to end (unless, perhaps, he or she is writing a dissertation on DL's work, which is surely something that someone might do). Having been tasked with reviewing the book, however, I did read it from beginning to end, and I have to say that I found it well put together and enjoyable to read in that fashion. The articles engage in a good amount of repetition, but I found that to be a virtue, in that by the end I felt like I had a real sense for DL's positions on a whole host of issues that I might not have had otherwise, without going back and re-reading previous pieces (things do not often sink in for me the first time I read them). The mix between longer pieces and shorter ones, scholarly ones and those written for different audiences, is well done and shows off DL's ability (not so often found in the world of legal academia) to write lucid prose that just about anyone can read without getting a headache. Indeed, as someone who flinches at the notion of reading too many law review articles in any given two-week period, I can honestly say that even the most hardcore of DL's scholarly writings—the *Harvard Law Review* piece on *Locke v. Davey* and the Pledge of Allegiance case[65]—is written with an obvious (and, again, rather unusual, given the field) interest in *communicating* with readers.

But this last point leads me to one sort of nagging wish about the book. As I worked my way through the volume's eight hundred or so pages, I kept wondering whether the time and money and other resources spent on putting this collection together might otherwise have been better spent at producing a shorter and fully original book setting out DL's views on religious liberty and the First Amendment for the general public. Now, of course, this "I think you should have written a different book" position is the classic unfair line to take when writing a book review,[66] and far be it for me to suggest to

62. 1 RELIGIOUS LIBERTY, *supra* note 2, at xx.

63. Witte, *supra* note 32, at xiv–xv.

64. Eerdman lists the book at $35. Expensive, yes, but nothing like the absurd amounts academic books are often sold for. *Religious Liberty, Volume 1: Overviews and History*, EERDMAN'S CATALOGUE, http://www.eerdmans.com/shop/product.asp?p_key=9780802864659.

65. Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, and Religious Liberty*, *supra* note 7, at 126–224.

66. *But see* Douglas Laycock, *Reflections on Two Themes: Teaching Religious Liberty and Evolutionary Changes in Casebooks*, 101 HARV. L. REV. 1642 (1988) (reviewing JOHN T. NOONAN, JR., THE BELEIVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT (1987), *reprinted in* 1 RELIGIOUS

DL or to John Witte or to Eerdmans what they should be doing with their time and money. Still, though, I think that DL's ability to write clearly and effectively, when coupled with his passion for the subject and willingness to follow his principles wherever they may take him (to say nothing of the extreme erudition he brings to his work), practically screeches out for a book that speaks to readers outside the academy. Okay, enough complaining. Maybe such a book is in DL's future. Maybe it is not. Either way, we have got (or at least, we will soon have) this four-volume collection, and that is more than enough accomplishment for one career.

LIBERTY, *supra* note 2, at 465, 480 ("I have digressed a long way from Noonan's book on religious liberty, and have surely committed the sin of complaining that he did not write a different book.").

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Reviews of a Lifetime

RELIGIOUS LIBERTY, VOLUME ONE: OVERVIEWS & HISTORY. By Douglas Laycock. Wm. B. Eerdmans Publishing Co., 2010. 888 pages. $35.00.

Reviewed by Douglas Laycock*

Thomas Berg, Steven Smith, and Jay Wexler have offered reviews that are at once extraordinarily generous and deeply thought provoking. Getting to read their introductions was like Tom Sawyer getting to attend his own funeral and hear what a perfect child he had been.[1]

Those passages were pleasant but not very enlightening. I learned much more when the reviewers began to disagree with me. In my allotted space, I can respond only in part.

I. My Puritan Mistake?

Professor Smith thinks that I have committed a version of the Puritan mistake that I often warn others against.[2] He does not say that I would protect only people who share my religious beliefs, but he does think that I have let my views on religion drive my views on religious liberty. Devout believers tend to think the religious side should win all the cases that are the least bit arguable; committed secularists tend to think the secular side should win all the cases that are the least bit arguable. I am a thoroughly secular agnos-

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1. *See* MARK TWAIN, THE ADVENTURES OF TOM SAWYER 131 (Lee Clark Mitchell ed., Oxford Univ. Press 1993) (1876). For readers from abroad and anyone else who might not know, Tom and his friends were missing and presumed dead when in fact they were camped out on an island having a grand time. They sneaked into the church loft and listened to the praise-filled eulogies at their own funerals. As this episode suggests, Tom was very far from a perfect child.

2. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996), *reprinted in* DOUGLAS LAYCOCK, 1 RELIGIOUS LIBERTY: OVERVIEWS & HISTORY 54, 98 (2010) (describing the Puritan mistake as defending religious liberty only or principally for one's own faith group); Douglas Laycock, *Religious Liberty: Not for Religion or Against Religion, but for Individual Choice*, 3 UT L. MAG., Spring 2004, at 42, *reprinted in* 1 RELIGIOUS LIBERTY, *supra* at 123, 123 (describing the Puritan mistake in practice as thinking that religious liberty means either whatever is good for religion or whatever is good for secularism); Douglas Laycock, Remarks on Acceptance of National First Freedom Award from the Council for America's First Freedom (Jan. 15, 2009), *in* 1 RELIGIOUS LIBERTY, *supra* at 268, 268 ("If I am remembered for anything after my career is over, I hope it will be that I avoided the Puritan mistake, and that I warned others against it.").

tic who respects believers and bears them no ill will, and I think that both the religious and secular "sides" should win on some issues and lose on others.

More specifically, I think that government should be neutral toward religion and that this neutrality should extend even to government speech, so that government takes no position on religious questions. After finding my reasons for this position wanting, Professor Smith concludes that "Laycock thinks the First Amendment committed the government to the same sort of respectful, neutral agnosticism that he himself embraces."[3] But, he says, this is not "an egregious failing," because it is inevitable that people's views on religion will drive their views on religious liberty.[4]

He may not think that this would be an egregious failing, but I do. Religious liberty is supposed to ameliorate the problems arising from deep religious disagreements. Religious liberty cannot serve that function if everyone's views about religious liberty are derived from underlying views about religion. The resulting disagreements about religious liberty would simply replicate our religious disagreements. It is only to the extent that we distinguish our views on religious liberty from our views on religion that religious liberty can contribute towards solving the underlying problem.

But this is no response at all to Professor Smith; he made this point long ago. He thinks that our disagreements about religious liberty *do* just replicate our underlying disagreements about religion, and hence, that a coherent theory of religious liberty is impossible.[5] Thus the thesis and title of his first book: the quest for a constitutional theory of religious freedom is a foreordained failure.[6]

As he notes,[7] I am a more practical-minded kind of guy. I am not searching for a grand philosophical theory; I am trying to implement a constitutional principle in a messy world. "Good enough for government work"[8] is one way to describe it, and not unfair; in a similar vein, Professor Winnifred Sullivan recently said that I am "committed to a sort of muddling through," adding that she meant that "in a very positive sense."[9] As close as we can come, or the best that we can do, is how I more often think of it. I

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3. Steven D. Smith, *Lawyering Religious Liberty*, 89 TEXAS L. REV. 917, 931 (2011) (book review).

4. *Id.* at 932.

5. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 63–75 (1995).

6. *Id.*

7. *See* Smith, *supra* note 3, at 921 ("[H]is primary goal is not to produce a theory to be admired by political philosophers for its elegance or sophistication. . . . Laycock's goal has been to devise a plausible account of the religion provisions of the United States Constitution that can be used to resolve contemporary controversies.").

8. *Id.* 924.

9. Winnifred Sullivan, Panel at the Association of American Law Schools Annual Meeting: Law and Religion: Nonbelievers and the First Amendment (Jan. 9, 2010), http://www.aalsweb.org/2010podcasts/saturday/lawandreligion.mp3.

resist letting the perfect be the enemy of the good; I think we do a lot of good by achieving as much religious liberty as we can.

II. Avoiding the Puritan Mistake

Different views about religion imply different views about religious liberty. But it is impossible for government to act on all the different religious views, and it is self-defeating to import our underlying religious premises into our efforts to implement religious liberty.

I tried to escape this circle by building a "religion-neutral case for religious liberty."[10] I tried to state secular reasons for religious liberty that do not reject religion and that can be accepted by religious and secular citizens alike. I also tried to give a supporting role to the religious reasons for religious liberty by recasting them in terms that secularists can understand and accept.

First, I said that attempts to suppress dissenting religious views had caused vast human suffering and social conflict. This is about as uncontroversial a claim as there can be about human history. Second, I said that beliefs about religion are often of extraordinary importance to the individual. This too seems to me to be a relatively uncontroversial claim, verifiable by observing human behavior, past and present. And third, I said that "beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government."[11] Certainly they are less important to the government than to the individuals and groups that hold the beliefs. This third claim is obviously more controversial, especially in its more absolute formulation: little importance. It is still debatable, but I think much less so, in its comparative formulation: less important to the government than to believers.

I think that all three of these points were part of the Founders' reasons for adopting a regime of religious liberty in both the state and federal constitutions. Of course there were also other reasons, both secular and religious.[12] The religious reasons that I would recast in secular terms were essential, because the demand and the political muscle for disestablishment came from the dissenting churches, who were mostly the evangelical Christians of the time.[13]

A. Barring Religious Justifications by the Government

Professors Berg and Smith each take me to task, on somewhat different grounds, for my effort to justify religious liberty in exclusively secular

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10. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 58–61.

11. *Id.* at 59.

12. *Id.* at 66–69 (providing other explanations, including self-interest, fear of central government, and the religious reasons).

13. *Id.* at 88–91.

terms.[14] I now see that I was not clear about just what limits I proposed to put on justifications for religious liberty. I certainly did not mean to exclude religious arguments from the public debate, and I did not even mean to exclude public officials from relying on religious motivations.

I intended a much narrower proposition: government cannot announce its commitment, as government, to a disputed religious proposition. It cannot declare that Jesus of Nazareth was or was not the Son of God, that salvation is or is not by faith alone, or that salvation is or is not a meaningful concept. It cannot declare that only voluntary religious faith and actions are efficacious, that government aid to religion corrupts religion, or that humans owe duties to God that are superior to all temporal obligations.[15] Because government cannot take these religious positions, the *government* cannot justify religious liberty on these grounds.

Professor Smith takes me to insist that government "cannot act on religious beliefs or reasons,"[16] and Professor Berg may read me the same way.[17] That is a common enough secular view, and I failed to explicitly disclaim it in the passage they cite.[18] I have repudiated it elsewhere, in an article slated for volume 4.[19] When American governments guaranteed religious liberty, or when they freed the slaves, or when they provide medical care for the poor in our time, I do not care whether individual voters or legislators or Executive Branch officials were motivated by religious or secular reasons or by both. Their personal motivations for acting, even in their official capacity, raise no constitutional question. There was a recent campaign to change Alabama's regressive tax laws on the explicit ground that they are unchristian.[20] The campaign failed, but if it had succeeded, an Establishment Clause attack on the new tax code would have been frivolous. When voters or legislators have religious reasons for adopting policies that I would vote against, an Establishment Clause attack is still frivolous. I still do not care why they acted; my political complaint is about what they did. The

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14. *See* Thomas C. Berg, *Laycock's Legacy*, 89 TEXAS L. REV. 901, 909–10 (2011) (arguing that religious reasons for religious liberty were essential at the founding and better fit the views of the American people today); Smith, *supra* note 3, at 919 (arguing that modern commitments to religious liberty are derived from, and depend on, a long history of Christian thought).

15. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 67–69 (noting these important religious reasons for religious liberty).

16. Smith, *supra* note 3, at 920.

17. *See* Berg, *supra* note 14, at 909 (taking me to question "whether religious or theological arguments may serve as significant public reasons for America's system of religious liberty").

18. They each cite Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 58.

19. Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 793–807 (1996); *see also id.* at 806 (extending from voters to government officials the argument that political actors may act on the basis of religious motivations).

20. *See* Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1, 67–75 (2002) (arguing that Judeo-Christian moral principles forbid the oppression of the poor and that Alabama's tax system violates any reasonable understanding of these principles).

Establishment Clause limits political outputs—the laws government enacts and the actions it takes—not political inputs—the arguments that voters or legislators can make.[21]

When a government employee acting in his official capacity leads a prayer, or erects a Nativity scene, I take the government to be engaged in inherently religious conduct. But when the government protects religious liberty, or takes any other policy action within its regulatory domain, it is doing something secular and governmental, and its actions are not invalidated by the possible religious motivations of the individuals who were empowered to determine government policy on the matter.

The Legislative and Executive Branches in modern times rarely issue policy statements justifying religious liberty, so they have few occasions to run afoul of the restriction I would impose. Such arguments do not appear even where they might be expected. Official statements justifying the Religious Freedom Restoration Act argued the importance of free exercise with conclusory appeals to the Founders and the first colonists.[22] More substantial secular arguments might be too theoretical for legislative consensus. Certainly the legislative cause would not have been advanced by trying to agree on religious reasons for religious liberty.

Judicial opinions do sometimes state reasons for religious liberty, and judges need to maintain religious neutrality. Mary Ann Glendon once complained that the Justices gave Protestant reasons that exclude Catholics and Jews.[23]

I try to *interpret* the Religion Clauses in the same religiously neutral way in which I try to *justify* them. This is what I meant when I said, somewhat inartfully, that "religious beliefs cannot be imputed to the Constitution."[24] Unlike many state provisions and state proposals of the founding era, the federal Religion Clauses do not limit religious liberty to Protestants, to Christians, or even to monotheists. I interpret the Religion Clauses broadly to protect all Americans of every faith and of none. The Religion Clauses become incapable of mediating religious conflict if they are limited to late-eighteenth-century Protestant perspectives or captured by any other view about religion.

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21. Laycock, *Freedom of Speech That is Both Religious and Political*, *supra* note 19, at 795.

22. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(1) (2006); S. REP. NO. 103-111, at 3–4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893–94 (1993). The corresponding House report assumed the value of free exercise and said nothing to justify it. H.R. REP. NO. 103-88 (1993).

23. *See* Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 678–79 (1992) (noting that many Americans experience religion as communitarian and imposed, not as individualistic and chosen).

24. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 67.

B. Weakening the Case for Religious Liberty?

Professor Berg emphasizes a different objection—that we weaken the case for religious liberty when we omit the religious reasons.[25] Professor Smith probably shares this objection,[26] although he does not urge it here.

Whether omitting the religious reasons weakens or strengthens the argument is entirely a matter of audience. When addressing religious audiences, I emphasize the religious reasons too. But those reasons are worse than useless with the secular audiences most resistant to claims of religious liberty. These audiences tend to think that if religious liberty cannot be justified without appeals to religion, then obviously it cannot be justified at all. These secular audiences are where the principal problem is: what do we say to them?

The only reasons that can justify religious liberty to a broad audience in a religiously diverse society are reasons that do not require acceptance or rejection of any propositions of religious faith. Of course such a scheme will not persuade everybody, and perhaps in the end it will not persuade anybody. But that is what I was trying to do. I am happy to supplement the argument with religious reasons when speaking to audiences that might be persuaded by them.

At one point Professor Berg offers a formulation that seems logically equivalent to mine:

> The various religious justifications for religious freedom need not rest on confidence that God, or a higher realm, exists. They might rest on simply recognizing the potential that a higher power exists and the potential cost of interfering with individuals' duties or fulfillment in that realm—coupled with the proposition that the government is not competent to make judgments about the true nature of any such power or realm.[27]

If many Americans believe in such a realm, and if government cannot take positions on religious questions (my formulations), then the belief in such a realm may be either true or false, and thus it is potentially true (Professor Berg's formulation). And we agree that the cost of interfering with that belief is very high. If there is a disagreement here, it is exceedingly narrow.

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25. Berg, *supra* note 14, at 911.

26. *See id.* at n.61 (citing for this proposition Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149 (1991)).

27. *Id.* at 912.

III. Government Speech About Religion

A. Why No Endorsements?

My view that government should not endorse any view for or against religion will be the subject of much of volume 4, but it also appears repeatedly in the overview articles in volume 1.[28] Professor Smith takes this view to grow out of my Puritan mistake. This charge is partly based on his view that none of us can avoid the Puritan mistake and partly on his view that the reasons I have offered for the rule against endorsements are plainly insufficient.[29]

Nonfinancial government support for religion appears to have been uncontroversial in the Founders' time, because the country was overwhelmingly Protestant and disagreements among Protestants were not so large that Protestant congressional chaplains or religious appeals by government officials became a serious issue. These "endorsements" of Protestant beliefs were part of a much larger set of governmental practices and attitudes. In the states, there were blasphemy laws, religious qualifications for voting and holding public office, Sunday laws (with vigorous enforcement in some places), and pervasive anti-Catholicism.[30] It was this whole constellation of practices that I meant to describe as "unreflective bigotry"[31]—not just religious appeals in political rhetoric, and certainly not Lincoln's Second Inaugural considered in isolation.[32]

Professor Smith says that my position on endorsements depends more on logic than history,[33] and with respect to the eighteenth century, there is something to that. But I do not claim that the Founders enacted a principle that they did not know about, did not favor, and regularly violated.[34] I think that even in the eighteenth century there were relevant principles that the Founders recognized or would have recognized and that they repeatedly acted on. It was a commonplace of founding-era arguments for disestablishment that government is not a competent judge of religious

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28. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 33, 33–34, 38–41; Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 62–64, 93; Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51 (2007), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 225, 248–56 [hereinafter Laycock, *Substantive Neutrality Revisited*]; Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155 (2004), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 126, 128–29, 206–07 [hereinafter Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*].

29. Smith, *supra* note 3, at 924–27, 930–31.

30. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 531, 569–71 [hereinafter Laycock, *"Nonpreferential" Aid to Religion*].

31. *Id.* at 571.

32. Smith, *supra* note 3, at 925.

33. *Id.* at 926.

34. *Id.* at 925.

truth.[35] Stating that point a little differently—this is my paraphrase and not a frequent statement of the time—the founding generation believed that government should stay out of religious controversies. Forms of support for religion that became controversial among Protestants were soon abandoned. These principles were most prominently and explicitly applied to government coercion, and John Locke had applied them only to coercion.[36] Applying these principles to persuasion is an extension. But even in the eighteenth century, symbolic indications of preference for particular denominations—a form of endorsement—were attacked and eliminated.[37]

Government's inability to judge religious truth did not meaningfully restrict speech invoking generic Protestantism, because universally accepted Protestant truths did not require judgment or arouse any real controversy. Those statements were simply accepted as true. Such statements did not present an issue on which the Founders had any intent; it was an issue they had no occasion to think about.[38]

My principal appeal to history on issues of government speech about religion is not to the eighteenth century, but to the nineteenth.[39] When government created public schools, what it said about religion did become controversial, even among Protestants.[40] When the large Catholic immigration began to arrive, the controversy became intense, producing mob violence and church burnings, new political parties, amendments to state constitutions, and an unsuccessful attempt to amend the federal Constitution.[41] With a more religiously diverse population, neutral instruction in Christianity became impossible, and the attempt to do it anyway produced the kind of intense religious conflict that the Founders undoubtedly had hoped to avoid. This nineteenth-century history is relevant to constitutional interpretation in my view because we can and must interpret

35. *See* JOHN LOCKE, *A Letter Concerning Toleration* (1689), *reprinted in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215, 220 (Ian Shapiro ed., Yale Univ. Press 2003) ("For, there being but one truth, one way to heaven, what hopes is [sic] there that more men would be led into it, if they had no other rule to follow but the religion of the court.").

36. *Id.* at 219–20.

37. Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1992), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 617, 622–28 [hereinafter Laycock, *"Noncoercive" Support for Religion*].

38. *See* Douglas Laycock, *Original Intent and the Constitution Today*, *in* THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (James E. Wood ed., 1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 594, 596 (arguing that, in searching for original intent, little weight should be given to "cases that were not controversial in [the Founders'] time," because such cases "received no serious scrutiny").

39. Laycock, *"Noncoercive" Support for Religion*, *supra* note 37, at 631–34.

40. *Id.* at 632.

41. *Id.* at 632–33.

constitutional principles in light of experience and in light of the changing conditions to which those principles must be applied.[42]

The large Catholic immigration extended meaningful religious diversity in America beyond Protestantism; a little later, the large Jewish immigration extended it beyond Christianity. Still later, non-European immigration extended religious diversity to include Muslims, Buddhists, Hindus, and many smaller faiths from around the world.

The biggest change is the emergence of a large minority of nonbelievers—15% or more by some measures,[43] although answers to polling questions on this issue cannot be taken entirely at face value. Whatever the exact percentage, we are talking about tens of millions of people, disproportionately among the highly educated—among those who are most able to effectively complain. Religious diversity in meaningful numbers now extends beyond theism, and the conflict between intense believers and secularists is the principal alignment of religious conflict in the country today.[44]

The emergence of a substantial nonbelieving minority in a society of believers will destabilize long-held assumptions and institutional practices. If the number of nonbelievers gets large enough, this change will be as destabilizing as the Protestant Reformation in Catholic Europe or the Catholic immigration to Protestant America. We have probably learned enough to skip the violence this time, but the scope of rights and of acceptable governmental practices will come under pressure from new conditions. Practices that aroused no religious controversy in 1791 do arouse religious controversy today. It is the function of the Religion Clauses to mediate this new religious conflict, and to protect the rights of both sides, just as those clauses mediated earlier religious conflicts between Catholics and Protestants[45] and between different denominations of Protestants.[46] To claim that the interests of the nonbelieving minority do not inform constitutional interpretation, because the Religion Clauses were adopted by a Protestant nation that made no

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42. Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 579, 589; Laycock, *Original Intent in the Constitution Today*, *supra* note 38, at 595–96.

43. *See* Barry A. Kosmin & Ariela Keysar, *Summary Report*, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008, at 3 tbl.1 (Mar. 2009), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf (reporting 15% of respondents answered "no religion" and an additional 5.2%, with similar demographic characteristics, answered "don't know" or refused to answer).

44. Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 399, 406–09 [hereinafter Laycock, *Church and State in the United States*].

45. *See id.* at 405–06 (describing Protestant–Catholic conflict over religion in public schools, and over government funding for private schools, as the dominant religious conflict during the nineteenth and early twentieth centuries).

46. *See id.* at 403–04 (describing the conflict between established and dissenting Protestant denominations as the dominant religious conflict at the time of the founding).

provision for nonbelievers, would strip the Religion Clauses of credibility among nonbelievers and among millions of sympathetic believers with largely secularized worldviews.

B. Equal Respect

Professor Smith has another pair of interconnected objections. He thinks I count the alienation of nonbelievers as a reason to keep the government from endorsing religious beliefs, but that I do not count the parallel alienation of believers who expect government to endorse their religious beliefs.[47] He thinks the alienation of nonbelievers is the only argument sufficiently plausible to actually motivate me, and that I weigh it more heavily because I am a nonbeliever myself—the Puritan mistake again.[48]

Taking the second objection first, making nonbelievers feel like second-class citizens is only one reason why I think government should refrain from taking positions on religious questions. Taking religious positions violates the principle that government is not a competent judge of religious truth, and there are many reasons for that principle. Taking religious positions is an obvious departure from neutrality, with effects on the religious incentives of both the speakers and the target audience.

I agree with Professor Smith that government-sponsored religious observances rarely move anybody from nonbelief to belief or from one strong faith to another.[49] But whether or not anyone is induced to believe, everyone is induced to go through the motions: to participate, or give every outward appearance of participating, in someone else's religious observance.[50] Substantive neutrality means not just that government should not encourage or discourage belief, but also that it should not encourage or discourage religious practice.[51] A religion with a tradition of martyrs who went to the lions or the stake rather than go through the motions cannot credibly dismiss as insignificant the burden of feigning religious participation.

Government sponsorship also affects the public *practices* of believers.[52] Government-sponsored religion becomes a subject of political decision making and, sometimes, of open political controversy. Government-sponsored prayer must hold a majority in the school board or the city council. In tolerant communities, government prayer tends to a mushy ecumenism; in

47. Smith, *supra* note 3, at 927–29.

48. *Id.* at 929–32.

49. *Id.* at 927.

50. Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 248.

51. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 3, 13; Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 62; Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 229.

52. Laycock, *"Noncoercive" Support for Religion*, *supra* note 37, at 642–46.

intolerant communities, it tends to a heavy-handed imposition of majoritarian practice. Whether to pray in Jesus' name is an utterly intractable question when it is government leading the prayers. We can think of these effects as encouraging believers to adjust their religious practice as necessary to hold their majority, or more simply as government support corrupting religion, a problem much noted by the Founders.[53] Either way, these effects mark a departure from substantive neutrality, especially in light of the related cluster of values that I have always said should and do inform the meaning of the Religion Clauses.[54]

The potential effect on *belief* is not on resistant nonbelievers or resistant adherents of other faiths, but on marginal believers. Some will be driven away; others may be nudged from one form of observance to another. We can infer from the dramatic decline of the formerly established churches here and in Europe that many believers will be put off by government religion and become less likely to believe or practice whatever the government is offering.[55] For those who are not driven away, some may know only the government's model of religion. Whatever form of religious observance government adopts, it repeatedly and persistently models that form in preference to all the alternatives. In a society where most Americans claim to believe but many know little about their religion,[56] the government model of religion—the model chosen by the political process—will be the model some inactive believers know best.

So what about the alienation of those who perceive government silence about religion as hostility? What about those who believe that the nation must worship as a nation and not merely as individuals?[57] Such feelings are real, and no doubt a cost of robustly protecting religious liberty for others. It is not that such feelings don't count. It is certainly not that I treat religion as something like a mere hobby.[58] If I thought religion were a mere hobby, I would not insist that it is far more important to believers than to government, and I would not have so vigorously and persistently defended regulatory exemptions for religiously motivated conduct. To the extent that I cannot satisfy the needs of those who believe we should worship as a nation, I would

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53. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 68. *See* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1848–77 (2009) (collecting classic formulations of the claim).

54. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 51, at 9–10; Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 240–44.

55. Laycock, *"Noncoercive" Support for Religion*, *supra* note 37, at 646.

56. *See* Pew Forum on Religion & Public Life, *U.S. Religious Knowledge Survey* (Sept. 28, 2010), http://www.pewforum.org/Other-Beliefs-and-Practices/U-S-Religious-Knowledge-Survey.aspx (finding that Americans on average could correctly answer about half of a series of multiple choice questions about religion—questions that for the most part were not difficult or esoteric).

57. *See* Smith, *supra* note 3, at 930–31 (noting belief that it is the duty of nations, and not merely of individuals, to pray for God's protection and thank Him for His blessings).

58. *Id.* at 929–30.

offer those people other solutions, and to the extent that those solutions are inadequate, I think these people are making impossible demands.

Serious believers are better off running religious observances themselves than having the government do it for them. This point is implicit in what I have already said about government corrupting religion and embroiling religion in political controversy. It is most clearly illustrated by comparing the enormous success of the Equal Access Act[59] to the serious difficulties of school-sponsored prayer. The Equal Access Act has permitted tens of thousands of student prayer clubs to meet in public schools with remarkably little social conflict (after the initial round of obstructionist litigation by school boards[60]). These clubs control the religious content of their own meetings, which need not be watered down to hold a majority in the school board and need not be confined to one or two minutes to avoid inflaming the objections of all the people who don't want to be there. The point can be generalized. Given robust protections for freedom of religious speech, which I support,[61] the public square would never be naked. It would be filled with the messages of believers, undistorted by the limitations that accompany government sponsorship.

Those who believe we should worship as a nation necessarily lose. As to them, my proposals are not neutral. I understand that; I even regret it. But I can't fix it. A coherent understanding of religious liberty requires a sort of categorical imperative: religious liberty must be defined in such a way that it can be equally guaranteed to all. I cannot have a liberty to do things that prevent you from doing the same things. Nor can I have a right to do things at the margins of constitutional liberty that prevent you from doing things closer to the core. These are structural limitations on elaborations of liberty, and they gore oxen on both sides of the religious–secular divide.

Conservative Christians cannot have the right to use the instruments of government to exercise their religion, or to worship "as a nation," because it is impossible to generalize that right. It is impossible to simultaneously let conservative Christians, liberal Christians, Jews, Muslims, Wiccans, and all the others conduct their worship "as a nation." That is simply not a right that can be included in a coherent understanding of religious liberty. At most we could say that the majority religion—or the most intense and well-organized minority religion—has such a right but that no other religion has such a right. That is not religious liberty at all; that returns (at least for this issue) to religion as something that dominant groups impose on weaker groups.

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59. 20 U.S.C. §§ 4071–4074 (2006).

60. *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226, 239–40 (1990) (upholding the Act against an Establishment Clause challenge, and rejecting an interpretation that would have made the Act ineffective).

61. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 93.

The secular counterpart to those who believe we should worship as a nation are those who believe they should be protected from exposure to private religious speech. There are many of these people; sympathetic government officials have repeatedly litigated their claim to the Supreme Court, and they have repeatedly lost.[62] They cannot have an implied right not to be exposed to religious speech, because that would impose a huge limitation on other Americans' express right to speak. Many secular Americans, many Jews, and many members of other religious minorities are alienated by what they see as the aggressive religious speech of evangelical Protestants.[63] My proposals are not neutral as to these complaints either. Once again, I understand it, regret it, and can't fix it. People on both sides of the culture wars are precluded from defining their own rights so expansively that they shrink the rights of others to something smaller than what they claim for themselves.

Professor Smith notes that I once gave a different answer to this question. I still adhere to that answer, even though I have added a less hypothetical answer here. I said that only if we agreed on government neutrality toward religion could we end the political battles to determine which religious group would control the government and get to impose on all the others.[64] Professor Smith says we could get the same result if we could all agree on one religion.[65] Fair enough. But I did not call for agreement on one religion; I called only for agreement on a principle of religious liberty. Assuming agreement on religion would assume away the problem religious liberty is supposed to solve. Hoping for agreement on religious liberty may be utopian, but it does not assume away the problem to be solved.

C. Generic Endorsements and the Pledge of Allegiance

Professor Smith especially questions my resistance to bland and generic endorsements like the national motto.[66] I think that in principle government should take no position on any religious question, even whether God exists. But in practice, there will always be a de minimis exception, and I have even suggested to the Court a set of criteria for drawing the line[67]—a line that will inevitably be an unprincipled matter of degree.

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62. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; Widmar v. Vincent, 454 U.S. 263 (1981) (all upholding rights to religious speech in public schools or universities). *But cf.* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (creating a significant loophole in these decisions).

63. *See, e.g.*, Michael Newsom, *Pan-Protestantism and Proselytizing: Minority Religions in a Protestant Empire*, 15 WIDENER L. REV. 1, 76–87 (2009) (complaining bitterly about Protestant evangelism).

64. Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 64.

65. Smith, *supra* note 3, at 931 n.77.

66. *Id.* at 928–29.

67. Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 28, at 215 & n.529.

The best argument for permitting generic endorsements of religion is that they are not really controversial, and so do not require a government judgment on any live religious dispute. There is something to that, but less and less as the nonbelieving population grows. The reason we now have cases that we never had before—cases challenging Christmas displays,[68] Ten Commandments monuments,[69] and government nods to generic theism[70]—is not just that the judicial doctrine has changed, but also that the facts on the ground have changed. The religious demography of the American people and the principal alignments of religious conflict are and always have been highly relevant to interpreting the Religion Clauses.[71]

Even if nonbelieving views become dominant, there will still be vestiges of government religious speech; there is no imaginable scenario in which the Court will be absolutist about this. The Court will not order cities and states to change religious place names, and it will not tell the President what he can say at his inauguration (which is his personal free speech in any event) or even in a Thanksgiving proclamation (which I think is governmental). For some issues, the only remedies are political, and the political solution is more likely to add recognition of nonbelievers than to eliminate every last endorsement of traditional faiths.

"[U]nder God" in the Pledge of Allegiance is a generic endorsement that raises unique issues. I say that every day we are asking children in public schools for a succinct affirmation of faith, and that it is unconstitutional to do that.[72] Professor Berg agrees that "government should not conduct prayers or make official statements taking religious positions,"[73] and that "under God" in the Pledge "is constitutionally troublesome."[74] But he also worries that eliminating the phrase might imply that our government is a government of unlimited powers, subject to no higher authority, and that many religious citizens might be unwilling to pledge allegiance to such a government.[75]

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68. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 598–613 (1989) (striking down a freestanding Nativity scene); Lynch v. Donnelly, 465 U.S. 668, 679–87 (1984) (upholding a Nativity scene accompanied by a "secular" Christmas display).

69. *See* McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 859–81 (2005) (striking down a Ten Commandments display recently erected with explicit religious motivation); Van Orden v. Perry, 545 U.S. 677, 688–92 (2005) (plurality opinion) (upholding a forty-year-old Ten Commandments display on the grounds of the state capitol); *id.* at 702–03 (Breyer, J., concurring in the judgment).

70. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–17 (2004) (dismissing a challenge to "under God" in the Pledge of Allegiance for lack of standing).

71. Laycock, *Church and State in the United States*, *supra* note 44, at 403–09.

72. Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty*, *supra* note 28, at 200–05.

73. Berg, *supra* note 14, at 912–13.

74. *Id.* at 913.

75. *Id.* at 914.

I do not doubt the sincerity of this argument. I do doubt that many Americans would so interpret a secularized Pledge on their own initiative. Americans recited the Pledge without "under God" from 1892 to 1954,[76] and I doubt that it ever occurred to any of them that they were pledging allegiance to an unlimited government. "With liberty and justice for all" can easily be read as a limitation on government, not merely as descriptive or aspirational, and protections for liberty and justice are the principle limitations we care about. But none of this matters now. Professor Berg's interpretation is now in circulation, and millions of Americans would instantly subscribe to it as soon as it appeared on the conservative talk shows and became part of the political argument for keeping "under God" in the Pledge.

Christopher Eisgruber and Lawrence Sager proposed "one Nation, of equals" in an amicus brief in the Pledge case.[77] After the filing deadline, they thought of the more felicitous "one Nation, under law," which fits the familiar rhythms and states Professor Berg's central point that government is limited. Some believers might say that law is itself man-made, and thus an insufficient limit on government. But other believers might with equal plausibility interpret "under law" to refer to natural law, which would seem to fully satisfy the desire for an external limit on government. Those who do not believe in natural law could interpret "under law" to mean the Constitution, or the rule of law more generally. "Under law" would help finesse the nation's deep disagreements over faith.

But it would not succeed, at least not for a long time. Still other believers would say that substituting "under law" for "under God" equates law with God and is idolatrous. When God was not in the Pledge, nobody missed Him there. But once He is in, meanings and expectations change, and taking Him out would not restore the previous status quo until a whole generation passed away—if then.

In any event, this is a wholly academic discussion. "[U]nder God" in the Pledge is not going away. Forced to consider the issue by Michael Newdow's first lawsuit, I gave the principled answer that the current Pledge is unconstitutional. But nothing good can come from Newdow's litigation, which is many decades premature. The nonbelieving minority is not yet large enough or influential enough to have such a politically aggressive claim taken seriously. If Newdow ever gets the Supreme Court to consider his claim on the merits, he will almost certainly lose, and the opinion may do much broader damage to Establishment Clause doctrine. If he were to win, the victory would be Pyrrhic, leading to a constitutional amendment, widespread defiance of the Court, or both.

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76. *See* Linda P. McKenzie, Note, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379, 385–90 (2004) (reviewing the history of the Pledge).

77. Berg, *supra* note 14, at 914.

My amicus brief in *Newdow*, to be reprinted in volume 4, was an attempt at damage control. I made the argument for why the Pledge is unconstitutional, not in any hope of winning, but hoping only to get the Court to take the issue seriously and write a more cautious opinion.[78] And then I suggested a way to uphold the Pledge that would do the least damage to surrounding doctrine.[79] I am not campaigning to amend the Pledge. Here too, the perfect should not be the enemy of the good.

IV. What Does Neutrality Have to Do With It?

Professor Wexler generally likes the substance of my interpretation of the Religion Clauses, but he thinks it more misleading than helpful to call it "neutrality."[80] He notes that I accept three important limits on the pursuit of neutrality. First, government cannot avoid encouraging or discouraging religion; the best we can hope for is to minimize its influence. Second, I would allow burdens on religion where necessary to serve compelling government interests. And third, I would allow government to take positions on secular issues, such as evolution, even though that makes it more difficult to sustain religions that view the issue as religious and reject the government's position on religious grounds.

This objection raises two rather different questions. The first is whether short-hand labels in general are more confusing than helpful. The second is whether this particular short-hand label is especially confusing because these three limitations turn my proposed standard into something that is not neutrality at all.

My label, substantive neutrality, has drawn many objections over the years from people who insist that neutrality is impossible and from others who insist that formal neutrality is the only conceivable meaning of neutrality.[81] Professor Wexler's objection is different, but I think it is ultimately a variation on the claim that neutrality is impossible. What I propose is in his view so far removed from true substantive neutrality that it is more confusing than helpful to call it neutrality.

All short-hand labels omit qualifications, omit detail, and otherwise oversimplify. Yet we cannot easily communicate without them. Professor Wexler's summary statement of my actual proposal takes four full lines; we cannot recite all four lines every time we refer to it. There must be a usable name, and he does not suggest an alternative.

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78. Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey et al. as Amici Curiae Supporting Respondent Michael A. Newdow at 4–20, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624), 2004 WL 314150.

79. *Id.* at 20–29.

80. Jay Wexler, *I'm a Laycockian! (for the most part)*, 89 TEXAS L. REV. 935, 941–45 (2011) (book review).

81. Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 226–28, 230.

Labels have costs as well as benefits. Once a label is proffered, people argue about the label. Once a label becomes established, it is difficult to change. Formal neutrality requires neutral categories; substantive neutrality requires neutral incentives.[82] So I wish I had thought of the labels suggested by Michael McConnell and Richard Posner: category neutrality and incentive neutrality.[83] But my labels caught on and theirs did not, and it is probably too late now.

I proposed the modifiers, formal and substantive, but I took "neutrality" from the pre-existing literature and cases.[84] "Neutrality" was well-entrenched as a core purpose of the Religion Clauses, and people were attacking regulatory exemptions for religious behavior as departures from neutrality. I offered substantive neutrality as a coherent understanding of neutrality that was consistent with robust protections for religious liberty, including regulatory exemptions.[85] It never occurred to me to argue that neutrality should be irrelevant. But if it had occurred to me, it would have seemed much more promising to explain how neutrality could be consistent with liberty than to argue that neutrality should not be a goal of the Religion Clauses.

With respect to all three of what Professor Wexler views as my departures from neutrality, my response is that I would have the government pursue neutrality as far as possible. It is helpful to specify substantive neutrality as the goal even though it is not fully achievable. If I tell someone to go north as far as he can, I give clear guidance, even though for most of us it would be quite impossible to get anywhere close to the North Pole. I think of substantive neutrality in similar terms, even if the instruction is less precise.

It is utterly impossible for government to have no effect on religious incentives. Government spends one-third of gross domestic product, it regulates pervasively, it can take citizens' property in taxes and fines, and it can send people to jail. The best we can hope for is that government will minimize its effects on religious incentives.

Something like the compelling-interest exception is common to many constitutional rights, and no one familiar with constitutional law could be confused by it. This is a matter of what is practically and politically possible. Constitutional rights have costs as well as benefits, and when the costs become prohibitively large in a particular application, courts will not and should not rigidly enforce the constitutional right. As a political matter they cannot; the political branches and the voters would find ways to obstruct

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82. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006), *reprinted in* 1 RELIGIOUS LIBERTY, *supra* note 2, at 709, 714; Laycock, *Religious Liberty as Liberty*, *supra* note 2, at 62; Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 229–30.

83. Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 230–31.

84. Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, *supra* note 51, at 4.

85. *Id.* at 26–28; Laycock, *Substantive Neutrality Revisited*, *supra* note 28, at 240–41.

enforcement of judicial decisions taking too absolutist a view of constitutional rights.

Professor Wexler's third objection is also a matter of what is possible. Government is not a competent judge of religious truth, and in my view it cannot compete with religions by taking positions on religious questions. But religions take religious positions on all sorts of questions that can also be addressed from wholly secular perspectives. Government could not function if it could not take a position on any secular question that some religion somewhere had treated as a religious question.

I do not think that these limitations on the pursuit of neutrality, individually or collectively, turn my proposals into something other than the pursuit of substantive neutrality. I think they are all consistent with pursuing substantive neutrality as far as practically possible.

V. Conclusion

There is much more to be said, and no doubt Professors Berg, Smith, and Wexler could say much more in support of their side of this discussion. All four of us have pressed against the word limits, at least in this venue. But this is not the only venue. The criticisms in these reviews will help inform my future work, and for that I will owe them a continuing debt.

Notes

Why the Enforcement Agencies' Recent Efforts Will Not Encourage Ex Ante Licensing Negotiations in Standard-Setting Organizations*

I. Introduction

Fairtrade-certified coffee,[1] an elevator's alarm button,[2] a teddy bear's button nose,[3] the supersonic Concorde[4]—all of these products incorporate standards: "set[s] of characteristics or quantities that describe[] features of a product, process, service, interface, or material."[5] Standards are "absolutely everywhere" and have been for some time.[6] For example, Intertek, a company that ensures products meet relevant standards,[7] is almost 100 years old, as it was once part of Thomas Edison's laboratory.[8] While standards arise through different mechanisms, private industry groups known as standard-setting organizations (SSOs) frequently develop those most important to intellectual property (IP)-intensive, high-technology industries.[9] Oftentimes, these standards incorporate technology covered by a patent; when this occurs, corporations that manufacture products that include the standard—

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* I thank Professor John Golden and the staff of the Texas Law Review—particularly Anthony Arguijo, Serine Consolino, and Sarah Hunger—for making this a much stronger Note. I also thank my family for their support and encouragement and Chris for making life much sweeter.

1. *See* FAIRTRADE LABELLING ORGS. INT'L, FAIRTRADE STANDARDS FOR COFFEE FOR SMALL PRODUCERS' ORGANIZATIONS 4–5 (2009), *available at* http://www.fairtrade.net/fileadmin/user_upload/content/02-09_Coffee_SPO_EN.pdf (defining standards that cover the purchase and sale of Arabica and Robusta green coffee).

2. *See In Business: Who Sets Our Standards?*, BBC RADIO 4, at 2:21–2:50 (Apr. 4, 2010), *available at* http://www.bbc.co.uk/programmes/b00rp1wj (discussing with Professor of Industrial Economics Peter Swann the standards incorporated into an elevator, including those surrounding public information signs, e.g., the buttons used to sound the alarm).

3. *See id.* at 7:00–7:51 (interviewing Philip Bullock, Technical Manager, Intertek, as he tests whether a teddy bear's nose meets a standard requiring it to withstand ninety newtons of force for ten seconds—and hopefully withstand a child's prying fingers).

4. *See id.* at 17:38–18:02 (eliciting from Howard Mason, Information Standards Manager, BAE Systems, why his company became involved in standards during the development of the Concorde).

5. NAT'L RESEARCH COUNCIL, STANDARDS, CONFORMITY ASSESSMENT, AND TRADE: INTO THE 21ST CENTURY 9 (1995).

6. *In Business: Who Sets Our Standards?*, *supra* note 2, at 2:00–2:08.

7. *About Us*, INTERTEK, http://www.intertek.com/about/.

8. *In Business: Who Sets Our Standards?*, *supra* note 2, at 7:52–8:08.

9. *See* Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEXAS L. REV. 783, 837 (2007) (asserting that SSOs are typical of firms interested in implementing heavily patented technologies).

such as Apple, Dell, Hewlett Packard, and Sony, who manufacture computers that virtually all incorporate Intel's x86 microprocessor architecture[10]—must license the patented technology from the patent holder.

Typically, the patent holder and many potential licensees are SSO members, and ostensibly they could determine licensing terms when considering whether to incorporate the patented technology into the standard. Historically, however, the agencies tasked with enforcing U.S. antitrust laws—the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—have discouraged SSOs from engaging in such ex ante licensing negotiations; because SSO members frequently are competitors, these negotiations could facilitate collusion in violation of the Sherman Act's Section 1.

Recently, however, the enforcement agencies have indicated that ex ante licensing negotiations have procompetitive benefits that may outweigh any anticompetitive effects. As such, the enforcement agencies have begun to encourage SSOs to engage in such negotiations through a series of speeches and documents. In this Note, I abstain from commenting on whether it is wise for the enforcement agencies to promote such conduct. I do, however, argue that given this policy, SSOs will continue to *not* engage in ex ante licensing negotiations without further agency action. The statements made by the DOJ and the FTC to date do not provide SSOs with sufficiently clear guidance. As such, SSOs continue to fear antitrust liability, and without more, the agencies' recently announced policy will not be implemented. This is problematic both because it undermines the agencies' credibility and because it will remain unclear whether ex ante licensing negotiations are in fact desirable.

Before moving forward, it is important to clarify that although the government and the marketplace also develop standards, this Note will focus only upon SSOs—because they are the focus of the enforcement agencies' recently announced policy. Hundreds of SSOs, which vary in formality as well as size and scope, exist worldwide.[11] On one end of the spectrum are formal SSOs, such as the American National Standards Institute, an umbrella organization for more than 200 standard-developing organizations[12] that requires due process and open participation.[13] On the other end are informal consortia, such as the World Wide Web consortium,[14] which generally have

10. *See* Benj Edwards, *Birth of a Standard: The Intel 8086 Microprocessor*, PCWORLD (June 17, 2008), http://www.pcworld.com/article/146957/birth_of_a_standard_the_intel_8086_microprocessor.html (explaining that the "DNA" of Intel's 8086 microprocessor "is likely at the center of whatever computer—Windows, Mac, or Linux—you're using to read this").

11. MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW 326 (2009).

12. *Standards Activities Overview*, AM. NAT'L STANDARDS INST., http://ansi.org/standards_activities/overview/overview.aspx?menuid=3.

13. CARRIER, *supra* note 11, at 326.

14. *Id.*

fewer procedural protections and limited membership but greater control and faster implementation.[15]

The standards developed by SSOs are frequently those most important to IP-intensive, high-technology industries and are known as interoperability or compatibility standards.[16] These standards "specify properties that a product must have in order to work . . . with complementary products within a product . . . system."[17] Because of them, consumers can purchase a printer made by one manufacturer and a personal computer made by another, knowing they will be able to communicate.[18] Oftentimes, interoperability standards also foster network externalities,[19] which occur when a product becomes more valuable to a user as more users adopt the same or compatible products.[20] The benefits to consumers from network externalities occur both directly and indirectly. A direct benefit results when more users adopt the same product: for example, a telephone user directly benefits when others join the same telephone network.[21] An indirect benefit occurs when the adoption by many users of Product A leads suppliers to produce complementary Products B, C, and D.[22] For example, as more users adopt a computer operating system, more applications will be written on it; similarly, as more people purchase a certain car brand, more dealerships will service it.[23]

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15. ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARDS SETTING 5 (2004) [hereinafter HANDBOOK].

16. *Id.* at 10; *see also* James J. Anton & Dennis A. Yao, *Standard-Setting Consortia, Antitrust, and High-Technology Industries*, 64 ANTITRUST L.J. 247, 247 (1995) (stating that interface standards "are of primary interest in telecommunications and information technology industries"). For examples, see David A. DeMarco, Note, *Understanding Consumer Information Privacy in the Realm of Internet Commerce: Personhood and Pragmatism, Pop-Tarts and Six-Packs*, 84 TEXAS L. REV. 1013, 1047 n.178 (2006) (describing the World Wide Web consortium as a promoter of web interoperability), and Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEXAS L. REV. 863, 944–45 (2004) (explaining that the WiFi Alliance tests WiFi devices if the devices are to use the WiFi trademark).

17. Gregory Tassey, *Standardization in Technology-Based Markets*, 29 RES. POL'Y 587, 590 (2000). Complementary goods are "two products, for which an increase (or fall) in DEMAND for one leads to an increase (fall) in demand for the other." *Economics A–Z*, ECONOMIST, http://www.economist.com/research/economics/alphabetic.cfm?term=complementarygoods#complementarygoods.

18. *See* HANDBOOK, *supra* note 15, at 10 ("[I]nteroperability standards also allow communication between devices. Facsimile machines are able to transmit faxes because of an interoperability standard.").

19. *See* Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 986–87 (2003) (describing the way in which interoperability creates demand-side economies of scale).

20. JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 405 (1988).

21. *Id.*

22. *Id.*

23. *Id.*; *see also* Robert P. Merges, *Software and Patent Scope: A Report from the Middle Innings*, 85 TEXAS L. REV. 1627, 1661–62 (2007) (describing Adobe's marketing technique of providing free software in order to make PDF compatible software more valuable).

In Part II, I indicate that in an effort to mitigate holdup, many SSOs require members to license any patented technology incorporated into a standard on certain terms. However, because SSOs fear antitrust liability, the terms are not determined through ex ante licensing negotiations and are vague, arguably undercutting their usefulness. In Part III, I argue that the approach of the enforcement agencies matters. I also offer a refresher on the Sherman Act before taking a more in-depth look at naked restraints of trade and the exercise of group buying power, two violations potentially posed by ex ante licensing negotiations. In Part IV, I analyze the statements recently made by the DOJ and the FTC. I argue that while the agencies needed to provide clear legal guidance to SSOs to catalyze their engagement in such negotiations, they failed to do so for several reasons. Although I concede that the agencies' lack of experience with ex ante licensing negotiations may have been a factor, I encourage the agencies to provide additional guidance. And, assuming that the agencies' approach changes over time as their experience increases and as economic thinking evolves, I offer two suggestions to reduce the likelihood that SSOs that engage in ex ante licensing negotiations today will be ensnared in liability tomorrow. Finally, in Part V, I provide concluding remarks.

II. Antitrust Liability Concerns Constrain SSOs' Use of Licensing Policies to Deter Holdup

When SSOs adopt a standard that incorporates patented technology, they confer substantial market power upon the patent holder.[24] Oftentimes, the patent holder uses this market power to engage in "holdup"—a phenomenon discussed in more detail below—of SSO members who wish to license the technology and use the standard. In an attempt to deter holdup, many SSOs implement licensing policies that require patent-holding members to license on a "reasonable and nondiscriminatory" (RAND) basis.[25] However, because SSOs fear antitrust liability arising under Section 1 of the Sherman Act—which prohibits collective conduct that unreasonably restrains competition—the terms of the licensing policies generally are vague and, arguably, less effective at mitigating holdup.

In subpart A, I describe how the adoption of standards can facilitate holdup. In subpart B, I explain that while most SSOs do implement licensing policies in an attempt to mitigate holdup, the terms of such policies are consciously vague because SSOs fear that more precise language would result in antitrust liability arising under Section 1 of the Sherman Act.

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24. *See* Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEXAS L. REV. 685, 719 (2009) (explaining that when companies make misrepresentations to SSOs in attempting to adopt a standard, such misrepresentations can facilitate monopolization of an industry if the standard is patented).

25. Daniel A. Crane, *Intellectual Liability*, 88 TEXAS L. REV. 253, 268 (2009).

A. *Standards Adoption Facilitates Holdup*

When SSO members select a proprietary technology to incorporate into a standard, they confer substantial market power, "the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time,"[26] upon the technology's owner—which he or she can use to hold up potential licenses.[27] In the SSO context, holdup occurs because (1) potential patent licensees incur sunk costs, and (2) the adoption of one proprietary technology over another reduces the number of competing technologies. First, potential patent licensees incur sunk costs—costs that have been sustained and cannot be recovered[28]—when they make expenditures that are specific to the adopted IP and that cannot be redeployed to alternative IP.[29] Second, before a proprietary technology is selected, there may be other technologies vying for inclusion; however, after the SSO selects one technology, alternative technologies likely will be nonexistent in the market, even if viable in principle, precisely because the SSO did not choose them.[30] The lack of alternatives, coupled with sunk costs incurred by potential patent licensees, places the owner of the selected technology "in a very strong bargaining position to extract royalties . . . from people who want to comply with the standard."[31]

B. *While Most SSOs Implement Licensing Policies, the Terms Are Vague—SSOs Fear Antitrust Liability*

To reduce the possibility of holdup, most SSOs impose upon their members licensing policies,[32] which require patent-holding members to

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26. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 4 (1995) [hereinafter IP GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

27. *See* Curran, *supra* note 19, at 991 ("When an SSO adopts a proprietary technology as an industry standard, the owner of that technology obtains considerable market power, . . . [the] grant of [which] can (and often does) result in monopoly pricing for patent licenses . . . .").

28. *Economics A–Z*, ECONOMIST, http://www.economist.com/research/economics/alphabetic.cfm?letter=s#sunkcosts.

29. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 35 n.11 (2007) [hereinafter IP2 REPORT], *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

30. *Id.* at 35–36; *see also* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 1991, 2016 (2007) (describing the difficulties in designing around standards set by SSOs).

31. Federal Trade Commission and Department of Justice Antitrust Division Roundtables: Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy 15 (Nov. 6, 2002) (remarks of Carl Shapiro, Transamerica Professor of Bus. Strategy, Haas Sch. of Bus., Univ. of Cal., Berkeley) [hereinafter Roundtable Discussion], *available at* http://www.ftc.gov/opp/intellect/021106ftctrans.pdf.

32. *See id.* (explaining that companies with essential patents are in a "very strong bargaining position" for obtaining licenses).

license implicated IP on certain terms.[33] The majority of these policies require members to license their patents on a RAND basis.[34] Generally, however, the terms *reasonable* and *nondiscriminatory* are not defined and are instead left vague, arguably because SSOs themselves[35] and their members fear that more precise terms would result in antitrust liability under Section 1 of the Sherman Act.[36] To date, courts also have failed to define RAND.[37] As a result, a license's specific terms are determined in bilateral negotiations that take place outside the SSO.[38]

Specifically, members must negotiate individually with the patent holder, either before or after the adoption of the standard.[39] According to Damien Geradin and Miguel Rato, bilateral ex ante licensing negotiations conducted outside of the SSO occur frequently.[40] Given that the terms reached during such negotiations are rarely disclosed, however, members who have not yet engaged with the patent holder are no more informed as to what RAND means practically than are others.[41] Because of this uncertainty and because most SSOs do not provide procedures for resolving disputes,[42] patent owners and SSO members who cannot come to a bilateral agreement have been forced to either litigate the definition of RAND[43] or mount costly challenges, such as "developing evidence of prior art that would invalidate the patent claims."[44]

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33. *See id.* at 42 (remarks of Carolyn Galbreath, U.S. Dep't of Justice, Antitrust Div.) (acknowledging the potential for licensing holdups).

34. *See supra* note 27 and accompanying text.

35. *See* John J. Kelly & Daniel I. Prywes, *A Safety Zone for the Ex Ante Communication of Licensing Terms at Standard-Setting Organizations*, ANTITRUST SOURCE, Mar. 2006, at 5 ("[T]he Supreme Court has held that SSOs themselves are subject to liability for anticompetitive activity conducted under their auspices.").

36. *See* Michael G. Cowie & Joseph P. Lavelle, *Patents Covering Industry Standards: The Risks to Enforceability Due to Conduct Before Standard-Setting Organizations*, 30 AIPLA Q.J. 95, 102 (2002) ("SSOs have been reluctant to specify or become involved in setting royalty rates for patented technology for fear that they will be accused of price fixing or another violation of the antitrust laws.").

37. *See* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1954 n.272 (2002) (asserting that "there has not been much in the way of judicial explanation" of RAND).

38. *See* Damien Geradin & Miguel Rato, Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND 27 (April 2006) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946792 (stating that parties can license outside of the SSO if they so choose).

39. Curran, *supra* note 19, at 992.

40. Geradin & Rato, *supra* note 38 (manuscript at 27).

41. *See* Lemley, *supra* note 37, at 1965 (claiming that "reasonable and nondiscriminatory" may be "too amorphous" for some).

42. *Id.* at 1906.

43. *See* Curran, *supra* note 19, at 983 (explaining that the ambiguity of RAND has led to high-risk litigation for those seeking licenses).

44. Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq., Drinker, Biddle & Reath LLP 3 (Oct. 30, 2006) [hereinafter VITA Business Review Letter], *available at* http://www.usdoj.gov/atr/public/busreview/219380.pdf.

III. The Enforcement Agencies' Traditional Approach Toward Section 1 Violations, Including Those Presented by Ex Ante Licensing Negotiations

For fear of violating Section 1 of the Sherman Act, some SSOs do not engage in ex ante licensing negotiations. While Section 1 may be enforced by state attorneys general[45] and private parties, it is also enforced by the DOJ and the FTC.[46] In subpart A, I explain why the DOJ and the FTC approach in particular is relevant. In subpart B, I describe the two Section 1 violations that the agencies believe ex ante licensing negotiations might present: naked restraints of trade and the exercise of group buying power. Lastly, in subpart C, I explain how the enforcement agencies have traditionally addressed Section 1 violations in the context of licensing agreements.

A. The Enforcement Agencies' Approach Toward Section 1 Violations Is Relevant

SSOs fear that ex ante licensing negotiations will be prosecuted under Section 1 of the Sherman Act,[47] which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[48] While most antitrust actions are *not* brought by the DOJ and the FTC, and while "the ultimate responsibility for interpretation of the Sherman Act lies not with the DOJ or the FTC but with the federal courts,"[49] the enforcement approach of the DOJ and the FTC is relevant.

The agencies' enforcement approach, particularly with respect to ex ante licensing negotiations, is relevant because little on-point case law exists,[50] courts often follow the agencies' approach,[51] and, likely as a result of these two factors, lawyers of SSO members rely upon the agencies'

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45. 15 U.S.C. § 15c(a)(1) (2006).

46. *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, *available at* http://www.usdoj.gov/atr/public/div_stats/211491.pdf (explaining that the federal antitrust laws are enforced through "criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice, civil enforcement actions brought by the Federal Trade Commission and lawsuits brought by private parties asserting damage claims").

47. *See* HANDBOOK, *supra* note 15, at 23 ("Cooperative standard-setting activities are most often challenged under Section 1 of the Sherman Act . . . .").

48. 15 U.S.C. § 1 (2006).

49. Margaret H. Lemos, *The Other Delegate: Judicially Administered Standards and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 462 (2008).

50. *See* Scott D. Russell, *Analytical Framework for Antitrust Counseling on Intellectual Property Licensing*, *in* PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY 2009, at 575, 577 (2009) ("[T]here is some case law from lower courts that involves the appropriate antitrust principles to be applied in the context of IP licensing.").

51. *See Roundtable Discussion: Revisions to the Horizontal Merger Guidelines*, ANTITRUST, Fall 2009, at 8, 9 ("And at this point, the [Horizontal Merger] Guidelines are so ubiquitous—[FTC] Chairman Leibowitz referred to them as one of the most cited documents in modern antitrust—the courts do rely on them.").

approach when providing guidance.[52] Generally, the approach is expressed in reports, "business review" letters, and speeches.[53] While the reports—and the business review letters and speeches—are not binding upon the courts,[54] they do "reflect the enforcement position and governing analytical framework of the federal antitrust authorities" and "are based primarily on existing case law and current economic thinking, making them persuasive authority and an informed source for counselors."[55]

Additionally, SSO members may either request a business review letter from the DOJ with respect to a proposed patent policy or look to existing letters responding to other parties' proposed policies, which are publicly available.[56] A business review letter is the DOJ's response to a private party who has requested that the DOJ state its enforcement intentions relative to the party's proposed conduct.[57] Bear in mind, however, that the DOJ may refuse a request,[58] and if it opts to respond, which likely will take months,[59] it will only address proposed conduct[60] and will not be barred from bringing "whatever action or proceeding it subsequently comes to believe is required by the public interest," even if it indicates it currently has no such intention.[61] Nonetheless, to date, the DOJ "has never exercised its right to bring a criminal action [against a party to whom it has stated a present intention not to bring an action] where there has been full and true disclosure at the time of presenting the request."[62] And again, while business review letters are not binding, the Supreme Court recently relied favorably on a business review letter in the context of a joint venture.[63]

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52. *See* Russell, *supra* note 50, at 577 n.2 ("The 1995 *Intellectual Property Guidelines* . . . form the primary basis for advising clients on the antitrust boundaries of technology licensing.").

53. *See id.* (relating that in addition to reports and business review letters, "the various mechanisms used to provide industry guidance, such as: speeches from the top ranking officials, studies from agencies' leading economists; policy statements regarding the negotiation and settlement of claims that fall short of litigation; and joint reports generated from investigative hearings into particular practices and hearings," are relevant to understanding the agencies' position).

54. *See* Geraldine M. Alexis, Troy P. Sauro & Mamta Ahluwalia, *The Department of Justice's Report on Single Firm Conduct: What Influence Will It Have?*, ANTITRUST, Fall 2008, at 51, 51 (indicating that the "antitrust guidelines . . . do not constitute substantive regulations under the [Administrative Procedures Act]" and "do not therefore have the weight of law").

55. Russell, *supra* note 50, at 577 n.2; *see also id.* (making such remarks about the IP Guidelines).

56. 28 C.F.R. § 50.6(10) (2009).

57. *Id.* § 50.6.

58. *Id.* § 50.6(3).

59. *See* Joyce Mazero & Suzie Loonam, *Purchasing Cooperatives: Leveraging a Supply Chain for Competitive Advantage*, 29 FRANCHISE L.J. 148, 158 (2010) (noting that "[m]ost requests take months").

60. 28 C.F.R. § 50.6(2).

61. *Id.* § 50.6(9).

62. *Id.*

63. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 3–4 (2006) (referring to the FTC's approval of a joint venture in evaluating whether the venture violated Section 1 of the Sherman Act).

B. *Ex Ante Licensing Negotiations Present Two Potential Section 1 Violations*

As previously mentioned, Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[64] In the context of ex ante licensing negotiations, the enforcement agencies fear that SSO members will exercise market power—"the ability profitably to maintain prices above, or output below, competitive levels for a significant period of time"[65]—to unreasonably restrain trade in one of two ways: (1) to reach naked restraints of trade, or (2) to exercise group buying power.[66]

1. The First Potential Section 1 Violation: Naked Restraints of Trade.— Naked restraints of trade "*only* function . . . to create, allocate, exploit or police economic or market power,"[67] and therefore constitute conduct that always or almost always tends to raise price or to reduce output. In the context of ex ante licensing negotiations, restraints may arise in two ways. First, "[s]ham multilateral licensing negotiations . . . may offer an opportunity for SSO members to reach naked price-fixing agreements that lack plausible and cognizable justifications, restraints that the Agencies and courts summarily condemn" under Section 1.[68] Because SSO membership generally includes manufacturers of standardized products, manufacturers may "use the cover of multilateral licensing negotiations to reach naked agreements on the prices of the products they sell downstream."[69] According to Professor Robert Skitol, however, such collusion in the context of ex ante licensing negotiations is unlikely. To trigger this concern, the license must represent at least 20% of the total cost of the downstream product, yet "[r]oyalties on patents incorporated in a standard are not likely ever to approach that percentage."[70]

Second, because SSO membership also includes companies that possess IP vying for inclusion in a standard, such patent holders may "reach naked agreements on the licensing terms they will propose . . . , thus, in effect, rigging their selling bids."[71] Bid rigging raises prices for purchasers

64. 15 U.S.C. § 1 (2006).

65. IP GUIDELINES, *supra* note 26, at 4.

66. IP2 REPORT, *supra* note 29, at 50.

67. Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A [Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations*, 45 ANTITRUST BULL. 349, 355 (2000) (emphasis added).

68. IP2 REPORT, *supra* note 29, at 51.

69. *Id.*

70. Robert A. Skitol, *Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 ANTITRUST L.J. 727, 741 (2005).

71. IP2 REPORT, *supra* note 29, at 51–52.

(licensees) and occurs when competitors (patent holders) agree in advance who will submit the winning bid (the least restrictive licensing terms).[72]

2. The Second Potential Section 1 Violation: The Exercise of Group Buying Power.—Alternatively, ex ante licensing negotiations might lead to members exercising group buying power.[73] Particularly when no alternatives to a patent holder's technology exist and the patent holder's market power is not enhanced by the standard,[74] potential licensees can "say to the patent holder, 'We will collectively reject a standard that incorporates your patented technology unless you agree to license it to us at pre-specified rates that we collectively find acceptable.'"[75] Effectively, competition between potential licensees is eliminated,[76] and together licensees can require the patent holder to license at subcompetitive prices.[77] The enforcement agencies prohibit the exercise of group buying power, not because prices increase, as in the case of naked restraints of trade, but because innovation incentives for patent holders may be reduced.[78] While a patent holder may also license other technology incorporated into standards—and *save* money by paying subcompetitive prices on these technologies—he or she will *lose* money when paid subcompetitive prices for his or her technology: if the patent holder's losses exceed his or her gains, he or she has fewer innovation incentives.[79]

C. The Enforcement Agencies' Traditional Approach Toward Section 1 Violations in the Context of Licensing Agreements

Depending upon the alleged restraint of trade, the DOJ and the FTC will examine potential Section 1 violations under either a "rule of reason" or per

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72. *See* U.S. DEP'T OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2, *available at* http://www.justice.gov/atr/public/guidelines/211578.pdf ("Bid rigging is the way that conspiring compet[i]tors effectively raise prices where purchasers . . . acquire goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process.").

73. For a more detailed discussion of this phenomenon, known as monopsony, see generally Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223 (2007).

74. *See infra* text accompanying note 145.

75. David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1955 (2003).

76. *See id.* (explaining that requiring potential licensees to announce the terms for a patent license in advance may result in "collusive, oligopolistic 'price-fixing'" in advance).

77. CARRIER, *supra* note 11, at 337.

78. *See id.* (explaining that if SSO members have the power to reduce license prices below competitive levels, dynamic efficiency may be affected, reducing innovation).

79. While I cannot comment on whether the average licensee will likely save or lose money, some suggest that "many firms take on the roles of both IP owners and users in the standard-setting process." Michael A. Carrier, *Why Antitrust Should Defer to the Intellectual Property Rules of Standard-Setting Organizations: A Commentary on Teece & Sherry*, 87 MINN. L. REV. 2019, 2030 (2003).

se approach. While the rule of reason is more commonly applied,[80] the per se approach is appropriate for conduct "that always or almost always tends to raise price or to reduce output"[81]—naked restraints of trade.[82] With a per se restraint of trade, commission of the conduct is in and of itself a Section 1 violation.[83] However, if the conduct is not per se illegal, the agencies apply the rule of reason to determine whether the restraint of trade is reasonable.[84] In the context of licensing agreements, the rule of reason considers "whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects."[85]

1. Ex Ante Licensing Negotiations Affect Both Goods and Technology Markets.—To demonstrate that the agreement is anticompetitive, the plaintiff must show either that (1) the restraint has caused actual harm to competition through increased prices or decreased output, or (2) "the restraint is likely to impair competition by creating, enhancing, or facilitating the use of market power."[86] Most rule of reason analyses proceed under the second theory,[87] and to determine whether market power exists, the agencies begin by defining the relevant market or markets affected by the challenged practice.[88] While licensing arrangements in general affect three types of markets—(1) goods markets, (2) technology markets, or (3) innovation markets[89]—only the first two are directly affected by the naked restraints to trade and exercise of group buying power that the agencies fear could result from ex ante licensing negotiations.

The first type of market—a goods market—consists of markets for intermediate or final goods made using the IP (downstream goods markets) or markets for goods used, in combination with the IP, as inputs to the

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80. David A. Balto & Andrew M. Wolman, *Intellectual Property and Antitrust: General Principles*, 43 IDEA 395, 400 (2003); *see also* Frank B. Cross, *What Do Judges Want?*, 87 TEXAS L. REV. 183, 221 (2008) (book review) (noting that antitrust law increasingly employs a rule of reason analysis).

81. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

82. *See* Chiawen C. Kiew, Comment, *Contracts, Combinations, Conspiracies, and Conservation: Antitrust in Oil Unitization and the Intertemporal Problem*, 99 NW. U. L. REV. 931, 951 (2005) (explaining that naked agreements are "formed with the objectively intended purpose or likely effect of increasing price or decreasing output").

83. Balto & Wolman, *supra* note 80, at 400.

84. *Id.*

85. IP GUIDELINES, *supra* note 26, at 16.

86. HANDBOOK, *supra* note 15, at 44.

87. *See id.* at 44–45 ("A number of courts and commentators take the position that a showing of market power is a requirement for a rule of reason claim.").

88. *Id.*

89. IP GUIDELINES, *supra* note 26, at 7–8.

production of other goods (upstream goods markets).[90] The downstream goods market for standardized products will be affected if ex ante licensing negotiations allow SSO members who manufacture standardized products to reach naked agreements on the products' prices. The second type of market—a technology market—consists of the IP that is licensed and its close substitutes—the technologies or goods that significantly "constrain the exercise of market power with respect to the intellectual property that is licensed."[91] Technology markets will be affected if ex ante licensing negotiations either allow SSO members who are patent holders to reach naked agreements on the licensing terms they will propose—bid rigging—or lead to members exercising group buying power.

2. The Enforcement Agencies Are Familiar with Goods—but Not Technology—Markets.—If the competitive effects of the licensing agreement can be adequately assessed within the goods market, the agencies define and analyze only that market[92]—arguably because the agencies know how to define it and analyze it, unlike technology and innovation markets. Because goods markets involving IP are analogous to goods markets not involving IP,[93] the agencies define the relevant market and measure market share—perhaps the most important factor considered when determining whether market power exists[94]—according to principles used for non-IP goods markets.[95]

However, while the agencies claim to provide a means by which to delineate the relevant technology market that "is conceptually analogous to the analytical approach to goods markets,"[96] to date neither they nor the courts have substantively specified the process for defining technology markets.[97] The agencies' guidance as to how to determine whether market power exists is equally vague. If market-share data are available—which would require the technology market to be defined[98]—and such data

90. *Id.* at 8.

91. *Id.*

92. *Id.* at 7–8.

93. *See id.* at 2 ("[F]or the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property . . . .").

94. *See* Russell, *supra* note 50, at 589 (relating three points regarding the importance of market share: (1) that "[m]arket shares are a starting point for determining whether a party has 'market power' in a relevant market," (2) that when analyzing technology markets, "the [IP Guidelines] instruct that one first look to objective evidence of market share," and (3) that, in the context of innovation markets, the IP Guidelines indicate how to compute market shares).

95. *See* IP GUIDELINES, *supra* note 26, at 8 ("[T]he Agencies will approach the delineation of relevant market and the measurement of market share in the intellectual property area as in section 1 of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines.").

96. *Id.* at 9 & n.20.

97. *See* Russell, *supra* note 50, at 587 ("To date, the courts have not yet specified the process for defining technology markets.").

98. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 13–14 (rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf ("[T]he

"accurately reflect the competitive significance of market participants," the agencies will consider the data; however, the agencies "also will seek evidence of buyers' and market participants' assessments of the competitive significance of technology market participants."[99] Barring the availability of market-share data or "other indicia of market power," the agencies will assign each technology the same market share if "it appears that competing technologies are comparably efficient."[100] The agencies decline to indicate how they will determine whether the data "accurately reflect the competitive significance of market participants," or what constitutes "evidence of buyers' and market participants' assessments of the competitive significance of technology market participants" or "comparably efficient" competing technologies.[101]

IV. Analysis of the Enforcement Agencies' Recent Approach Toward Ex Ante Licensing Agreements

Between 2006 and 2007, the enforcement agencies offered guidance to SSOs on ex ante licensing negotiations. In subpart A, I review the details of this guidance: while most of the discussion is devoted to the three documents that provide the most substantive statements, I do mention speeches by top officials as these, more than the other documents, clearly indicate that the agencies wish to foster the use of and experimentation with ex ante licensing negotiations. In subpart B, I argue that while the enforcement agencies issued guidance in 2006 and 2007 with an eye toward encouraging ex ante licensing negotiations, their efforts did not go far enough. In particular, while five reasons mandated that the agencies provide clear legal guidance, they failed to do so sufficiently. Both what constitutes permissible conduct in joint ex ante licensing negotiations occurring within the SSO and, assuming the rule of reason is applied to such joint negotiations, how the agencies will conduct their analysis when technology markets are implicated are unclear. In subpart C, I argue that the agencies can provide clear legal guidance, primarily through reports and commentaries. While the agencies' approach will likely change, potentially imposing liability upon SSOs that relied upon previous statements to engage in ex ante licensing negotiations, the agencies and courts can act—and historically have acted—to minimize such risks.

Agency normally will calculate market shares . . . based on the total sales or capacity currently devoted to *the relevant market* together with that which likely would be devoted to *the relevant market* in response to a 'small but significant and nontransitory' price increase." (emphasis added)).

99. IP GUIDELINES, *supra* note 26, at 10.

100. *Id.*

101. *Id.* at 11.

A. *The Details of the Enforcement Agencies' Recent Approach Toward Ex Ante Licensing Negotiations*

In a series of speeches and documents issued in 2006 and 2007, the FTC and the DOJ indicated they would take a more lenient approach toward ex ante IP licensing negotiations that occur within SSOs. While the agencies had previously indicated that such negotiations would generally be examined under the rule of reason, they had provided no guidance as to which types of negotiations, such as those held jointly and within SSOs, would be permissible.[102] Beginning in 2006, the agencies made more specific statements in seven documents: (1) DOJ Business Review Letter to VMEbus International Trade Association (VITA), October 30, 2006;[103] (2) then-Deputy Assistant Attorney General's January 18, 2007 Speech;[104] (3) Chapter 2, DOJ and FTC IP2 Report of April 17, 2007;[105] (4) DOJ Business Review Letter to the Institute of Electrical and Electronics Engineers, Inc. (IEEE), April 30, 2007;[106] (5) then-Deputy Assistant Attorney General's May 10, 2007 Speech;[107] (6) then-Deputy Assistant Attorney General's October 11, 2007 Speech;[108] and (7) then-Counsel to the Assistant Attorney General's March 29, 2007 Speech.[109]

Most of the agencies' substantive guidance occurs in the two business review letters and the report, which the speeches summarize for various audiences. As such, I devote most of this subpart to a discussion of these documents. However, the speeches are noteworthy because they contain general but very encouraging statements by some of the enforcement

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102. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Address at Standardization and the Law: Developing the Golden Mean for Global Trade (Sept. 23, 2005), *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

103. VITA Business Review Letter, *supra* note 44.

104. Gerald F. Masoudi, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property, Remarks at the High-Level Workshop on Standardization, IP Licensing, and Antitrust (Jan. 18, 2007) [hereinafter Masoudi, Jan. 18 Speech], *available at* http://www.usdoj.gov/atr/public/speeches/220972.pdf.

105. IP2 REPORT, *supra* note 29, at 33–53.

106. Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (Apr. 30, 2007) [hereinafter IEEE Business Review Letter], *available at* http://www.usdoj.gov/atr/public/busreview/222978.pdf.

107. Gerald F. Masoudi, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Enforcement and Standard Setting: The VITA and IEEE Letters and the "IP2" Report, Remarks Before the American Intellectual Property Law Association (May 10, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/223363.pdf.

108. Gerald F. Masoudi, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct, Address at the Annual Comprehensive Conference on Standards Bodies and Patent Pools (Oct. 11, 2007) [hereinafter Masoudi, Oct. 11 Speech], *available at* http://www.usdoj.gov/atr/public/speeches/227137.pdf.

109. Hill B. Wellford, Counsel to the Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Issues In Standard Setting, Remarks at the 2d Annual Seminar on IT Standardization and Intellectual Property (Mar. 29, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/222236.pdf.

agencies' top officials. For example, in his January 18, 2007 speech, then-Deputy Assistant Attorney General Masoudi encouraged approaches different from those addressed in business review letters[110]—in part because "experimentation and competition between S[S]Os . . . is a good thing."[111] Moreover, he indicated that the agencies should exercise "great caution," acknowledging that the agencies could hinder "dynamic efficiency and long-term consumer welfare."[112] In his March 29, 2007 speech, then-Counsel to the Assistant Attorney General Wellford echoed these sentiments when stating that "we should not overreact to the inevitable short-term missteps—or perceived missteps—that S[S]Os and businesses will make."[113] Although lacking in substantive guidance, these statements signal an agency that wishes to foster the use of and experimentation with ex ante licensing negotiations.

Below, I discuss the following documents, in the following order: the DOJ Business Review Letter to VITA, the DOJ Business Review Letter to IEEE, and Chapter 2 of the IP2 Report. While the IP2 Report was issued before the IEEE letter (April 17 versus April 30), I have chosen to address them in reverse chronological order because the IP2 Report not only incorporates analysis from the VITA letter,[114] delivered nearly six months earlier, but also from the IEEE letter.[115] Because only a matter of days separated the issuance of the IP2 Report and the IEEE letter and because the letters ought to be discussed in tandem—in the sense that their analyses concern only specific, proposed patent policies, unlike the IP2 Report, which provided more generally applicable guidance—I think this approach sensible.

In summary, the DOJ indicated in the letters that because ex ante licensing negotiations had procompetitive effects, they would generally be examined under the rule of reason; however, because such negotiations did raise anticompetitive concerns, they would be condemned as per se illegal under certain circumstances. While these comments sanctioned some forms of ex ante licensing negotiations, the agencies were not required to offer guidance on *joint* licensing negotiations *within* the SSO because neither policy permitted them. To clarify their position, the DOJ and the FTC

110. Masoudi, Jan. 18 Speech, *supra* note 104, at 14–16.

111. *Id.* at 15.

112. *Id.* at 16.

113. Wellford, *supra* note 109, at 18.

114. *See, e.g.*, IP2 REPORT, *supra* note 29, at 54–55 (discussing the VITA Business Review Letter).

115. For example, in the IEEE letter, the DOJ indicated that it currently would not take enforcement action against IEEE's proposed patent policy, which gave patent holders the option to disclose their most restrictive licensing terms, including their maximum royalty rate. IEEE Business Review Letter, *supra* note 106, at 4, 12. In the IP2 Report, the agencies approved of "voluntary and unilateral disclosure[s] of . . . licensing terms, including . . . royalty rate[s]." IP2 REPORT, *supra* note 29, at 54.

released the IP2 Report in April 2007, which provided their most comprehensive statements yet on ex ante licensing negotiations.[116]

1. VITA DOJ Business Review Letter of October 30, 2006.—In October 2006, the DOJ issued a business review letter to VITA, in which it stated that it "ha[d] no present intention to take antitrust enforcement action"[117]—the agency's "most favorable possible response"[118]—against VITA's proposed patent policy. VITA proposed to supplant its RAND licensing policy with one in which all members "must declare the maximum royalty rates and most restrictive non-royalty terms that the . . . member . . . will request for any such patent claims that are essential to implement the eventual standard."[119] Although the members could consider the licensing terms when determining which technology to adopt for the proposed standard, the proposed policy forbade "any negotiation or discussion of specific licensing terms among working group members or with third parties at all [VITA] and working group meetings."[120] Thus, while the proposed policy *would* require members to unilaterally disclose the maximum rate at which they would seek to license their IP and *would* allow members to consider those terms when selecting a technology, it *would not* allow members to engage in ex ante negotiations of specific licensing terms, either bilaterally or jointly, within the SSO—members would still have to negotiate such terms bilaterally with the patent holder outside the SSO.

The DOJ examined VITA's proposed patent policy under the rule of reason and chose to not take action because "the proposed policy should preserve, not restrict, competition among patent holders."[121] Specifically, the DOJ believed that by requiring members to disclose their maximum royalty rates, competition between technologies would increase—because technology would be evaluated on technical merit *and* licensing terms—and holdup would be mitigated—because members would not be subject to "unreasonable patent licensing terms that might threaten the success of future standards."[122] Additionally, given the licensing terms, members might make more informed decisions[123] and avoid disputes over licensing terms,[124] which can be costly if litigation results or the standard's adoption and

116. Frances E. Marshall, *U.S. Department of Justice Guidance Regarding Ex Ante Patent Licensing Policies of Standard-Setting Organizations*, *in* 2 PATENT LAW INSTITUTE 211, 217 (2008).

117. VITA Business Review Letter, *supra* note 44, at 10.

118. Ed Levy et al., *Patent Pools and Genomics: Navigating a Course to Open Science?*, 16 B.U. J. SCI. & TECH. L. 75, 85 (2010).

119. VITA Business Review Letter, *supra* note 44, at 4.

120. *Id.* at 5.

121. *Id.* at 8, 10.

122. *Id.* at 9–10.

123. *Id.* at 9.

124. *Id.* at 10.

implementation are delayed. Because the policy forbade members from discussing licensing terms, the DOJ found the exercise of group buying power unlikely.[125] However, the DOJ did caution that any attempt to use the declaration process as a cover for price-fixing of downstream goods or to rig bids among patent holders would be a per se violation of Section 1 of the Sherman Act.[126]

2. IEEE DOJ Business Review Letter of April 30, 2007.[127]—In April 2007, the DOJ issued a business review letter to IEEE, declaring that it would not presently take antitrust enforcement action against IEEE's proposed patent policy.[128] Under the proposed policy, patent-holding members could, but would not be required to, "publicly disclose and commit to the most restrictive licensing terms (which may include the maximum royalty rate) they would offer for patent claims that are found to be essential to the standard."[129] Although members may "discuss the relative costs of licensing . . . the essential patent claims needed to implement the technologies under consideration," they would not be allowed to confer about specific licensing terms.[130]

As with its review of VITA's proposed patent policy, the DOJ examined IEEE's policy under the rule of reason and decided not to take action, finding that IEEE's policy "could generate similar benefits" as those provided by VITA's policy.[131] Similar to its statements in VITA's business review letter, the DOJ emphasized the increased competition between technologies and the ability of members to make more informed decisions, as well as the avoidance of holdup and litigated disputes over licensing terms; however, it also based part of its decision upon the "increased predictability of licensing terms," which "could lead to faster *development*, implementation, and adoption of a standard."[132] In addition to expressing frustration with holdup and litigation, IEEE complained that its existing policy, which requested members to agree either to not enforce their IP rights or to license on RAND terms, "impede[d] the ability of . . . members to make decisions on a consensus basis," as required by IEEE procedures.[133] Thus, it appears that when evaluating SSOs' licensing policies under the rule of reason, the DOJ is

125. *Id.* at 9.

126. *Id.* at 9–10.

127. As of Fall 2009 and two years after IEEE enacted the policy, only three members had provided licensing terms. Anne Layne-Farrar et al., *Preventing Patent Hold Up: An Economic Assessment of Ex Ante Licensing Negotiations in Standard Setting*, 37 AIPLA Q.J. 445, 452 (2009).

128. IEEE Business Review Letter, *supra* note 106, at 12.

129. *Id.* at 4.

130. *Id.* at 8.

131. *Id.* at 9–10, 12.

132. *Id.* at 10 (emphasis added).

133. *Id.* at 3–4.

increasingly willing to identify more expected competitive benefits as its experience with such policies increases and/or as the circumstances present themselves.

While noting that IEEE's policy prohibited joint negotiation of licensing terms within meetings, the DOJ did indicate that permitted discussions of costs related to a proposed standard "could, in certain circumstances, rise to the level of joint negotiation of licensing terms."[134] With regard to such negotiations, the DOJ declined to provide its "views on joint negotiations that might take place inside or outside such standards development meetings or IEEE sponsored meetings."[135] It did, however, reiterate the DOJ's willingness to challenge any attempt to fix prices of standard-dependent products or to rig bids among patent holders.[136]

3. Chapter 2, DOJ and FTC IP2 Report of April 17, 2007.— Recognizing the procompetitive effects of SSOs, the DOJ and the FTC indicated in their IP2 Report that they would generally adopt a rule of reason approach toward ex ante licensing negotiations, including those negotiations that occur jointly and inside an SSO and those that involve disclosure of maximum or model licensing terms.[137] Specifically, the enforcement agencies identified the two primary procompetitive benefits as ex ante competition between technologies and mitigation of holdup, both of which might also foster additional, downstream benefits.[138]

First, because "[p]atent holders choosing to participate in the standard-setting process would compete against other patent holders, as well as against public domain technologies, on the basis of technical merit and on price and other licensing terms in order to have their technology included in the standard," ex ante competition between technologies would increase.[139] Because such negotiations would "increas[e] the [ex ante] knowledge of SSO decision-makers about licensing terms," ex ante competition might also "improve the quality of their decisions, enabling them to make tradeoffs between price and technical merit that are not possible unless the price of patented technological inputs is known before the standard is set."[140] Second, ex ante licensing negotiations would mitigate holdup because they would "place an upper bound on a patent holder's RAND commitment and . . . lower[] the risk that users of a standard [would] face," demanding "more restrictive licensing terms after the standard is set than SSO members expected when they chose to include the patented technology in the

134. *Id.* at 11.
135. *Id.*
136. *Id.*
137. IP2 REPORT, *supra* note 29, at 37.
138. *Id.* at 52–53.
139. *Id.* at 52.
140. *Id.* at 52–53.

standard."[141] A downstream benefit of this reduced risk might be faster adoption of the standard in the marketplace.[142]

Nonetheless, the DOJ and the FTC acknowledged that ex ante licensing negotiations raise two antitrust concerns: naked agreements to restrain trade by patent holders or SSO members and the exercise of group buying power by potential licensees.[143] Naked agreements to restrain trade—"such as bid rigging by members who otherwise would compete in licensing technologies for adoption by the SSO or naked price fixing on downstream products by members who otherwise would compete in selling downstream products compliant with the standard"—would be condemned as per se illegal.[144] Similarly, joint negotiations might also be unreasonable if "there were no viable alternatives to a particular patented technology that is incorporated into a standard, the IP holder's market power was not enhanced by the standard, and all potential licensees refuse to license that particular patented technology except on agreed-upon licensing terms" because potential licensees could exercise group buying power.[145]

Emphasizing that it would examine joint ex ante licensing negotiations under the rule of reason, the DOJ and the FTC provided specific guidance in three situations.[146] First, voluntary, unilateral disclosure of licensing terms by a patent holder—like the conduct permitted by IEEE's proposed policy[147]—is not a violation of Section 1 of the Sherman Act.[148] Second, bilateral ex ante licensing negotiations that occur outside SSOs—like the conduct that already occurs under most SSO policies[149]—generally do not require antitrust review.[150] Third, joint ex ante licensing negotiations that occur inside SSOs and require unilateral disclosures of licensing terms—like the conduct mandated by VITA's proposed policy[151]—are not per se illegal—unless they constitute naked restraints of trade or exercises of group buying power and instead will be examined under the rule of reason.[152]

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141. *Id.* at 53.

142. *Id.*

143. *Id.* at 50.

144. *Id.* at 37.

145. *Id.* at 53.

146. *Id.* at 54–55.

147. *See supra* note 129 and accompanying text.

148. *See* IP2 REPORT, *supra* note 29, at 54 ("[A]n IP holder's voluntary and unilateral disclosure of its licensing terms, including its royalty rate, is not a collective act subject to review under section 1 of the Sherman Act.").

149. *See supra* note 40 and accompanying text.

150. *See* IP2 REPORT, *supra* note 29, at 54 ("[B]ilateral [ex ante] negotiations about licensing terms that take place between an individual SSO member and an individual intellectual property holder (without more) outside the auspices of the SSO also are unlikely to require any special antitrust scrutiny.").

151. *See supra* note 119 and accompanying text.

152. *See* IP2 REPORT, *supra* note 29, at 54 (explaining that per se "condemnation is not warranted for joint SSO activities," which include joint ex ante licensing negotiations or an SSO

B. *The Flaws of the Enforcement Agencies' Recent Approach Toward Ex Ante Licensing Negotiations*

By issuing a series of speeches and documents in 2006 and 2007, the enforcement agencies intended to encourage those SSOs that wished to engage in ex ante licensing negotiations to do so. While statements made by top officials in several speeches *generally* reassured SSOs that they would not face antitrust liability if they experimented with ex ante licensing negotiations, two business review letters and a 2007 report provided more *specific* guidance. However, these documents were largely insufficient to inform SSOs as to what conduct would and would not result in antitrust liability. This is particularly ironic as the agencies themselves identified several of the reasons why "clear legal guidance" was necessary.[153]

1. The Enforcement Agencies Must Provide Clear Legal Guidance for Five Reasons.—The enforcement agencies must provide clear legal guidance to SSOs for five reasons: (1) antitrust claims are expensive to defend, even if the SSO prevails; (2) engineers who possess minimal legal knowledge would be the participants in any ex ante licensing negotiations; (3) little guidance on what constitutes legal ex ante licensing negotiations currently exists, with the enforcement agencies' statements serving as the primary source; (4) since the 2006 and 2007 statements on ex ante licensing negotiations were issued, the administration has changed, potentially affecting the agencies' approach; and (5) the existing safe harbors generally will not be available.

a. Antitrust Claims Are Expensive to Defend.—Given that ex ante licensing negotiations may reduce holdup and given the enforcement agencies' recent, encouraging statements, the SSOs' trepidation would appear foolish if the costs of "get[ting] the selection process 'wrong'" were not so high.[154] However, the costs associated with antitrust litigation, whether or not the SSO loses, can be enormous.[155] First, an action brought by the enforcement agencies themselves may engender additional private claims, "intensif[ying] the penalty."[156] Second, an action brought by state attorneys

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rule requiring IP holders to announce their intended (or maximum) licensing terms for technologies under consideration).

153. *See* Masoudi, Jan. 18 Speech, *supra* note 104, at 10 (insisting that standard-setting participants "crave clear legal guidance").

154. *See* Kelly & Prywes, *supra* note 35, at 5 ("If an SSO and its participants get the selection process 'wrong' under the antitrust laws, and lose an antitrust case in litigation, the cost can be enormous.").

155. *Id.*; *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 12–13 (1984) (arguing that the use of the rule of reason in antitrust analysis is a strong example of litigation costs borne of "vague rules with high stakes").

156. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 223 (1983); *see also id.* at 222–23 (explaining that private parties "simply piggyback[] on the efforts of public agencies—such as the

general or private parties may result in treble damages, payment of plaintiff's attorneys' fees, and injunctions that impede future standard-setting activity.[157] Even if no liability is imposed upon the SSO, the cumulative litigation expense, both in terms of dollars spent and time diverted, can be considerable: for example, in *Sony Electronics, Inc. v. Soundview Technologies, Inc.*,[158] two SSOs and several of their member companies spent over ten million dollars and two years to defend against antitrust counterclaims that were eventually mooted.[159]

b. Engineers, Not Lawyers, Participate in Ex Ante Licensing Negotiations.—Because engineers—and not economists or lawyers—ordinarily determine which technology to incorporate into a standard,[160] clear legal guidance is required if the agencies wish to convince SSOs that ex ante licensing negotiations will not necessarily result in costly antitrust liability. The enforcement agencies recognized this. For example, in his January 18, 2007 speech, Masoudi indicated that SSO members erroneously pointed to *Soundview* as the source of their group-buying-power liability fears precisely because the members were not lawyers:[161] while "[i]t may seem strange to you that a case like *Soundview* could have such a great impact on standard setting participants[] when a careful reading by an antitrust lawyer shows that it should have little impact," SSO members "generally are not antitrust lawyers or lawyers at all, and do not wish to delve into legal complexities. . . . They crave clear legal guidance."[162]

c. The Enforcement Agencies' Statements Are the Primary Source of Guidance.—Little guidance on what constitutes legal ex ante licensing negotiations currently exists, with the enforcement agencies' statements the primary source.[163] Because courts are less likely to misinterpret and to rule adversely to the agencies' approach if that approach is apparent, the agencies must provide clear legal guidance.

Courts are less likely to misinterpret the agencies' approach if that approach is clear. Because the agencies' approaches are motivated by

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SEC, the FTC, and the Antitrust Division of the Department of Justice—in order to reap the gains from the investigative work undertaken by these agencies").

157. Kelly & Prywes, *supra* note 35, at 5.

158. 157 F. Supp. 2d 180 (D. Conn. 2001).

159. *Id.* at 5–6.

160. *Id.* at 4–5.

161. *See* Masoudi, Jan. 18 Speech, *supra* note 104, at 9–10 (indicating that SSOs usually point to *Soundview*, as well as one other district court case, "as the source of their buy-side antitrust liability fears").

162. *Id.* at 10.

163. *See supra* notes 50–52 and accompanying text.

economics[164] and because courts, unlike the agencies, do not have staffs of Ph.D. economists,[165] the courts may honestly misinterpret the agencies' approaches—particularly if they are unclear. The courts' initial misinterpretation of the DOJ's more nuanced challenges to mergers on grounds of ease of entry provides a good example. In the 1990 appellate decisions *Baker Hughes*[166] and *Syufy*,[167] the DOJ attempted to enjoin mergers based on new economic learning about entry that was not reflected in the 1984 Merger Guidelines[168] then in force.[169] Both courts, however, misunderstood the DOJ's arguments,[170] and after "sharply criticiz[ing] the Justice Department's entry arguments and the Department's seeming lack of fidelity to the 1984 Merger Guidelines," they refused to enjoin the mergers.[171] As a result, the enforcement agencies drafted the 1992 Merger Guidelines, in which they successfully articulated the new economic learning and why it mattered.[172] Subsequently, they not only stopped habitually losing merger challenges on grounds of ease of entry[173] but also saw the new economic learning, as embodied in the 1992 Merger Guidelines, invoked by the courts.[174]

Courts also are less likely to rule adversely to the agencies' approach if that approach is clear. Much of this has to do with reliance: if, in the absence of case law, parties, such as SSOs and their lawyers, rely upon agency statements in good faith to engage in, for example, ex ante licensing

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164. *See* Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 189–90 (2003) (remarking, "only partly facetious[ly]," that any redrafting of the 1992 Merger Guidelines should "encapsulate every major article on industrial organization economics published in the *American Economic Review*"); *supra* note 55 and accompanying text.

165. *Roundtable Discussion*, *supra* note 51, at 9.

166. United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990).

167. United States v. Syufy Enters., 903 F.2d 659 (9th Cir. 1990).

168. U.S. DEP'T OF JUSTICE, 1984 MERGER GUIDELINES, *available at* http://www.justice.gov/atr/hmerger/11249.pdf.

169. *See* Baker, *supra* note 164, at 196 n.39 (indicating that while the 1984 Merger Guidelines incorporated a distinction that "was a predecessor to the distinction made in the 1992 Merger Guidelines between uncommitted and committed entry, . . . it was rooted more in Bainian entry barrier thinking").

170. *See id.* at 197 (stating that the courts' exasperation with the government arose from their misunderstanding of the government's arguments about committed entry).

171. *Id.* at 190–91.

172. *See id.* at 191 ("The drafters of the 1992 Merger Guidelines understood the need to respond to these decisions by setting forth a[n] . . . analysis that would harmonize the Division's internal analytic approach to entry with the judiciary's concerns."); *id.* at 201–02 (stating that the 1992 Merger Guidelines successfully articulated "the distinction between committed and uncommitted entry and explain[ed] why the difference matters").

173. *Id.* at 201.

174. *See id.* at 202 (indicating that the district courts in FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), and in FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998), followed the 1992 Merger Guidelines).

negotiations, courts arguably will not impose liability.[175] However, courts also will not rule conversely to the agencies' approach—and will even overturn precedent—if the agencies convince them that current economic thinking so requires. A paramount example is *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[176] in which the Supreme Court abrogated *International Salt Co. v. United States*[177] to hold that possession of IP in a tying product is not per se illegal because it does not necessarily confer market power upon the owner.[178] In so doing, the Court relied upon the IP Guidelines, which it believed reflected "the virtual consensus among economists" that a patent does not necessarily confer market power upon its owner.[179]

d. The Administration Has Changed Since the Statements Were Made.—Because the DOJ and the FTC are led by political appointees,[180] many believe that the amount[181] and the type of action taken by the enforcement agencies change with the administrations.[182] If this is true, the agencies' approach toward ex ante licensing negotiations expressed in 2006 and 2007 may no longer be accurate: in 2009, Democrat Barack Obama replaced Republican George W. Bush as President.[183] The agencies must thus signal to SSOs whether it is safe to rely upon their previously issued statements.

Since the change in administration, the DOJ and the FTC have not issued any new statements on ex ante licensing negotiations; they have,

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175. *Cf.* Brian D. Shannon, *Administrative Law*, 21 TEX. TECH L. REV. 1, 9 (1990) (indicating that in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), the Supreme Court identified several possible exceptions in which an agency's discretion might be limited, including (1) "in a case in which the affected parties have placed substantial reliance on the agency's past decisions that invoked a contrary policy to the one being established;" and (2) "in a case in which the agency has imposed some new liability on individuals for past actions that were taken in good-faith reliance on prior agency pronouncements").

176. 547 U.S. 28 (2006). In *Staples*, the district court chose to harmonize, rather than abrogate, the entry analysis of *Baker Hughes*, which controls in the D.C. Circuit, with the 1992 Merger Guidelines. Baker, *supra* note 164, at 202.

177. 332 U.S. 392 (1947).

178. *Ill. Tool Works*, 547 U.S. at 45–46.

179. *Id.* at 45.

180. The FTC consists of five commissioners appointed by the President, whereas the DOJ's Antitrust Division is led by "an assistant attorney general who is appointed by, and serves at the pleasure of, the president." William J. Baer & David A. Balto, *The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113, 113 n.2 (1999).

181. *See* Steven T. Taylor, *Antitrust Practices Bustling with International, M&A and Class-Action Matters*, OF COUNSEL, Aug. 2006, at 1, 2 (relating that "with most Republican administrations, antitrust investigations . . . wane").

182. *See* Daniel A. Crane, *Obama's Antitrust Agenda*, REG., Fall 2009, at 16, 18 (remarking that the kind of case that the agencies brought changed from administration to administration).

183. Andrew Clark, *Obama Inauguration: George Bush—The Man Who Was No Longer President*, GUARDIAN.CO.UK, Jan. 20, 2009, http://www.guardian.co.uk/world/2009/jan/20/obama-inauguration-george-bush.

however, signaled a more aggressive stance toward antitrust enforcement[184] and a willingness to jettison approaches of the Bush-era agencies.[185] Nonetheless, these actions may not portend a DOJ and FTC that are less encouraging of ex ante licensing negotiations for two reasons. First, while the agencies under the Bush Administration largely ignored monopolization cases[186] and merger reviews,[187] they aggressively fought price-fixing cartels[188]—one of the two types of Section 1 violations the agencies feared ex ante licensing negotiations would facilitate.[189] Yet, at the same time they were fighting price-fixing cartels, the agencies *also* issued statements that encouraged ex ante licensing negotiations.[190] Even if the Obama-era enforcement agencies are as aggressive at fighting price-fixing cartels, which appears not to be the case,[191] it does not necessarily follow that they will take a less encouraging approach toward ex ante licensing negotiations.

Second, President Obama appointed Commissioner Jon Leibowitz, who joined the majority in *N-Data*,[192] to chair the FTC.[193] In *N-Data*, N-Data allegedly "repudiated a prior licensing commitment made to a standard-setting organization, demanding royalties higher than the original offer made when the organization was deciding whether to adopt the patented technology."[194] While the case was decided under Section 5 of the FTC Act,[195] it is relevant in the context of Section 1 of the Sherman Act both because of its pro-SSO statements and its broad interpretation of the FTC's enforcement powers. Specifically, the majority reasoned that "[c]onduct like N-Data's—which undermines standard-setting—threatens to stall [one of

184. *See* Crane, *supra* note 182, at 18 ("There is no doubt that the Obama administration is trying to up the tempo of antitrust enforcement.").

185. *See id.* at 16 (discussing "the dramatic decision of Christine Varney—the Obama administration's new Antitrust Division head—to jettison the entire report on monopolization offenses released by the Bush Justice Department just eight months earlier").

186. Sean Gates, *Obama's Antitrust Enforcers: What Can We Expect?*, ANTITRUST SOURCE, Apr. 2009, at 1, 2 ("[T]he Bush administration DOJ did not bring a single monopolization case.").

187. *See id.* at 6 (remarking that President Obama "cited statistics showing that [during the Bush Administration], the antitrust agencies challenged mergers at less than half the rate of the prior four years under the Clinton administration").

188. *See* Crane, *supra* note 182, at 18 ("In recent decades, Republican administrations have prioritized fighting price-fixing cartels.").

189. *See supra* notes 67–72 and accompanying text.

190. *See supra* notes 102–52 and accompanying text.

191. *See* Crane, *supra* note 182, at 18 (indicating that agencies in recent Republican administrations have brought price-fixing cartel cases, rather than monopolization cases or merger reviews); Gates, *supra* note 186, at 1 (arguing that actions taken by the Obama agencies "will likely lead [to] a resurgence of antitrust enforcement in both the [single-firm] conduct and merger areas," while making no mention of any change in the agencies' position toward price-fixing cartels).

192. In the Matter of Negotiated Data Solutions LLC, Statement of the Fed. Trade Comm'n (2008) [hereinafter N-Data Statement], *available at* http://www.ftc.gov/os/caselist/0510094/0810122statement.pdf.

193. Gates, *supra* note 186, at 1.

194. *Id.* at 4.

195. N-Data Statement, *supra* note 192, at 1.

the] engine[s driving the modern economy] to the detriment of all consumers."[196] And, in finding N-Data's alleged conduct to be a Section 5 violation, the majority condemned N-Data's conduct arguably without finding a concurrent Sherman Act violation[197]—extending the FTC's powers beyond those popularly viewed permissible[198]—and "alleged that the conduct was an 'unfair practice' . . . , an allegation normally reserved for consumer protection matters, not competition matters involving major corporations."[199] As Chairman, Leibowitz may also be willing to use the FTC's enforcement powers broadly to address conduct, such as barriers to ex ante licensing negotiations, that "undermines standard-setting."[200]

e. Existing Safe Harbors Offer Little Protection.—The two existing safe harbors for which SSOs may qualify are either largely unavailable or offer little protection. First, in the IP Guidelines, the DOJ and the FTC established safety zones for restraints in IP-licensing arrangements that affect competition in both goods and technology markets, provided that the restraints are not facially anticompetitive.[201] The agencies will not challenge a restraint if the licensor and its licensees collectively account for no more than 20% of the goods market significantly affected by the restraint.[202] This, however, may not be the case in many SSOs. As long as the analysis of the goods market alone adequately addresses the effects of the licensing arrangement on competition among technologies, the agencies will assess the restraint by reference only to the goods market.[203] If analysis of the goods market alone is insufficient, however, and "if market share data are unavailable or do not accurately represent competitive significance," a safety zone exists for a restraint "that may affect competition in a technology market if . . . there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the licensing arrangement that may be substitutable for the licensed technology at a comparable cost to the user."[204] However, because in complex industries

196. *Id.* at 3.

197. *See* Gates, *supra* note 186, at 4 (indicating that the "conduct arguably did not violate Section 2" of the Sherman Act).

198. *See id.* at 3 (relating that Chairman Leibowitz's view—"that the FTC has powers that reach beyond the bounds of Section 2 [of the Sherman Act], allowing the FTC to condemn conduct that neither the DOJ nor private antitrust litigants may challenge"—is not the prevailing position).

199. *Id.* at 4.

200. N-Data Statement, *supra* note 192, at 3.

201. IP GUIDELINES, *supra* note 26, at 22–23. "'Facially anticompetitive' refers to restraints that normally warrant per se treatment, as well as other restraints of a kind that would always or almost always tend to reduce output or increase prices." *Id.* at 22 n.30.

202. *Id.* at 22.

203. *Id.*

204. *Id.* at 23.

there often are no substitutable technologies,[205] this safe harbor often may be unavailable.

Second, under the Standards Development Organization Advancement Act (SDOAA),[206] enacted by Congress in 2004, "SSOs that engage in a defined range of 'standards development activity' will be subject to antitrust challenge only under the rule of reason standard"[207] and subject to only actual—not treble—damages.[208] However, this safe harbor does not apply to individual firms participating in an SSO's standards development process.[209] Nor does it extend to the "[e]xchang[e of] information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required for the purpose of developing or promulgating a voluntary consensus standard, or using such standard in conformity assessment activities,"[210] which may include ex ante licensing negotiations—the SDOAA is unclear.[211] Because SSO members "remain at risk of claims alleging that their [ex ante] royalty communications are illegal per se"[212] and of treble damages and because ex ante licensing negotiations may themselves constitute per se illegal activity, the SDOAA offers little protection to SSOs that wish to pursue such negotiations.

Several commentators have advocated providing a safe harbor to SSOs specifically for ex ante licensing negotiations.[213] Such a safe harbor would constitute clear legal guidance[214] and would encourage SSOs to engage in

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205. Damien Geradin, *Pricing Abuses by Essential Patent Holders in a Standard-Setting Context: A View from Europe* 12 (Tilburg Law & Econ. Ctr., Working Paper No. 1174922, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1174922 ("In many instances of standard development, . . . no sufficiently attractive alternative technology exists.").

206. Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301–4306 (2006).

207. Kelly & Prywes, *supra* note 35, at 6.

208. *See* Masoudi, Jan. 18 Speech, *supra* note 104, at 11 (explaining that the Act grants limited immunity from treble damages if the SSOs file notification of their activities with the agencies).

209. 15 U.S.C. § 4301(a)(8).

210. *Id.* § 4301(c)(1).

211. *See* Greg R. Vetter, *Open Source Licensing and Scattering Opportunism in Software Standards*, 48 B.C. L. REV. 225, 237–38 (2007) ("Discussing licensing in the S[S]O, however, creates a potential dilemma: are licensing terms an intellectual property policy, or does such discussion constitute . . . prohibited exchange of information . . . ? The Act gives little guidance on how to resolve this tension.").

212. Kelly & Prywes, *supra* note 35, at 6.

213. *See, e.g.*, Alan Devlin, *Standard-Setting and the Failure of Price Competition*, 65 N.Y.U. ANN. SURV. AM. L. 217, 223 (2009) ("[T]here should be an explicit safe harbor provision for SSOs that require prospective licensors to declare their most restrictive licensing terms, including the highest royalty rate, ex ante.").

214. *See* Kelly & Prywes, *supra* note 35, at 11 (asserting that "[t]he time has arrived to bring greater certainty into the area of ex ante royalty communications" and that "[t]he federal antitrust agencies, and Congress, should seriously consider adopting such safety zones in the near future").

such negotiations.[215] However, the agencies may be cautious to offer blanket protection to such conduct because they know so little about its anticompetitive effects:[216] in other contexts, the agencies have offered safe harbors only after building up institutional knowledge.[217] Here, I take no position: a safe harbor may "jumpstart" ex ante licensing negotiations, but so too may additional, clear legal guidance. Regardless, it is important to note that a safe harbor defined by the agencies, such as those in the IP Guidelines, would not be binding upon private antitrust suits, although it may be influential upon the courts.[218] A safe harbor defined by new legislation, such as that in the SDOAA, would be binding.[219]

2. The Enforcement Agencies Fail to Provide Clear Legal Guidance for Two Reasons.—The enforcement agencies' statements on ex ante licensing negotiations did not provide sufficiently clear legal guidance for two reasons: (1) what constitutes permissible conduct in joint ex ante licensing negotiations occurring within the SSO is unclear, and (2) assuming the rule of reason is applied to such joint negotiations, how the agencies will conduct their analysis is unclear when technology markets are implicated.

In the two business review letters and the IP2 Report, the enforcement agencies indicated that both voluntary and required unilateral disclosures of licensing terms occurring within the SSO and voluntary, bilateral negotiations occurring outside the SSO are permissible.[220] What is less clear, however, is what type of voluntary or required joint negotiation is per se illegal and what type will be analyzed under the rule of reason. To this end, the agencies made three relevant statements: (1) per se "condemnation is not warranted for joint SSO activities that mitigate hold up and that take place before deciding which technology to include in a standard;"[221] (2) however, any attempt "to use the declaration process as a cover for price-fixing of downstream goods or to rig bids among patent holders" would be a per se violation of Section 1;[222] and (3) joint negotiations in which "there were no viable alternatives to a particular patented technology that is incorporated

215. *Cf. id.* at 6 ("SSOs and their respective industries would greatly benefit from the development of 'safety zone' guidelines which, if followed by SSOs, would ensure that antitrust action will not be taken by the federal antitrust agencies absent extraordinary circumstances.").

216. *See infra* text accompanying note 230.

217. *See, e.g.*, Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEXAS L. REV. 453, 461 n.45 (1983) ("One can . . . identify examples, especially in the safe harbor area, in which the 1982 [Merger] Guidelines will immunize a merger that would have been challenged under the 1968 version.").

218. Kelly & Prywes, *supra* note 35, at 6.

219. *Id.*

220. *See supra* notes 146–52 and accompanying text.

221. IP2 REPORT, *supra* note 29, at 54.

222. *See supra* note 126 and accompanying text.

into a standard, the IP holder's market power was not enhanced by the standard, and all potential licensees refuse to license that particular patented technology except on agreed upon licensing terms" might also be per se illegal.[223]

These statements raise several questions: (1) To what extent is a showing that the joint ex ante negotiation mitigated hold up relevant? (2) What circumstantial evidence will be considered proof of the use of the negotiations as a cover for price-fixing or bid-rigging? (3) What circumstantial evidence will be considered proof that all potential licensees refused to license except on agreed upon licensing terms? Questions (2) and (3) are particularly pertinent because in civil prosecutions, the SSO's intent need not be shown.[224] Question (3) may arise more often than anticipated because one of the conditions identified as encouraging the exercise of group buying power—no viable alternatives to a particular patented technology—may be quite common.[225]

Additionally, assuming the rule of reason is applied, the framework used by the agencies—and possibly mimicked by the courts[226]—to analyze the conduct is unclear when technology markets are implicated. For example, the agencies will analyze only the goods market when "[t]he competitive effects of licensing arrangements . . . can be adequately assessed within the relevant markets for the goods affected by the arrangements"[227] but "may rely on technology markets" when rights to IP are marketed separately from the products in which they are used,[228] as will often be the case in ex ante licensing negotiations.[229] What constitutes competitive effects that "can be adequately assessed" within the goods market and the point at which technology markets "may" be analyzed is unclear, particularly as relevant case law is absent.

C. *How the Enforcement Agencies Should Provide Clear Legal Guidance*

The enforcement agencies' failure to provide sufficiently clear guidance on ex ante licensing negotiations is unsurprising: because "S[S]O practices

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223. *See supra* note 145 and accompanying text.

224. While specific intent must be proved in a criminal prosecution, in a civil prosecution, the plaintiff need only establish an unlawful intent or an anticompetitive effect. THOMAS V. VAKERICS, ANTITRUST BASICS § 1.05 (2009).

225. *See supra* note 209.

226. *See Roundtable Discussion*, *supra* note 51, at 9 (stating in the context of the proposed redrafting of the Horizontal Merger Guidelines, "[t]he agencies might as well concede that the courts are going to rely on them and draft them accordingly").

227. IP GUIDELINES, *supra* note 26, at 7–8.

228. *Id.* at 8.

229. *See* Damien Geradin, *What's Wrong with Royalties in High Technology Industries?* 3 (Tilburg Law & Econ. Ctr., Working Paper No. DP 2009-043, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104315 (indicating that licensing agreements include pure upstream firms that "conduct research and development activities and patent their innovations, but . . . do not engage in manufacturing").

are evolving and it is not yet clear what the specific practices and their effects are likely to be" and because "[s]ound antitrust analysis is fact-specific and, at least outside the realm of [per se] violations, is effects-based," the agencies have chosen to "reserv[e] judgment on the many S[S]O practices that have not come before them."[230] Similarly, when issuing guidelines on horizontal mergers, the agencies' first attempts at guidance were vague and difficult to apply; it was not until later revisions that the framework became clearly defined.[231] Nonetheless, without clear legal guidance, SSOs' fears of antitrust liability likely will not be allayed sufficiently to encourage them to engage in ex ante licensing negotiations. Going forward, if the agencies do wish to provide additional guidance, they should do so primarily in reports and commentaries, the latter of which have been used by the agencies to provide example analyses in other contexts.[232] Based upon the agencies' experience in other contexts, the agencies should use reports to provide more guidance on the framework that they and the courts should use to analyze ex ante licensing negotiations[233] and the commentaries to provide examples of analyses[234] applied to joint negotiations conducted within the SSO, for example. While the economic thinking that informs the agencies' approach will and does change, experience has shown that the enforcement agencies can and do update the reports to reflect these changes and that the courts can and do alter their analyses accordingly.

The agencies' approach toward ex ante licensing negotiations will likely change over time, both as the agencies gain more institutional knowledge about such negotiations as more SSOs engage in them[235] and as economic

230. Masoudi, Jan. 18 Speech, *supra* note 104, at 1.

231. *See* Gina M. Killian, Note, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857, 880–81 (1994) (explaining that while the 1984 Merger Guidelines' vague analysis was hard to apply, the 1992 Merger Guidelines' three-part analysis "should enable regulators to more clearly identify a committed entrant").

232. *E.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm. All of this is not to say that the agencies should stop issuing speeches and business review letters. Instead, I argue that the bulk of the agencies' guidance should be disseminated through reports and commentaries.

233. *See Roundtable Discussion*, *supra* note 51, at 9 (soliciting from Paul Denis, one of the principal drafters of the 1992 Merger Guidelines, that "[t]he Guidelines ought to provide th[e] framework and literally become the outline the staff uses to organize information necessary to support their recommendations" and that the 1992 Merger Guidelines, and any update to them, "can also guide the courts").

234. *See id.* ("The Guidelines cannot be a detailed description of how the facts in each case will be analyzed because the appropriate analysis will vary depending on the very different circumstances of each case. A commentary . . . , describing examples of analyses that have been used in the past, could be useful.").

235. *See* Masoudi, Jan. 18 Speech, *supra* note 104, at 1 ("The application of antitrust law to . . . the use of [ex ante] licensing regimes by S[S]Os . . . is unsettled. . . . [T]he U.S. antitrust agencies are reserving judgment on the many S[S]O practices that have not come before them.").

thinking evolves.[236] In other contexts, the agencies have accommodated these changes by updating their reports, effectively providing notice to firms, lawyers, and courts.[237] Notice, however, does not mean that SSOs that relied upon the agencies' previous statements to engage in ex ante licensing negotiations may not subsequently find themselves liable. To allay such fears, the agencies have stated that "businesses, when applying guidance put forth by the enforcement agencies, should have every confidence that past guidance will be adapted to new developments in a flexible and efficient way."[238] Moreover, even when administrations change, the agencies rarely reject a recently announced approach wholesale.[239] However, such liability in fact may arise if either (1) the agencies apply the rule of reason to conduct previously considered per se illegal but the courts fail to follow, or (2) the agencies find previously permissible conduct unreasonable.

While the agencies have indicated that the rule of reason generally should apply to ex ante licensing negotiations, the courts may fail to follow, at least immediately, and find SSOs liable for conduct taken in reliance upon the agencies' current statements. Historically, this has occurred in other contexts; for example, the Supreme Court's eleven-year delay in holding that the possession of IP in a tying product is not per se illegal.[240] While the

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236. *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm (indicating that the FTC and the DOJ are considering updating the 1992 Merger Guidelines in part "to take into account legal and economic developments that have occurred"). The agencies' approach toward tying provides a good example: in 1972, the Deputy Assistant Attorney General for Antitrust stated that tying the sale of patented goods to unpatented materials was prohibited; however, in the IP Guidelines, the agencies reversed course by presuming that a patent did not necessarily confer market power upon its owner. Michael G. Egge & Nathan D. Grow, *An Introduction to the Interface Between Antitrust and Intellectual Property*, *in* UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 2005, at 613, 616–17, 620 (2005).

237. *See* Press Release, *supra* note 236 ("Merger Guidelines were first adopted in 1968 by DOJ. They were substantially revised in 1982 and again in 1992, when they became the Horizontal Merger Guidelines, jointly issued by the FTC and DOJ. The section on efficiencies was revised in 1997.").

238. Masoudi, Jan. 18 Speech, *supra* note 104, at 16.

239. I have found only two examples of a subsequent administration explicitly rejecting a former administration's antitrust guidelines: (1) Assistant Attorney General Anne Bingaman's 1993 rescission of the Reagan-era 1985 Vertical Restraint Guidelines, *see* Alexis, Sauro & Ahluwalia, *supra* note 54, at 55, and (2) Assistant Attorney General Christine Varney's 2009 rescission of the Bush-era Section 2 Report, *see* Russell, *supra* note 50, at 640. In both instances, however, it is unlikely that many firms were adversely affected. For example, when the 1985 Vertical Restraint Guidelines were rescinded, the announcement was displayed in the Antitrust Division's Manual on its website, providing firms notice. Alexis, Sauro & Ahluwalia, *supra* note 54, at 55. The Section 2 Report was rejected only eight months after it was adopted, limiting the number of firms that had relied upon it. *See supra* note 185. Moreover, the circumstances surrounding its adoption also likely limited reliance: while the FTC and the DOJ had conducted joint hearings in anticipation of the report, the FTC refused to endorse it and issued a critique joined by three of the four FTC commissioners. Chris Bernard, Note, *Shifting and Shrinking Common Ground: Recalibrating the Federal Trade Commission's and Department of Justice's Enforcement Powers of Single-Firm Monopoly Conduct*, 34 DEL. J. CORP. L. 581, 582, 586–87 (2009).

240. *See supra* notes 176–79 and accompanying text.

agencies cannot require the courts' compliance, they likely can expedite it by providing clear legal guidance, as discussed above.[241]

Second, if the agencies find previously permissible conduct unreasonable, SSOs that relied upon their previous statements may find themselves facing liability. As long as the agencies' change in approach is clear and as long as it is not retroactive, SSOs likely have little to fear. However, a real possibility exists that the modification will not be clear, given the criticisms of the agencies' current statements waged here and the agencies' inability to explain their new approach toward mergers in *Baker Hughes* and *Syufy*.[242] Here, the courts have a real role to play by not finding liability and forcing the agencies to better explain their revised analysis. In the aftermath of *Baker Hughes* and *Syufy*, the agencies drafted the 1992 Merger Guidelines, successfully articulated the change in their analysis, and stopped habitually losing merger challenges on grounds of ease of entry.[243]

V. Conclusion

In stating that the rule of reason typically would be applied and sanctioning proposed patent policies such as those considered by VITA and IEEE, the DOJ and the FTC signaled a change in their approach toward ex ante licensing negotiations. To those SSOs that would like to engage in such negotiations to mitigate holdup, these statements are welcome. However, because SSOs historically have feared antitrust liability arising from such conduct—going so far as to outright forbid it—the agencies need to provide clear legal guidance as to which types of negotiations will and will not warrant their attention. In the statements issued in 2006 and 2007, however, the agencies failed to do so sufficiently. As a result and without more, it is unlikely that their policy will be implemented and that they, SSOs, and academics will know whether ex ante licensing negotiations are in fact desirable.

To remedy the situation, the agencies must clarify both what constitutes permissible conduct in joint ex ante licensing negotiations occurring within the SSO and, assuming the rule of reason is applied to such negotiations, how the agencies will conduct their analysis when technology markets are implicated. And while the approach of the agencies likely will evolve over time as they gain more experience and as economic thinking changes, historically, the agencies have proven capable of updating their guidance through reports and commentaries. Nonetheless, SSOs that engage in ex ante licensing negotiations today might find themselves liable tomorrow under the agencies' updated approach. To reduce the likelihood of this occurring, both

241. *See supra* Part IV.

242. *See supra* notes 166–71 and accompanying text.

243. *See supra* notes 172–74 and accompanying text.

the agencies, by providing clear legal guidance to the courts, and the courts, by forcing the agencies to effectively articulate their modified approach, have a role to play.

—Lauren E. Barrows

Quality Care for Queer Nursing Home Residents: The Prospect of Reforming the Nursing Home Reform Act*

I. Introduction

The U.S. population is steadily aging: while currently comprising only 12% of the population, adults over the age of sixty-five will likely grow to comprise one-fifth of the populace in the next twenty-five years.[1] In about forty years, this group will consist of 25% of the population.[2] One aspect of individuals that tends to be thought about and discussed less as they age is their sexual orientation and gender identity. It is thus unsurprising that some dub the significant portion of this aging population identifying as gay, lesbian, bisexual, transgender, queer, or of a questioning sexuality[3] as "the hidden population."[4] Presently, as many as three million people ages sixty-five and older identify as queer,[5] a number that "could grow to [four] million by 2030."[6] As the average age of the population increases, so will the

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1. Saul Friedman, *Gray Matters: AARP Flexes Its Muscles on Medicare, Support for Gays*, NEWSDAY, Aug. 16, 2008, 2008 WLNR 15417037.

2. *See* Julia Medew, *Home Comforts, When Nursing a Fear of Aged Care*, AGE (Sept. 17, 2008), http://www.theage.com.au/national/home-comforts-when-nursing-a-fear-of-aged-care-20080916-4hxv.html (citing a report on the expected population over the age of 65 in Australia by 2050).

3. *See id.* ("[T]he proportion of the general population [in Australia] that is not exclusively heterosexual is thought to be between 8 and 11%."). This Note uses the term "queer" to refer generally to gay, lesbian, bisexual, and transgender individuals.

4. Joy Silver, the president and CEO of RainbowVission Properties assisted living community in Santa Fe, NM lamented,

> While there are other assisted living communities that cater to the LGBT population, it is difficult to start these programs . . . . The current lack of data on LGBT populations makes it hard to convince a lender that might fund a building project that LGBT services are needed in an area. "We're still the hidden population . . . ."

Mary Ellen Schneider, *Nursing Homes Address LGBT Aging Issues*, INTERNAL MED. NEWS, Sept. 15, 2008, 2008 WLNR 25838589.

5. Linell Smith, *One More Battle: Gay Boomers, Who Fought Discrimination and Confronted AIDS, Face a New Fight as They Grow Old*, BALT. SUN, Apr. 1, 2007, 2007 WLNR 6377171.

6. Wyatt Buchanan, *Graying Gays Find Helping Hands: As Population Ages, Service Agencies Struggle to Address Community's Social, Financial, Medical Concerns*, S.F. CHRONICLE, Oct. 19, 2006, 2006 WLNR 18127515. About three-and-a-half million people over the age of fifty identify as either gay or lesbian. Saul Friedman, *Gray Matters: A Community for Aging Suburban Gays*, NEWSDAY (Feb. 1, 2008), http://www.newsday.com/columnists/other-columnists/gray-matters-1.545670. Over two million people over fifty-five identify as gay, lesbian or bisexual. Jane Gross, *Aging and Gay, and Facing Prejudice in Twilight*, N.Y. TIMES, Oct. 9, 2007, at A1.

number of queer elders[7] in nursing homes throughout the country—a situation for which many nursing homes in the country are largely unprepared.[8]

At least two unique aspects of queer elders' lives make them more likely to move into nursing homes than the general population. First, they often lack immediate family members to move in with when they become unable to live alone.[9] Second, unlike opposite-sex couples, same-sex partners are frequently ineligible for tax and other benefits; this can limit their options for dependent living.[10] The impending demographical changes thus necessitate nursing-care facilities whose staffs and nursing aides are more informed of queer health and social issues.[11] While nursing aides' primary function is to deliver medical care to nursing home residents,[12] aides frequently provide the only sustained personal contact with nursing home residents.[13] Thus, the key psychosocial roles they perform cannot be understated. Nursing aides' intolerance and ignorance contribute to unwelcoming nursing home environments that render these homes significantly less capable of providing the continuous medical and psychosocial care that their queer patients need.[14]

The discrimination against queer elderly individuals in nursing homes is receiving more and more national attention. In 2007 and 2008, investigative journalists exposed the pervasive abuse of queer elders in nursing homes by conducting a variety of interviews with queer nursing home residents.[15]

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7. This Note uses the term "elder" to refer to older individuals, not necessarily over the age of sixty-five and particularly those needing the assisted medical care of a nursing home. This term is often used in the developed world to mean someone who is over the "chronological age of 65 years." *Definition of an Older or Elderly Person: Proposed Working Definition of an Older Person in Africa for the MDS Project*, WORLD HEALTH ORGANIZATION, http://www.who.int/healthinfo/survey/ageingdefnolder/en/index.html.

8. *See* Tom Watkins, *Aging Issues Can Be Tougher on Gays*, CNN.COM (Mar. 17, 2010), http://articles.cnn.com/2010-03-17/living/gays.aging.problems_1_couples-heterosexual-peers-social-security?_s=PM:LIVING (detailing the various problems the aging gay population will face).

9. Friedman, *supra* note 1.

10. *See* Sean Cahill, *The Coming GLBT Senior Boom*, GAY & LESBIAN REV. (Jan.–Feb. 2007), http://www.glreview.com/issues/14.1/14.1-cahill.php (noting that same-sex couples' pensions benefits are taxed at the maximum withholding rate and that same-sex couples are not eligible for the same Family and Medical Leave Act benefits as married couples).

11. This Note uses the term "nursing aide" to refer to nursing home staff that provide residents with their primary day-to-day care. Nursing aides are also known as "nurse aides, nursing assistants, certified nursing assistants, geriatric aides, unlicensed assistive personnel, orderlies, or hospital attendants." U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 2010–11 EDITION (2009) [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK], *available at* http://www.bls.gov/oco/ocos327.htm.

12. *Id.*

13. *See* David Crary, *Gay Elders' Distinctive Challenges Get Closer Look*, USA TODAY (Oct. 5, 2008), http://www.usatoday.com/news/nation/2008-10-04-2630414941_x.htm (indicating that many nursing home residents frequently only interact with nursing home aides and staff).

14. *See infra* Part II.

15. *See, e.g.*, *supra* notes 1–2, 5–6.

Since then, the news coverage and reports of neglect, abuse, and otherwise discriminatory actions by nursing home staffs have only been increasing.[16] Though the federal government passed on an opportunity to increase the protection of queer elderly individuals in nursing homes in its recent groundbreaking healthcare reform legislation,[17] the U.S. Department of Housing and Urban Development (HUD) has recently recognized the pervasive discrimination against queer elderly individuals in nursing homes.[18] In 2009, HUD announced a plan to conduct a national survey of housing discrimination against elderly individuals in nursing homes and discrimination against queer individuals in the broader housing context.[19]

This Note argues that because nursing homes across the country are ill-prepared to offer effective care to the influx of queer elderly patients they will see in the near future, the federal government should increase its protections pertaining to the sexual orientation and gender identity of nursing home residents under the Nursing Home Reform Act (NHRA). Part II provides an overview of the problems associated with the transition of elderly individuals from independent living to nursing home living and highlights the distinctive troubles queer elders face when making this move. Discrimination against queer residents in the form of abuse, neglect, and stigmatization—combined with their perceived need to conceal their sexual orientation or gender identity—significantly contributes to the deterioration of patients' physical and mental health and renders ineffective the care nursing aides provide.

Part III reviews pertinent provisions of the NHRA that allocate federal funds to incentivize improvements in the quality of patient care. The NHRA heavily regulates nursing homes receiving federal funds by establishing a residents' bill of rights and requiring nursing homes to maximize the welfare of each patient.[20] It delegates the authority to set forth standards for training and certification of nursing aides that work in nursing homes[21] and the discretion to issue a variety of penalties for noncompliance to the Secretary of the Department of Health and Human Services.[22] Parts IV and V contend and conclude, respectively, that adding a statutory right of nondiscrimination based on sexual orientation and gender identity to the residents' bill of rights;

16. *See* Watkins, *supra* note 8 (noting the recent rise in awareness of quality-of-life issues for LGBT elders).

17. *See generally* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2010) (as introduced in the House) (failing to provide for any protections for queer elderly individuals in the healthcare context).

18. *See Administration on Aging Issues Grants Notice to Provide Guidance to Administration on Aging, Aging Network on Provision of Supports, Services to Older Adults*, U.S. FED. NEWS, Oct. 30, 2009, 2009 WLNR 21673601 (noting that "[d]iscrimination against LGBT individuals by nursing homes . . . has been reported across the country").

19. *Id.*

20. 42 U.S.C. § 1396r(b)(1)(A), (c) (2006).

21. *Id.* § 1396r(f)(2)(A)(i).

22. *Id.* § 1396r(h)(2)(F), (A)(i)–(iii).

requiring nursing aides to undergo sensitivity training; and, most importantly, diminishing the discretion of the Secretary to decide whether or not to issue penalties to nursing homes in violation of the NHRA's proscriptions, would effectively facilitate better relationships between queer nursing home patients and their nursing aides, and substantially improve the quality of care these residents would receive.

II. Queer Elders Face Distinctive Physical & Mental Health Issues in Nursing Homes

Queer elders moving into nursing homes must cope with additional facets of nursing home life that heterosexual elders generally need not.[23] Thus, they suffer age-related physical- and mental-health issues more acutely than their heterosexual counterparts.[24] For many queer elders, moving to a nursing home entails going back into the closet after many years of being out;[25] being stigmatized by their nursing aides' uninformed actions; and experiencing overt harassment, social isolation, and neglect from their nursing aides or nursing home staff—all of which have the potential to adversely affect patients' health.[26]

Of course, moving into a nursing home can be physically taxing and psychologically traumatic for anyone involved in the process. The decision to make this move is normally rushed due to a sudden, crippling illness or a recent death of a family member.[27] This emotionally charged and often hastily made determination[28] frequently leaves those about to enter nursing homes fearing and resenting the abrupt changes and leaves their families with feelings of guilt.[29] At least three factors further constrain the decision making of families and individuals involved in choosing an appropriate home. The costs of housing oneself or a family member in a nursing home is currently quite colossal and is also increasing.[30] Thus, finding methods to

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23. Gross, *supra* note 6.

24. Buchanan, *supra* note 6.

25. Matt Sedensky, *A Little Late, but Out and Proud; Seniors' Proclamations Are Straining Some Lifelong Relationships*, WASH. POST, Mar. 28, 2010, at A02 (explaining that many individuals are coming out at a younger age than in the past).

26. *Id.*

27. AM. HEALTH CARE ASS'N, NAT'L CTR. FOR ASSISTED LIVING, A GUIDE FOR FAMILIES: MAKING THE TRANSITION TO NURSING FACILITY LIFE 1, *available at* http://www.longtermcareliving.com/pdf/making_transition.pdf [hereinafter A GUIDE FOR FAMILIES].

28. Jason Young & David Marks, *The Nursing Home Conundrum: Advising the Client on Nursing Home Selection, Resident Rights and Actionable Neglect*, HOUS. LAW. (May/June 2006), http://thehoustonlawyer.com/aa_may06/page48.htm.

29. A GUIDE FOR FAMILIES, *supra* note 27, at 1, 4.

30. *See* METLIFE MATURE MARKET INST., THE METLIFE MARKET SURVEY OF NURSING HOME & HOME CARE COSTS 8 (2005), *available at* http://www.geckosystems.com/downloads/NHHCcosts.pdf ("The 2005 average daily rate for a private room in a nursing home is $203 ($74,095 annually), an $11 or 5.7% increase over the 2004 rate of $192."); Ellen O'Brien, *Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?*, GEO. U. LONG-TERM CARE FIN. PROJECT 1 (May 2005), *available at*

finance the unexpected costs of paying for care is one particular constraint on finding a suitable home, especially when "[s]ome nursing homes are private pay and do not accept Medicare or Medicaid."[31] A second limit on this choice is matching the particular medical needs of the person requiring assistance with the capability of nursing homes to provide for those needs.[32] Finally, finding a home within the right price range is complicated by geographical considerations; families frequently want their relatives moving to nursing homes "within driving and visiting distance."[33]

Adjusting to the new living situation may be just as difficult as the process of moving into the nursing home. Beyond becoming accustomed to a nursing facility and different neighbors, new nursing home residents mourn the recent loss of their independence, loved ones, personal control, identity,[34] "home, health, belongings and usual activities."[35] Not uncommonly, anger accompanies this mourning[36] and may further result in "depression, anxiety, dementia, and delirium."[37] Ultimately, the total adjustment period may range from three to six months.[38] But in addition to the financial cost, mourning, and anger generally associated with making this move, queer elders needing the regular care of nursing aides must fight additional battles.

A. Abuse, Neglect, and Stigmatization by Nursing Aides

Prior to the 1990s, abuse and neglect of elders were rampant in nursing homes across the country.[39] Collaborative advocacy efforts led by "advocates, consumers, provider associations, and health care professionals"

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http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf (demonstrating graphically that out-of-pocket expenses for nursing homes constitute about 28% of the sources of funding).

31. Young & Marks, *supra* note 28.

32. *Id.*

33. *Id.*

34. *See* BETSY VOURLEKIS ET AL., INST. FOR GERIATRIC SOC. WORK, BLUEPRINT FOR MEASURING SOCIAL WORK'S CONTRIBUTION TO PSYCHOSOCIAL CARE IN NURSING HOMES: RESULTS OF A NATIONAL CONFERENCE 2 (2005), *available at* http://www.charityadvantage.com/iaswr/FinallGSWIASWRBrief33105.pdf (noting that the "range of issues" addressed by social workers in nursing homes include some with "obvious social dimensions, including loss of relationships, loss of personal control and identity, and adjustment to the facility").

35. LAUREN UNGAR, BLUE CROSS BLUE SHIELD BLUE CARE NETWORK OF MICH., HELPING HANDBOOKS: MENTAL HEALTH AND NURSING HOME RESIDENTS 2, *available at* http://www.iog.wayne.edu/pdfs/mental_health.pdf.

36. *See* PAC. NW. EXTENSION, MAKING DECISIONS ABOUT A NURSING HOME 3 (2003), *available at* http://extension.oregonstate.edu/catalog/pdf/pnw/pnw563.pdf (noting that it is essential to consult the person for whom care is needed before deciding on a nursing home, despite the fact that the person "may not understand and may be unhappy").

37. VOURLEKIS ET AL., *supra* note 34, at 2.

38. PAC. NW. EXTENSION, *supra* note 36, at 21.

39. *See* Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 655 & n.8 (2000) (noting that a 1990 Report by the House Subcommittee on Health and Long-Term Care estimated that between one and two million incidents of elderly abuse occur every year, affecting about 5% of the elderly population).

eventually helped to shed light on this systematic poor treatment.[40] One particular study from the late 1980s, which reported the widespread neglect and abuse of elders in nursing homes in the United States, prompted the consideration and passage of the corrective NHRA in 1987.[41]

Although the NHRA has had some success in improving conditions for nursing homes residents,[42] the abuse, neglect, and stigmatization of queer nursing home patients demonstrate that there is much room for improvement.

Nursing homes' nursing aides have ridiculed and harassed queer patients for expressing their identities,[43] and reports of this mistreatment are on the rise.[44] For example, some nursing aides have neglected their personal care responsibilities—such as refusing to give patients sponge baths—because they were gay or lesbian.[45] Nursing aides' intolerance of queer patients may therefore denigrate those patients and interfere with the nursing aides' ability to provide quality care.

Nursing aides' lack of training and awareness of queer health and social issues might also stigmatize nursing home residents, particularly with regard to the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS) and transgender patients. Nursing aides have presumed that their gay patients have HIV/AIDS and changed their behaviors in a medically unjustified way—wearing gloves when opening doors and changing the bedding, for example—when the risk of HIV/AIDS exposure would be statistically improbable.[46] Aides that are not trained in dealing with transgender residents may also run the risk of inappropriate behavior when providing care to those patients.[47] Stigmatizing gay and transgender nursing

40. HOLLIS TURNHAM, FEDERAL NURSING HOME REFORM ACT FROM THE OMNIBUS BUDGET RECONCILIATION ACT OF 1987 OR SIMPLY OBRA '87 SUMMARY 2, *available at* http://www.ncmust.com/doclib/OBRA87summary.pdf.

41. *See generally* INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES (1986); TURNHAM, *supra* note 40, at 2–3 (noting that the 1986 study prompted the National Citizen's Coalition for Nursing Home Reform to organize the "Campaign for Quality Care" to ensure the recommendations of the Institute of Medicine would be implemented); Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act: Fact Sheet*, AARP (2001), http://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html (noting that many of the reforms proposed in the 1986 Institute of Medicine Study, which was conducted at the request of Congress, were later adopted in the NHRA).

42. *See* Bernadette Wright, *Federal and State Enforcement of the 1987 Nursing Home Reform Act*, AARP (Feb. 2001), http://www.aarp.org/home-garden/livable-communities/info-2001/federal_and_state_enforcement_of_the_1987_nursing_home_reform_act.html (noting that, although inadequate implementation limited the effectiveness of the NHRA, the 1998 Nursing Home Initiative, introduced by the Clinton Administration to address the shortcomings of the NHRA, did lead to some improvements).

43. Medew, *supra* note 2.

44. Gross, *supra* note 6.

45. Loree Cook-Daniels, *Lesbian, Gay Male, Bisexual and Transgendered Elders: Elder Abuse and Neglect Issues*, SURVIVOR PROJECT, http://www.survivorproject.org/elderabuse.html.

46. Gross, *supra* note 6.

47. *See* G. Allen Johnson, *"Ten More Good Years" Probes LGBT Aging Issues*, S.F. CHRONICLE (June 19, 2008), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/19/

home patients may thereby diminish the quality of nursing home care by creating a relationship of distrust and resentment.

B. Retreating Back into the Closet

Another unique aspect of moving into a nursing home that openly queer patients must confront is confronting the decision of whether to come out to their nursing aides and nursing home staff. The choice to come out is one that initially arises whenever a queer person meets someone for the first time, and continually remains so long as the queer person opts for nondisclosure.[48] This choice involves "weigh[ing] the benefits and risks of being open,"[49] a process influenced by the perceived likelihood that the other person would be either accepting or hostile.[50] Thus, queer elders moving into nursing homes must generally size up nursing aides and other staff in making the choice of coming out to them.[51]

Because the decision to choose a nursing home is frequently rushed,[52] it is not often feasible for families to filter through the various alternatives to find a home that has a reputation for being queer friendly.[53] This aspect of a nursing home's reputation may not even factor in when families are heavily involved in the decision-making process, especially when they do not understand or accept the sexuality or gender identity of the family member moving into the home.[54] And even when the open-mindedness of the nursing home is factored into the decision, the cost, services, and location of the nursing home may trump reputational considerations.[55] It is therefore not uncommon for those moving into nursing homes to bear the burden of closed-minded nursing aides and other nursing home staff.

NS0U118OPK.DTL (noting that some transgender elders have had to switch medical professionals because the medical staff was not properly trained).

48. *See Sexual Identity–Definitions and Terminology*, WELLINGTON-DUFFERIN-GUELPH PUBLIC HEALTH, http://www.wdghu.org/printerFriendly.cfm?id=838 (defining "coming out" as "[w]hen a gay man or lesbian shares his/her sexual orientation with others"). However, this definition fails to include those who would identify as "bisexual" or those who have variant gender identities. Moreover, the choice to come out may be deprived when the other person finds out accidentally or is told by someone else.

49. HUMAN RIGHTS CAMPAIGN, A RESOURCE GUIDE TO COMING OUT 5 [hereinafter A RESOURCE GUIDE TO COMING OUT], *available at* http://www.hrc.org/documents/resourceguide_co.pdf.

50. *Id.*

51. *See* Gross, *supra* note 6 ("'You size people up,' Dr. Perry said. 'You know the activities person is a lesbian; that's a quick read.'").

52. Young & Marks, *supra* note 28.

53. *See* Gross, *supra* note 6 (describing facilities in Boston, New York, Chicago, and Atlanta, that cater to or are designed for older LGBT residents).

54. *See* A RESOURCE GUIDE TO COMING OUT, *supra* note 49, at 5 (noting the risk that family members and friends of LGBT individuals may not be understanding).

55. *See* A GUIDE FOR FAMILIES, *supra* note 27, at 2–3 (listing various factors that should be considered when deciding on a facility).

Several other dynamics unique to nursing homes weigh against queer elders being out to their nursing aides. Many residents presume nursing homes and their staffs to be generally less tolerant and accepting of queer residents.[56] One study reported that "less than half [of those surveyed] expressed strong confidence that health care professionals will treat them 'with dignity and respect.'"[57] This presumption results from learning of reports of discriminatory incidents against queer residents;[58] having observed the poor treatment of their partners or friends at nursing homes;[59] the lack of neutral language in interactions with nursing homes' nursing aides and staff or in their materials and publications;[60] and the actual and perceived "problems in the workers' attitudes towards gay and lesbian residents."[61]

Moreover, many older, queer members of society have spent much of their lives in the closet; concealing their identity may thus be a common or default reaction to an unfamiliar living environment.[62] The unwelcoming and hostile attitudes toward queer residents held by the other residents might also deter some from coming out to their nursing aides because coming out to one aide might entail being out among other residents at the home.[63] Finally, coming out to a nursing aide can heighten the vulnerability of an elderly person in a nursing home—incorrectly sizing up a nursing aide or nursing home staff member can have significant consequences. Intolerant or hostile nursing aides have used residents' sexual orientations and gender identities as tools of psychological control over their residents by threatening to out them to the others in the nursing home.[64]

Those who decide against coming out to their nursing aides must not only adjust to the new life at the nursing home but must also modify their usual behaviors and mannerisms after decades of being out of the closet.[65] The necessary changes in behavior are noteworthy because they restrict residents' activities at their new home—a place where they must spend most, if not all, of their time—when they have not previously needed to hide their identity.[66] Aside from intentionally avoiding some behaviors and topics of

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56. Smith, *supra* note 5.

57. *Id.*

58. *See* Cahill, *supra* note 10 (noting the various reports about poor treatment of queer individuals in nursing homes).

59. Gross, *supra* note 6.

60. Schneider, *supra* note 4.

61. Saul Friedman, *Gray Matters: Time to Recognize Gay Seniors*, NEWSDAY (June 2, 2006), http://www.newsday.com/columnists/other-columnists/gray-matters-1.732945.

62. Gross, *supra* note 6.

63. *See, e.g.*, *id.* (reporting an incident of "[a] lesbian checking into a double room at a Chicago rehabilitation center [who] was greeted by a roommate yelling, 'Get the man out of here!'").

64. *See* Cook-Daniels, *supra* note 45 (reporting an incident of a nursing aide threatening to out a patient if the patient reported the aide's neglect).

65. Medew, *supra* note 2.

66. *See* Buchanan, *supra* note 6 ("As gay, lesbian, bisexual and transgender people age, they face most of the same problems anyone does, but often more acutely. Along with isolation, unsafe

conversation, queer residents deciding they should not come out to their nursing aides must constantly be mindful that they do not accidentally say or do something that might give away their sexual orientation or gender identity. For instance, residents may have to hide or dispose of their queer-themed magazines, artwork, and books,[67] and avoid watching the movies they wish to see.[68] They must also evade discussing with their nursing aides certain aspects about their lives and other topics of interest.[69] Moreover, partnered residents may also have to introduce their significant others as members of their immediate family.[70]

Nursing aides provide a significant amount of care to nursing home residents[71] and may provide a patient's only sustained human contact.[72] The nursing aides'

> [s]pecific tasks vary, with aides handling many aspects of a patient's care. They often help patients to eat, dress, and bathe. They also answer calls for help, deliver messages, serve meals, make beds, and tidy up rooms. [Nursing] aides sometimes are responsible for taking a patient's temperature, pulse rate, respiration rate, or blood pressure. They also may help provide care to patients by helping them get [into and] out of bed and walk . . . or provid[e] skin care. Some aides help . . . by setting up equipment, storing and moving supplies, and assisting with some procedures. Aides also observe patients' physical, mental, and emotional conditions . . . .[73]

Patients that choose to disclose their sexual orientation or gender identity to their nursing aides facilitate "stronger, richer, more fulfilling and authentic" relationships.[74] Conversely, in the context of old age and infirmity, fighting the strong force that leads people to want to be out and honest about their sexual orientation or gender identity may grossly interfere with the effectiveness of care nursing aides provide by attaching a host of

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housing and financial insecurity, their problems include possible prejudice from doctors and other caregivers, for example.").

67. *See* Gross, *supra* note 6 ("The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives . . . . No pictures or gay-themed books are left around."); Medew, *supra* note 2 ("Another man, who told nursing home staff he was married to a woman, said he could not keep gay magazines in his room because it would 'out' him.").

68. *See* Smith, *supra* note 5 ("We [in the lesbian and gay community] wonder if we could see the kind of movies we want to see in a retirement home . . . .").

69. *Id.*

70. *See* Gross, *supra* note 6 ("The most common reaction, in a generation accustomed to being in the closet, is a retreat back to the invisibility that was necessary for most of their lives, when homosexuality was considered both a crime and a mental illness. A partner is identified as a brother.").

71. *See* OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 11 (detailing the job requirements of nursing aides).

72. Crary, *supra* note 13.

73. OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 11.

74. A RESOURCE GUIDE TO COMING OUT, *supra* note 49, at 4.

mental-health problems to the residents' poor physical-health conditions.[75] Having to hide their sexual orientations or gender identities after years of being out of the closet can also result in nursing home patients sliding into depression.[76] "[F]ailure to thrive and even premature death" might accompany their depression "at a time when [their] entire identit[ies are already being] threatened."[77] In extreme cases, this depression can result in patients taking their own lives.[78] In light of the extent to which nursing aides interact with their patients—as well as the physical and mental-health issues associated with the dread of being mistreated due to coming out[79]—the government should explore options to improve medical and psychosocial nursing home care to help queer patients feel more comfortable with being out.

III. The Nursing Home Reform Act

In response to the widespread abuses and neglect in nursing homes throughout the United States, Congress passed the NHRA[80] as part of the Omnibus Budget Reconciliation Act of 1987.[81] To beef up these efforts, the Clinton Administration announced the Nursing Home Initiative (NHI) in 1998.[82] While the provisions of the NHRA and NHI mandated that nursing homes receiving federal funding provide the highest quality of care to their patients, these policies failed to include any stipulation for specialized training in caring for queer patients.[83] Despite the general efforts to improve the quality of care in nursing homes, the overall approach of the NHRA is ineffective at reaching neglect, abuse, stigmatization, or elders' concerns about coming out at nursing homes.[84] The Act also fails to require that

75. *See id.* at 3 (noting that people may feel "scared, worried or confused when facing these truths").

76. *See* Medew, *supra* note 2 ("Interviews with 19 people who use various services and facilities revealed people sinking into depression because they felt compelled to hide their sexuality after years of being openly gay, her report says.").

77. Gross, *supra* note 6.

78. *Id.*

79. *See id.* ("Some have seen their partners and friends insulted or isolated. Others live in fear of the day when they are dependent on strangers for the most personal care. That dread alone can be damaging, physically and emotionally, say geriatric doctors, psychiatrists and social workers.").

80. *See* TURNHAM, *supra* note 40, at 2 (explaining that the NHRA "became law with growing public concern with the poor quality of care in too many nursing homes").

81. Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, §§ 4201–4218, 101 Stat. 1330-160 to 1330-220 (codified as amended in scattered sections of 42 U.S.C. (2006)). For a discussion of the congressional purposes behind the NHRA, see Michael Stockham, Note, *"This Might Sting a Bit": Policing Skin Care in Nursing Facilities by Litigating Fraud*, 87 CORNELL L. REV. 1041, 1051–52 (2002).

82. 106 CONG. REC. 21,274 (2000) (statement of Sen. Grassley); Wright, *supra* note 42.

83. *See generally* 42 U.S.C. § 1396r.

84. *See supra* Part II.

nursing homes benefiting from federal funds take any proactive steps in reducing queer residents' distinct hardships.[85]

The purpose of the NHRA is to ensure that nursing homes operate in a manner that promotes the quality of life of all residents in the facility,[86] which includes offering "services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of *each* resident."[87] To facilitate these ends, the NHRA appropriates funds to be allocated to the states[88] whose participating nursing homes must follow the Act's regulations.[89] As part of the effort to promote resident well-being,[90] nursing homes participating in the program must assess each resident's medical needs[91] and capacity to participate in its services.[92] Nursing homes are also required to provide a variety of specific services by qualified persons,[93] such as nursing and rehabilitative services[94] and social,[95] pharmaceutical,[96] dietary,[97] and dental services.[98] They must further offer "an on-going program, directed by a qualified professional, of activities designed to meet the interests and the physical, mental, and psychosocial well-being of *each* resident."[99] Lastly, nursing homes may not employ full-time nursing aides for more than four months unless those aides complete "training and competency evaluation" programs[100] and are actually "competent to provide nursing or nursing-related services."[101]

The NHRA also includes a residents' bill of rights that requires nursing homes to recognize their patients' legal interests in: choosing their personal nursing aides;[102] being free from "physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience";[103] maintaining privacy

85. *See generally* § 1396r (enumerating requirements for nursing facilities but failing to include any queer-specific provisions).

86. *Id.* § 1396r(b)(1)(A).

87. *Id.* § 1396r(b)(2) (emphasis added).

88. *Id.* § 1396r(b).

89. *See generally id.* § 1396r (providing federal guidelines that nursing homes must follow while requiring state programs to establish additional guidelines).

90. *Id.* § 1396r(b)(3)(D).

91. *Id.* § 1396r(b)(3)(A)(iv).

92. *Id.* § 1396r(b)(3)(A)(i).

93. *Id.* § 1396r(b)(4)(B).

94. *Id.* § 1396r(b)(4)(A)(i).

95. *Id.* § 1396r(b)(4)(A)(ii).

96. *Id.* § 1396r(b)(4)(A)(iii).

97. *Id.* § 1396r(b)(4)(A)(iv).

98. *Id.* § 1396r(b)(4)(A)(vi).

99. *Id.* § 1396r(b)(4)(A)(v) (emphasis added).

100. *Id.* § 1396r(b)(5)(A)(i)(I).

101. *Id.* § 1396r(b)(5)(A)(i)(II).

102. *Id.* § 1396r(c)(1)(A)(i).

103. *Id.* § 1396r(c)(1)(A)(ii).

and confidentiality of medical records;[104] having their needs accommodated;[105] and objecting to certain transfers within the nursing home.[106] Nursing home patients also have the right to be notified in writing of these rights under the NHRA.[107] The Act further prohibits the discharge or transfer of patients from their current facility to another except under a few, specified circumstances, including the patient's inability to pay the nursing home.[108] Finally, residents have the right to access a representative of the Secretary of Health and Human Services or an ombudsman in the case of a violation of these rights.[109]

The NHRA employs both carrots and sticks to influence nursing homes to comply with its provisions and the rules promulgated by the Secretary and states pursuant to the Act. States may implement a reward or incentive program that recognizes and gives a monetary award to the nursing home giving the highest quality of care to its residents.[110] From funding allocated by Congress, the NHRA fully compensates states for these reward programs.[111] For noncompliant nursing homes, on the other hand, states may impose a range of remedies, including a denial of NHRA payments,[112] the appointment of a special management team to oversee the nursing home until the deficiencies are corrected,[113] and civil penalties.[114] The funds collected from the imposed civil penalties must be directed toward improving the quality of nursing home care within the state.[115] The Secretary may also deny payments to states for noncompliant nursing facilities,[116] appoint temporary management to ensure that violations in such nursing homes cease,[117] and impose a civil remedy of up to "$10,000 for each day of noncompliance."[118]

Despite the NHRA's increased protections of the elderly in nursing homes, the Act left much room for improvement.[119] The Clinton Administration launched the NHI in 1998 to strengthen the enforcement of

104. *Id.* § 1396r(c)(1)(A)(iii)–(iv).
105. *Id.* § 1396r(c)(1)(A)(v).
106. *Id.* § 1396r(c)(1)(A)(x).
107. *Id.* § 1396r(c)(1)(B).
108. *Id.* § 1396r(c)(2)(A).
109. *Id.* § 1396r(c)(3)(A).
110. *Id.* § 1396r(h)(2)(F).
111. *Id.*
112. *Id.* § 1396r(h)(2)(A)(i).
113. *Id.* § 1396r(h)(2)(A)(iii).
114. *Id.* § 1396r(h)(2)(A)(ii).
115. *Id.*
116. *Id.* § 1396r(h)(3)(C)(i).
117. *Id.* § 1396r(h)(3)(C)(iii).
118. *Id.* § 1396r(h)(3)(C)(ii).
119. *Forum: Nursing Home Residents: Short-changed by Staff Shortages: Hearing Before the S. Special Comm. on Aging*, 106th Cong. 118 (1999) (statement of Helene Fredeking, Senior Advisor, Division of Outcomes and Improvement, Center for Medicaid and State Operations, Health Care Financing Administration).

the NHRA.[120] It aimed to improve several nursing home deficiencies—for example, by establishing protocols for surveys relating to patients' "hydration, nutrition, and pressure sores."[121] It also mandated that states investigate claims of abuse within ten days and identified specific facilities for increased monitoring.[122] Finally, the NHI encouraged states to impose stricter sanctions and prohibited them from lifting these sanctions until the nursing homes had corrected their deficiencies, as verified by a personal visit from state officials.[123] To boost the effectiveness of these changes, Congress has consistently increased Medicare and Medicaid funding for survey and certification processes.[124]

The NHRA and NHI have undoubtedly improved the overall quality of nursing home care throughout the United States.[125] Notwithstanding these efforts, the federal and state governments are not subjecting the many nursing homes providing substandard care to harsh enough penalties to deter violations.[126] After having been found to violate the NHRA, many nursing homes tend to temporarily improve the quality of their care and then slide back into their habitual poor care of their patients.[127] This problem hits queer nursing home residents particularly hard.[128] Because they comprise a smaller portion of the population,[129] their unique problems—specifically those related to the forces pushing many back into the closet and the stigmatization of queer residents—are much less visible than, yet just as important as, the more evident problems of abuse at nursing homes.

In addition to its substantive shortcomings, the NHRA lacks an effective mechanism to enforce its mandates, which arguably already address many of the concerns of queer elders in nursing homes.[130] Currently, the NHRA relies substantially on public enforcement—via the states or the Secretary—to impose penalties upon noncompliant nursing homes.[131] The ineffectiveness of this mechanism lies within the substantial discretion given to the states

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Wright, *supra* note 42.

125. *The Nursing Home Reform Act Turns Twenty: What Has Been Accomplished, and What Challenges Remain: Hearing Before the S. Special Comm. on Aging*, 110th Cong. 110 (2007) [hereinafter *NHRA Hearing*] (statement of Sen. Herb Kohl, Chairman, S. Special Comm. on Aging).

126. *Id.*

127. *Id.*

128. *See supra* Part II.

129. *See* Medew, *supra* note 2 (citing a study showing that "the proportion of the general population that is not exclusively heterosexual is thought to be between 8 and 11%").

130. *See supra* text accompanying notes 86–109 (explaining that the NHRA provides that participating nursing homes must address each resident's particular needs, which should include special needs based on a patient's sexual orientation or gender identity).

131. *See supra* text accompanying notes 112–18 (describing the statutory provisions that authorize denial of payments, fines, and government oversight of noncompliant nursing homes).

and the Secretary to determine whether to impose penalties upon noncompliant nursing homes and, if they are imposed, the severity of the penalties.[132]

Private enforcement of the NHRA, including direct actions against nursing homes under the terms of the NHRA, is quite limited. Courts have held that while the NHRA creates a private cause of action against state-operated nursing homes,[133] no such cause of action exists against private nursing homes.[134] Courts addressing this issue have concluded that residents living in state-operated nursing homes have a § 1983 claim against their nursing homes for violations of the NHRA.[135] Under § 1983 of the Civil Rights Act of 1871, an individual may bring suit against a person acting under the color of state law who has deprived the individual of "a right secured by the Constitution or the laws of the United States."[136] Because the employees of a state-operated nursing home are employees of a governmental entity, their actions are taken "under color of state law."[137] Moreover, the NHRA, an act of Congress, secures a variety of rights for individuals in nursing homes.[138] Thus, for residents in state-operated nursing homes, the NHRA confers privately enforceable rights pursuant to § 1983.[139]

However, residents of private nursing homes have no such remedy available to them: because nursing aides at private nursing homes are not employees of a governmental entity—unlike nursing aides at state-operated nursing homes—they do not act under the color of state law.[140] Ordinarily, a

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132. *See supra* text accompanying notes 112–19 (listing only discretionary penalties, not mandatory penalties).

133. *See, e.g.*, Ottis v. Shalala, 862 F. Supp. 182, 186–87 (W.D. Mich. 1994) (holding that a nursing home resident has a cause of action under § 1983 against a state-operated nursing home for violations of the NHRA).

134. *See, e.g.*, Nichols v. St. Luke Ctr. of Hyde Park, 800 F. Supp. 1564, 1567–68 (S.D. Ohio 1992) (noting that federal statutes ordinarily do not permit private causes of action for violations of the statute, and that nothing in the NHRA provided for such causes of action against private nursing homes).

135. *See, e.g.*, Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel, 570 F.3d 520, 525–32 (3d Cir. 2009); Rolland v. Cellucci, 198 F. Supp. 2d 25, 28–30 (D. Mass. 2002); Tinder v. Lewis Cnty. Nursing Home Dist., 207 F. Supp. 2d 951, 954–56 (E.D. Mo. 2001) (all holding that the rights provided by the NHRA were a sufficient basis for a § 1983 claim). *But see In re* NYAHSA Litig., 318 F. Supp. 2d 30, 38–41 (N.D.N.Y. 2004) (holding that a private right of action existed under § 1983 only for beneficiaries of the program, not for providers).

136. *Tinder*, 207 F. Supp. 2d at 954 (citing Roe v. Humke, 128 F.3d 1213, 1215 (8th Cir. 1997)).

137. *Id.* at 954–55.

138. *Id.* at 955.

139. *See supra* notes 102–09 (listing rights granted to nursing home residents under the NHRA).

140. *Cf. Grammer*, 570 F.3d at 525–32; Concourse Rehab. & Nursing Ctr. Inc. v. Whalen, 249 F.3d 136, 143–47 (2d Cir. 2001); *Rolland*, 198 F. Supp. 2d at 28–30; *Tinder*, 207 F. Supp. 2d at 955 (all suggesting that because state-operated nursing homes are subject to § 1983 suits by virtue of their state operation, and thereby implying that private nursing homes would not be acting under the color of state law).

federal statute does not confer a private cause of action on any individual who is harmed by another private person's violation of the statute.[141] Courts considering whether the NHRA provides a cause of action to residents of private nursing homes have concluded in the negative.[142] One court reached this conclusion, noting that nothing in the text or legislative history of the NHRA indicated Congress's intention to create a private right of action.[143] Another court reasoned that Congress intended the NHRA not to confer privately enforceable federal rights, but rather to be a regulatory scheme to improve the lives of nursing home residents.[144] Consequently, the options of residents in private nursing homes are seemingly limited to suits alleging that nursing home employees have committed a tort or breach of contract.[145]

But even private causes of action—whether § 1983, tort, or breach of contract claims—may be ineffective at addressing the discrimination, neglect, and abuse of queer nursing home residents. Several aspects of the nursing home context make it difficult to pursue a lawsuit. First, many elderly individuals residing in nursing homes may simply be unwilling to further disrupt their living conditions by suing their caretakers.[146] Second, many nursing home residents lack access to adequate legal counsel, who might not view nursing home patients as "attractive clients."[147] Third, many nursing homes require patients to sign arbitration clauses that compel patients to present any legal claims to an arbitrator.[148] It is thus unsurprising that "there is scant case law concerning discrimination against lesbian, gay, bisexual, and transgendered (LGBT) assisted care residents."[149] But more importantly for residents at private nursing homes, the actions available for tortious conduct and breach of contract are not necessarily coterminous with the protections of the NHRA. Thus, suits in contract and tort do not discourage the same types of actions as does the NHRA. In addition to needed substantive changes to the NHRA, Congress should consider improving the NHRA's public-enforcement mechanism.

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141. Stewart v. Bernstein, 769 F.2d 1088, 1092–93 (5th Cir. 1985).

142. *See, e.g.*, *Tinder*, 207 F. Supp. 2d at 957; Brogdon v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1326–28 (N.D. Ga. 2000); Estate of Ayres v. Beaver, 48 F. Supp. 2d 1335, 1339 (M.D. Fla. 1999); Nichols v. St. Luke Ctr. of Hyde Park, 800 F. Supp. 1564, 1567–68 (S.D. Ohio 1992) (all holding that the NHRA created no private cause of action against private nursing homes).

143. *Nichols*, 800 F. Supp. at 1567.

144. *Tinder*, 207 F. Supp. 2d at 957.

145. *Cf. id.* at 953 (explaining that plaintiffs brought suit alleging violations of the NHRA and arguing tortious conduct and breach of contract in the alternative).

146. *The 10 Worst Nursing Homes in Washington State*, WASH. L. BLOG (May 12, 2010), http://www.phillipswebster.com/blog/2010/05/the-10-worst-nursing-homes-in-washington-state/.

147. David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings From a National Survey of Attorneys*, 22 HEALTH AFF. 219, 219 (2003).

148. *Patients Sign Away Right to Sue Nursing Homes*, MSNBC (June 17, 2008), http://www.msnbc.msn.com/id/25217455/ns/health-aging/.

149. Jaime E. Hovey, Note, *Nursing Wounds: Why LGBT Elders Need Protection from Discrimination and Abuse Based on Sexual Orientation and Gender Identity*, 17 ELDER L.J. 95, 96 (2009).

IV. Opportunities to Improve the Quality of Care Provided to Queer Elders in Nursing Homes

To minimize the abuse, neglect, and stigmatization of queer elders in nursing homes, Congress should amend the NHRA to require nursing homes' nursing aides and administrators to undergo queer-sensitivity training as part of their required training and competency-evaluation programs when working at a nursing home. Such sensitivity training could consist of an in-house information session that increases nursing aides' awareness that their patients may have alternative sexual orientations or gender identities, and *teaches* the aides techniques to create a more welcoming environment for their queer patients.[150] To give further support to these residents, a nondiscrimination provision ought to be included within the nursing home residents' bill of rights that prohibits differential treatment, abuse, and neglect based on the sexual orientation or gender identity and expression of a resident.[151] Finally, to guarantee compliance with these added provisions—as well as the NHRA's more general provisions—Congress should require a more stringent application of the NHRA's remedies by reducing the discretion that the Secretary and states have in administering sanctions on nursing homes that violate the NHRA.

While other writers have proposed a right of nondiscrimination and sensitivity training,[152] this Note fills the gap in this scholarship by providing a framework for these amendments within the NHRA and arguing that no substantive changes will have much effect without reducing the discretion to impose penalties. Thus, a combination of these three modifications would help to improve the declining quality of care received by queer nursing-home residents and make the NHRA a more effective deterrent of neglect and abuse.

By including the right of nondiscrimination based on sexual orientation and gender identity under the NHRA, nursing homes would have three incentives to be more wary of hiring individuals who may be hostile to queer patients, and to be more willing to have their nursing aides go through sensitivity training: (1) losing NHRA payments; (2) facing a state or federally imposed civil penalty; and (3) ceding temporary control over the nursing home to state management.[153] The right of nondiscrimination would thus encourage nursing homes to go beyond the minimum requirements to make

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150. Smith, *supra* note 5.

151. This nondiscrimination policy need not be limited to sexual orientation or gender identity. A broader right of nondiscrimination in the NHRA—including race, color, religion, sex, national origin, disability, etc.—would fit well within the framework of the right of nondiscrimination provided in the Fair Housing Act. Hovey, *supra* note 149, at 122.

152. *See, e.g.*, *id.* at 112 (identifying a need for sensitivity training for staff and residents at nursing homes).

153. *See* 42 U.S.C. § 1396r(h)(2)(A)(i)–(iii) (2006) (listing specific remedies available for the state against nursing facilities that fail to meet the requirements of the preceding sections).

queer residents feel more welcome at their facilities, perhaps by changing the language on nursing home forms and literature to reflect inclusivity of queer residents.[154] The right of nondiscrimination would also send a message to the elderly queer population that nursing homes would be more tolerant and accepting of their various sexual orientations and gender identities, which would further facilitate the coming-out process.[155] Those unaware of this right prior to entering the nursing home would be informed pursuant to the NHRA's requirement that nursing homes notify their incoming residents of their statutory rights.[156]

Aside from a statutory right of nondiscrimination, sensitivity training would not only decrease the likelihood of nursing aides discriminatorily targeting queer residents for abuse or neglect, but would also improve nursing aides' relationships with their patients by minimizing the risk that they would act in ways that communicated intolerance of alternative sexual orientations or gender identities. Nursing homes could draw upon external experts to help craft their own in-house programs to teach sensitivity and cultural competence on queer issues.[157] Such a requirement would fit well within the NHRA's current requirement that nursing homes not employ for more than four months any nursing aide that has not completed training and competency evaluation programs.[158] Nursing aides who understand concepts such as "'constructed' families";[159] that elders still maintain the right to sexual relations in nursing homes;[160] that not all gay men have HIV/AIDS;[161] and how to avoid inappropriately approaching transgender patients—will be much more effective at furnishing the personal care needed by queer residents. As queer patients feel more comfortable about coming out to their nursing aides, a more honest and open relationship will ensue, and the quality of care nursing aides provided to their patients will thereby improve.[162]

Because the current system of penalties under the NHRA is ineffective at "motivat[ing] lasting improvements for and safety of residents,"[163] the Act

154. *See* Schneider, *supra* note 4 ("SAGE teaches ways to make residents feel that their culture is respected. Nursing homes tend not to use neutral language around sexual identity and orientation . . . . [Intake forms], for example, typically give residents only standard choices for designating their relationship status: married, single, divorced, and widowed.").

155. *See id.* (explaining that if facilities allow residents to indicate that they have a significant other it would make the resident more likely to open up about their sexual orientation).

156. § 1396r(c)(1)(B).

157. Smith, *supra* note 5.

158. § 1396r(b)(5)(A)(i).

159. Smith, *supra* note 5.

160. *Id.*

161. *See* Gross, *supra* note 6 (discussing the fact that aides must be reminded that they do not need to use gloves at inappropriate times when there is no evidence that the resident has the HIV infection).

162. *See* A RESOURCE GUIDE TO COMING OUT, *supra* note 49, at 4 (discussing the benefits of coming out).

163. *NHRA Hearing*, *supra* note 125, at 110.

needs more structural modifications with regard to its remedies to actualize the benefits of any right of nondiscrimination and training requirements. The NHRA leaves the Secretary and states with too much discretion over whether to impose sanctions on noncompliant nursing homes.[164] As courts considering the availability of a private cause of action under the NHRA have noted, Congress intended the NHRA to be a regulatory system, rather than a means of conferring rights on individuals to enforce through private causes of action.[165] Given the limitations of elderly individuals in nursing homes—unwillingness to sue one's caretaker, the lack of access to legal representation, and the proliferation of arbitration agreements[166]—reliance on private suits will remain an ineffective method of enforcing the provisions of the NHRA.

Congress should therefore cut back on administrative discretion by imposing a required minimum penalty for violations of the NHRA, and thereby add teeth to the meaningful regulatory system that Congress initially intended the NHRA to be.[167] Without strong and consistent measures that sanction nursing homes for noncompliance with the NHRA, nursing homes have far fewer incentives to follow its proscriptions.[168] Thus, a more stringent application of the remedies currently provided by the NHRA is a key component to improving the effectiveness of the Act's general requirements and would enhance the likelihood that nursing homes would follow through on a right of nondiscrimination and train their nursing aides as per the proposed amendments to the NHRA. Reducing the Secretary's and states' discretion to impose penalties is therefore necessary to give effect to any substantive amendment to the NHRA.

Additional regulation is appropriate given the private market's inability to fashion welcoming environments for queer residents, particularly because of the circumstances surrounding the transition to a nursing home.[169] Though some upscale nursing homes cater specifically to the queer population,[170] only a small portion of the most affluent can usually afford to live in these specialized nursing homes.[171] Thus, those lacking personal wealth or family to rely on for assistance are economically excluded from these homes; and elders that do have families may be limited by geographical concerns if there

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164. *See* 42 U.S.C. § 1396r(h)(1)(A), (3)(C) (2006) (using permissive language when describing the remedies the state or Secretary may pursue).

165. Tinder v. Lewis Cnty. Nursing Home Dist., 207 F. Supp. 2d 951, 957 (E.D. Mo. 2001).

166. *See supra* notes 146–48 and accompanying text.

167. *See Tinder*, 207 F. Supp. 2d at 956–57 (explaining that Congress intended the NHRA to be publicly enforced).

168. *See NHRA Hearing*, *supra* note 125, at 110 (noting that the sanctions for violations of the NHRA are too minimal).

169. *See supra* subpart II(B).

170. Rosemary McClure, *Going Back to Their Roots at Nikkei Senior Gardens*, L.A. TIMES (Feb. 20, 2010), http://www.latimes.com/features/home/la-hm-nikkei-20100220,0,5584414,full.story.

171. Smith, *supra* note 5.

is no such special nursing home close by.[172] Without a uniform national policy that encourages nursing homes to train their nursing aides in queer sensitivity, the limited choice in nursing homes will relegate many elders to homes where they are neglected, abused, stigmatized, or afraid of coming out.

V. Conclusion

As the U.S. population grows older, the number of queer elders that nursing homes must care for will dramatically increase.[173] In the next twenty years, as many as four million queer people will be over the age of sixty-five,[174] many of whom may eventually need to move into nursing homes. The distinct problems queer elders face when moving into nursing homes justifies government policies to facilitate the training of nursing aides in queer sensitivity. Queer residents at nursing homes have faced ridicule, stigmatization, and harassment from their nursing aides, resulting from those nursing aides' lack of training and awareness of their queer patients' unique health and social issues.[175] This lack of awareness sacrifices the quality of care that nursing aides are able to provide to their patients. Because choosing a nursing home is a frequently rushed decision,[176] many soon-to-be nursing home residents are unable to find accessible homes that have a reputation for being queer friendly. As a result, many residents feel that they must hide their identities, which contributes to their "depression, anxiety, dementia, . . . delirium,"[177] failure to thrive in the nursing home, and "even premature death."[178]

Congress enacted the NHRA to improve the quality of care nursing homes provide to their residents,[179] but many nursing home residents are not fully receiving the potential benefits of the Act. Amending the NHRA to add a right of nondiscrimination, mandate sensitivity training, and eliminate discretionary enforcement, would make the Act a much more effective deterrent of neglect, abuse, discrimination against and stigmatization of queer nursing home residents.[180] Because private enforcement of the NHRA has failed to achieve significant results, reducing the Secretary's discretion over whether to sanction nursing homes in noncompliance is the lynchpin of the strategy of beefing up the NHRA's overall effectiveness and making amendments to the

172. Young & Marks, *supra* note 28.

173. *See supra* Part I.

174. Buchanan, *supra* note 6.

175. Gross, *supra* note 6.

176. Young & Marks, *supra* note 28.

177. VOURLEKIS ET AL., *supra* note 34, at 2.

178. Gross, *supra* note 6.

179. *See* 42 U.S.C. § 1396r(b)(1)(A) (2006) ("A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.").

180. *See supra* Part IV.

NHRA viable solutions to the plight of queer elders. These changes will also create more accepting nursing home environments that encourage patients to come out to their nursing aides. Nursing home residents' relationships with their nursing aides and other nursing home staff will thus be based on a stronger foundation of trust that facilitates advancement of the overall quality of care nursing aides can provide to their queer residents.

Michael J. Ritter

Two Problems with the Value of Participation in Democratic Theory and Copyright*

I. Introduction

Among the theories used both to justify and to change substantive copyright doctrine is democratic theory. Democratic theorists seek to use copyright to bring society, individuals, or both closer to some articulated ideal, such as a well-functioning democracy of active and diverse individuals. Democratic theorists value participation—the active making of works of expression by individuals—in part because they believe it can help to achieve this ideal. Certain democratic theorists argue that we should relax or eliminate the control that creators have over derivative works made off of their originals because doing so would open up further opportunities for participation in the creation of expressive works, and thereby, contribute to the constitution of the populace as creative and active, for example.

However, there are two problems with the value of participation. First, the content of the value of participation, even if not viciously vague, does leave opportunities for further specification. Is participation as such good or only participation in certain discussions? Is any kind of participation desirable or only certain forms of participation, such as very original works? Second, the value of participation seems to mandate government action on the basis of a conception of the good, in violation of the neutrality thesis. Neutralists argue that it is inappropriate for the government to take coercive action that is designed to promote a view of the good. If government were to use copyright to promote greater participation by individuals in making expressive works, then this action may violate the neutrality thesis. Because at least some democratic theorists appear to be committed to the neutrality thesis,[1] this tension should be addressed.

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1. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1764 (1988) (describing the position that "government ought to remain neutral as to alternative theories of the good and therefore that paternalistic intervention in a person's affairs can be justified . . . only when it enables him to realize his own conception of his well-being more effectually than would leaving him to his own devices"); *cf.* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 352–53 (1996) ("By supporting a market-based sector of authors and publishers, copyright achieves considerable independence from government administrators and private patrons who would otherwise meddle in expressive content."); *id.* at 344 (advocating a conception of civil society that "provides opportunities for collective self-rule outside formal institutions of government [and] encompasses sites for associational activity in which citizens may determine their preferences and commitments and assert control over resources, without state direction").

I argue that understanding the relationship between the value of autonomy and the value of participation helps to give further specification to the latter. I also argue that this further specified concept of participation does not violate the neutrality thesis, both because it does not qualify as a concept of the good and because its implementation does not involve coercion.

II. The First Problem with Participation: Specification

A. Democratic Theory in the Context of Copyright

1. The Basic Idea of Democratic Theory.—Neil Netanel's 1996 article is a prominent articulation of the democratic theory of copyright.[2] He argues that copyright law should adopt a framework whereby "copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society."[3] Copyright accomplishes this function by incentivizing creative expression and "support[ing] a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy."[4]

In more general terms, democratic theorists seek to use copyright to bring society, individuals, or both closer to some normative ideal, which is to say, some conception of the "good society."[5] Some base this idea on a particular conception of what democracy is.[6] Others, such as Professor William Fisher, understand it in the more expansive terms of the "utopian society," characterized by creative and challenging employment, equality of resources, education, and state support of the arts.[7] Democratic copyright theorists seek to use specific copyright doctrines to bring the world more into line with their normative prescriptions.[8]

For example, Professor Netanel uses the democratic paradigm to argue for a middle ground between the traditionally strong derivative works right and the wholesale abolition of that right: "[The democratic paradigm] would advocate varied treatment for different types of transformative uses in an effort to maintain author incentives without unduly suppressing secondary

2. Netanel, *supra* note 1, at 283.

3. *Id.* at 288.

4. *Id.*

5. Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEXAS L. REV. 1799, 1843 (2007).

6. *See, e.g.*, Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 231 (1996) (defining democracy as a process of "discursive will formation").

7. Fisher, *supra* note 1, at 1761–62.

8. *See, e.g.*, Bracha, *supra* note 5, at 1813, 1852–55, 1868–69 (arguing that an opt-out scheme for digital libraries would promote the normative considerations of "cultural democracy").

borrowing. From the democratic perspective, a broad derivative right poses an unacceptable burden on expressive diversity."[9]

Part of the problem with a strong derivative works right is that it inhibits the participation of individuals in the creation of expressive culture.[10] Democratic theorists are unified in the value they place on participation.[11]

2. The Value of Participation in Democratic Theory.—Scholars who advocate for the application of democratic theory to copyright emphasize the value of participation, but the account of participation's value often differs. This Note will focus on some conceptions of that value instead of others, but this section will provide an overview of the different accounts.

a. Participation Is Valuable by Virtue of Its Relationship to the Democratic Process.—To begin, let us explore Professor Netanel's conception of participation in his classic essay, where he states that "copyright's paramount objective is not allocative efficiency, but citizen participation in democratic self-rule."[12] According to Netanel, copyright is crucial to fostering the exchange of ideas that is a necessary condition to democratic association, essential to the creation and distribution of knowledge necessary for an educated public, and important for maintaining democratic debate.[13] In these ways, participation by individuals serves the end of fostering the kind of political process needed for a healthy democracy.

Professor Netanel also argues that copyright is important for creating the kind of citizen needed in a healthy democracy:

> In addition, the autonomous creation, critical interpretation, and transformation even of works of pure aesthetics or entertainment helps to support a *participatory* culture. Citizens who engage in these activities gain a measure of expressive vitality and independence of thought that may carry over into matters of more unequivocal public import as well. So long as the sources for pure aesthetics and entertainment are varied, such works may also foster an appreciation for diversity and a sense that elite cultural and social values may be confronted and contested. When taken as a whole, therefore, expressive works created for symbolic impact or broad audience appeal must, no less than copyright-supported political analysis, be seen as a vital part of democratic self-governance.[14]

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9. Netanel, *supra* note 1, at 378.

10. *See id.* at 362–63 (arguing that a "democratic copyright" would limit the control a copyright owner has over derivative works, which would "further the goal of expressive diversity").

11. *See* Bracha, *supra* note 5, at 1845 ("A recurring important value in cultural-democracy writings is the active participation by all members of society in the process of making and transforming cultural meaning.").

12. Netanel, *supra* note 1, at 386.

13. *Id.* at 348–49.

14. *Id.* at 351.

For Professor Netanel, the value of fostering participation through copyright law lies in creating citizens whose "vitality and independence" make it more likely that they will appreciate diversity and challenge accepted values.[15] Participation's value is therefore instrumental in a second way: in addition to facilitating the political process directly (e.g., through the distribution of knowledge), it is also said to create the kinds of persons necessary for the political process to be successful.[16]

Professor Oren Bracha articulates the point more directly still when he describes the specific traits that participation is said to develop on the democratic theory and then outlines how they are said to be crucial to a democracy:

> [A] vibrant discursive sphere would also have the additional benefit of cultivating in the citizenry habits and character traits that are prerequisites of a healthy democracy: political awareness, active involvement, social responsibility, and discursive skills. Participation and diversity are thus seen as essential conditions for the democratic political process: . . . they cultivate an empowered sovereign citizenry.[17]

Professor Rosemary Coombe understands the relationship between the value of participation and the political process differently. She argues that when the law prohibits participation, culture becomes problematically burdened:

> [I]ntellectual property laws may deprive us of the optimal *cultural* conditions for dialogic practice. By objectifying and reifying cultural forms—freezing the connotations of signs and symbols and fencing off fields of cultural meaning with "no trespassing" signs—intellectual property laws may enable certain forms of political practice and constrain others.[18]

Copyright law should encourage a certain kind of "dialogic practice," whereby culture remains open to what Professor Coombe calls "reconfiguration."[19] While Professor Coombe does not tie this specifically to the value of participation as it is discussed in the democratic theory literature, her discussion of the relationship between the self and society makes very plausible the inference that participation is one mechanism by which this kind of culture can be achieved.[20]

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15. *Id.*

16. *See* Bracha, *supra* note 5, at 1846 (positing that participation in the creation of individual identity and group culture forms the basis of a truly democratic society).

17. *Id.* at 1845.

18. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853, 1866 (1991).

19. *Id.* at 1880.

20. *See id.* at 1877–81 (stressing that individual participation in forming the meaning of social signs and symbols is integral to constituting and reconfiguring culture).

Further, and most importantly, the value of participation for Professor Coombe lies not in its value toward some further end (e.g., fostering the political process), but rather in the exercise of participation itself. Professor Coombe believes that "[i]f what is quintessentially human is the capacity to make meaning, challenge meaning, and transform meaning, then we strip ourselves of our humanity through over-zealous application and continuous expansion of intellectual property protections."[21] Copyright should respect participation as inherently valuable because it is the case that the "human condition" is to have subjectivity that is "fundamentally dialogic."[22]

b. Participation Is Valuable Because of Its Relationship to the Good Society and the Good Life.—Professor Jack Balkin locates the value of participation more squarely in the constitution of the individual life.[23] Professor Balkin argues that free speech is about the "promotion and development of a democratic culture"[24] and that "[w]hat makes a culture democratic . . . is not democratic *governance* but democratic *participation*."[25] The value of participation is then described in the following way:

> First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them . . . .
>
> Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. . . . [T]he freedom to create is an active engagement with the world.[26]

Professor Balkin, therefore, values participation because (1) it constitutes people as free in the sense that it promotes a certain kind of relationship between individuals and the world around them—"an active engagement"—and (2) culture is a "source of the self," so participating in the creation of culture is in fact participating in the creation of the self.[27]

Professor Fisher, at certain points in his work, also locates the value of participation in the creation of a kind of person, although he supports this position differently: "Active interaction with one's cultural environment is

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21. *Id.* at 1879.

22. *Id.* at 1860.

23. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).

24. *Id.* at 34.

25. *Id.* at 35.

26. *Id.*

27. *Id.*

good for the soul. A person living the good life would be a creator, not just a consumer, of works of the intellect."[28] Professor Fisher uses this consideration, among others, to argue for the fair-use doctrine to be applied in such a way as to increase protection for uses that "either constitute or facilitate creative engagement with intellectual products."[29] This analysis is taken to the full extreme of character formation when Professor Fisher argues that the copyright modifications he advocates "would modify consumers' habits and eventually their desires, thereby enhancing not just their access to but also their appreciation of the good life."[30]

Professor Fisher is concerned not only with the constitution of a particular kind of individual; he is also concerned with how the constitution of individuals interacts with the constitution of society.[31] Part of the reason that he values participation is that a society in which participation is encouraged creates good people: "In an attractive society, all persons would be able to participate in the process of meaning-making. . . . Active engagement of this sort would help both to sustain several of the features of the good life—e.g., meaningful work and self-determination—and to foster cultural diversity."[32]

A society of active participants is more desirable than the alternative, for Professor Fisher, because it will be a society in which the good life will be achieved and diversity respected.

c. Summation on the Value of Participation.—In sum, those who advocate for the application of democratic theory to copyright agree that the participation of individuals is critical, but there are competing—although not necessarily mutually exclusive—accounts of why that participation is so valuable. Some argue that participation is valuable because it serves the ends of democracy or democratic culture: we should encourage participation because it will serve the ends of creating a particular kind of political process. Others emphasize the claim that a society in which participation is encouraged serves the end of constituting people as people who are more likely to lead the good life or constituting a society as a good one. Finally, some argue that participation is valuable for its own sake, i.e., it is inherently valuable.

3. The Specification of the Concept of Participation.—A concept so central to democratic theory as participation should be defined as clearly and

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28. Fisher, *supra* note 1, at 1768.

29. *Id.*

30. *Id.* at 1769.

31. William Fisher, *Theories of Intellectual Property* (describing the social planning theory of intellectual property law), *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 175 (Stephen R. Munzer ed., 2001).

32. William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217–18 (1998).

exactly as possible. I argue that the concept of autonomy can serve to give further specification to this concept. While the argument that follows is insufficient to demonstrate that autonomy is *necessary* to making the value of participation more intelligible, the argument does show that autonomy is *capable* of performing this function along at least two lines of questioning.

First, is any and all participation in expressive works valuable? If democratic theory seeks to promote a democratic society, then it would seem that only participation in works of certain subject matters would be valuable. For example, participation in political or policy discussions would have value, while participation in blogs devoted to certain reality television shows might not. Put generally, if participation is valuable *because* it promotes a certain kind of society, certain instances of participation would seem to be valuable only *insofar* as they promote that kind of society. Unless one is willing to defend the (very bold) claim that all participation promotes the ideal society, then one is forced to ask whether copyright law should be concerned only with promoting certain instances of participation.

Second, if participation is valuable because it constitutes individuals in such a way that they will lead the good life, then the question becomes whether all forms of participation so constitute individuals, or whether there are certain forms of participation that lack this value. It is entirely plausible that making derivative works off of J.D. Salinger works might be helpful in making one a creative person, while merely performing faithful covers of a pop song at a concert or karaoke bar might make one merely imitative and therefore passive.

Both of these questions are based on a certain vagueness in the value of participation. The location of that vagueness is precisely in the causal connection between participation and the good society or individual. Only when we have a more clear, concrete, and specific answer to *why or how* it is that participation gives rise to the right kind of individual or society can we have an answer to the question of whether it is all participation or just some subset of participatory activities that that can serve this function. I will ultimately argue that the relationship between the value of participation and the value of autonomy can help to answer these questions.

B. Background: The Value of Autonomy Generally

In this subpart, I will posit the assumption that democratic theorists are committed to the value of autonomy, and then argue that understanding the connection between the value of autonomy and the value of participation can cure some of the vagueness in the concept of participation.

It is respectable to assume that democratic theorists are committed to the value of autonomy. As evidence of this respectability, I note that other commentators have made similar claims. Professor Bracha, for example, explicitly connects the themes of participation and autonomy: "Another important theme of cultural democracy is the maximization and

empowerment of individual autonomy . . . . [I]ndividual autonomy includes the freedom to interact in an active way with existing cultural materials, to recreate and reshape them, and to express one's own voice through a dialogue with those of others."[33]

Before moving to the present Note's discussion of the connection between participation and autonomy, it is necessary to lay the foundation of the analysis by exploring the concept of autonomy generally and the value that autonomy is purported to have.

1. What Is Autonomy?—Autonomy is a notorious concept in philosophy.[34] It is used in different ways and for different ends. I do not, of course, seek here to settle any of the numerous disputes among those who advocate competing conceptions of autonomy. In this section, I will merely lay out the definition of autonomy with which I will work in this Note. The choice of definition is not arbitrary, however. The definition used here must serve a number of ends: (1) it must be amenable to democratic theory, (2) it must be sufficient to give further specification to the value of participation, and (3) it must be robust enough to serve as the basis for the neutrality thesis articulated in Part II of this Note.

A wide and general definition of autonomy can be found in the *Stanford Encyclopedia of Philosophy*: "Individual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces."[35] I follow George Sher's slightly more specific definition of autonomy. Sher finds most viable the version of autonomy that considers an agent autonomous when the agent is "self-directing" in the sense that the agent's actions and choices are "motivated by [the] agent's appreciation of reasons provided by his situation."[36] To say that an action is motivated by the agent's appreciation of reasons is just to say that the agent: (1) upon critical

33. Bracha, *supra* note 5, at 1846–47.

34. *See* NOMY ARPALY, UNPRINCIPLED VIRTUE: AN INQUIRY INTO MORAL AGENCY 118 (2003) (admitting that "[t]here are at least eight distinct things we [philosophers] sometimes call 'autonomy'").

35. John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 11, 2009), http://plato.stanford.edu/archives/fall2009/entries/autonomy-moral/.

36. GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 48 (1997) (internal quotation marks omitted). In the passages of his book discussed in what follows, Professor Sher is explicating what he thinks would be the best account of the argument for the neutrality thesis on the basis of the concept of autonomy, rather than advocating for that account itself. Ultimately, and for reasons outside the scope of this Note, Sher argues against various arguments for the neutrality thesis, including the argument from autonomy. *Id.* at 16 ("[N]o appeal to the value of autonomy can justify neutralism."). However, his analysis is very helpful for clarifying the concepts involved and for putting the relevant arguments on solid footing before he attacks them. This Note assumes, rather than argues, the truth of the account of autonomy and the neutrality thesis here outlined.

reflection endorses those reasons as good ones,[37] and (2) recognizes those reasons as her own.[38]

Those reasons must be the agent's own because autonomy is, in Professor Joseph Raz's formulation, "opposed to a life of coerced choices."[39] In this vein, some have argued that for a person to be autonomous, she must have lived a life where her choices were chosen from a range of viable options.[40] Otherwise, her life would be coerced and therefore not autonomous.[41]

The reasons must be endorsed by the agent upon critical reflection because, as Professor Sher puts it, "[i]f autonomy were simply arbitrary choice, there would be no obvious basis on which to claim either that it is good to be autonomous or that our legal and political system should protect and foster autonomous choice."[42]

2. Why Is Autonomy Valuable?—To define autonomy is one thing; to identify it as valuable is another. Professor Bruce Ackerman argues that "the good is of a kind that cannot—conceptually cannot—be imposed on another."[43] His basic idea is that it simply makes no sense to violate autonomy in order to promote the good because to do so would be self-defeating.[44] Whether one takes on a Socratic or a Kantian approach to the good—to use Professor Ackerman's examples—or any other approach, Professor Ackerman believes that it would be "transparently silly" to impose a concept of the good because all of the concepts of the good under consideration require that the agent herself autonomously adopt that concept of the good in conducting her life.[45] Professor Ackerman, therefore, builds autonomy squarely into what it means to be a concept of the good, or rather, what is meant by a concept of the good under any position currently under consideration. For example, Professor Ackerman claims that for Immanuel Kant, "the only good thing is the capacity to form a rational plan of life."[46] It would be impossible to impose a concept of the good on an individual without at the same time violating that agent's "capacity to form" a good

37. Christman, *supra* note 35, § 3.4.

38. *See* SHER, *supra* note 36, at 49 (describing the importance of an actor being capable of recognizing his reasons for acting).

39. JOSEPH RAZ, THE MORALITY OF FREEDOM 371 (1986).

40. *Id.* at 204.

41. *See id.* ("A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.").

42. SHER, *supra* note 36, at 50.

43. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 367 (1980).

44. *Id.*

45. *See id.* (making the point that it would be "transparently silly to deprive people of power when all you can say is that you know what's good better than they do" in the context of a Socratic conception of the good).

46. *Id.*

life.[47] The capacity to form a life is just what is central to the concept of autonomy: the capacity to live a life that is self-directed. The formation of the plan of life is merely the agent's taking it on as her own.[48] The rational plan of life can be thought of as the self-direction of the agent on the basis of reasons provided by her situation.[49] This argument has the result of putting autonomy first before all other values: for a life to be good, on Professor Ackerman's account, it must first be autonomous, whatever is meant by the good.[50]

Take, for example, the decision to join the military. Assume that the life of military service is a good life, meaning that it is valuable. If one joined and remained in the military because one had decided that there were good reasons for doing so and that those reasons were one's own, then it would be natural to praise that person for living the martial life. If, however, one was drafted into the military and remained in the military only under threat of incarceration, then the action takes on a wholly different character. No longer would the decision to join the military itself be praiseworthy. We might praise the coerced soldier's respect for the law or sense of respect for what society demanded of her, but we could not, without more, praise that military life as a good one. This is not to say that it is a bad life; rather, it is merely not a morally praiseworthy, i.e., valuable, one. It is critical to note, however, that even under conditions of coercion, autonomous action is possible. For example, even the drafted recruit could recognize, adopt, and act from good reasons she sees for giving her life to military service. In this case, the fact that she is not free to choose otherwise does not determine her actions or life and is therefore irrelevant to the value of that life. Such an action is morally praiseworthy and therefore valuable.

Professor Thomas Hurka articulates a fine distinction that, while helpful in understanding the value of autonomy, will for good reason be ignored in what follows. He distinguishes between considering autonomy as one value among others—but one with a huge importance—and considering autonomy not as a value itself but rather as a condition of value.[51] There are important reasons to endorse one view or the other (Professor Hurka himself endorses neither), but for the purposes of this Note, we can consider autonomy to be both (1) a value, and (2) a value that is a necessary condition for the

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47. *Id.*

48. *See id.* ("Whenever I offend Neutrality, I offend this good [the capacity to form a rational life plan]: for, by definition, I must declare that another citizen is to be subordinated to my purposes . . . rather than recognized as a person whose capacity to form a life plan is no less valuable than my own.").

49. *Cf.* SHER, *supra* note 36, at 48 (discussing the idea that autonomous persons are self-directing and that self-directed activity means "activity that is motivated by an agent's appreciation of reasons provided by his situation").

50. *See* JOHN RAWLS, A THEORY OF JUSTICE 368 (1971) (arguing that autonomy is "the best thing that there is" but may not be the only thing that is valuable).

51. Thomas Hurka, *Why Value Autonomy?*, 13 SOC. THEORY & PRAC. 361, 377–79 (1987).

activation of any other moral value. The important point to note on the account I am proposing, and that Professor Ackerman seems to adopt,[52] is that it is not possible to counterbalance any infringement on the value of autonomy with gains in the terms of another value. Put differently, autonomy is valuable because, unless an action or life is chosen autonomously, that action or life is not valuable.

C. *Solution: Careful Attention to the Value of Autonomy Gives Further Specification to the Value of Participation*

If autonomy is a condition of the value of any other values, then one way to inquire after a more clearly specified concept of participation is to ask specifically how autonomy is a necessary condition for participation. How does autonomy structure the ability to live a life of participation?

A good angle into this question is to reverse it: What would participation look like if it were not autonomous, i.e., if it were not characterized by self-direction? A person who participated in culture for reasons that were not her own might mimic the kinds of expression dictated by those who direct her participation. For example, a person who wrote political polemics in an effort to win the approval of a potential employer might attempt to write with the voice and style of the employer that person was attempting to please. If a person participated in expressive culture as a result of having been coerced, that person would likely be wholly unreflective, i.e., the kinds of expression that person generated would not be the result of that person's considered acceptance of a set of reasons as good ones for acting (or here, communicating a particular idea or story). If people are creating expressive works because they are coerced to do so, then they will make the kinds of works they are coerced to make, not the kinds of works that they would generate were they given the opportunity to reflect and adopt as their own a certain set of ideas to be expressed.

The upshot of the discussion in the preceding paragraph is that participation in democratic theory will not be valuable unless it involves articulating, reflecting on, and adopting a certain set of ideas and forms of expression. In order for the participation to satisfy autonomy as a precondition to the participation's own value, the expressive works created must invoke the agent's own sense of who she is, such that she recognizes the ideas as her own, expresses those ideas in particular ways because that is part of who she recognizes herself to be, and adopts those ideas and their expression because she finds them personally compelling. All of this is to say that participation is valuable only in cases where it forms an engagement with expressive works that involves the exercise of a person's autonomy.

It is important not to misunderstand autonomy as the teleological end of all action; the magnitude of participation's value need not be *equivalent* to

52. *See supra* notes 43–50 and accompanying text.

the magnitude of its service to the agent's autonomy. Rather, autonomy is a necessary *condition* for any act or characteristic being valuable. Participation, as valuable, must in the first instance satisfy the demands contained in the concept of autonomy. Participation might still have as its *ultimate* aim the constitution of a certain character or society, or some other goal.

1. Autonomy Applied to the Various Views on the Value of Participation.—The divergent views of the value of participation discussed earlier in this Note[53] make much more sense when viewed in light of the condition of autonomy.

The concept of autonomy can shed light on the view that participation is valuable because it gives rise to a particular political process. Remember that Professor Netanel argues that participation creates citizens characterized by a "vitality and independence" that would promote challenging accepted values and acceptance of diversity.[54] This independence can be recast in terms of autonomy, in the sense that participation enables one to reflect on and adopt various views of how one ought to live and how society ought to function. The idea here is that participation in the creation and distribution of expressive works promotes the reflection on and considered adoption of different ideas.

If one adopts the view that participation is valuable because it is "good for the soul,"[55] then the autonomy condition for the value of participation is likewise clarifying. Professor Fisher and Professor Balkin believe that the good life is partly to be a creator of intellectual works and a producer of one's culture.[56] Participating in expressive works provides an occasion or opportunity for one to be creative and productive. Participation at the same time provides an opportunity to constitute one's creative engagement of the world of expression as autonomous.

One way of understanding the claim that participation is inherently good is to understand it as an activity that is always at the same time autonomous. If to participate is simply to engage the expressive world on one's own terms, for one's own reasons, and on account of the life one has decided to live, then participation will, as such, satisfy the conditions of the baseline value of autonomy and therefore be valuable in itself.

2. Autonomous Participation and the Question of Kinds of Participation.—I asked above whether participation in expressive works of all subject matters is valuable and whether all forms of participation in

53. *See supra* section II(A)(2).
54. *See supra* notes 14–15 and accompanying text.
55. *See supra* note 28 and accompanying text.
56. *See supra* subsection II(A)(2)(b).

expressive works are valuable.[57] Using the value of autonomy to fill out the concept of participation helps also to address these two questions. For participation to be valuable, it must first be autonomous, which is to say that participation must be self-directed in the way described above.[58] There seems to be no reason to believe that making derivative works based off of a work of literature would be more autonomous than making derivative works based off of a contemporary gossip magazine. While one might be more valuable than another on the basis of some value other than participation (e.g., literary value), each seems equally given to autonomous participation. Participation, therefore, is not a basis for distinguishing between different subject matters.

However, certain kinds or forms of participation would seem to give rise to differing levels of participation's value. For example, making exact and direct copies of literary works is a less self-directed activity than is making a derivative work such as a sequel to an existing literary work. It is less likely that in merely copying an existing work one is critically reflecting on and independently adopting ideas as one's own; it is more likely that the copier is deferring to the literary decisions of the original creator and therefore allowing the maker of the original to direct the expression in which the copier is engaged. Therefore, while both copying and making a new derivative work are participation, on some level the autonomy condition to valuable participation shows that there is reason to protect and promote the latter and not the former. In this way, not all forms of participation are equally valuable.

The autonomy condition to participation also provides some insight into the originality requirement for copyright protection. The first part of originality[59]—independent creation[60]—clearly involves autonomy, even in cases where one independently creates a work that is identical to a preexisting work. Independent creation is autonomous, i.e., self-directing, precisely because it is independent: the creator is taking on his or her own ideas and forms of expression and authoring the product. Minimal creativity is also a doctrinal device that promotes autonomy. Insofar as courts apply the distinguishable-variation test so as to ensure that the maker of the derivative work—e.g., a derivative work based on a public domain painting[61]—adds

57. *See supra* section II(A)(3).

58. *See supra* section II(B)(1).

59. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."); 17 U.S.C. § 102 (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship . . . .").

60. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) ("[O]riginality requires independent creation plus a modicum of creativity . . . ." (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879))).

61. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 74 F. Supp. 973, 976 (S.D.N.Y. 1947) (holding that mezzotint engravings of paintings in the public domain include a modest but original and copyrightable contribution), *aff'd in part*, 191 F.2d 99 (2d Cir. 1951).

something nontrivial,[62] the court is ensuring that it promotes participation in which the painter exhibited active consideration of the options open to him and in which actual artistic choices were made. Democratic theorists generally argue that copyright law should promote transformative uses more freely;[63] this account of the role of participation in derivative works is helpful in seeing why this makes sense.

III. The Second Problem: The Neutrality Thesis Appears to Foreclose Democratic Theory's Participation Value

A. Autonomy and the Neutrality Thesis

If one accepts (1) the definition of autonomy laid out above,[64] and (2) the account of the value of autonomy laid out above,[65] it is plausible that one will be led to endorse the version of the neutrality thesis set out in this subpart of the Note. While there are a number of versions of this thesis,[66] they share the claim that government action should not be about, in some sense, the promotion of the moral good.[67] Many of the differences among those who adopt neutralism are beyond the scope of this Note, but in order for the argument that follows to be sufficient as a challenge to the democratic theorist, it will be necessary to articulate and deploy a very clear form of neutralism.

The form of neutralism I use in this Note is a hybrid of the forms advocated by Professor Raz and Professor Ackerman. Professor Raz puts the basic point in the following way:

> The anti-perfectionist principle claims that implementation and promotion of ideals of the good life, though worthy in themselves, are not a legitimate matter for governmental action. . . . Government action should be neutral regarding ideals of the good life. Such a doctrine is a doctrine of restraint. Doctrines of governmental restraint are those which deny the government's right to pursue certain valuable

62. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03 (2d Cir. 1951) ("All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.'" (quoting Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945))).

63. *See, e.g.*, Netanel, *supra* note 1, at 295–96 (warning against the effects of overly extended copyrights in stifling transformative expression).

64. *See supra* section II(B)(1).

65. *See supra* section II(B)(2).

66. *See* SHER, *supra* note 36, at 1–19 (introducing various arguments for the proposition that the state should not act to promote the good).

67. *See id.* at 1 ("[M]any who call themselves liberals have maintained that the state should not favor, promote, or act on any particular conception of the good. Instead, it should simply provide a neutral and just framework within which each citizen can pursue the good as he understands it.").

> goals, or require it to maintain undisturbed a certain state of affairs, even though it could, if it were to try, improve it.[68]

On Professor Raz's account, even if the government is right about what is good and is justified in its belief as to what is good, it would be illegitimate for the government to act in order to promote this view of the good. One extreme example of government acting to promote the good is a theocracy that seeks to ensure that individuals conform to a particular religious practice precisely because the government believes that such practice is what constitutes the good in life. Even if the government were justified on theological and religious grounds, the neutralist would argue that government action toward these ends is illegitimate.

On the neutrality thesis analyzed in this Note, neutrality is about the justifications, and not the effects, of government actions.[69] Therefore, a legislature that passes a law for neutral reasons does not violate the neutrality thesis. If a legislature passes a law for neutral reasons but that law has a significant effect on the goodness of the life that people lead, the law still does not violate the neutrality thesis. If a legislature passes a law motivated by a concept of the good but that law has absolutely no effect on the society or the populace (in terms of the good life or in terms of anything else), the law does violate the neutrality thesis.

The neutrality thesis is about the kind of reasons that justify the law. For the purposes of this Note, I will postulate that the justification at issue is the best available justification for the law and not necessarily the operative justification.[70] While it will frequently be the case that the best justification is the operative justification, i.e., the reason that actually motivated the legislature to pass and the executive to sign the law, this may not always be so. The utility of focusing on the best available justification is that it obviates some of the evidentiary disputes and conceptual difficulties in determining what justification motivates a large group of people to pass a certain law. In fact, it is likely that the actors involved have disparate justifications and that there is not, therefore, "one reason" on which the law's passage is based. One important rider on this simplifying mechanism is that reasons are better justification insofar as they are non-neutral; neutral reasons are better, on this

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68. RAZ, *supra* note 39, at 110 (citation omitted). Note that perfectionism starts by denying the neutrality thesis, so anti-perfectionism is, in part, neutralism. *See id.* at 110–11 (arguing that anti-perfection is based on ideas of restraint and neutrality); Steven Wall, *Perfectionism in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 13, 2007), http://plato.stanford.edu/archives/fall2009/entries/perfectionism-moral/ ("A perfectionist approach to politics rejects the doctrine of state neutrality . . . . For perfectionists, there is no general principle in political morality that forbids the state from directly promoting the good, even when the good is subject to reasonable disagreement.").

69. *See generally* SHER, *supra* note 36, at 22–23 (explaining the distinction between neutralism based in justification and neutralism based in effects).

70. *See id.* at 23–27 (describing the different possible sets of reasons that the neutralist could find illegitimate and agreeing with the plausibility of the account advocated in this paragraph, although not for *entirely* the same reasons).

account, simply because they do not violate the neutrality thesis. Therefore, if the reason for closing post offices on Sunday rather than Friday could be (1) to encourage people to go to a Christian church over a mosque, or (2) to pick a day of rest arbitrarily, but with a view to the fact that most people will be resting on Sunday anyway of their own accord (even if because they are Christian), then the neutrality analysis is run on the second reason because it is at least *potentially* neutral. If the second justification passes the neutrality thesis tests, then the law does not violate neutrality.

In the preceding paragraphs, I have used the term "the good" or "the good life." I know of no definition of "the good" or "the good life" that is widely accepted in academic philosophy. This is a significant problem for the neutralist because if it is not clear which reasons are reasons about the good, then it will not be clear which reasons violate the neutrality thesis. Neutralists generally adopt some functional definition of the good and defer the substantive metaethical questions. For example, Professor John Rawls identified the good with an individual's plan of life.[71] On this rendering, a reason would be non-neutral if it were geared toward dictating to an individual the life plan (e.g., Christian, feminist, yoga and meditation intensive, scholarly) that she adopts. Professor Rawls further claims that "in a constitutional democracy the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines."[72] On this account, it is right for government to pursue certain things valued by everyone or almost everyone. Included in this set might be economic efficiency, equitable distribution, and prevention of harm to others. Other things are controversial, such as specific religions or values about the meaning of individual lives. Therefore, for the purposes of this Note, a view of the good life has two features: (1) it pertains to an individual's overall plan or form of life, and (2) it is a controversial religious or philosophical doctrine. This definition has its own problems (e.g., what it means to be a "philosophical" doctrine). Even though there will be hard cases of line drawing, this definition should be adequate to provide a basic framework moving forward.

Autonomy plays the important role of justifying the version of the neutrality thesis at play in this Note. A particularly important passage from Professor Ackerman will serve to highlight how autonomy and neutrality relate:

> Even if you don't think you need to experiment [in how to live your life], you may adopt a concept of the good that gives a central place to autonomous deliberation and deny that it is possible to *force* a person to be good. On this view, the intrusion of non-Neutral argument into

71. RAWLS, *supra* note 50, at 407–11.

72. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 223 (1985).

> power talk will seem self-defeating at best—since it threatens to divert people from the true means of cultivating a truly good life.[73]

On the definition of the neutrality thesis outlined above, government acts illegitimately when it acts on the basis of reasons about the good life, i.e., about controversial religious or philosophical claims concerning how individuals should live. Why is such government action illegitimate? On this account of the neutrality thesis, government action is illegitimate when it seeks to promote the good because it is antithetical to the good itself. It is antithetical to the good itself because it is not "possible to *force* a person to be good" in the sense that it is not possible to lead a good life unless that life is at the same time autonomous.[74] A person who gives to charity because failing to do so would be illegal is not living out a charitable plan of life that we have occasion to praise; she is merely following the law. While following the law may in itself be praiseworthy, that is another question altogether. Insofar as autonomy is a necessary condition to the actualization of any of the other values and insofar as government acts with the intention of promoting the good, government's attempt to promote the good is self-defeating: In its attempt to promote the good, it violates the autonomy condition and therefore blocks the good.

It is important to note that government violates an individual's autonomy only when government *coerces* the individual to act in a certain way. The paradigmatic example of coercion is the threat of imprisonment as a response to criminal acts. Equitable relief, such as an injunction, is also coercive. There are degrees of coercion, however. Fines would seem to be less coercive than imprisonment because they still leave the party in question the live option of breaking the law and just paying the fine. Incentives would seem not to be very coercive because they do not directly punish or compel action, except insofar as being unresponsive to an incentive entails an opportunity cost. As I shall define it in this Note, a law is coercive if and only if it violates autonomy. A law violates autonomy if and only if it prevents a person from living a life that is self-directed, i.e., on the basis of good reasons that one takes on as one's own. A law is therefore coercive if and only if it prevents a person from leading such a self-directed life. While prison and equitable relief compel action irrespective of the reasons an individual takes on as her own, government incentives still leave the individual open to respond to the reasons that she identifies as good and her own, and therefore still leaves the agent autonomous.

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73. ACKERMAN, *supra* note 43, at 11.

74. *Id.*

B. *As a Value, Participation Might Be Thought to Violate the Neutrality Thesis as a State Promotion of a Theory of the Good*

Insofar as democratic theory has as its end the use of copyright law to promote the value of participation, it is liable to the accusation that it advocates government action based in a view of the good. If this were so, democratic theory would violate the neutrality thesis. This subpart will explain and motivate this concern.

First, if the value of participation is understood to be based in the idea that participation is constitutive of the right kind of society or culture, then participation is not a concept of the good. This is because the goal of participation would not be about the individual plan of life led by the members of society. Only reasons that pertain to the good, as defined above, are prohibited under the neutrality thesis. If participation is about the quality of society or culture, then it is, as such, a legitimate end for government to pursue. The analysis and result is the same if participation is seen as an inherent good on the level of society. Note also that even if government actions taken in pursuit of this end substantially affect the lives that individuals live, those government actions will not violate the neutrality thesis because the neutrality thesis as defined is concerned only with justifications.

Second, things are much more dubious on the level of individual participation. Whether the value of participation is conceptualized as constitutive of good character or is understood as the inherent good of individual participation, the neutrality thesis would appear to be violated. There are two prongs to the definition of a concept of the good discussed above: (1) pertaining to an individual's life plan, and (2) involving a controversial philosophical or religious doctrine.[75] It is clearly intuitive that the first prong is satisfied if participation is valuable because it constitutes individuals as certain kinds of persons or because it is inherently good for individuals to engage in participation. The second prong is slightly less clear. I am not aware of any scholar who denies the value of participation. However, it does not follow from the lack of contrary viewpoints that the point is not controversial. A claim is controversial if it is not generally accepted; from this it follows that a claim need not have strong deniers in order to be controversial because controversy can also exist in the lack of general acceptance. Therefore, the question of whether participation can serve as a justification for government action depends partly on whether this participation is a controversial value, and this in turn depends partly on the specific content of the value. This result points back to the additional specification that autonomy can give to the value of participation, a topic that will be explored in the next subpart of this Note.

In addition, only coercion can violate the autonomy value, and therefore the neutrality thesis is violated only when the government action in question

75. *See supra* notes 71–72 and accompanying text.

is coercive. Remember that autonomy and coerciveness were cast above as correlative notions: a law is coercive if and only if it violates the autonomy value, which is to say, it prevents the individual from leading a life that is self-directed in the sense that it is motivated by reasons that the individual recognizes as good and as her own. For this reason, government actions that seek to promote the value of participation violate neutrality only to the extent that they impinge on the ability of individuals to be self-governing. This topic will also be addressed in the next section of this Note.

C. Solution to the Neutrality Problem

1. Autonomy and the Specification of Participation.—I argued above that the value of autonomy, as a necessary condition on other values, informs the concept of the value of participation because only insofar as participation is autonomous can it be valuable.[76] In order for participation in expressive works to be autonomous, it must involve self-direction on the part of the agent, i.e., it must involve the articulation, consideration, and adoption of ideas and expressive forms that the agent takes on as her own. Remember also that, while different forms of participation might have differing values, there is no basis in the participation value itself for differentiating between the subject matters in which one might participate.[77]

There are three main ways in which this autonomy-informed account of participation responds to the neutralist worry.

a. Participation Is a General Value.—First, the value of participation exists on a very general level vis-à-vis the individual's life. That is to say, one can satisfy this value by engaging expressive works in a self-directed way, and there are many ways to do this. The question is not about the specific engagement itself but rather about the fact of engagement—the fact of participation. This is *closer* to government requiring all persons to develop some life plan and to adopt some set of religious and philosophical positions than it is to dictating which life plan is to be adopted and mandating the acceptance of certain religious doctrines. In general, the concern that non-neutral laws will impinge on the autonomy of individuals has less bite in this context because the content of the participation value itself is constrained by the autonomy value.

b. Participation Is Neutral as to Subject Matter.—Second, and related, the fact that engagement with expressive works of different subject matters is equally valuable in terms of the participation value helps to distinguish the participation value from one with controversial religious or philosophical content. If participation had value only, for example, when it

76. *See supra* subpart II(C).

77. *See supra* notes 57–58 and accompanying text.

involved opera and never when it involved pop music, then a controversial philosophical (here, aesthetic or ethical) doctrine would be implicated. If the value of participation is neutral as to subject matter, then this controversial philosophical doctrine is not involved; the point is just to participate no matter the nature of the expressive materials in which one is participating.

c. The Value of Autonomy, Widely Understood, Is Not Controversial.—There is great debate about what the concept of autonomy is and should be, and on the usefulness of that concept itself. However, I submit as uncontroversial the general idea that individuals should lead lives that are a result of choices that they make and values that they adopt. While there is great disagreement about the concept of autonomy, the limited version at play in this Note seems rather uncontroversial. For example, many political arguments are premised on the value of individual self-determination, freedom, or liberty; these amorphous notions are used widely and indeed seem to overlap with the more clearly delineated concept of autonomy adopted. Insofar as the content of the concept of participation is filled out through its association with the concept of autonomy, then participation itself, rightly understood, seems less controversial as well. This third point is not dispositive because participation is not only about autonomy, but it does serve to push against the claim of the neutralist that participation is a controversial philosophical doctrine.

2. Government Need Not Be Coercive in Promoting Participation.—In order for government to impinge on the autonomy of individuals and therefore be a self-defeating pursuit of the good, it must be coercive. Only when it is coercive can it thwart individuals in their attempts to lead self-directed lives. In the last section, I proposed some responses to the claim that in promoting participation, government would be promoting a conception of the good. Here, I aim to prove that, even if participation were a forbidden conception of the good, it would still be legitimate for government to promote it.

Take derivative works as an example.[78] A number of democratic theorists argue that the derivative works right given to the owner of the original work should be loosened to allow for greater transformative uses because this would serve the value of participation.[79] If Congress took this all the way and abolished the derivative works right on the basis of its recognition of the value of participation, would it be infringing on the autonomy of anyone—i.e., would it be coercive? I argue that the application of this value

78. *See* 17 U.S.C. § 106(2) (2006) (reserving to the copyright holder the exclusive right to make derivative works based on the original).

79. *See, e.g.*, Netanel, *supra* note 1, at 378 ("From the democratic perspective, a broad derivative right poses an unacceptable burden on expressive diversity. . . . Seen in that light, it would be preferable to allow free competition and a diversity of expression among secondary authors in the adaptation of existing works and their components.").

to copyright doctrine merely opens up opportunities that individuals may seize or not as they see fit. In order to promote participation by eliminating the derivative works right, government is merely giving to the makers of derivative works the opportunity to participate. It is not forcing them to participate if they choose not to do so. Further, it is not forcing the makers of the original works to do anything either: they remain free to make or refrain from making derivative works as they see fit.

While taking the derivative works right away from the maker of the original work would deprive them of the benefits (economic and otherwise) of being able to control derivative works made off of their original work, this is not coercion either. At most, it is the removal of one incentive to create the original work.[80] As I noted above, incentives leave intact an individual's ability to make a reasoned and free choice among competing options about how to live one's life: one still has the ability to act from reasons that one considers best and one's own. Removing the incentives merely makes some of those actions (here, creation of the original) less profitable; it does not coerce the maker of the original work not to create and does not remove the opportunity to create that original work.

The result of this analysis is the conclusion that even if participation were a conception of the good and therefore barred as a reason for government action under the neutrality thesis, this value is one that is not given to coercive implementation. Given how, in this Note, participation has been conceptualized in terms of autonomy, it seems unlikely that government could coerce individuals to participate without at the same time making that participation *unrecognizable* as participation. Once again, the derivative works example is helpful here. If government were to mandate that all citizens, on threat of imprisonment, must make at least three derivative works per year, then the participation involved would no longer be participation in the relevant sense. Participation, as here defined, must involve the articulation, consideration, and adoption of ideas and forms of expression that the creator recognizes as her own. If government mandated that participation, then the occasion of that participation would be forced, and it is therefore unlikely that the individual making a derivative work would be expressing ideas that are her own or in ways that are her own. The mandating of a derivative work, moreover, is the mandating of a particular form of expression and therefore impinges on the ability of the creator to be self-directing in the creation of the work. The ultimate point here is that if we understand participation as related intimately with autonomy, it becomes clear that government could not coercively implement the value of participation without, at the same time, distorting participation so as to make it something altogether different.

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80. *See id.* at 316 (summarizing the neoclassical argument that the exclusive right to create derivative works will incentivize creators to create original works that can easily be developed into derivative works that consumers want).

IV. Conclusion: Scope Limitations

It is certainly worth noting how counterintuitive this result is from the neutralist perspective. Even if participation were a conception of the good in the relevant sense, state action based upon it would not violate the neutrality thesis. In the case of a seemingly strange result, we are left with the choice between diagnosis and acceptance. By way of diagnosis, one might believe that the intuition that noncoercive state action motivated by the good is inappropriate on the basis of some other version of the neutrality thesis. For example, one might find it paternalistic to use noncoercive means to promote the good and that government ought not be paternalistic vis-à-vis its citizenry.[81] If this consideration stands behind the counterintuitive result of this Note, then this issue stands outside the scope of this Note. The argument here presented is premised on a number of assumptions, foremost of which are the importance of autonomy generally and the centrality of the autonomy version of the neutrality thesis. These limiting mechanisms might explain the apparent strangeness of the conclusion that the state uses its power legitimately, as regards the neutrality thesis, whenever it acts noncoercively, even when it is motivated by a conception of the good.

By way of acceptance, however, one might simply accept that our intuitions are, in this case, wrong. It might *seem* wrong to say that the state can pass laws based in a conception of the good and yet not violate the neutrality thesis simply because those state actions are noncoercive, but it may be that this apparent tension is merely apparent. It might be that we lack a coherent or well-developed theoretical account to justify this moral intuition, and therefore, that moral intuition is properly discarded. Whether this is the case lies outside the scope of this Note. I have not endeavored to show that the autonomy version of the neutrality thesis is the only viable one, and nothing here argued assists at all in showing that there might not be other equal or better arguments against state action based in a conception of the good. I have merely provided one compelling account and deployed it in the area of copyright.

—David A. Snyder

81. *See* Fisher, *supra* note 31, at 194 ("A . . . common charge is that the social-planning and personhood perspectives are 'paternalistic' insofar as they curtail persons' freedom on the basis of conceptions of what is 'good for them' with which they themselves may not agree.").

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